

STUDY

Requested by the CULT Committee



European Media Freedom Act

Background Analysis



Culture and Education



Policy Department for Structural and Cohesion Policies
Directorate-General for Internal Policies
PE 733.129 - April 2023

EN

RESEARCH FOR CULT COMMITTEE

European Media Freedom Act

Background Analysis

Abstract

This background analysis focusses on relevant issues to be taken into account in the discussions on the Proposal for a European Media Freedom Act (EMFA), especially from a media law perspective. Dealing with questions on the appropriate legal basis and coherence with the existing regulatory framework, as well as selected substantive issues and the proposed institutional structures, the analysis highlights possible shortcomings regarding practical impact and enforcement that should be addressed.

This document was requested by the European Parliament's Committee on Culture and Education.

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LINGUISTIC VERSIONS

Original: EN

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Manuscript completed in April 2023

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This document is available on the internet in summary with option to download the full text at: <https://bit.ly/43AFMBY>

This document is available on the internet at:

[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2023\)733129](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2023)733129)

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Please use the following reference to cite this study:

Cole, MD & Etteldorf, C 2023, Research for CULT Committee – European Media Freedom Act - Background Analysis, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels

Please use the following reference for in-text citations:

Cole and Etteldorf (2023)

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LIST OF ABBREVIATIONS

AVMSD	Audiovisual Media Services Directive
cf.	confer
CJEU	Court of Justice of the European Union
CiTiP	European University Institute, Centre for Information Technology and Intellectual Property
CMPF	Centre for Media Pluralism and Media Freedom
CSAM	child sexual abuse material
CULT	Committee on Culture and Education
DG	Directorate-General (EU Commission)
DSA	Digital Services Act
DMA	Digital Markets Act
e.g.	for example
EAO	European Audiovisual Observatory
EBMS	European Board for Media Services
EC	European Community
ECtHR	European Court of Human Rights
ed./eds.	editor(s)
EMFA	European Media Freedom Act
EMR	Institute of European Media Law
EPRS	European Parliamentary Research Service
ERGA	European Regulators Group for Audiovisual Media Services
et al.	and others
et seq.	and the following

etc.	et cetera
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Journal)
GDPR	General Data Protection Regulation
i.e.	that means
ibid	in the same place
IViR	Institute for Information Law of the University of Amsterdam
JIPITEC	Journal of Intellectual Property, Information Technology and Electronic Commerce Law
MMR	Multimedia und Recht (Journal)
MoU	Memorandum of Understanding
MPM	Media Pluralism Monitor
OJ	Official Journal of the European Union
para.	paragraph(s)
SMIT	Studies in Media, Innovation and Technology
TCO	Regulation on preventing the dissemination of terrorist content online
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TV	television
TwFD	Television without Frontiers Directive
VLOP(s)	very large online platform(s)
VOD	video on demand
VUB	Vrije Universiteit Brussels
VSP(s)	video-sharing platform(s)

EXECUTIVE SUMMARY

KEY FINDINGS

- The 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 (EMFA) is accompanied by a Recommendation which needs to be considered already now. The EMFA addresses a variety of different issues with very diverse provisions and several institutional mechanisms attached. Ensuring practical coherence with existing EU and national laws is therefore a key concern.
- Regulating the media sector, characterized by its dual nature of cultural and economic components, needs careful attention not only of the principle of limited conferral of powers, but especially subsidiarity and proportionality in the relationship between EU and Member States. Rules have to be clear, precise, effective and necessary on EU level, which is why invoking only the single market clause as legal basis raises concerns not only about the allocation of competences, but also the choice of legal instrument.
- The proposed substantive rules have some definitional ambiguities that make it difficult to assess the intended scope and actual impact. This concerns, for example, the concepts of editorial decision in Art. 4 in contrast to Art. 6 or the concept of independence of the privileged media service providers in Art. 17.
- Questions about the formulation of the provisions extend to their enforceability and thus the possibilities of protection for media service providers and recipients as is the aim of the proposal. For example, in Art. 5, 6, 17 and 20, it is not clear to what extent monitoring of compliance shall take place or how different appeal bodies interact with national regulatory authorities and bodies or the newly established Board, as the EMFA does not contain a specific allocation of supervisory tasks or a sanctioning regime.
- The coordination of supervisory measures, both within the EMFA and the Audiovisual Media Services Directive (AVMSD), is of particular importance in today's media landscape. The independent Board is assigned an important role, although concerns arise in the interplay with the powers of the Commission.

Background and overview

The media and information landscape in its constantly changing state as well as recent crisis situations demonstrate the sensitivity and importance of the media sector and its regulation for the formation of public opinion, but also highlight protection gaps in light of guaranteeing democratic principles and fundamental rights. There are concerns when analysing national frameworks within the EU with regard to a sufficient protection of the independent functioning of media regulatory authorities, media pluralism in light of media ownership developments as well as potential political influence on the media. The EMFA aims to establish EU-wide harmonised rules to tackle these issues and overcome fragmentations in the national frameworks identified by the Commission. The wide range of rules covered by the Proposal must be considered in the overall concept of regulatory initiatives at EU level

that the EMFA is integrated into. They also necessitate a detailed consideration of the potential impact on fundamental rights and demand particular precision and clarity. This applies to the substantive rules and the institutional system, as only an effective cross-border enforcement framework justifies the creation of rules in a Regulation with EU-wide unified binding force. This requirement is to be considered in light of the allocation of competences between EU and Member States concerning a sector characterised by its twofold economic and cultural nature.

The aim of this background analysis is to present especially relevant parts of the Proposal that have been intensively debated. With that, the main problems that should be addressed in the further steps of the legislative procedure are identified.

Legal basis and coherence

The EMFA is based solely on the single market clause of Art. 114 TFEU. This requires further assessment in light of the Proposal's objectives going beyond countering barriers to the internal (media) market and explicitly referring to protecting freedom of the media, media pluralism and editorial independence. The limited conferral of powers principle, especially in view of the Member States' cultural competence (Art. 167 TFEU) and the subsidiarity and proportionality principles, limit harmonisation measures to clearly demonstrated distortions of competition on the single market and aim at the elimination or avoidance of those hindrances.

While introducing coordination and cooperation structures for an improved (cross-border) enforcement of the law to be realized by national regulatory authorities generally does not raise any concerns, the actual design needs to be assessed in view of the different actors' roles. More importantly, the EMFA's substantive rules need to be reviewed in light of the assumed internal market dimension, because they would also address local, regional or national offerings, including public service media for which structural decisions are left to the Member States according to the 'Amsterdam Protocol' to the Treaties. The rules and limitations on the allocation of powers need to be considered for the legal basis and the type of legislative instrument chosen which impacts remaining margins of manoeuvre for the national level. This is additionally relevant for the interplay with other legal acts framing content dissemination. Although the Proposal shall not affect relevant secondary legislation in this field, for the case of a collision in practice the EMFA does not provide precise indications of a priority of rules. Besides its relation to competition law, the relationship to the AVMSD is of particular relevance which is not addressed besides mentioning the amendments to the Directive.

Recommendation (EU) 2022/1634 on internal safeguards for editorial independence and ownership transparency in the media sector accompanying the EMFA proposal, can have an important political significance without being legally binding. However, overlapping elements will cease to apply after EMFA's entry into force irrespective of its implementation status.

Selected substantive issues

The definitions are key for the application of the EMFA and therefore require precise and clear formulations oriented at the Regulation's aims, as well as uniform use within the EMFA and consistency with other legal acts. This applies in particular to the definition of media service providers determining the scope of application. In contrast to developments in international media and communication governance and recent jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights, the proposal contains a rather traditional approach to this definition that applies uniformly to all substantive rules and does not distinguish between levels of protection in individual provisions. This background analysis discusses several aspects of the EMFA in this regard, focussing on Art. 2, 3, 4, 5, 6, 17, 20 and 21.

For example, Art. 6 contains duties for the special category of media service providers that provide news and current affairs content, because of their special relevance for public opinion forming, although other content can also be relevant for this purpose in a democratic society. Art. 6(1) extends information obligations to such providers in relation to ownership intending to ensure transparency for the public. However, there is no link to the tasks of regulatory authorities, the establishment of a (central) database or the existing provision in Art. 5(2) AVMSD. Art. 6(2) contains an obligation to take internal measures guaranteeing the independence of individual editorial decisions within the media service providers. While Recommendation (EU) 2022/1634 offers a clearer idea of the structures that the EMFA would be expecting from providers, the EMFA's broad formulation leaves the decision mainly up to the providers which measures are necessary and appropriate and how these impact the internal allocation of responsibilities between providers and editors.

Art. 17 contains a rule on the protection of media service providers' editorial content on very large online platforms (VLOPs) by prioritising content, which has already been created subject to editorial responsibility obligations, in the content moderation by VLOPs. However, beyond an obligation to justify moderation decisions and an aim for advanced notification, no further limitations to the VLOP decisions are introduced. It is questionable to what extent this would efficiently further the position of media service providers in comparison to the Digital Services Act (DSA) and Regulation (EU) 2019/1150.

Institutional issues

The EMFA builds in institutional terms on the national regulatory supervisory authorities established under the AVMSD, in particular transferring the level of independence ensured therein to the EMFA, without, however, assigning dedicated enforcement or sanctioning powers. In that sense it follows the AVMSD approach leaving the institutional and procedural design to Member States, including the obligations under Art. 30(4) AVMSD to provide adequate resources and enforcement powers also for the cooperation work on EU level. In contrast to the approach chosen in the AVMSD, a central role is foreseen for the Commission. It is vested with a wide range of powers to issue opinions and guidelines, the scope and legal effects of which are not always clear. In particular Art. 15(2) empowering it to issue Guidelines not only concerning the application of the EMFA but also the national rules implementing the AVMSD could lead to tensions with Member States competences and the tasks of independent national regulatory authorities.

The European Board for Media Services (EBMS) shall replace and succeed the European Regulators Group for Audiovisual Media Services (ERGA) established under the AVMSD. It is created by the EMFA as new cooperation body on EU level and tasked with, essentially, coordination issues, including developing best practices and issuing opinions in matters of cross-border relevance. Its independence is ensured by establishing criteria similar to those in the General Data Protection Regulation (GDPR) for the respective cooperation body. However, concerns may arise because the EBMS is dependent on a request or agreement with the Commission in many activities and does not have a general right of initiative based on own considerations. This dependence may be reinforced as the Commission continues to provide the secretariat, although the competences of the new Board are significantly expanded compared to ERGA.

1. EMFA PROPOSAL: BACKGROUND AND OVERVIEW

KEY FINDINGS

- The EMFA addresses a variety of different issues with very diverse provisions, which have to be considered each separately but at the same time by evaluating the overall potential effect of the legal act.
- The regulatory framework in which the EMFA is embedded is an additional part of this overall picture, in particular initiatives derived from the European Democracy Action Plan and the Audiovisual Media Services Directive, which need to be taken into account when evaluating the EMFA.
- In this light, it needs to be ensured that the approach of the proposed Regulation from an economic perspective with the aim of improving the functioning of the single market takes sufficiently into account the characteristics and specificities of the media sector and their consequences for the regulatory framework.

The media and information landscape is in a constant state of change, with an acceleration especially in the past two decades. This concerns the advancing convergence, new distribution technologies and types, new players both on the side of content creators and of intermediaries and, associated with this, new possibilities of consumption of content that is relevant to the formation of opinions – all of which with an increasing cross-border dimension.¹ Recent international crisis situations such as the Covid pandemic and the Ukraine war underlined both the sensitivity and importance of this sector and its regulation, but also highlighted gaps in protection. There have been further developments that have raised concern in the light of the guarantee of democratic principles and fundamental rights when it comes to the position of media services.

The Media Pluralism Monitor 2022², analysing 32 countries (27 EU Member States and 5 candidate countries) for the year 2021, addressed (again)³ certain issues relating to problematic developments in the areas of fundamental rights protection, plurality, political independence and social inclusiveness of media. The report concluded for the area of market plurality (ie. economic dimension of media pluralism, assessing the risks that are related to the context in which market players operate) a risk factor of 66%, close to “high risk” on average,⁴ and with 16 states actually being at “high risk”. For the area of political independence (esp. politicisation of the distribution of resources to the media, political interference with media organisations, news-making and public service media) a risk factor of 49% is mentioned with 8 countries being at “high risk”. In an overall ranking of Member States clustered into five levels of risk, Bulgaria, Greece, Hungary, Malta, Poland, Romania and Slovenia were considered to be “high risk”-countries. In another overview, the Reporters Without Borders Global Press Freedom Index shows corresponding problematic situations with regard to, for example, the level of protection

¹ See on this with further references Cole/Etteldorf/Ullrich, *Updating the Rules for Online Content Dissemination*, p. 81 et seq.

² Bleyer-Simon et al., *Monitoring Media Pluralism in the Digital Era* (MPM 2022).

³ The MPM is conducted on a yearly basis, with exceptions for 2018 and 2019, since 2014.

⁴ The report expresses the risk level based on various assessment factors in a percentage value between 0% and 100%, whereby a value of ~67% or higher is assumed to be a high risk for the respective area.

for journalists, even though most EU Member States are positioned rather positively here.⁵ Based inter alia on the Media Pluralism Monitor 2022, the European Commission's Rule of Law Report 2022⁶ identifies certain areas of concern, too. This includes a necessary strengthening of the independent functioning of media regulators, obstacles related to the transparency of media ownership, certain specific issues in light of safeguarding media from political pressure and influence⁷, access to information as a necessary prerequisite for the media, civil society and public trust, threats against the safety of journalists as well as legal threats and abusive court proceedings against public participation.

While some of these aspects are or will be part of dedicated legislative procedures,⁸ the Proposal for a European Media Freedom Act⁹ explicitly addresses the first three areas of concern identified – independent functioning of media regulators, transparency of media ownership and safeguards against political pressure and influence.¹⁰ These areas are currently characterised by differing rules in the Member States concerning whether at all and how they have been addressed.¹¹ The Impact Assessment for the EMFA¹² justifies as main argument for EU-wide harmonisation this fragmentation and diversity of Member State approaches. The development of the Proposal and the drafting of the impact assessment took place at a time, taking into account the public consultation running from 21 December 2021 until 25 March 2022,¹³ which was particularly heavily influenced by the developments mentioned at the outset above. In addition, it ran parallel to the final steps of the legislative procedure for the Digital Services Act (DSA)¹⁴ and the Digital Markets Act (DMA)¹⁵. In this context, it should be emphasised that the EMFA is part of the broader approach the EU is pursuing with its Democracy Action Plan¹⁶ aiming to promote free and fair elections and strong democratic participation, support free and independent media and combat disinformation through different initiatives.

The Proposal for the EMFA should therefore not be seen in isolation, but as part of an overall picture that (also) concerns the regulation of content distribution. In addition to DSA, DMA and a network of additional secondary legislation or pending proposals such as for a Regulation on the transparency and

⁵ Interactive index available at <https://rsf.org/en/index>.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report, COM/2022/500 final.

⁷ Including in particular risks related to lack of transparency and fairness in the allocation of state advertising, independence of public service media and political pressure and influence on the media through licensing restrictions and decisions.

⁸ Cf. in particular Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, C/2021/6650, OJ L 331, 20.9.2021, p. 8–20; Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”), COM/2022/177 final.

⁹ Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final, 2022/0277 (COD).

¹⁰ On a first overview of the Proposal Cabrera Blázquez, *The proposal for a European Media Freedom Act*; Ory, *Medienfreiheit – Der Entwurf eines European Media Freedom Act*.

¹¹ CMPF et al., *Study on media plurality and diversity online*. This study conducted on behalf of the European Commission was published alongside the launch of the EMFA Proposal. It focusses on the areas of prominence and discoverability of general interest content and services as well as on market plurality and the concentration of economic resources.

¹² SWD(2022) 286 final, available at <https://digital-strategy.ec.europa.eu/en/library/european-media-freedom-act-impact-assessment>.

¹³ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules_en.

¹⁴ 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.

¹⁵ 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, OJ L 265, 12.10.2022, p. 1–66.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Region on the European democracy action plan, COM/2020/790 final.

targeting of political advertising¹⁷, self-regulatory initiatives¹⁸ such as in the area of hate speech¹⁹ and disinformation²⁰ or funding initiatives from the Media and Audiovisual Action Plan²¹ are of relevance. Above all, the Audiovisual Media Services Directive²² is significant and was also only recently revised in 2018 with new rules touching upon the above-mentioned areas, e.g. on transparency of media ownership or public value content.²³ The implementation process in the Member States has only just been completed²⁴ and the evaluation report of the Commission is still pending.²⁵ The proposed EMFA is closely connected with the AVMSD, as it would not only amend it, but is intertwined with the institutional system and contains overlaps also in the substantive provisions.²⁶

The substantive rules of the EMFA cover a wide range of different areas, based on the definitions listed in Art. 2, which are of particular importance for the scope as they lay down (partly) new definitions with relevance for the sector. While, in general, all rules revolve around safeguarding media freedom and pluralism,²⁷ they nevertheless respond to specific aspects in relation to which current developments are seen as problematic. These range from introducing a “right” - at least circumscribed as such - of recipients, safeguards for independence and editorial freedoms and corresponding duties, to rules for online platforms and in relation to media market concentrations.

Thus, the diversity of regulatory elements of the EMFA necessitate a detailed analysis of each of them in view of the potential impact for the media sector. This can only be provided in an exemplary manner in this background analysis. Importantly, the overview needs to include how the approach of the proposed Regulation from an economic perspective improving the single market takes sufficiently into account the characteristics and sensitivities of the media sector. In light of the relevance of the sector concerned and the fundamental rights basis on which it operates, particular precision and clarity in the regulatory framework needs to be achieved.²⁸ This question of clarity, meaning and impact of the

¹⁷ Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM/2021/731 final.

¹⁸ In this light certain initiatives on EU level can be mentioned such as the EU Internet Forum against terrorist propaganda online, the Alliance to better protect minors online under the European Strategy for a better internet for children and the WePROTECT global alliance to end child sexual exploitation online as well as several initiatives in the field of consumer protection.

¹⁹ Code of Conduct on countering illegal hate speech online, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

²⁰ 2018 Code of Practice on Disinformation, <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>, which was updated by the 2022 Strengthened Code of Practice on Disinformation, <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

²¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Region, Europe’s Media in the Digital Decade: An Action Plan to Support Recovery and Transformation, COM(2020) 784 final.

²² 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).

²³ Extensively Cole/Etteldorf/Ullrich, *Cross-Border Dissemination of Online Content*, p. 53 et seq.

²⁴ See on this Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*.

²⁵ See on this Draft Report of the CULT Committee on the implementation of the revised Audiovisual Media Services Directive (2022/2038(INI)), https://www.europarl.europa.eu/doceo/document/CULT-PR-738565_EN.html. For certain areas of implementation see also CMPF et al., *Study on media plurality and diversity online*; Deloitte/SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive*.

²⁶ Cf. in detail Cole/Etteldorf, *Future Regulation of Cross-border Audiovisual Content Dissemination* (in print), Executive Summary available at https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Presse/Pressemitteilung/Gutachten_ExSum_lang_EN_Cole_2023.pdf.

²⁷ See on the concept and development of the term “media pluralism” in general Etteldorf, *Media pluralism*, in: *Global Dictionary of Competition Law*.

²⁸ This requirement obviously refers to the text of the proposal as well as the final outcome, but an added difficulty in the legislative discussions might be that some of the language versions of the proposed EMFA have quite remarkable omissions and contradictions in contrast to the “original” English version that was first published. In the further steps of the legislative procedure this should also be carefully considered.

proposed substantive rules is additionally linked to their enforcement and supervision. Here, too, specifics of the media sector need considerations which must ensure structures that are independent from the state. Only an effective enforcement framework contributing to the regulatory framework having practical effect justifies the creation of rules within a Regulation that has EU-wide unified binding value, otherwise the potential damage for fundamental rights of the providers or the blocking of effective structures by Member States could potentially be the result.

The aim of this background analysis²⁹ is to present selected parts of the Proposal which are especially relevant and overlap with other legal acts. In addition, these are issues that have been intensively debated since the Proposal was put forward. With that, the main problems that should be addressed in the further steps of the legislative procedure are identified.

²⁹ This Background Analysis is complemented by a Recommendations Briefing on 'European Media Freedom Act'. These two research papers were commissioned by the Policy Department as a part of concomitant expertise aiming to support the work of the CULT Committee on the legislative report on '[European Media Freedom Act](#)'.

2. LEGAL BASIS AND COHERENCE

KEY FINDINGS

- Regulating the media sector, characterized by its dual nature of cultural and economic components, needs careful attention not only of the principle of limited conferral of powers, but especially subsidiarity and proportionality in the relationship between EU and Member States.
- Invoking the single market clause as legal basis is not precluded per se but must nonetheless reflect the limits resulting from the cultural sovereignty of the Member States and the 'Amsterdam Protocol' to the Treaties, in particular when it comes to local, regional or national offers as well as public service media.
- Considerations in connection with the single market clause and the mentioned principles do not only concern the allocation of competences as such, but also the choice of legal instrument and its scope.
- The network of rules that (also) apply to the dissemination of ('opinion-shaping') content is becoming increasingly complex, requiring clear indications on the relationship between different legal instruments and priority of rules, both for legal clarity for the addressees as well as for effective enforcement of the law.
- Accompanying Recommendation (EU) 2022/1634 on internal safeguards for editorial independence and ownership transparency in the media sector can have an important political significance even without being legally binding, but overlapping elements will cease to apply after entry into force of the EMFA irrespective of its status of implementation.

2.1. The question of the legal basis

2.1.1. Single market clause Art. 114 TFEU as legal basis

The European Commission based the EMFA proposal solely on Art. 114 of the Treaty on the Functioning of the European Union (TFEU)³⁰ as is evident from the citation at the beginning of the proposed EMFA text. This is relevant when it comes to analysing the allocation of powers between the EU and its Member States and whether this division of competences is respected by the proposal and the Commission relying on the single market clause of Art. 114 TFEU.³¹ According to the single market clause, in order to achieve the objectives of Article 26 (1) and (2) TFEU, namely establishing or ensuring the functioning of the internal market with the free movement of goods, persons, services and capital, the EU may adopt 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

³⁰ Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, p. 47-200.

³¹ Extensively on this in general terms but also in view of media pluralism measures see Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 93 et seq.

of the internal market.³² According to the EMFA proposal risks and barriers to the freedoms in and the functionality of the internal market are identified which result in media services being prevented by various external influences from fully being able to realize the free dissemination of their services. These include, according to the Explanatory Memorandum, legal and regulatory fragmentation and different state influences on media services in the Member States, as well as market operations by rogue operators and the developments of the media landscape itself which is adapting to a more digital environment. However, these justifications for a basis on the internal market clause are formulated very generally and have been criticized from the perspective of the law on competences for several reasons.

The diversity of objectives pursued by the EMFA is not reflected with regard to a generalisation of the legal basis for all elements of EMFA. Although Art. 1 in its formulation of the scope of application and objective of the EMFA only refers to internal market aspects referencing the “proper functioning”-approach of Art. 114 TFEU – in addition to mentioning the preservation of the “quality of media services” –, both the Explanatory Memorandum and the Recitals repeatedly and explicitly include or refer to the objective of protecting freedom of the media – and not (only) freedom to provide (media) services –, media pluralism and editorial independence. Without being able to go into all details of the consequences of the principle of limited conferral of powers, the application of the principles of subsidiarity and proportionality in areas of shared competences as well as competence limitations that follow from other Treaty provisions,³³ some relevant aspects that follow from this observation will be presented in the following.

Although Art. 114 TFEU has become a standard legal basis applied in harmonisation efforts, it is necessary to remind that Art. 114 TFEU is a *lex generalis*-legal basis which can only be invoked if the Treaties do not provide for a more specific legal basis of relevance for a planned measure. One such source could be imagined to be media freedom, of which editorial independence is an essential part, as well as media pluralism. Both are constitutive elements of the values³⁴ on which the EU is based and as they are referred to in Art. 2 TEU³⁵ as well as in the way fundamental rights principles are enshrined in the Charter of Fundamental Rights of the EU, namely in this context in Art. 11(1) and (2) CFR.³⁶ However, these references do not provide a basis for competences of the EU as such. In particular, they do not change the limited conferral of powers-principle according to which competences that have not been granted to the EU remain with the Member States. And for fundamental rights specifically, not only Art. 6 TEU, but also Art. 51 (2) CFR underline in explicit language that the powers of the EU are neither extended nor the division of competences modified.

To the extent that the EMFA proposal refers to the aspect of ensuring media pluralism a consideration of a legal basis could be Art. 167 TFEU on culture where there is the only mention of (audiovisual) media in the TFEU. However, the culture provision underlines the cultural sovereignty of the EU’s Member States by limiting action of the EU to supportive and supplementary measures while explicitly

³² Extensively on this Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 93 et seq.; in light of the EMFA and following a broader understanding of the internal market clause see Cantero Gamito, *The European Media Freedom Act (EMFA) as meta-regulation*, p. 10 et seq.

³³ See extensively for each of these aspects Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 57 et seq.

³⁴ On the relevance of the values in the context of regulating the media environment even without these being a sufficient legal basis for action, cf. Cole/Etteldorf/Ullrich, *Cross-Border Dissemination of Online Content*, p. 83 et seq; Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 87 et seq.

³⁵ Consolidated versions of the Treaty on European Union, OJ C 202, 7.6.2016, p. 1-46.

³⁶ Cole/Etteldorf/Ullrich, *Cross-Border Dissemination of Online Content*, p. 53 et seq.

excluding in para. 5 harmonisation of national laws and regulations in this regard.³⁷ In addition, the EU acknowledges, in its action to contribute to the development of the cultures of the Member States, that these are nationally and regionally diverse and exist in a plurality of forms. This limiting effect of the “culture-clause” which demands that the EU in any of its actions considers the possible impact on the diversity of the Member States cultures (Art. 167(4) TFEU) has led in the past to instruments – based on appropriate other legal bases – with a potential effect on the culture policy to be used in a more restricted manner. It resulted, for example, in the inclusion of certain explicit exceptions for Member State action – such as in the Merger Regulation³⁸ – or a noteworthy margin of manoeuvre for them – such as in the e-Commerce Directive³⁹. Most importantly in the context of this background analysis, the AVMSD which is based on harmonisation of diverging rules in Member States in order to improve the single market for offering (television, now audiovisual media) services, is limited to a very specific scope of application (albeit being expanded over the years) and leaves Member States the possibility to enact stricter rules⁴⁰ even in the fields coordinated by the Directive, as well leaving partly very significant discretion to the Member States on how they deal with specific provisions of the Directive.

Even though the regulatory framework for the media touches upon media in both their cultural and economic dimension, a clear division between the two is not always possible. Therefore, regulating the market aspect of media services can in principle be based on the single market clause even though there may be overlaps with the cultural aspects. However, an approach with which any economic dimension would be regarded to suffice as justification to rely (only) on Art. 114 TFEU for a legal act, would effectively remove the principle of enumerated powers because then any legislation addressing undertakings as market actors could also cover a wide range of other related aspects, even if those were the actual focus of regulation and for which no separate competence of the EU could have been identified.⁴¹ Besides having to analyse what the actual focus of a legal act is in order to establish the appropriate legal basis, that same question needs to be answered for all elements of legislative intervention by the EU in the specific act. Especially in overlap cases, it needs to be scrutinized whether the (economic-driven) regulation of Art. 114 TFEU still adequately takes into account the cultural competence of the Member States. In order to do so, it actually has to have the purpose of improving the conditions for the establishment and functioning of the internal market, which is to be examined on the basis of objective, judicially reviewable arguments that take into account the objective and content of the measure in question. As the EU does not have the competence to create equal domestic conditions in all Member States per se, the barriers to trade or relevant distortions to competition need to be clearly demonstrated. Further, it is to be questioned whether the harmonisation measures actually aim at the elimination or avoidance of those hindrances,⁴² although there seems to be a

³⁷ Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 103 et seq.

³⁸ 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, Art. 21(4).

³⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178, 17.7.2000, p. 1–16, Art. 1(6).

⁴⁰ On the question of the meaning of the formulation “stricter rules” in contrast to the “more detailed”-formulation in Art. 1(3) EMFA see below at 2.2. and footnote 56.

⁴¹ Highly critical in that light, especially with regard to the provisions Articles 3, 4, 5, 6, 21 and 22 Cornils, *Statement on the Proposal for a European Media Freedom Act*.

⁴² Extensively CJEU C-376/98, ECLI:EU:C:2000:544, Germany/Parliament, para. 13, 84; see also C-491/01, ECLI:EU:C:2002:741, British American Tobacco (Investments) and Imperial Tobacco, para. 60; C-380/03, ECLI:EU:C:2006:772, Germany v Parliament and Council, para. 36 et seq.; C-217/04, ECLI:EU:C:2006:279, United Kingdom v Parliament and Council, para. 42; Even though this is sometimes regarded as a singular reference in the Court’s jurisprudence, the findings are still applicable, cf. Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 94 et seq.

tendency to allow for a relatively broad reliance on the single market clause even when for some regulatory approaches the gravity of measure calls for another legal basis or refraining from regulating at EU level.⁴³

Specifically, for the proposed EMFA provisions this observation leads to differing results. While introducing coordination and cooperation structures for an improved (cross-border) enforcement of the law, which then is realized by national regulatory authorities does not raise any concerns in general, the actual design of this needs to be assessed in view of the roles of the different actors. More importantly, the substantive rules of the EMFA proposal need to be reviewed in light of the assumed internal market dimension, because they would also address purely local, regional or national offerings.⁴⁴ The mere possibility of dissemination via the internet does not reflexively establish internal market relevance in the sense required by Art. 114 TFEU, even though suggesting a more unified regulatory approach to all types of media formats is understandable in view of convergence developments. Therefore, Articles 4(2), 6, 19, 21, 23(2), 24(2) in particular, as well as the multiple references to possible Commission Guidelines concerning the implementation of the EMFA (and the AVMSD) for which it is uncertain to what extent they would limit the interpretation powers of national authorities, require closer examination in this regard.

Similarly, the safeguards for public service media in Art. 5 of the proposal need to be seen in connection with the so-called Amsterdam Protocol⁴⁵. That clarifying declaration by the Member States openly addresses the aforementioned tension that can exist between the democratic, social and cultural dimension of the media and their economic relevance. In response to possible limitations of their competences by the application of the competition chapter of the Treaty, the Member States unequivocally stated:

“The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the *public service remit as conferred, defined and organised by each Member State*, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account” [emphasis added].

Although the proposal states that it respects the Protocol and does not interfere or affect with the Member States’ powers, it emphasises the significance for the funding aspect under state aid law and even states that the main conclusion is that public service media are “implicitly” within the scope of the internal market.⁴⁶ In actual fact, the motivation of the Member States to attach the protocol was to underline that the application of competition law finds its limits in their power to not only decide about the financing, but also the definition of the remit and the structure of the public service media,⁴⁷ which

⁴³ CJEU, C-547/14, ECLI:EU:C:2016:325, Philip Morris Brands and Others, para. 65 et seq.; cf. e.g. also Malferrari, *Der European Media Freedom Act als intra-vires-Rechtsakt*, p. 49 et seq., who shows a very broad understanding of the use of Art. 114 TFEU, according to which it is sufficient that there is a connection to it by the subject matter of a proposed legislation, even if then multiple other goals are also aimed at.

⁴⁴ Cornils, *Statement on the Proposal for a European Media Freedom Act*, arguing that especially public service media do not operate in the internal market as well as the internal relationship between journalists and owners having no relation to the internal market.

⁴⁵ Originally attached to the Treaty of Amsterdam this is now Protocol No. 29 on the system of public broadcasting in the Member States, OJ C 202, 7.6.2016, p. 311.

⁴⁶ See on this Explanatory Memorandum p. 5; see also p. 9 and Recital 18.

⁴⁷ Cf. on that also the accompanying Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ C 30, 5.2.1999, p. 1.

in turn in some Member States is closely linked to constitutional traditions and identity.⁴⁸ The wording of the Protocol refers to broadcasting but the premise of it extends to other types of public service media which were not foreseeable at the time of drafting the Protocol. Protocols are an integral part of the Treaties according to Art. 51 TEU and therefore also impact the question of the use of competence provisions such as Art. 114(1) TFEU. Although Art. 5 of the proposal clearly leaves the definition of the public service remit to the Member States, its paragraph 2, however, spells out structural elements concerning public service media⁴⁹ and thereby ultimately establishes an interpretative competence of the Court of Justice of the European Union to define what the mentioned criteria mean.

2.1.2. Principle of subsidiarity

Besides the need for an appropriate legal basis for EU action further principles such as the limitation to what is necessary (proportionality) are to be respected and, notably, in areas of shared competences the principle of subsidiarity. Under the subsidiarity principle, in areas which do not fall within its exclusive competence, the EU shall act only if and insofar 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 (Art. 5(3) TEU). Although this is one of the fundamental principles and it was reinforced in a procedural sense with the last Treaty revision, its practical relevance in disputes between the EU and its Member States has been limited in the past.⁵⁰ Nonetheless, it is worth briefly highlighting it in connection with the EMFA proposal because even if the principle may not in itself question Art. 114 TFEU as the legal basis, it can challenge the assumption of an improved regulatory solution on EU level for some of the elements contained in the EMFA.

According to the necessity or negative criterion of the subsidiarity principle, it must be demonstrated for the EMFA proposal that there is a regulatory deficit which cannot be satisfactorily remedied by the Member States themselves. In its Impact Assessment, the Commission addresses such regulatory deficits for the individual areas covered by the EMFA.⁵¹ While no detailed analysis is possible here – which, however, needs to be undertaken when applying the subsidiarity principle –, it is striking that the main regulatory deficit used as justification for harmonising efforts is the fragmentation of the legal situation in the different Member States. In that context, the assessment is limited to exemplifying critically the situation in some Member States where there are either forms of positive rules or a negative approach with lacking rules, without conducting a comprehensive and comparative analysis for each of the elements of the EMFA. In that sense, the assessment relates to rules with which pluralism is safeguarded actively, without discussing their effectiveness or potentially positive effects on the national media market, but instead referring only to the potentially negative impact for the single market, because the rules differ between the Member States. Where the harmonised rules would in result fall short of the protective level for media freedom and plurality currently applicable in individual Member States, especially where it concerns domestic offerings, the EMFA proposal needs to take a limited approach. Furthermore, the second positive criterion of the subsidiarity principle, as an efficiency criterion, requires an added value by Union regulation. Even though the CJEU has in the past

⁴⁸ Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 112 et seq.

⁴⁹ In this respect also Llorens/Muñoz Saldaña, *The impact of new European policies on the regulation of Spanish public service media: a decisive influence?*, p. 1, 10.

⁵⁰ On details on the principle cf. Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 117 et. seq.

⁵¹ SWD(2022) 286 final, PART 1/3, p. 5 et seq.

showed a tendency to emphasise the positive criterion and assume an added value based on that,⁵² in the case of EMFA the principle remains relevant and especially so for the extension of the provisions to local and regional media as well as public service media, because for these it is (also) the market structures in the Member States that determine the economic abilities of providers and therefore not a question of added value on EU level.

In view of the limited impact the principle has had in legislative and judicial proceedings so far, it is all the more noteworthy that in the subsidiarity control mechanism⁵³ for EMFA, four Member States (Denmark⁵⁴, France⁵⁵, Germany⁵⁶ and Hungary⁵⁷) have addressed reasoned opinions to the European Commission alleging that the EMFA in its current shape constitutes a violation of the principle of subsidiarity. Without giving it the format of a reasoned opinion, several other Member States (inter alia Czech Republic, Italy, the Netherlands and Poland) likewise voiced reservations in this regard in other policy documents or at least expressed the need for further concretisation and examination of this issue. Although the required number of reasoned opinions – which would be 1/3 of votes – for an official review procedure by the Commission has not been reached, the criticized extent of use of single market powers by the EU needs to be carefully taken into account in the legislative procedure.

2.1.3. Considerations for the appropriate legal instrument

The rules on the allocation of powers as well as the limitations for EU action need to be considered not only for the legal basis, but also for the type of legislative instrument chosen for the specific action. In that context both questions of coherence with other legal instruments and a possible adaptation of the legal nature for some elements of the EMFA could be addressed.

For example, the proposed rules on media market concentrations are not entirely clear in their relation to existing provisions in competition law. While Art. 21(4) of the Merger Regulation allows Member States to add to the assessment under market power aspects an evaluation that aims at other legitimate interests such as media pluralism, the EMFA proposal would make such scrutiny mandatory, where a “significant impact” on media pluralism and editorial independence is to be assumed. For mergers falling under the Commission’s competence due to meeting the conditions of the Merger Regulation, an equivalent test, at least by the Commission itself, is not foreseen. Such a procedure could supplement what would happen on national level for domestic situations and the Member States could be given the possibility for submissions to share specific concerns.⁵⁸ Notification and information obligations when assessing mergers also on national level do not limit the competences of regulatory authorities to take decisions and are not problematic in the way they are included in the EMFA.

More importantly, the tensions described above in connection with the choice of legal basis, but especially the requirements of the principle of subsidiarity, could be overcome by softening the degree of harmonisation of the EMFA and leaving instead the Member States more scope for manoeuvre.⁵⁹ As

⁵² Cf. Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 121 et. seq with further references.

⁵³ See on the procedure Art. 4 of Protocol (No 2) to TEU on the application of the principles of subsidiarity and proportionality, OJ C 115, 9.5.2008, p. 206–209. The difficulties in procedural terms are discussed in general in Cole/Ukrow/Etteldorf, *On the Allocation of Competences between the European Union and its Member States in the Media Sector*, p. 124-125.

⁵⁴ Danish Folketinget, J.nr.: 22-001044-1, <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/dkfol>.

⁵⁵ French Sénat, no. 194 (2022-2023), <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/frsen>.

⁵⁶ German Bundesrat, Printed Papers 514/22, <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/debra>.

⁵⁷ Hungarian National Assembly, OE-42/619-1/2022, <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/huors>.

⁵⁸ See on considerations in this light already Bania, *The Role of Media Pluralism in the Enforcement of EU Competition Law*, p. 162 et seq.

⁵⁹ For an EU-wide approach on economic aspects but complemented by additional policy approaches also Rucz/Irion/Sentfleben, *Contribution to the public consultation on the European Media Freedom Act*, p. 7.

the EMFA is proposed in the form of a Regulation, by its nature the leeway of Member States is much more restricted than in case of a Directive. On the other hand, the wording of some parts of the EMFA are not very concrete and rather resemble the wording of a Directive leaving scope for implementation. The justification for proposing a Regulation is the fear of fragmentation and the delay until the rules become applicable,⁶⁰ however, with some open formulations concerning rights or obligations, such as e.g. Art. 6(2) EMFA proposal, the harmonising effect would be limited and instead there would be interpretation issues because although the rules would require Member State action, the assessment of the steps taken would be in view of the EU rules which could have a restricting effect. Therefore, while for some elements – such as the institutionalisation of cross-border cooperation which is clearly more efficient if the framework is set on EU level – the choice of Regulation is evident, for other parts it would be more preserving for Member State competences if the provisions would be extracted to a Directive setting a minimum harmonisation standard. This potentially concerns not only parts of the chapter on rights and duties, but as mentioned above potentially also the media market concentration rules where they impact the domestic dimension and especially rules on the allocation of economic resources. A split of the Proposal into two separate legal acts could still be based on the same legal basis as is currently planned, but it would allow to take more into account the limiting factors such as Art. 167 TFEU. If the application of the single market clause as legal basis is disputed altogether as the sole possible justification for the new areas covered by the EMFA proposal, some provisions of EMFA should be designed as amending provisions to existing legal acts which would then also have to consider the legal basis on which those acts were originally based.

2.2. Interplay with other legal acts

According to Art. 1(2), the EMFA shall not affect rules laid down by Directive 2000/31/EC, Directive 2019/790/EU (DSM Directive)⁶¹, Regulation 2019/1150 (Platform-to-Business Regulation)⁶², Regulation (EU) 2022/2065 (Digital Services Act, DSA)⁶³ and Regulation (EU) 2022/1925 (Digital Markets Act, DMA)⁶⁴ as well as, if enacted, the Regulation on the transparency and targeting of political advertising, which was proposed by the Commission end of 2021 and is currently in trilogue negotiations⁶⁵. A further specification of this relationship between EMFA and other acts is not provided in the recitals. Also, the choice of wording (“shall not affect”) is in contrast to that of the DSA, the proposal for a regulation on political advertising and many other legislative acts that state the new act is “without prejudice” to certain other existing rules. This seems to be based on the premise that there are or should be no cases of conflict between EMFA and the legal acts mentioned.⁶⁶

For the case of a collision in practice, however, the provision does not provide any precise indication of a priority of rules, e.g. in the sense of a *lex specialis/ generalis* rule as it can be inferred from a wording stating that one act is “without prejudice” to the others. Within the specific provisions (as well as some

⁶⁰ Explanatory Memorandum p. 2 (“Choice of instrument”); Recital 5.

⁶¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.

⁶² 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, OJ L 186, 11.7.2019, p. 57–79.

⁶³ 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.

⁶⁴ 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, OJ L 265, 12.10.2022, p. 1–66.

⁶⁵ See European Parliament, press release of 2.2.2023, <https://www.europarl.europa.eu/news/en/press-room/20230130IPR70208/meps-vote-for-tougher-rules-on-political-advertising>.

⁶⁶ However, Cantero Gamito, *The European Media Freedom Act (EMFA) as meta-regulation*, p. 14, argues in favour of a clear *lex specialis* relation of the EMFA to the other acts.

Recitals) of the EMFA there is then a frequent reliance on "without prejudice" again. This concerns the duties of very large online platforms under the EMFA, for which Recital 31 states that the obligations imposed by the DSA are not overridden by the specific requirements that would be newly introduced by EMFA. There are further overlaps between DSA and the EMFA that can occur, for example in view of video-sharing platforms. Recital 8 of the EMFA expressly points out that these, in the way they are offered on the market today, can be partly "only" a video-sharing platform that organises content without having editorial responsibility, but that at the same time for certain parts of the content available on the platform they might have to be regarded as media service provider.⁶⁷ A similar situation may apply to core platform services (including video-sharing platforms) with their obligations under the DMA, for which Recital 46 merely states that the rules of the EMFA on audience measurement are without prejudice to any obligations that apply to providers of audience measurement services under Regulation 2019/1150 or the DMA, including those concerning ranking or self-preferencing, but does not give any further indication of possible tensions.

Especially relevant is the relationship to the AVMSD, the only other legal act that – according to the draft – would be amended (in the institutional aspects) by the EMFA. Although there are some clear overlaps besides the institutional chapter, there is no general rule on possible collisions. For some specific areas there is a clear indication that specific rules under the AVMSD should be unaffected, the EMFA being "without prejudice" to these rules, such as the Member States' transpositions of Art. 7a AVMSD in relation to user autonomy under Art. 19 EMFA and Recital 37. As the prohibition of any type of, even indirect interference with editorial decisions under Art. 4(2)(a) EMFA has been broadly formulated, the question could arise whether Art. 4(1) EMFA (and Recital 13) stating that restrictions of the right to exercise the economic activity of media services providers are possible if legitimate under (any) Union law, sufficiently covers actions by supervisory authorities according to the AVMSD. In addition, Art. 1(3) EMFA gives Member States the possibility to adopt "more detailed" rules,⁶⁸ but only concerning Chapter II and Section 5 of Chapter III, while the AVMSD allows more generally for the adoption of stricter rules for providers under their jurisdiction.⁶⁹ A clearer positioning of the AVMSD and the national transpositions in relation to the EMFA is therefore needed, especially as the relationship between the Directive and the DSA is another not clearly defined field, a problem that would be maintained also with EMFA as this in turn "shall not affect" the DSA.⁷⁰

Another evident overlap exists between EMFA and competition law, both in terms of state aid and mergers, and the Explanatory Memorandum underlines how EMFA is intended to supplement EU competition law. Partly, the relevant sections mention that the EMFA rules shall be "without prejudice" to state aid rules, e.g. Art. 24(4) or Recital 18. For the assessment of media concentration provisions the interconnection with the Merger Regulation and especially its Art. 21(4) is not evident as mentioned above. The Merger Regulation assessment shall stand aside the one under EMFA and national rules on scrutinising concentrations of an EU-wide significance for other reasons than market powers would remain possible (and unaffected by the EMFA, as Art. 21(1) subparagraph 2 states) but not mandatory, while purely domestic mergers (with possible impact on pluralism and editorial independence) would have to – according to Art. 21 EMFA – be assessed from a substantive point of view specifically for that potentially negative impact on pluralism and editorial independence.

⁶⁷ For the definition of the category of media services see also Art. 2 no. (1) and (2) EMFA.

⁶⁸ This formulation deviates from the otherwise used "stricter rules" and leaves open whether only more detailed rules are admissible or whether such kind of rules can also have a stricter effect than those in the EMFA.

⁶⁹ Art. 4(1) AVMSD.

⁷⁰ Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*, p. 42 et seq.

2.3. Interplay with Commission Recommendation (EU) 2022/1634

The EMFA proposal is accompanied by Recommendation (EU) 2022/1634 on internal safeguards for editorial independence and ownership transparency in the media sector⁷¹ which the Commission also published on 16 September 2022. As follows from Recital 6 and para. (1) of the Recommendation, it is meant to be a tool with immediate effect that is to be seen separate from the EMFA itself. Therefore, it leaves the – possible future – provisions of the EMFA unaffected and is even explicitly foreseen in para. (25) to be revised, if necessary, after adoption of the EMFA.⁷² Due to its nature as a Commission Recommendation under Art. 288 AEUV it is not legally binding, but can have important political significance.⁷³ It serves as a support of self-regulatory initiatives by the media sector and thereby follows the roadmap prepared by the European Democracy Action Plan (Recital 7).

Consequently, the Recommendation is mainly directed to media service providers – albeit without defining them – rather than to the Member States. It “encourages” them to put in place certain safeguards concerning editorial independence and integrity as well as media ownership transparency while providing for a catalogue of possible measures that are to be regarded appropriate and could be used for orientation. It reflects – and thereby in a way pre-empts – the conditions laid down in Art. 6(2) concerning obligations of media service providers (including Commission powers to issue Guidelines on this) about ownership structures, but is also much more specific on what is expected from the providers.

Member States are addressed only insofar as they are “encouraged” to take action to effectively implement the Council of Europe Committee of Ministers Recommendation CM/Rec(2018)1 to Member States on media pluralism and transparency of media ownership, inter alia by entrusting a relevant national regulatory authority with maintaining an online media ownership database. The Member States are invited by the Recommendation to provide the Commission with information by March 2025 concerning gathered media ownership details, although this “invitation” is of a non-binding nature.

⁷¹ 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.

⁷² That paragraph also clarifies that after adoption of the EMFA the recommendations that run parallel to the EMFA provisions in the Commission instrument will cease to apply. This and a possible future replacement with a new Recommendation will depend on the final outcome of the legislative procedure concerning the EMFA.

⁷³ Cf. on this and for a critical assessment of Recommendations in light of the impact on Member States Andone/Greco, *Evading the Burden of Proof in European Union Soft Law Instruments*, p. 79 et seq.

3. SELECTED SUBSTANTIVE ISSUES

KEY FINDINGS

- In the light of both the freedom of the media and the freedom to provide services, the definitions of the EMFA require clarity and precision, oriented towards a clear objective.
- Some formulations of the EMFA are ambiguous making it difficult to assess their practical impact, which would be necessary in light of fundamental rights and freedoms and the potential effect of the rules.
- There are different degrees of overlap with existing Union or Member State law concerning the substantive rules of the EMFA which cannot be easily resolved in the way some of the provisions are currently designed.
- It is often not clear within the substantive rules whether and to what extent rights and obligations contained in the EMFA can – or should – be enforced and in which institutional dimension this should take place. Therefore, questions arise on how to achieve a practically effective protection of the aims pursued with the EMFA.

3.1. Definitions

The definitions of the EMFA are a key element of the proposed Regulation as they finally decide on which actors are addressed by the rules, thereby only referring for some definitions on existing ones from other legal acts.

One of the central definitions is “media service provider” as most of the duties and rights of the EMFA are connected to this category. According to Art. 2 no. (3) this is a natural or legal person whose professional activity is to provide a media service and who has editorial responsibility for the choice of the content of the media service and determines the manner in which it is organised. Essentially, there are four conditions to be met:

First, professional activity requires a certain degree of professionalism and permanence of the service. Recital 7 in that context requires that the service is normally provided for financial or other consideration, which means that user-generated content can, but regularly does not meet this criterion.

Second, a “media service” according to Art. 2 no. (2) is a service as defined by Articles 56 and 57 TEU, where the principal purpose of the service as a whole or a dissociable section thereof consists in providing programmes or press publications to the general public, by any means, in order to inform, entertain or educate, under the editorial responsibility of a media service provider. For the specific category of an audiovisual media service the EMFA definition (Art. 2 No. (6)) refers to the definition of the AVMSD, but such services also constitute media services as the more general category in Art. 2 no. (1). In contrast to the AVMSD, the EMFA definition addresses a convergent media concept, i.e. covering different types and formats of media. The content of these service comes either in form of programmes, i.e. "a set of moving images or sounds constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider" (which includes linear and non-

linear offerings in not only the audiovisual, but also audio segment), or in form of press publications. For the latter, the EMFA proposal (Art. 2 No. (5)) references the definition of Art. 2(4) DSM Directive, i.e. a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine, has the purpose of providing the general public with information related to news or other topics and is published in any media under the initiative, editorial responsibility and control of a service provider. The similarity, but not equivalence to the definitions in the two Directives when it comes to the more general “overarching” media service definition of EMFA could lead to disparity in application, especially when one considers the examples and description given in Recital 7.

Third, the person must have ‘editorial responsibility’ over the choice of content disseminated through the respective media service as well as its organisation Art. 2 no. (10). Similarly to the inclusion in the AVMSD, there is again no further clarification in the Recitals of EMFA what the threshold and object of control and organisation exactly is. Recital 8 of the EMFA concerning video-sharing platform services (for which Art. 2 no. (11) references the AVMSD definition, too) points out that these can be merely platforms or also media service providers (for part of what is available on the platform). It therefore explicitly underlines the potential of holding providers of video-sharing platforms or VLOPs responsible for that specific content on their platforms, without, however, creating a new category of control which would equate such providers with media service providers.⁷⁴

Fourth, the provider needs to determine the manner in which it is organised. As already the editorial responsibility refers to the control over the content (programmes or press publications), this criteria needs to be either read as referring to the organisation of the service or it is a duplication of the requirement mentioned in the other definition.

It needs to be underlined that this definition, in essence, decides on the applicability of rights and duties under the EMFA. All in all, although it includes digital transmissions of such media, it takes a rather traditional media-oriented approach relying on traditional structures such as broadcasters, video on demand (VOD) services and publishers. This has been partly criticized as being in the way of a modern and convergent concept of the term media based on the understanding that journalistic and opinion forming content in their functions for democracy does not necessarily have to come from professional media service providers.⁷⁵ It is argued that there is no apparent reason to disadvantage such content in comparison to professional content with regard to certain rights and obligations proposed under the EMFA. Such an understanding of the relevance of the democratic function of the content rather than the way and by whom it is disseminated is also supported in recent jurisprudence

⁷⁴ On the limited understanding of exercising editorial responsibility in the conceptual framework established by the eCommerce Directive and the corresponding case law of the Court of Justice, cf. also Barata, *The European Media Freedom Act's Biased Approach*, concluding that Recital 8 is more of an aspirational statement or perhaps an invitation for further amendments in this direction rather than an actual legal determination

⁷⁵ Barata, *The European Media Freedom Act's Biased Approach*; arguing for a meta regulation based on a dynamic concept around media freedom Cantero Gamito, *The European Media Freedom Act (EMFA) as meta-regulation*, p. 14; CMPF, *Feedback on the Proposal for a EMFA*, p. 3, suggesting that “professional activity” should be not understood only in a commercial way but rather could reflect if a natural person adheres to journalistic professional standards; Rucz/Irion/Senfleleben, *Contribution to the public consultation on the European Media Freedom Act*, arguing for an orientation towards a better protection of “public interest journalism”; Tambini, *The democratic fightback has begun: The European Commission's new European Media Freedom Act*, stating that not only large mainstream media, but local, civic and alternative media should benefit from privileges.

of the CJEU⁷⁶ and the ECtHR⁷⁷ as well as international approaches to media and communication governance⁷⁸, while not neglecting the possible differentiation between diverse types of providers.

3.2. Rights and duties of recipients and media services providers

3.2.1. The right of recipients of media services under Art. 3

The above-mentioned difficulties concerning a lack of or imprecise definitions extend to the category of “recipients” of media services in particular. These are not only addressed in connection with obligations of media service providers – for example in Art. 17 in connection with the obligation of very large online platforms to allow a self-declaration of certain recipients of their services (see below 3.5.) – but are assigned an own right in Art. 3. This makes it more questionable why this category has not been included in the definitions, even though it may seem obvious what is meant with a recipient of a media service. Instead of a definition, Recital 6 details that these are “natural persons who are nationals of Member States or benefit from rights conferred upon them by Union law and legal persons established in the Union” which is a very broad notion as, besides all Union citizens, the other persons do not need specific media-related rights that have been conferred upon them, but any rights.

More importantly, however, the actual formulation of Art. 3 leaves the meaning of this provision open. By the wording, it lays down a rule that all of these recipients have the “right to receive a plurality of news and current affairs content, produced with respect for editorial freedom of media service providers, to the benefit of the public discourse”. Obviously, an actual possibility of reception or even a contractual relationship with a media service provider for the reception of such services is not a prerequisite. What seems to be an actual right reiterating the fundamental right to freedom of information, as it is guaranteed by Art. 10 ECHR and Art. 11 CFR and the according jurisprudence of the CJEU and the ECtHR that emphasise the importance of a plurality of information sources, remains as a merely aspirational goal of an ideal setting which is not accompanied by any actual direct legal consequence. The provision does not state whether the right should be regarded as an enforceable individual rights claim and it would be difficult to even envisage what this right should look like in practice as media services enjoy their own freedom of expression (and freedom of the media) in deciding on content production and provision. Recital 11 and 12 pick up this dilemma concerning Art. 3 by clearly stating that the EMFA should not contradict the fundamental rights guarantees offered by Art. 10 ECHR and Art. 11 CFR and clarifying that the “right” to have access to quality media does not “entail any correspondent obligation on any given media service provider to adhere to standards not set out explicitly by law”. Indeed, the exact level of sufficient plurality as aimed for by Art. 3 or whether the value for public discourse would have to be regarded as a separate criterion or is only the justification for the provision, remains equally open as the question of the legal quality of this right.

Several elements that are obviously regarded by the European Commission as conditions for ensuring that recipients have the benefit of the type of news and current affairs content as addressed by Art. 3 are detailed in further provisions of the EMFA, such as Art. 4 and Art. 6 that deal with editorial independence. Therefore, Art. 3 could be regarded as being only a substantiation of the objectives or a justification for proposing the EMFA and certain of its provisions, but this is already contained in Art.

⁷⁶ For example for determining journalistic activity under data protection law, ie. on the question of applicability of the so-called media privilege CJEU, judgement of 14.2.2019, C-345/17, ECLI:EU:C:2019:122, Buivids, para. 55 et seq.

⁷⁷ ECtHR, judgement of 1.12.2015, Applications nos. 48226/10 and 14027/11, Cengiz a.o./Turkey, on the importance and democratic function of user-generated content as “citizen journalism”.

⁷⁸ Council of Europe, Recommendation CM/Rec(2011)7 on a new notion of media adopted 21. September 2011; Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance adopted on 6 April 2022.

1 or would rather be expected in recitals accompanying the relevant provisions. In this sense the reminder in Recital 12 that the ECtHR has interpreted Art. 10 ECHR as including a positive obligation for “public powers” to create a framework which guarantees effective pluralism, can be seen as an explanation for Art. 3 EMFA which would be a statement that this legislative act is an element of such a framework. Nonetheless, this would still leave Art. 3 – entitled as a “right” – empty when it comes to concrete obligations as these already flow for Member States from fundamental rights obligations, namely Art. 10 ECHR, and a provision only alluding to this without having a concrete consequence, would be somewhat alien to a Regulation which otherwise lays down very specific rights and obligations.

3.2.2. Rights of media services providers under Art. 4

Based on the definition for media service providers Art. 4 lists a number of rights for such providers, which are further elaborated in Recitals 13-17. According to Art. 4(1), they shall have the right to exercise their economic activities in the internal market without restrictions other than those allowed under Union law. That part of the provision thus essentially confirms what already applies to media companies as it does to any other economic operator in the Union that can rely on the freedom to provide services as guaranteed by primary law (Art. 56 TFEU). In accordance with the possibilities under the freedom to provide services, restrictions are possible if they are “allowed under Union law”, for which Recital 13 mentions as example those imposed by the AVMSD or by measures taken by competent national authorities. The provision does not go beyond a mere restatement, in contrast, for example, to Art. 3(1) AVMSD, which explicitly links the freedom to provide services with the country of origin principle for the fields coordinated by the Directive and details a procedure for possible exceptions. At first glance, such an emphasis may not be necessary, but it seems harmless, as it corresponds to the basic idea of Union law. However, the reference (only) to “economic activities” could also lead to the conclusion that activities with a cultural focus are not covered by this, i.e. that they are subject to a narrower scope of application than the broad concept of provision of services in Art. 56 TFEU, a fact that is certainly not intended to be a legal consequence of Art. 4, which is based on the premise of guaranteeing more and not fewer rights. If the proposal aims to attach to Art. 4(1) also certain supervisory, monitoring or review powers going beyond the Member States' commitment to the freedom to provide services, this in any case cannot be derived from chapter 3 (see on this below).

In comparison to this very general statement, Art. 4(2) contains much more concrete provisions aimed at ensuring that Member States respect editorial freedom of media service providers. In that regard, certain actions by Member States, including by their national regulatory authorities and bodies, are prohibited.

According to Art. 4(2)(a) they shall not interfere in or try to influence in any way, directly or indirectly, editorial policies and decisions by media service providers. An ‘editorial decision’ is defined in Art. 2 no. (9) as a decision taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of a media service provider. This open and therefore far-reaching formulation aims to prevent any type of state interference in editorial freedom. It serves as a fundamental rights-based comprehensive protection of journalistic activity in view of the role of media as public watchdog in democratic societies. While the provision itself addresses interferences by the State in general and for clarification mentions that this includes actions by the national regulatory authorities⁷⁹ that are in charge of supervising the media, the accompanying Recital 15 mentions “other actors, including public authorities, elected officials, government officials and politicians” and thereby

⁷⁹ These are the ones foreseen in the framework of the AVMSD (for audiovisual media services) as definition in Art. 2 no. 12 EMFA shows.

points to a wide understanding of the source of intrusion. Both principal decisions concerning the editorial policy as well as individual decisions, the latter of which is defined in Art. 2 no. (8) referring to decisions taken on a regular basis and linked to the day-to-day operation of a given provider in connection with its editorial responsibility, are covered by Art. 4(2). The exact meaning is not clear, however, if compared to the use of the same term of “editorial decisions” in Art. 6 where it relates to the internal relationship between media service provider and responsible editor (-in-chief), but not the provider itself as in Art. 4. In addition, this prohibition flows already from the scope of protection of freedom of the media as a fundamental right and it is not certain whether there is an added value of including a broad formulation which by referring to any type of indirect interference or influence makes it difficult to determine the scope of the prohibition and thereby ultimately questions its practical enforceability.

Even more specific are the prohibitions in Art. 4(2)(b) and (c) EMFA to avoid hindering the work of journalists. According to lit. b) Member States shall not detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers in order to find information about a source which the provider refuses to disclose. The protection extends – in case there is such a constellation in a given situation – to the provider’s family members, employees (and their family), and to both corporate and private premises. Exceptionally such measures can be justified, for which the provision refers to the fundamental rights test of the Charter by requiring an overriding public interest in accordance with Article 52(1)⁸⁰ CFR and only if the measure is also in compliance with other Union law. Again, with this an already existing comprehensive protection of journalistic sources by case law especially from the ECtHR, is repeated.⁸¹ Some aspects of the jurisprudence on protection of journalistic sources are taken up in Art. 4(2)(b), but it cannot be understood as an exhaustive list of prohibited measures, because that could mean limiting the fundamental rights protection.⁸² Other measures can also constitute interference, such as, for example, simple orders to hand over other documents which enable or facilitate the identification of sources without directly disclosing them.⁸³ The main effect of this repetition may be seen in the possibility of more directly being able to initiate infringement procedures by the Commission⁸⁴, possibly expanding the likelihood of preliminary references to the CJEU in evaluating such national measures and mainly in having an additional recourse to an oversight institution according to Art. 4(3) EMFA.

According to lit. c) Member States shall further refrain from deploying spyware in any device or machine used by media service providers – again extended in scope of protected persons as in lit. b) – except if it is justified for specific legitimate aims, namely national security or, conditional to the inadequacy or insufficiency of measures that could be taken exceptionally under lit. b), in serious crimes investigations. This provision directed against another form of infringement of fundamental rights is clearly a very targeted reaction to very specific cases of the recent past, where such spying software

⁸⁰ In this respect, the wording here falls somewhat short, since, already according to the binding requirements of fundamental rights, Art. 52 CFR in its entirety must be included in the consideration, which is particularly relevant for the clause establishing an equation (Art. 52(3) CFR) with the ECHR and the case law of the ECtHR in the present context of a correspondence of the freedom of expression in Art. 10(1) ECHR and Art. 11(1) CFR.

⁸¹ In the context of using spyware Liger/Gutheil, *The use of Pegasus and equivalent surveillance spyware*, p. 70 et seq.

⁸² Critically therefore Voorhoof, *The proposal of a European Media Freedom Act and the protection of journalistic sources: still some way to go*, p. 2.

⁸³ See for example ECtHR, judgment of 22.11.2012, no. 39315/06 *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*.

⁸⁴ It should be noted, however, that such an infringement procedure is also possible under the current legal framework if a Member State violates fundamental rights precisely through the measures mentioned, as the CFR (in its interpretation and equivalence to the ECtHR, Art. 52(3) CFR) is of equal value as the Treaties and applicable to Member States if their action is in the scope of Union law. Despite the developments mentioned in the Impact Assessment, the Commission has not yet initiated such concrete proceedings.

was used in various Member States.⁸⁵ Unlike lit. b), it does not only refer to the fundamental rights framework but limits the possible justifications which would be applicable under a fundamental rights test. Concerning the possible use in criminal investigations, interestingly the EMFA defines “serious crime” in Art. 2 no. 17 as a selected list from the lengthy crimes list on which European Arrest Warrants can be based.⁸⁶ All of those are regarded to be comparable in terms of the seriousness that would justify the exceptional use of spyware, but it needs to be underlined that the provision of Art. 4(2)(c) cannot undermine the fundamental rights protection of media in that the intensity of the measure needs to be justified in each case also in light of the severity of the assumed crime. The EMFA further establishes a rule that measures mentioned in lit. (b) are to be regarded as less infringing than the use of spyware which is why they take priority and use of the latter can only be considered if they are not sufficient. However, from a fundamental rights perspective in an individual case this hierarchy of intensity of infringement might not always be adequate, because, for example, personally sanctioning a journalist in order for him or her to hand over information⁸⁷ could be regarded as less intrusive.

It is noteworthy that although Art. 4 and the accompanying Recitals address the protection of journalistic work as an element of freedom of expression and the media that – in the understanding of the Proposal – need robust protection reaching beyond the fundamental rights framework (at least by creating an additional source of protection), the aspect of privacy and protection of personal data in connection with protection of sources is not touched upon. Measures such as seizures of documents or the installation of spying software not only interfere with freedom of expression and freedom of the media, but also with these rights of both journalists and third parties who are subject to communications content. This reinforces the need for a particularly limited use of such measures and the requirement of very precisely developed provisions.⁸⁸ This finding is all the more relevant for supervision, as for data protection matters there is even a procedural fundamental rights guarantee in the Charter (Art. 8(3) CFR) with far-reaching requirements concerning the independence of the supervisory authority as further developed by the CJEU. Even though the main goal of the additional protection system under Art. 4(3) is not oriented to the protection of personal data, there may be questions about the set-up of such a body compared to the strict independence criteria for the data protection authorities.

3.2.3. Special duties of news media providers under Art. 6

A specific category of media service providers is addressed in Art. 6, namely those “providing news and current affairs content”. Because of their relevance and the importance of trust in what is more generally addressed as “news media” in Recital 19, the EMFA proposal imposes certain duties on them. There is no specific definition given on this category of providers, although news and current affairs content is also included in Art. 3 according to which recipients of media services in the EU shall have the right to receive a plurality of such content. Recital 19 explains why it is crucial for the recipients to know who owns and stands behind news media with the ability to identify and understand potential conflicts of interest which in turn is a prerequisite for the recipients to form well-informed opinions in the context of democratic choices. The relevance of media content for the democratic decision-making

⁸⁵ Extensively Liger/Gutheil, *The use of Pegasus and equivalent surveillance spyware*, p. 15 et seq.

⁸⁶ Cf. Article 2(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1-20.

⁸⁷ See on this in the context of illicit trafficking of weapons for example ECtHR, judgement of 22.11.2007, no. 64752/01, *Voskuil v. the Netherlands*.

⁸⁸ Highly questioning the outcome of the EMFA Proposal in that light EDPS, Opinion 24/2022 on the 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, 11.11.2022, p. 9 et seq.

process of the population is well known as reason for the significance of its protection under fundamental rights. However, in that context the protection is not limited to the narrow framework of news and current affairs. Rather, it is recognised there that even purely entertainment and other similar formats – although they might be subject to a lesser level of protection when balancing with other interests – have relevance to opinion formation, not only in form of the content transmitted, but also by the selection of content formats for the programme/publication.⁸⁹ Therefore, designating a special status “only” for news and current affairs content may not be adequate for reaching the goal of the provision to support transparency of public opinion forming.⁹⁰ At the same time it seems that the reach of Art. 6 was supposed to be somehow limited, as it imposes additional duties.

However, in particular press publishers have reacted highly critical to the proposed scope of Art. 6 as being too broad. Traditionally, in most Member States, the press has been subjected to a low level of statutory regulation with more reliance of self-regulatory approaches. Although Art. 6 is not included in the framework for regulatory cooperation of Chapter III (see on this below 4.) imposing structural duties on press publishers as one category of media services providers may raise for some Member States the level of regulation for these, explaining the negative reaction irrespective of the actual formulation of Art. 6(1) and (2).

In terms of substantive rules, Art. 6 imposes two obligations on the providers of news and current affairs content: transparency of ownership and guarantees for the independence of editorial decisions.

According to Art. 6(1) respective media service providers shall make 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 as well as of their beneficial owners⁹¹ easily and directly accessible to the recipients, for example on their websites or in another medium⁹². For audiovisual media services there was a comparable transparency provision included in Art. 5(2) AVMSD⁹³, which was only optional and hardly taken up by the Member States in their transposition acts.⁹⁴ The EMFA provision would be limited to news media (of any type), but be mandatory. Although Art. 6(1) refers to Directive (EU) 2015/849 with regard to the definition of beneficial owners, which lays down general rules on transparency of ownership in the context of preventing money laundering and terrorist financing⁹⁵, that Directive in its implementation in national law shall not be affected by the EMFA.⁹⁶ Because of the similarity of the requirements, it is worth considering case law concerning said Directive, in particular concerning obligations to make personal data publicly available. The relevant provisions of an amending Directive to the Anti-Money Laundering Directive⁹⁷ were declared void due

⁸⁹ See on this eg. ECtHR, judgement of 24.6.2004, np. 59320/00, Hannover v Germany.

⁹⁰ Critical Ranaivoson/Afilipoaie/Domazetovikj, *Media pluralism in the EU: A prospective look at the European Media Freedom Act*, p. 4; CMPF, Feedback on the Proposal for a EMFA, p. 5.

⁹¹ Following the meaning as in Article 3, point 6 of 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, OJ L 141, 5.6.2015, p. 73–117.

⁹² Recital 19.

⁹³ In this degree of clearness, however, the relationship to the AVMSD is not explicitly clarified by the EMFA. This can lead to problems in connection with Art. 3 and 4 AVMSD when it comes to questions about the possibility of the Member States adopting stricter rules in the coordinated field of the AVMSD, because the EMFA does not belong to this coordinated field.

⁹⁴ Cappello (ed.), *Transparency of media ownership*, p. 31 et seq.; Deloitte/SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive*, p. 127 et seq.

⁹⁵ See in relation to the AVMSD transparency rules Cappello (ed.), *Transparency of media ownership*, p. 20 et seq.

⁹⁶ Recital 19.

⁹⁷ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.6.2018, p. 43–74.

to a fundamental rights violation, because they were seen by the CJEU as disproportionate due to a lack of sufficient guarantees against the risk of misuse.⁹⁸ These findings can also apply in the context of Art. 6(1) even if it pursues a different objective (protection of the democratic decision-making process in contrast to protection against abuse of the financial system).

At the same time, Art. 6(1) is not very detailed when it comes to the conditions of displaying the information, because – other than the provision in the AVMSD suggests – no inclusion in a database or a reporting format to public authorities is foreseen. Questions about the how (for example, in what format), where (for example, also in a linear broadcast) and for how long (for example, as an archived information in the event of a change of ownership structures or only in form of the most up-to-date information) of the availability of the ownership information are open. It is in essence limited to the names, but not the amount of investment or shareholding in the provider⁹⁹. The current wording (“easily and directly accessible”) leaves a wide range of possible ways to achieve the duty, many of which might in practice not have the desired effect.¹⁰⁰ Especially the lack of reference to the operation of a (central) database that could provide an overall picture of ownership structures in the media market, can limit the potential result of the provision, as well as the lack of a systematic provision of the information to regulatory authorities.¹⁰¹ Given that Art. 6 is not within Chapter III and the scope of the European Board for Media Services, Art. 15(2) only relates to ownership transparency as provided under Article 5(2) AVMSD, the EMFA does not transfer any binding character to Art. 5(2) AVMSD nor does it extend its scope to all media service providers or create an obligation¹⁰² for national regulatory authorities to collect and prepare such information. Rather, as mentioned, national rules on transparency of media ownership rarely exist at all,¹⁰³ and even if they do, they are very differently designed in terms of scope, addressees and actors involved, so that it would be difficult to derive a basis for a uniform database here without any further indications.

According to Art. 6(2) news and current affairs media service have to take measures to guarantee the independence of individual editorial decisions in their companies. In particular, such measures shall aim to guarantee that editors are free to take individual editorial decisions in the exercise of their professional activity and ensure disclosure of any actual or potential conflict of interest by any party having a stake in media service providers that may affect the provision of news and current affairs content. However, the formulation of the provision is not very strict in that it calls for measures that providers “deem appropriate” and it is to be “without prejudice to national constitutional laws”. The editors of the media services providers that are to be protected are defined in Art. 2 no. (7) as one or several natural person(s) possibly grouped in a body, regardless of its legal form, status and composition, that take(s) or supervise(s) editorial decisions within the media service provider. In addition to the fact that the term of editorial decision is not very precise, also in view of its use in Art. 4 in a different context (see above), the definition does not overcome the problem of an unclear relationship between owner and editor that shall be achieved by the EMFA. According to Recital 20 the owner shall have the freedom to define the “overall line” of the media service – although even that in agreement with the editors – after which it is the editors (typically an editor-in-chief) that shall have

⁹⁸ CJEU, Joined Cases C-37/20 and C-601/20, WM and Sovim SA / Luxembourg Business Registers, ECLI:EU:C:2022:912.

⁹⁹ Although only information of such owners is to be disclosed which have an influence on the provider or hold a certain share, recipients will likely not be aware of these legal circumstances and the actual distribution of ownership may remain unclear.

¹⁰⁰ For example, a radio broadcasting provider could release its ownership information at certain intervals in a late-nightly audio credit, a media service provider could prepare an annual report for the website with a huge amount of information in which also ownership is mentioned etc.

¹⁰¹ Pointing to this lack CMPF, *Feedback on the Proposal for a EMFA*, p. 4.

¹⁰² This point is indeed taken up in the Commission Recommendation (EU) 2022/1634, which has, however, no binding character.

¹⁰³ According to Bleyer-Simon et al, *Monitoring Media Pluralism in the Digital ERA (MPM 2022)*, vice-versa, only four Member States were at a low risk regarding such transparency rules.

the responsibility to decide on publication of individual content items as part of “editorial responsibility”. This shall be shielded against interference by the owner of the media service. The difficulty with this approach in the way it has been perceived since its publication is that it relates to an area which - especially for the press – protects media provider’s “freedom of tendency”, which for example in Germany (“Tendenzschutz”) and Austria (“Blattlinie”) has an impact in labour law and the question of the status of employees. It essentially means that a publisher is free to decide on the tendency in the sense of a general (political, social, etc.) line of reporting. Accordingly, editors will be employed that identify with this line, possibly in view of a certain market of recipients. If the editor’s or the provider’s attitude changes, i.e. if the convictions no longer go hand in hand, Art. 6(2) could be read in such a way that the editor maintains his freedom of decision which takes precedence over the owner’s position with regard to individual decisions.¹⁰⁴ In order to be able to assess the scope of Art. 6(2), it is necessary to clarify what editorial decision means and whether such a consequence is actually intended. It must be remembered that such a decision by the provider is not necessarily aimed at suppressing opinions in favour of political influence, but can also simply have economic reasons, for example if the risk of an indemnification claim on the publication of a certain very risky item is not economically viable – the EMFA makes no distinction in this regard. It needs to be considered whether such a rule is compatible with the CFR, i.e. whether the provider’s freedom of conduct and freedom of the media may be restricted in favour of the individual editor’s freedom of opinion even though in many cases it is the provider who bears ultimate editorial responsibility with all consequences.

As mentioned, in addition the provision leaves the appropriate measures mainly to the providers, although Recommendation (EU) 2022/1634 indicates with regard to Art. 6(2) lit. (a) what the Commission has in mind with its proposal, such as, for example, rules on editorial integrity, the establishment of internal bodies, the participation of journalists in editorial decisions, etc., none of which is foreseen specifically under the EMFA. It is even more opaque how Art. 6(2) lit. (b) on disclosing information about conflicts of interest – even potential ones – shall be achieved. As there is no direct connection to the supervisory framework under the EMFA with regard to Art. 6, it is open how it should be assessed whether the measures taken by the providers are sufficient. In practice, this would remain a pure self-regulation in accordance with Member State traditions.

According to Art. 6(3), the duties for the special category of providers do not apply to micro enterprises.¹⁰⁵ This is based on total assets, net sales and number of employees. A special consideration of the needs of SMEs corresponds to the goals of the SME strategy and can also be found in other recent legal acts impacting the media sector. However, due to the different market sizes in the Member States the extent to which the size (in the sense of a company’s economic strength) corresponds to the risks addressed by Article 6 EMFA may be questioned. The relevance of a content for the democratic decision-making process has little to do with the economic capacity of a company. This approach underlies the corresponding provisions of the DSA, which exempts SMEs precisely only from certain provisions, but not overall, because even small players can cause dangers to the fundamental rights of users. The goal of not imposing excessive burdens on micro-enterprises could also be achieved by a selective non-application, in the context of Art. 6 for example only as far as para. 2 is concerned.

¹⁰⁴ Highly critical in that light also with regard to competence framework Cornils, *Statement on the Proposal for a European Media Freedom Act*.

¹⁰⁵ For which EMFA relies on the meaning in the sense of Article 3 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19–76.

3.3. Addressing public service media

Until the EMFA was proposed by the Commission, public service broadcasting – or more generally public service media – were addressed by EU law only in relation to state aid law in relation to their financing as well as by provisions that apply to any type of (audiovisual) media service provider as, e.g., the AVMSD does not have an ‘*exception service public*’-approach.¹⁰⁶ Dedicated rules aiming specifically at the public service media based on their special role were for a long time regarded as being entirely out of the competence of the EU which is why it can be seen as a surprise that Art. 5 addresses guarantees for public service media providers.

As highlighted by Recital 18, the EMFA follows the idea that although public service media are established by the Member States according to their own decision and rules, they play a particular role in “the internal media market”, by ensuring that citizens and businesses have access to quality information and impartial media coverage, as part of their mission.¹⁰⁷ This assumption is valid insofar as public service media are constituted by the Member States precisely for the purpose of ensuring a supply of a specific type of media to reach potentially all of their citizens. However, the extent to which this role has a significance for the “internal media market” needs to be questioned against the background that the mission (or: remit) of these providers is determined by the Member States typically targeting the national market¹⁰⁸ and is oriented to cultural peculiarities as well as market conditions in that State. Thus, the actual design of the public service media and their remit is very diverse in the Member States; for instance, in States with a diverse and sustainable media landscape, the mandate of public service media may be less pronounced or even limited in order to strengthen the competitive situation of commercial providers, whereas in states where public service media are the main or one of few sources of information the mission may have to be defined much broader. The mandate imposed on the providers may also be diverse in terms of what type of content is offered – e.g. education, news, entertainment, etc. – as well as in which format – e.g. television, radio, online media, etc. Equally (and related to the remit) the diversity extends to the scope and limitation of state (-initiated) funding for public service media¹⁰⁹ as well as structural elements¹¹⁰. As is underlined by the Amsterdam Protocol attached to the Treaties (see above 2.1.), the Member States have a wide margin of discretion in deciding about “their” public service media. The definition of EMFA in Art. 2 no. (3) interestingly defines such providers as either having been entrusted with a public service mission under national law or qualifying as such because they receive some form of “national public funding”, the criteria not being cumulative.

Although, as a result of this clear assignment to the domain of the Member States, only few public service media are actually active outside of the territory of their home states or even have a cross-border focus – something that in many States would contravene the scope of the mission because this space is left to commercial providers –, the EMFA argues for an internal market dimension due to the risks that they are confronted with. Recital 18 sees a threat in the fact that public service media can be particularly exposed to the risk of interference by States, given their institutional proximity to the State

¹⁰⁶ Even Art. 7a AVMSD concerning a possibility for Member States to foresee rules on prominence for public value content does not specifically address public service media (or their content) but more generally public value, cf. in more detail Cappello (ed.), *Prominence of European works and of services of general interest*, p. 10 et seq.

¹⁰⁷ The Explanatory Memorandum, p. 2, fn. 8 goes even further and mentions that “[p]ublic service media occupy a crucial place in the media market, given their public service mission. They constitute an important, if not the essential, source of media for a substantial number of citizens and companies”.

¹⁰⁸ Exceptions apply to public service media that have an international reach in order to present e.g. news and current affairs programmes produced against the cultural, political, societal background of a specific State such as e.g. RFI, TVE Internacional, Deutsche Welle, etc.

¹⁰⁹ On the different aspects, including economic challenges, see in detail Lowe/van den Bulck/Donders (eds.), *Public service media in the network society*.

¹¹⁰ See on this Cabrera Blázquez et al., *Governance and independence of public service media*.

and the public funding they receive. The risk for the internal market is therefore construed in view of “uneven safeguards related to independent governance and balanced coverage by public service media” across the Member States which 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 not clear how the difference in protection of the status of public service media can have the effect of distorting competition as this is somewhat different to the reason for a state aid scrutiny by the Commission in view of public service media financing because there the potential competitive distortion results from addressing the same audience (and possibly advertising) markets.

The legal safeguards the EMFA aims to establish in response to risks for public service media, are all laid down in Art. 5. The provision starts, however, with what could be described as an “expectation” what should be in the mission of a public service media provider and how it should be fulfilled: according to Art. 5(1), they shall provide in an “impartial manner” a “plurality of information and opinions”. This shall be in accordance with their public service mission, which as mentioned in the definition clearly stems from the Member States. Although the provision of a pluralistic range of information and opinions is indeed likely to be the core part of the public service media remit defined at national level, it is questionable what consequence would derive from Art. 5(1) in case a Member State does not (explicitly) include these aspects. Clearly, the Amsterdam Protocol, although Recital 18 only relates to it concerning the Member State discretion to decide about the funding of public service media, does not allow a reading of the EMFA provision according to which in such a case the “minimum definition” of Art. 5(1) would override the Member State mandate, because it states that the financing is connected to the definition of the remit which is assigned to the Member States. Possibly, Art. 5(1) is rather aspirational in reminding that the underlying reason for the exceptional state (-initiated) funding is in the special role that public service media are tasked with.

Art. 5(2) has a structural dimension and contains rules on the independence of governing bodies within public service media which is to be safeguarded through specific procedural guarantees in the appointment and potential dismissal of concerned persons. In that sense, the leading positions shall 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. Referring to the “head of management and the members of the governing board” seems to have a specific governance model in mind and might not be reflected in that way in the existing and varied structures for public service media on Member State level.¹¹¹ There is no mention in the Recitals either in which way these references are to be understood, but in view of the very concrete consequences attached to the norm, a clearer formulation of what categories of bodies are meant would be needed, by referring e.g. to the functions relating to programme decisions or a supervisory role or having editorial responsibility or being in charge of personnel etc. In light of the objective of enabling public service media to fulfil their democratic mandate independently, a descriptive rather than conceptually fixed rule would be more expedient, since the EMFA itself cannot make specifications about the structural set-up of national public media service providers.

With regard to the substance of the rules on appointment, Art. 5(2) seems again to have very specific structures in mind, under which such an appointment procedure is possible in the first place. It is noteworthy that the rule established here is reminiscent of Art. 30(5) AVMSD, which was introduced in 2018 and applies to supervisory authorities.¹¹² Interestingly, although the requirements for the

¹¹¹ Dragomir/Söderström, *The State of State Media*.

¹¹² According to the AVMSD provision the appointment procedures shall be transparent, non-discriminatory and guarantee the requisite degree of independence. The latter criterion is not explicitly taken up in the EMFA but Art. 5 has the title “safeguards for the independent

procedure as well as the selection criteria have to fulfil several elements – they have to be transparent, open, non-discriminatory, objective and proportionate –, there is no actual substantive element indicating which type of qualification criteria should be addressed besides them having to be objective and thereby not determined by specific interests. As a result, this theoretically could lead to a situation in which a biased procedure that leads to an appointment of the person not by a body composed in a plural manner, but one that consists purely of actors following political or certain economic interests or determined purely by parliamentary majorities, would still have to be regarded to be in compliance with these criteria as long as the procedure follows e.g. the non-discrimination obligation. This again is due to the Member State competence to set-up the public service media, so the corresponding procedures are essentially left to the Member States, despite the general obligations introduced with EMFA.

Furthermore, the term of office for these bodies shall be “adequate and sufficient” in length to ensure effective independence of the public media service provider by not making the leadership prone to pressure concerning a possible prolongation in office. In addition, early dismissal shall only be possible exceptionally and based on details laid down in national law for cases when they no longer fulfil the legally predefined conditions required for the performance of their duties or because of illegal conduct or serious misconduct. There are again procedural safeguards such as the requirement of a justification that has to be notified to the concerned person in advance and a specific possibility for judicial review has to be guaranteed. In order to have a form of public scrutiny, the grounds for dismissal have to be made public. These criteria are again reminiscent of Art. 30(5) AVMSD but in comparison add the explicit possibility of dismissal for reasons of illegal or serious misconduct. Certain elements will depend on the way they would be realized in national law and are dependent on the structure of the public service media organisations, so in a way the situation would not be much different to the currently applicable one, i.e. that an evaluation of whether independence can be promoted with this would ultimately be reserved for an analysis of national law - as has already been the case up to now. Similarly, the requirements for fulfilling the functions are laid down by national law so the discontinued suitability in light of those requirements as ground for dismissal derives from that, too.¹¹³ The criterion of serious misconduct is included e.g. in Art. 53(4) GDPR, again with regard to independence of supervisory authorities, and has to be read taking into account the specific functions and tasks the head of management or a member of the governing board has to fulfil.

Potentially with more impact, Art. 5(3) requires Member States to mirror the mission they define for the public service media in the level of financial resources made available to them, “adequate and stable financial resources” shall be ensured which safeguard the providers’ editorial independence. Predictability in the planning for public service media is indeed an important element allowing less dependency on markets when making editorial decisions, but the financing needs to correspond to the remit in order to be justifiable under EU state aid law, which – according to Recital 18 – is to be untouched by the EMFA rule. Further, the Recital underlines that a multi-year valid decision about the financing would be ideal to keep the providers out of constant pressure in ongoing budget negotiations. Because of the sensitivity of the financing in relation to potential political interference it is not surprising that in many Member States the detailed procedural requirements were developed

functioning” so that seemingly suggests an orientation of the provision towards independence, but that criterion is not picked up in the substantive provision itself.

¹¹³ This is also the case for the supervisory authorities under the AVMSD, which can be structured by the Member States due to their procedural autonomy. The dismissal ground as such is also known for other supervisory authorities, such as in Art. 247 TFEU for the independent members of the European Commission or in Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank (Art. 11 and 14).

also in view of constitutional conditions. There is an inherent tension between the need to define – precisely enough to satisfy state aid rules¹¹⁴ – the public service mission from which the financing derives and keeping influence by state powers out of this procedure. The resolution of this will remain on the level of Member States as the EMFA does not precise this further, but the inclusion of the provision may speak in favour of a more intense oversight by the Commission in checking the application of the potential future Regulation and not being limited to moments when a new state aid notification is made.

Another notable step in the treatment of public service media is that Art. 5(4) requires Member States to designate one or more independent authorities or bodies in order to monitor compliance with the whole provision. The Communication from the Commission on the application of State aid rules to public service broadcasting had already provided for the necessity of a monitoring of the use of the financing cleared under state aid rules, in particular Art. 106 (2) TFEU. That supervisory body must be independent of the public service media organisations concerned, but not necessarily of the state, so might not be a possible candidate in the EMFA context. The designated body would have both task monitoring internal procedures in the service providers and the way the State treats them, namely in terms of financial resources. It is not evident what type of body could fulfil such a function and whether it could, for example, be the same as the “appellate body” foreseen under Art. 20(3) which providers can turn to in case they are confronted by an administrative or regulatory measure which is liable to affect their operations in the internal market.

3.4. Measures and procedures for well-functioning media markets

Section 5 of Chapter III sets requirements for measures and procedures that are (to be) taken by Member State authorities in view of what the EMFA addresses as well-functioning media markets. In actual fact, two very different issues are addressed under this joint heading, on the one hand a more general set of conditions for any State action (besides the judiciary) impacting “the operation of media service providers in the internal market” are established (Art. 20), on the other conditions for procedures to assess media market concentrations are introduced (Art. 21 and 22).

Art. 20 concerns a potentially very far-reaching rule concerning media service providers: *any* legislative, regulatory or administrative measure taken by a Member State that “is liable” to affect the operation of media service providers in the internal market has to follow certain formal and procedural requirements. It shall be duly justified and proportionate as well as reasoned, transparent, objective and non-discriminatory. In addition, for non-legislative measures timeframes to prepare decisions should be established. Although these criteria can be at least in parts derived from fundamental rights and freedoms, such as in the context of a proportionality test (or, when it comes to the EU, also from the right to good administration in Art. 41 CFR), the extension to “any” measure and the unclear question of the impact make this potentially very far-reaching. The term “operation of media service providers” – and not: operation of media services (by media service providers) – is not specified further nor are the measures limited to such that are targeted specifically at media service providers, so that the current formulation could encompass all measures that relate in some way to a business activity of any media service provider. Recital 38 mentions as examples much more narrow types of measures that are specific to such providers, namely media ownership rules or licensing and notification requirements, but the substantive provision does not follow this approach. The question of scope is so important because Art. 20(3) establishes besides the regular effective judicial protection that exists against infringing measures of the State a specific appeal procedure to a dedicated “appellate body”.

¹¹⁴ Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320, 15.11.2001, p. 5–11.

Because the examples of Recital 38 refer to decisions presumably taken by competition/cartel or media regulatory authorities, this appellate body will have to be distinct from them. Besides mentioning the appeal procedure, no detailed specifications are made on the body or the procedure and in addition the body is not tasked with other matters under the EMFA (but could be utilized in the context of Art. 5, see above 3.3). While Art. 20(4) and (5) foresee a procedure for involving the Commission and the EBMS if the threshold of “likely ... affect[ing] the functioning of the internal market” by the measure in question is met, no connection between the appeal body and this procedure is established. The opinions of these two bodies are to be made publicly available and therefore apparently intended to ensure transparency, while this is not (necessarily) the case for the appeal body decisions.

The second part of this section deals with media concentration law. Art. 21 provides for an assessment of concentrations in the media market, whereby Member States shall provide in national law such a specific assessment of concentration if these could have a significant impact on media pluralism and editorial independence. The assessment shall be carried out by the national regulatory authorities (Art. 21(1)(c)) which in many Member States would amount to an extension of the competences of these authorities. Recital 40 explains the situation that should lead to such dedicated assessment: if, as a result of a concentration operation a single entity controls or has significant interests in media services which (together) have substantial influence on the formation of public opinion in a given media market, within a media sub-sector or across different media sectors in one or more Member States, thereby giving them a dominant position that is not economic market share-, but opinion “market”-oriented. Certain specifications for such national rules are made by the EMFA itself: the rules need to be transparent, objective, proportionate and non-discriminatory, shall foresee a notification obligation for merger parties, the conditions of which have to follow similar predefined requirements as the rules themselves and for assessing the impact of the concentration by the authority.

For the actual assessment, the EMFA goes into further details and mentions in Art. 21(2) mandatory requirements to be taken into account, which concern, among other things, the impact on pluralism, safety mechanisms for editorial independence or factors of economic viability.¹¹⁵ In addition, according to Art. 21(3), the Commission can issue further guidelines on those criteria, which ultimately leads to a supranational entity determining what “media pluralism” encompasses.¹¹⁶ Recital 44 in that regard goes into quite some detail about how the effects of a concentration should be appreciated. However, it is not clear from the EMFA provision to what extent the result of the assessment would have a practical impact.¹¹⁷ Apart from the vagueness of the relationship to existing provisions on media concentration and competition law and the interplay between rules on EU level and (voluntary) rules by the Member States (see above, 2.2.), there is a lack of further requirements or competences to be met by Member States when empowering their national regulatory authorities in charge of carrying out the assessment. The lack of such detail is to be explained with the procedural autonomy of the Member States and the otherwise unclear relationship to decisions taken under the competition law framework which includes the possibility for a secondary assessment in view of the impact on media pluralism already. The way Art. 21(4) is construed it assumes an information of the Board by the competent national regulatory authority if the case of “notifiable media market concentration” has the

¹¹⁵ It is not evident from Art. 21(2) whether the criteria should be cumulative or, if not, in what order of priority they should be considered in relation to each other. Pointing to this also CMPF, *Feedback on the Proposal for a EMFA*, p. 7.

¹¹⁶ Critical Cantero Gamito, *The European Media Freedom Act (EMFA) as meta-regulation*, p. 18, highlighting that it is important to strike a balance between institutionalisation and proceduralisation; see on the tasks of the EBMS and the Commission also below 4.2 and 4.3; also Ranaivoson/Afilipoaie/Domazetovikj, *Media pluralism in the EU: A prospective look at the European Media Freedom Act*, p. 3, stating that there might be some resistance on Member State level on the involvement of the Commission in the media pluralism assessment.

¹¹⁷ For a more detailed assessment of the media concentration rules see eg. CMPF, *Feedback on the Proposal for a EMFA*, p. 7 et seq.; Grünwald, *Der European Media Freedom Act*, p. 919, 920; Ranaivoson/Afilipoaie/Domazetovikj, *Media pluralism in the EU: A prospective look at the European Media Freedom Act*, p. 3.

potential to “affect the functioning of the internal market”. If such consultation does not take place, it is Art. 20(4) that would give the Commission the possibility to involve the EBMS in lieu of the notification by the national authority, which is further explained in Recital 43. After issuance of an opinion by the EBMS (or the Commission) the national regulatory authority shall take “utmost account” of the opinion (Art. 21(6)), even though the authority may lack power to take any binding decision on the matter. Therefore, without more specific national rules, Art. 21 is limited to laying down a complex procedure to raise awareness about (potentially) problematic media concentrations. With this solution, the Member States’ competence to design specific procedures to assess media pluralism impact is retained and they can take into account the historical and cultural background of their society.¹¹⁸

3.5. Addressing very large online platforms

Art. 17 contains a rule on the protection of editorial content by media service providers on very large online platforms (VLOPs.) If such providers declare vis-à-vis a VLOP that they fulfil certain conditions, they are supposed to receive a privileged treatment of their content in the moderation practices of that VLOP. A similar provision was already discussed within the DSA as a (mandatory) “media exemption” in general terms and conditions as well as in the context of notice and action mechanisms, without political agreement being reached on it then.¹¹⁹ It would now find a delayed consideration outside of the DSA – meaning without formal amendment to the DSA – in the new provision of the EMFA.

In more detail, Art. 17(1) obliges the VLOP providers to make available a functionality for self-declaration of the specific category of its “recipients” (meaning users) as belonging to the group of media service providers, who are in addition independent and in their function underly already some form of regulatory oversight. The independence criterion can be seen as a reaction to the criticism that was uttered concerning a “media exemption” in the DSA, which would give providers the possibility to enhance their position (and avoid strict moderation) simply by declaring that they are media services without fulfilling any specific conditions. The debate shifted towards needing safeguards that media which does not fulfil independence standards, especially if they are under control of a third country, are not within the scope of protection, which shall be achieved with the introduction of this additional element. Because Art. 17(1)(a) relies on the definition of Art. 2 no. (2) for media service providers, the problems with the definition in terms of clarity and scope of protection (see above 3.1) apply also in this context. Although the EMFA revolves around the concept of editorial independence and its protection¹²⁰, regards it as a precondition for exercising the activity of media service providers¹²¹ and contains safeguards to ensure editorial independence¹²², there is no further clarification or a definition under which circumstances for the purpose of Art. 17 the criteria of such editorial independence is to be regarded as satisfied. Elements constituting independence can be diverse and concern the regulatory and policy framework and the involvement of the state in organisational terms, the funding, the oversight and impact on the (editorial) decision-making procedures. As Recital 15 rightfully recognises – but in another context – Member States have taken different approaches to the protection of editorial independence, which also lead to a different understanding of the notion of editorial

¹¹⁸ In that light the result of the study prepared for the Commission by Deloitte/SMIT, *Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)*.

¹¹⁹ Cf. on the developments in the legislative process and the criticism brought forward from different perspectives Bertuzzi, *Media exemption ruled out in DSA negotiations, but could return*, <https://www.euractiv.com/section/digital-single-market/news/media-exception-ruled-out-in-dsa-negotiations-but-could-return/>.

¹²⁰ Recital 4.

¹²¹ Recital 14.

¹²² Articles 4 to 6.

independence. This is true for commercial as well as public services media.¹²³ There are important Recommendations of the Council of Europe on this matter¹²⁴, but no binding standards which would make the decision about fulfilling the independence criterion straightforward for either the media service providers themselves or, more importantly, the platforms when they check the status, as Recital 33 underlines that they should “not accept such self-declaration where they consider that these conditions are not met”¹²⁵. Even with the different ways in which EMFA addresses editorial independence, e.g. as part of the guarantees in Art. 4 to 6 and in the institutional system, do not answer, whether any media service provider that falls into the scope “automatically” is to be regarded an independent media service provider or whether additional criteria in other texts than the EMFA itself need to be considered.¹²⁶ More easily seems the application of the third criterion in Art. 17(1)(c), according to which the media service providers have to declare that they are already subject to regulatory requirements in view of their editorial responsibility for the content. Regulation can be either statutory or in form of co- or self-regulatory mechanisms, however, for the latter two it needs to be demonstrated additionally that they are “widely recognised and accepted in the relevant media sector in one or more Member States” without further precision about this threshold. Especially in the area of self- and co-regulation, there are significant differences in the systems applied by the Member States and to which type of media these apply. A common standard of orientation could result from Commission Recommendation (EU) 2022/1634 in this area, but as mentioned, the Recommendation shall be superseded by the EMFA in the relevant parts once it has been enacted. Therefore, the Commission’s power according to Art. 17(6) to issue guidelines on the declaration will be decisive which is why a further precision on the scope of the guidelines beyond the explanations given in Recital 33 could facilitate a later application of Art. 17 by the market participants.

The main privilege resulting from having the special status is that VLOP providers are more limited in the way they moderate that content, although not in the sense of a prohibition to take measures against that content, but rather in form of an (advanced) transparency and information obligation towards the concerned provider of the information. The provision refers to other legal acts to frame this relationship: if the VLOP is of the opinion that content provided on its online intermediation services¹²⁷ by such a self-declared media service provider is incompatible with the terms and conditions and intends to suspend its service in relation to this content, the VLOP provider has to communicate a statement of reasons accompanying that decision to the media services provider.¹²⁸ According to Art. 17(3) complaints under Article 11 of Regulation (EU) 2019/1150 of such media service providers have to be processed and decided upon with priority and without undue delay which is supposed to give them an additional privilege compared to regular users of the VLOP. Finally Art. 17(4) wants to avoid a systematic negative treatment of media service providers in giving them another complaint possibility: if such media service providers “consider” that a VLOP provider “frequently restricts or suspends the

¹²³ See on national differences with regard to the different aspects of editorial independence mentioned Bajomi-Lazar/Stetka/Sükösd, *Public Service Television in European Countries*; Cabrera-Blasquez et al., *Governance and independence of public service media*, Bleyer-Simon et al., *Monitoring Media Pluralism in the Digital ERA* (MPM 2022); Council of Europe Information Society Department, *Freedom of Expression in 2021*; Dragomir/Söderström, *The State of State Media*.

¹²⁴ For public service media see Recommendation CM/Rec(2012)1 of the Committee of Ministers to member States on public service media governance, adopted on 15 February 2012; for commercial media see Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance, adopted on 6 April 2022.

¹²⁵ Interpreted as an obligation to review by Barata, *The European Media Freedom Act’s Biased Approach*.

¹²⁶ Critical also Barata, *The European Media Freedom Act’s Biased Approach*.

¹²⁷ This term is not defined in the EMFA but instead refers to the term used in Regulation (EU) 2019/1150 without declaring this definition applicable. The DSA to which Art. 17 refers with regard to the designation of a VLOP, however, requires an online platform which is a certain kind of an intermediary service (not: online intermediation service).

¹²⁸ This obligation does not concern content of the most risky nature which amounts to a systemic risk according to Art. 26 DSA.

provision of its services” in relation to their content without “sufficient grounds”, the VLOP provider shall “engage in a meaningful and effective dialogue” with them upon their 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 media service provider may notify the outcome of such exchanges to the European Board for Media Services (EBMS).

While some voices criticize this preferential treatment already from the outset,¹²⁹ Art. 17(2) to (4) certainly raise some doubts that need to be clarified. The privileges for the media service providers derive solely from the (self-)declaration and the respect of it by the VLOP. Such a declaration can in principle be made by any recipient of the service and although VLOPs are encouraged in the Recital 33, as mentioned above, to conduct a verification of the declaration, there is no such obligation even in case of doubt. If there were such an obligation, the same concerns would apply about the transfer of powers to private entities for such a meaningful decision as is being discussed in the context of content moderation in general.¹³⁰ Without more detailed descriptions of the criteria of Art. 17(1) it is not unlikely that there are differing opinions about their fulfilment between the media service provider and the VLOP, which lead to the difficulty of deciding which position should be followed.

Only if the platform decides against complying with the declaration and does not follow the further requirements of Art. 17, judicial review of the decision about the status of the service provider is possible, without this being explicitly laid down in the EMFA. Alternatively, the provider could resort to the “meaningful dialogue”, after which the EBMS can also become involved under Art. 17(4). With regard to the latter, however, it is not clear from the proposed provision what shape this participation takes, i.e. whether the EBMS can take on a role as mediator in the dispute or should pass the matter on to the competent regulatory authority. The structured dialogue provided for in Art. 18 only concerns exchange about the general framework and not for specific cases, although it ties back to Art. 17 as experience and best practices in the application of that provision shall be part of the structure dialogue. A possible negative outcome of this situation is that Art. 17 could have exactly the opposite effect to the intended aim, namely that media service providers (including those who may be disseminating propaganda, for example) enjoy privileged treatment for their content, which is not subject to review due to a lack of will or resources on the part of the VLOP providers to even engage in an evaluation of the self-declared status.¹³¹

In addition, the way the provision is formulated, the legal consequences of a breach of Art. 17 remain unclear, be it in terms of (self-)declaration, the provision of a mechanism for declaration or the actual preferential treatment. Especially whether such breaches would have consequences for civil proceedings between the parties is open.¹³² The latter also concerns another aspect of consistency that is of crucial importance in relation to the DSA: although the EMFA shall not affect rules under the DSA, the question is whether the specific obligation on VLOPs under Art. 17 EMFA impacts the liability privileges of the DSA and whether content moderation by the VLOPs or the lack of it (in the case of media service providers) could lead to the loss of liability privileges.

Furthermore, Art. 17(2) to (4) contain several undefined legal terms which could make practical application of the provision more difficult. For example, Art. 17(2) requires the VLOP provider to take

¹²⁹ Cf. eg. Barata, *The European Media Freedom Act's Biased Approach*, drawing comparison to must-carry proposals currently under discussion in the United States.

¹³⁰ In that regard also Cantero Gamito, *The European Media Freedom Act (EMFA) as meta-regulation*, p. 17, 18, pointing to the problem of delegating decision-making on fundamental rights issues to non-monitored actors, especially where decisions have been automated with algorithms.

¹³¹ Pointing to this also CMPF, *Feedback on the Proposal for a EMFA*, p. 4.

¹³² See also van Drunen/Helberger/Fahy, *The platform-media relationship in the European Media Freedom Act*.

“all possible measures” in order to inform media service providers prior to the suspension without delineating which difficulties would make it “not possible” and therefore justify not providing the information in advance of the measure. They are also obliged to handle complaints of media services providers with “priority and without undue delay” giving media service providers a comparable status as is granted to trusted flaggers under Art. 24(1) DSA; however, the latter cannot rely on a mere self-declaration, but must meet certain criteria and are designated by the Digital Service Coordinators in a formal procedure which includes a verification. Furthermore, while Art. 17(1) for the mechanism to be provided by the VLOPs only refers to those (as established by the DSA rules), Art. 17(2) and (3) refer to the Platform-to-Business Regulation that does not rely on online platforms, but rather on the concept of online intermediation services.

In addition, Art. 17(4) is particularly vague. “Frequently” could be understood very narrow, meaning more than two times in a certain timeframe or could be understood very broad by requiring that a majority of the content of one media service provider is restricted during a larger period, or even that the VLOP provider acts with bad intent from the perspective of the media service provider. More importantly, it is unclear what exactly characterises a “meaningful and effective dialogue” which can and shall lead to an “amicable solution”. Which perspective is decisive and whether a specific body should be entrusted with assessing this in case of complaints, is not answered. In conjunction with Art. 17 not providing any indication about the legal consequences of non-compliance, it is crucial to avoid the impression that the rule of law and procedural rights are replaced by merely a “meaningful and effective dialogue” for contentious issues.¹³³

Furthermore, it is argued that from the point of view of media service providers the “media privilege” would in practice only have a very limited effect the way it is introduced. A notification obligation, ideally before taking action, since Art. 17(2) provides for notification before suspension, but does not provide for the content to remain untouched until a final settlement or reaction on the part of the media service provider has followed.¹³⁴ If not taken seriously, the obligation of VLOPs in this respect may bring little added benefit, because the information about moderation decisions might only follow a glimpse earlier than for other users, which, in the case of any online platform due to Art. 20 DSA, and in the case of any online intermediation service due to Art. 4(1) of the Platform-to-Business Regulation¹³⁵, also have to be informed about the moderation decision in an internal complaint handling system. Whether this is a significant change if it is not linked with a protection against the actual moderation measure, can indeed be questioned and it may rather have an “awareness-raising effect” on the part of the VLOP providers.¹³⁶

Art. 18 requires the EBMS to organise a “structured dialogue” between invited media and VLOPs as well as civil society, to discuss relevant aspects of how VLOPs conduct their activity concerning access to content of its users. Besides, as mentioned, referring to the activities under Art. 17, an important point for this debate is to “monitor adherence to self-regulatory initiatives aimed at protecting society from harmful content, including disinformation and foreign information manipulation and interference”. These examples for harmful content would concern content that is not classified as illegal throughout the EU or in EU secondary law, but addressed also in self-regulatory initiatives such as the Code of Conduct against Disinformation. However, where such content is illegal due to Member State law, the

¹³³ With further elaboration van Drunen/Helberger/Fahy, 2023, *The platform-media relationship in the European Media Freedom Act*.

¹³⁴ Beaujean/Oelke/Wiorny, *Immer mehr Verordnungen aus Brüssel und ihre Auswirkungen auf die Medienregulierung*, p. 11, 15.

¹³⁵ Although Art. 1(2) EMFA states that it should not affect the Platform-to-Business Regulation, Art. 17(2) indeed changes the obligations of online intermediation services if they are designated as VLOP because according to Art. 4(1) of that Regulation they are only required to inform users of suspensions or restrictions “prior to or at the time of the restriction or suspension taking effect”.

¹³⁶ Pointing to this also van Drunen/Helberger/Fahy, *The platform-media relationship in the European Media Freedom Act*.

issue falls under the DSA and the supervisory mechanisms foreseen therein. With this, the VLOP-provisions of EMFA are a supplement to the DSA without amending the latter and also with a questionable impact when compared to the rules of the DSA, breaches of which can be sanctioned by the Commission in case of VLOPs. Art. 17 and 18 jointly impose obligations which are formulated in a way that are more like instruments of self-regulation or an inspiration for those, which makes their placing in a Regulation questionable.

4. INSTITUTIONAL ISSUES

KEY FINDINGS

- The EMFA builds in institutional terms on the national regulatory supervisory authorities established under the AVMSD, in particular transferring the level of independence ensured therein to the EMFA, without, however, assigning dedicated enforcement or sanctioning powers.
- In contrast to the approach chosen in the AVMSD, a central role is foreseen for the European Commission in the EMFA, which can lead to tensions with Member States competences and the tasks of independent national regulatory authorities, especially as some aspects in relation to the assigned powers are not clear.
- The European Board for Media Services (EBMS) is established as new cooperation body on EU level – building on the structures created under the AVMSD – and tasked with a coordinating and harmonising function which is crucial in view of the cross-border dimension of the media landscape today.
- The independence of the EBMS is ensured by establishing separate criteria, but the interplay with the Commission powers can raise concerns.

4.1. Oversight structures

4.1.1. Overview

In its Chapter III, the EMFA proposal provides for a framework for regulatory cooperation in addition to the substantive provisions on “a well-functioning internal market for media services” that have been dealt with in the relevant parts above. The institutional and cooperation structures included in Sections 1 to 3 of the chapter are fundamentally based on the AVMSD and would consequently amend the AVMSD¹³⁷, namely by deleting the provision of Art. 30b on the European Regulators Group for Audiovisual Media Services (ERGA) which would be replaced by the EMFA provisions. Going beyond a mere transfer of the provision and a replacement of ERGA by the European Board for Media Services (EBMS), these sections introduce significant innovations, in particular concerning more formalized cooperation structures. They also would set-up new mechanisms in the oversight of providers between the national regulatory authorities and the European Commission.

In essence and with regard to the main tasks of supervision, the EMFA relates to the supervisory structure as established by the AVMSD by referring in Art. 7(1) to Art. 30 AVMSD and declaring that the national regulatory authorities or bodies under the AVMSD shall be responsible “for the application of Chapter III” of the EMFA and shall exercise their powers in the context of the Regulation. This, with the

¹³⁷ The changes to the AVMSD concern only the institutional provision, although some proposed new provisions also impact procedural elements in the AVMSD or are the attempt to respond to certain deficiencies identified in the application of that Directive, which is the reason why a further-reaching amendment proposal for the AVMSD could have been imagined. Cf. on that Cole/Etteldorf, *Future Regulation of Cross-border Audiovisual Content Dissemination*, p. 248 et seq.

same independence and following the other requirements as stipulated for them in Art. 30 AVMSD when applying the national transposition of the Directive.¹³⁸ In addition to the national layer, a "new" supranational cooperation body will be created in the form of EBMS which actually is a reinforced version of ERGA that is replaced by it. More importantly, and to be further discussed, in this context not only the EBMS but also the Commission would be entrusted with various tasks in the EMFA system.

4.1.2. Institutional design of national regulatory authorities

As mentioned, Art. 7(1) and (2) mainly rely on the AVMSD when it comes to the institutional design of national regulatory authorities or bodies. Art. 30(2) AVMSD stipulates that Member States have to ensure that these authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of the AVMSD, in particular in view of media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition, ie. goals that are (partly) also in the focus of the EMFA. They shall not seek or take instructions from any other body in relation to the exercise of their tasks and shall be equipped with adequate financial and human resources. Furthermore, independence of the responsible members of such authorities or bodies is addressed in Art. 30(5) AVMSD. According to this provision, Member States shall lay down in their national law the conditions and procedures for the appointment and dismissal of the heads of national regulatory authorities and bodies or the members of the collegiate body fulfilling that function, including the duration of the mandate. Recital 54 of Directive (EU) 2018/1808 amending the AVMSD additionally emphasises the condition that editorial decisions have to remain "free from any state interference or influence by national regulatory authorities or bodies" – a principle the institutional set-up of the AVMSD serves as well. In addition to Art. 30(4) AVMSD, which already ensures this for the tasks under the AVMSD, Art. 7(3) EMFA repeats the requirement that Member States have to ensure adequate financial, human and technical resourcing for the authorities or bodies so that they can carry out their extended tasks also under the proposed EMFA. Thus, the level of independence ensured by the latest AVMSD revision is transferred to the EMFA.

4.1.3. Tasks and powers of national regulatory authorities

As Art. 7(1) states that national regulatory authorities shall be responsible for the application of Chapter III, only provisions of that Chapter need to be considered in order to assess which tasks or role the EMFA actually assigns to them. It is important to highlight that the provisions of Chapter II, even though they concern rights and obligations, do not contain a reference to supervision by or assign a role to the authorities mentioned in Art. 7. Rather, those rules partly require separately – such as Art. 5(4) with regard to public service media for example – the designation of an independent authority which does not necessarily have to be the authority addressed by Art. 7. Chapter III makes the national regulatory authorities or bodies as defined in Art. 2 no. (12) generally responsible for the application of that Chapter according to Art. 7(1) or assigns specific functions to them such as, for example in Art. 14 (1), 21, 23 or 24. The main focus of Chapter III in the allocation of tasks is on the EBMS and the obligation of the national authorities or bodies to participate in it and contribute to the structured cooperation procedures with regard to the implementation of provisions of the AVMSD (Art. 13) as well as for the enforcement of obligations of video-sharing platforms (Art. 14) and for the coordination of measures against foreign providers (Art. 16). In that regard, their role is an extension of the responsibilities

¹³⁸ See on that already Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*.

existing under the AVMSD while it is the Member States that have to spell out the conditions under which they operate.

Accordingly, the EMFA does not assign dedicated enforcement powers and it does not include any sanctioning system, in the same way as this is left to the Member States under the AVMSD. Art. 30(4) AVMSD does, however, require Member States to equip the authorities with sufficient enforcement powers which then would also apply under the EMFA.¹³⁹ However, as the EMFA is proposed as a Regulation it may seem surprising that no enforcement measures are included, if one compares this, for example, with the extensive provisions in GDPR, DSA and DMA in this regard. While no enforcement elements are specifically addressed besides the reference to Art. 30 AVMSD as a whole, Art. 7(4) EMFA explicitly introduces the obligation to foresee appropriate powers of investigation with regard to the conduct of natural or legal persons to which Chapter III applies and even gives details about this power (request relevant information to be given within a reasonable time period as long as it is proportionate considering the tasks for which it is needed). In which context the investigation powers are needed, is left open and where it seems obviously useful as in the context of Art. 17 and 18, it is not directly relevant as those provisions only assign a role to the EBMS.

4.2. The enhanced role of the Commission

Besides being tasked with the evaluation of the EMFA per se (Art. 26 EMFA), as is a standard procedure in other legal acts, the Commission is generally in charge of monitoring the internal market for media services, including analysing risks that exist and the resilience of the market overall (Art. 25). Furthermore, additional harmonisation powers are assigned to the Commission in form of a competence to issue opinions on media market concentration (Art. 22(2) and Art. 21(6) EMFA) or on national measures affecting the operation of media service providers (Art. 20(4) EMFA). Beyond that it has the power to issue guidelines on the practical application of audience measurement (Art. 23(4) EMFA), 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 (Art. 21(3) EMFA) and on the form and details of declarations to be provided by VLOPs (Art. 17(6) EMFA), all of which are far-reaching specification possibilities of the EMFA provisions.

The provision in Art. 15 is particularly noteworthy here. For Art. 15(2) a broad formulation was chosen that may suggest a problematic extension of the Commission's powers by referring to Guidelines it issues not only concerning the application of the EMFA but "the national rules implementing" the AVMSD. This should not be understood as a general Guideline competence in view of specific national transpositions of the AVMSD as no such general competence is assigned to the Commission – it has other possibilities to review national transpositions and the application of the AVMSD rules in Member States –, because any other interpretation would be a problematic encroachment on Member States' competences under the AVMSD. Although Art. 15 mainly refers to the involvement of the EBMS in any Guideline creating activity of the Commission, the examples given in Art. 15(2) concern the application of certain non-mandatory rules of the AVMSD which would result in an indirect amendment of the way the AVMSD conceived these rules. Irrespective of the legally non-binding nature of such Guidelines, the explanation in Recital 28 underscores that the provision is to be seen as a reaction to the limited uptake of the voluntary use of Art. 5(2) AVMSD on transparency of media ownership and Art. 7a AVMSD on highlighting public value content in the way Member States implemented Directive (EU) 2018/1808. It mentions that the Guidelines should respond to "regulatory issues affecting a significant number of

¹³⁹ In view of issues resulting from reliance on purely self-regulatory instruments which do not ensure an equal level of enforcement possibilities cf. Cole/Etteldorf/Ullrich, *Cross-border Dissemination of Online Content*, p. 239 et seq.

Member States or those with a cross-border element” and explains that Art. 7a AVMSD-measures are increasingly important because of the widespread use of digital means to access media content. The intention is obviously that these Guidelines would incentivise the further use of the possibility to introduce prominence measures, while at the same time giving an impetus to do so in a more harmonised manner.

However, if a change of the legislative choice as laid down in the AVMSD as a result of the negotiations leading to the 2018-Directive is seen as necessary, the actual provision itself should be subjected to an amendment proposal. As it stands, both provisions of the AVMSD that are mentioned are optional and deliberately leave the Member States a wide margin of discretion.¹⁴⁰ Therefore, the question already arises what impact potential Commission Guidelines would have on Member States that opted not to implement any prominence rules. In addition, the scope of the Guidelines would be important to be defined in advance, for example whom they are addressed to (the national legislator that should provide for certain mechanisms, the regulatory authorities entrusted with the practical implementation or monitoring of such rules, or the providers which have to follow the Member State rules). The current situation in the Member States concerning Art. 7a AVMSD-measures also shows a diversity in approaches chosen. There is a very detailed solution chosen in Germany with which the goal of Art. 7a AVMSD is approached. In brief,¹⁴¹ the German Interstate Media Treaty provides that user interfaces must make those broadcasting services and journalistic online media easy to find that make a special contribution to media pluralism. To assess which offerings qualify as such, the law provides for various criteria and a concretisation power of the German media authorities in form of a statute, which then designates the concrete offerings to be privileged in a so-called public value (tender) procedure. In contrast, in Bulgaria and Cyprus with a much less detailed transposition, the national regulatory authorities are entitled to take measures to ensure prominence of general interest content in more general and flexible approaches.¹⁴² How Guidelines would change this diversity without amending the legal basis of prominence rules in the AVMSD itself is unclear. In addition, Art. 15(2) mentions these two AVMSD-matters only as examples for areas to be addressed with Guidelines, therefore opening a possibly wide range of activities without having laid down the conditions in the binding secondary law itself. Similarly, Art. 15(3) takes a broad approach giving the Commission the power to issue opinions on any matter related to the application of the EMFA and of the national rules implementing the AVMSD. This does not relate to the general monitoring obligation of the Commission to check Member State compliance with the *effet utile* principle concerning AVMSD and EMFA nor the reporting and evaluation obligations foreseen under both instruments, but would introduce a general “commenting” right on individual cases and matters. Whether this is needed in addition, for example, to the exchange in the Contact Committee under the AVMSD should be considered and if it is regarded as necessary, the reach of this power should also be clarified similarly as for the Guidelines competence, especially as this would assign the Commission a central role which contrasts the approach chosen in the AVMSD.

¹⁴⁰ See on this Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*, p. 49 et seq. for Art. 7a and p. 47 et seq. for Art. 5 (2) AVMSD.

¹⁴¹ In detail Etteldorf, Country report Germany, in: Cappello (ed.), *Prominence of European works and of services of general interest*, p. 30 et seq.

¹⁴² See on this Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*, p. 50; cf. further background Cappello (ed.), 2023, *Prominence of European works and of services of general interest*.

4.3. European Board for Media Services

4.3.1. Composition

Art. 8 establishes the European Board for Media Services (EBMS; in the text referred to as “the Board”) which shall replace and succeed the ERGA as mentioned above. Recital 22 describes this Board as an independent advisory body at Union level gathering national regulatory authorities or bodies and coordinating their actions.

While the independence of the ERGA derives from the fact that it is composed of independent national regulatory authorities, Art. 9 separately provides for a rule that is intended to guarantee the independence of the EBMS in its work. According to that, the EBMS shall act in full independence when performing its tasks or exercising its powers. In particular, it shall neither seek nor take instructions from any government, institution, person or body. This provision is apparently modelled closely on the similar provisions in Art. 69 GDPR on the independence of the European Data Protection Board (EDPB). There is reason for that as the independence of the supervisory authority is anchored in both areas in fundamental rights. In contrast to the explicit guarantee of supervisory independence in Art. 8(3) CFR, combined with a pronounced case law on the independence criterion of the CJEU¹⁴³, there is no comparable explicit case law by the CJEU or ECtHR on independent supervision with regard to media freedom or a further detailing of what this independence entails.¹⁴⁴ Some further indicators can be found in different legal texts such as Recital 54 AVMSD or the Council of Europe's Recommendation Rec(2000)23¹⁴⁵ as well as in some national legal systems¹⁴⁶, without having an extensive circumscription in a legislative document of the EU.

It should also be borne in mind that data protection and media supervisory authorities are each obliged to protect different legal interests in their activity. Data protection authorities are seen as guardians of the fundamental right to the protection of personal data of data subjects on the one hand and the free movement of data and thus, *inter alia*, the freedom to provide services of data processors on the other. Independence is therefore regularly required to mediate between these two regularly conflicting interests. Media regulatory authorities are committed to protection the freedom of information of recipients including ensuring access to pluralistic and independent content (as is also foreseen in the “right” introduced in Art. 3 EMFA) as well as the economic interests of media providers in terms of their fundamental rights and freedoms. This contrasts the two sectors, as media service providers have culturally driven interests and can rely on their position as fundamental rights holders not only in business terms, but in view of the freedom of the media which relates, for example, to editorial freedom and typically runs in parallel to – or at least is not conflicting with – the interests of the recipients of the media.¹⁴⁷ As mentioned above and to be explained with the acknowledgement of the competence of Member States to design institutional structures, considerations following from these observations –

¹⁴³ CJEU, Case C-518/07, Commission/Germany, ECLI:EU:C:2010:125; CJEU, Case C-614/10, Commission/Austria, ECLI:EU:C:2012:631; CJEU, Case C-288/12, Commission/Hungary, ECLI:EU:C:2014:237.

¹⁴⁴ Cf. in more detail Schulz et al., *INDIREG*, p. 308 et seq. However, it is unequivocally recognised by the ECtHR that the states have a positive obligation to ensure that independent information is conveyed by the media in a democratic system, see eg. ECtHR, no. 13936/02, *Manole and others/Moldova*.

¹⁴⁵ Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector adopted by the Committee of Ministers on 20 December 2000. Cf. also Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector adopted by the Committee of Ministers on 26 March 2008.

¹⁴⁶ Schulz et al., *INDIREG*; Cole et al., *AVMS-RADAR*.

¹⁴⁷ In more detail on comparability Cole/Etteldorf, *Future Regulation of Cross-border Audiovisual Content Dissemination*, p. 232 et seq.

for example, incompatibility rules concerning the composition of regulatory authorities – are not included in the EMFA which confirms the approach as already established by the AVMSD.

According to the last sentence of Art. 9, the independent execution of the tasks by the EBMS shall not affect the competences of the Commission or the national regulatory authorities or bodies in the context of the EMFA. While this provision does not seem to affect the independence of the EBMS with regard to national regulatory authorities, which are also independently established, it is less clear how this would play out in the relation to the Commission. As will be shown below (4.3.3) the Commission's role in the institutional set-up with the EBMS and this general "unaffected-rule" in Art. 9 may be read as enforcing its involvement in the Board's activities.¹⁴⁸

With regard to the structure of the EBMS, Art. 10 stipulates that it shall be composed of representatives of national regulatory authorities or bodies, each of which have one vote in the Board. It shall be represented by a Chair, which is elected from amongst the members by a two-thirds majority for a term of office of two years. The Commission is involved in several ways in the structural composition of the EBMS: it shall designate a representative to the EBMS that participates in all activities and meetings but without voting rights, it shall be informed about the EBMS activities by the Chair and consulted in preparation of the work programme and for some matters an agreement with the Commission is to be reached, in particular, concerning the invitation of experts and the rules of procedures. In addition to this involvement in the substantive work, an administrative attachment follows from the role of providing the secretariat of the EBMS by the Commission according to Art. 11. The tasks of this secretariat are to contribute to the execution of and to assist carrying out the tasks of the EBMS as well as to provide administrative and organisational support. Secretarial work in this sense impacts the work in substantive terms insofar as the prioritisation and diligence is one of the deciding factors for dealing with certain matters. An "assistance" could extend to research activities, for example, which can have an impact on the fulfilment of certain investigation tasks. In view of the task description, such an activity is not limited to purely practical or administrative tasks nor can it be assumed that in such a set-up every single step taken by the secretariat would be reviewed by the (independent) members of the EBMS which would contribute to a strong position of the Commission compared to an administrative support structure which is specifically established for the EBMS.

This structural set-up is to be considered in its entirety in view of the independence criterion which is explicitly addressed by Art. 9. Although the described participation of the Commission is not designed in the sense of a controlling power, it has been argued that it can have a de facto effect on the performance of the tasks of the EBMS. Even without powers to issue instructions, the desired complete independence could be affected by this, even in the external perception by the media service providers that are supervised by the regulatory authorities.¹⁴⁹

4.3.2. Tasks and Powers of the Board

Compared to those currently assigned to ERGA, the tasks of the EBMS are considerably expanded. According to the detailed list provided for in Art. 12, it remains that the EBMS under the EMFA shall provide "technical expertise" to the Commission (Art. 12 lit. (a) EMFA), promote cooperation and the effective exchange of information, serve as a forum to exchange experiences and best practices and to give opinions when requested by the Commission. Going beyond structures under the AVMSD,

¹⁴⁸ It is interesting to note that in the provision of Art. 69(2) GDPR explaining the independent functioning of the EDPB there is a precise reference to the Commission powers which are unaffected by this rule, although here, too, the referenced provision of Art. 70 GDPR includes a lengthy list.

¹⁴⁹ Critical Beaujean/Oelke/Wierny, *Immer mehr Verordnungen aus Brüssel und ihre Auswirkungen auf die Medienregulierung*, p. 11, 16; arguing for a further evaluation whether an agreement in the cases mentioned in Art. 10 is really necessary CMPF, *Feedback on the Proposal for a EMFA*, p. 9.

however, the EBMS shall not only provide technical expertise but 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 all on other matters related to media services within its competence. Where the Commission requests advice or opinions, it may indicate a time limit, taking into account the urgency of the matter.

The EBMS shall not only promote cooperation and the exchange of experience as well as best practices, but is equipped with more concrete tasks contained in Art. 12 lit (i) to (m) EMFA). It shall, upon request of at least one of the concerned authorities, mediate in the case of disagreements between national regulatory authorities or bodies in the context of enforcing rules vis-à-vis video-sharing-platforms, it shall foster cooperation on technical standards related to digital signals and the design of devices or user interfaces with regard to guidance on media regulation matters, shall coordinate national measures related to the dissemination of or access to content of media service providers established outside of the Union, shall organise the structured dialogue between VLOP and media service providers mentioned above and finally foster the exchange of best practices related to the deployment of audience measurement systems.

The powers of the EBMS to issue opinions are also significantly expanded and connected to specific provisions and tasks covered in the EMFA. In addition, the EBMS is tasked with “assisting” the Commission in the process of drawing up Guidelines with respect to the application of the EMFA and of the national rules implementing the AVMSD (see also above 4.2). The same applies concerning factors to be taken into account when assessing the impact of media market concentrations (Art. 21(3) EMFA) and aspects of audience measurement (Art. 23 EMFA). An overall evaluation shows that the EBMS essentially performs coordinating tasks – both in relation to the EMFA and the AVMSD. The Board is supposed to ensure that cross-border cooperation is improved and that uniform solutions are found for current challenges. However, the actual decision-making power is very limited. Opinions, which are envisaged in various places and which can contribute to EU-wide coherent approaches to solving media-related problems by an independent body composed of all national regulatory authorities, are on the one hand not binding, neither vis-à-vis the national regulatory authorities – which only contribute to the agreement via the need for a majority decision on the opinion (Art. 10(7)) – nor vis-à-vis the addressees of the EMFA or the AVMSD. On the other hand, the EBMS does not have a general right of initiative within the EMFA to extend its coordinating activities to certain areas of particular relevance at its own discretion and to issue binding requirements in these areas. Concerns are therefore mainly raised with regard to the effectiveness of the Board.¹⁵⁰

4.3.3. Interplay with the European Commission

Although the powers of the EBMS, especially as regards opinions, are significantly expanded, these powers are, as a rule, dependent on either a request by the Commission (as regards national measures and media market concentrations likely affecting the functioning of the internal market for media services) or even an agreement with the Commission (as regards requests for cooperation and mutual assistance between national regulatory authorities or bodies, requests for enforcement measures in dispute cases and national measures concerning non-EU providers). The only case where the EBMS can issue opinions without involvement of the Commission is on draft national opinions or decisions for which the EBMS can assess 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. When it comes to issuing Guidelines, the EBMS is tasked only with assisting the Commission,

¹⁵⁰ CMPF, *Feedback on the Proposal for a EMFA*, p. 9.

which seems surprising insofar as it regularly concerns the performance of regulatory tasks of national authorities – and in their cooperation of the EBMS – which have an established expertise and experience in this regard.

Most importantly, the design of the cooperation structures (see below) in the Proposal involves the Commission intensively in the tasks of the EBMS. In all of the three cooperation and coordination procedures, the EBMS is required to issue an opinion that serves the purpose to find a common approach to which all national regulatory authorities can contribute. However, such an opinion can only be issued in agreement with the Commission which, unlike a mere obligation to inform or consult, presupposes consensus and grants the Commission a certain degree of control. In this respect, this puts into a different perspective the fact that the Commission has no voting rights in the EBMS, especially as Art. 13(7), 14(4) and 16(2) do not provide for an explanation for what happens if consensus cannot be reached. If the wording is followed, it would have to be assumed that in these cases the Commission has the power to overrule the majority decision found in the EBMS.¹⁵¹

4.4. Enforcement aspects

4.4.1. General approach to cooperation in enforcement

As already described above, the EMFA does not provide for a sanctioning or enforcement system with regard to the rules it proposes. Neither the EBMS nor the Commission are assigned enforcement powers, as this is left to the national regulatory authorities. The EMFA requests that the latter are assigned investigative powers in the context of the EMFA tasks, if needed (Art. 7(4)). Nevertheless, the EMFA contains rules relevant to enforcement, but these refer to substantive provisions outside the scope of the Regulation itself, mainly in the AVMSD. In that regard it is a reaction to the need for close cooperation among national regulatory authorities or bodies, in particular to resolve cross-border cases, which is a need that has increased since video-sharing-platforms have been included in the scope of the AVMSD.¹⁵²

Art. 13 of the Proposal contains rules on structured cooperation, whereby Art. 13(1) EMFA stipulates that any regulatory authority or body can request cooperation or mutual assistance at any time from another one for the purposes of exchange of information or taking measures relevant for the consistent and effective application of the EMFA and the AVMSD. Such a general mutual assistance idea is more concretely spelled out for certain issues: in case of a serious and grave risk of prejudice to the functioning of the internal market for media services or to public security and defence, Art. 13(2) EMFA provides for accelerated cooperation and mutual assistance. In all cases, in order to secure a manageable workflow, such requests shall contain all relevant information (Art. 13(3) EMFA) and the requested authority can, by providing reasons, refuse it in case it is not competent for the matter or fulfilling the request would infringe Union or Member State law. The requested authority or body shall inform the requesting authority or body on progress made and shall do “its utmost” to address and reply to the request without undue delay. This is specified as meaning that the requested authority shall provide intermediary results within the period of 14 calendar days from the receipt of the request, for accelerated cooperation or mutual assistance, the requested authority shall even (finally) address and reply to the request within this time period. If the requesting authority is not satisfied with the measures taken or if there is no reply at all to its request, it shall again confront the requested authority giving reasons for its position. If the requested authority continues to disagree with that position, or

¹⁵¹ Critical in that light CMPF, *Feedback on the Proposal for a EMFA*, p. 9; Ranaivoson/Afilipoaie/Domazetovikj, *Media pluralism in the EU: A prospective look at the European Media Freedom Act*, p. 5.

¹⁵² Recital 25.

again does not react at all, the authority may refer the matter to the EBMS. Within 14 calendar days from the receipt of that referral, the EBMS shall issue an opinion on the matter, including recommended actions. This opinion is not binding for the requested (competent) authority, it shall, however, “do its utmost to take into account the opinion”.

The specific and binding timelines laid down are a major step forward in enhancing the regulatory cooperation in terms of giving indications in the legal text. The main features of this provision are, however, based on a functioning system of cooperation between the regulatory authorities. ERGA members had jointly elaborated and decided a detailed Memorandum of Understanding¹⁵³, which the regulatory authorities and bodies agreed to adhere to especially in the enforcement of the law with regard to video-sharing platforms. In particular, it streamlines response obligations and deadlines provided for which with the EMFA would become legally binding manner. To which fields of enforcement Art. 13 extends is less clear: while the reference to the AVMSD is evident and concerns obviously all aspects of the AVMSD implementation, with regard to the EMFA the lack of precise supervisory and enforcement powers can make it difficult to establish for which aspects a structured cooperation obligation exists. This question is essential especially in relation to providers who were not covered by the AVMSD but would now be covered by the EMFA, especially providers of press publications, because for these there is not necessarily a specific supervisory regime or enforcement powers existing in the Member States which would also mean that cooperation mechanisms would not work in practice.

An example of a specific mechanism is Art. 14 as regards enforcement vis-à-vis VSPs. Any national regulatory authority or body may request the competent authority to take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms under Article 28b AVMSD. The requested national authority or body shall, without undue delay and within 30 calendar days, inform the requesting national authority or body about the actions taken or planned. In the event of a disagreement regarding such actions, either the requesting or the requested authority may refer the matter to the EBMS for mediation in view of finding an amicable solution. If no amicable solution can be found, both may request the EBMS to issue an opinion, in which it shall assess the matter without undue delay. If the EBMS then considers that the requested authority has not complied with a request, it shall recommend actions. The requested national authority or body shall, without undue delay and within 30 calendar days at the latest from the receipt of the opinion inform the Board, the Commission and the requesting authority of the actions taken or planned. However, contrary to the case in Art. 13, neither a binding effect of the opinion nor an obligation to take (utmost) account of it, is put on the competent authority. This provision reflects the pan-European nature of video-sharing platforms, which operate their service regularly across borders while in the EU being bound to the jurisdiction of only one Member State as their country of origin under the e-Commerce Directive as well as under the AVMSD. However, since they also disseminate content from this country of origin that is specifically aimed at addressees outside of it, often even in different versions of their service to the respective country of destination, the receiving Member States are dependent on both the legal system and its enforcement by the country of origin.¹⁵⁴ Therefore, the Memorandum of Understanding had addressed this situation in a specific section¹⁵⁵ and Art. 14 ensures in this respect that there is at least some kind of dialogue and obligation to justify actions or lack of

¹⁵³ ERGA Memorandum of Understanding of 3.12.2020, https://erga-online.eu/wp-content/uploads/2020/12/ERGA_Memorandum_of_Understanding_adopted_03-12-2020_1.pdf.

¹⁵⁴ See on this already Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis of the main aspects of the 2018 AVMSD revision*, p. 23 et seq.

¹⁵⁵ More in detail Cole/Etteldorf, *Future Regulation of Cross-border Audiovisual Content Dissemination* (forthcoming), p. 150 et seq.

actions on the part of the competent authority. Without a binding resolution of disputes, however, the actual enforcement is left to the country of origin as has been the case up to now.

In this context, it should also be noted that Art. 14(1) provides that Art. 3 of the e-Commerce Directive remains unaffected, which is clarified in Recital 27 to the effect that, in case the use of the cooperation mechanism does not lead to an amicable solution, the freedom to provide information society services from another Member State can only be restricted if the conditions set out in Article 3 of the e-Commerce Directive are met and following the procedure set out therein. However, neither Art. 13 nor Art. 14 clarify the relationship to the mechanisms and procedures in Art. 3 and 4 AVMSD for audiovisual media services providers. These provide for precise rules and procedures in cases where receiving Member States wish to take action against providers who are under the jurisdiction of another Member State. In the absence of an explicit provision in this regard, it cannot be assumed that the EMFA influences the applicability of Art. 3 and 4 in this respect.¹⁵⁶ The mechanism under Art. 13 could, however, be read as a precondition of the AVMSD mechanisms. Contrary to that the situation for Art. 13, Recital 30, otherwise dealing with Art. 16, states explicitly that in order to ensure that media services suspended in certain Member States under Article 3(3) and 3(5) of AVMSD do not continue to be provided via satellite or other means in those Member States, a mechanism of accelerated mutual cooperation and assistance should be available to guarantee the *effet utile* of the relevant national measures, in compliance with Union law. It is not clear if this can also be seen as a description of the relation to the AVMSD in the sense of Art. 13(2) taking place after Art. 3 AVMSD-proceedings for all other national authorities being targeted by an offer seriously infringing public security or defence, or if this issues shall be subject to coordination measures of the EBMS under Art. 16(1). The latter would require an understanding of providers “established outside the Union” in Art. 16 as including providers which transmit their service via satellite up-link situated in a Member State or a satellite capacity appertaining to a Member State which establishes jurisdiction (but indeed not an establishment) under Art. 2(4) AVMSD. In this case a clarification would be needed in the EMFA as to what extent the rules of the AVMSD are still of relevance in this context and what impact this has on the problems of application of such measures that have become obvious in light of recent developments.¹⁵⁷

4.4.2. Coordination of measures vis-à-vis non-EU providers

The above-mentioned Art. 16 EMFA contains a coordination rule concerning measures aimed at media service providers established outside the Union. In particular, it is a reaction to difficulties observed when trying to achieve a common response to the risks created by dissemination of Russian broadcast channels in the EU after the Russian Federation started the war against the Ukraine.¹⁵⁸ It states that the EBMS shall coordinate measures by national regulatory authorities related to the dissemination of or access to media services provided by such media service providers that target audiences in the Union where, inter alia in view of the control that may be exercised by third country governments or other entities of the states over them, such media services prejudice or present a serious and grave risk of prejudice to public security and defence. In such cases, in order to achieve a more common – and thereby more effective – approach to the issue, the EBMS has the option to issue an opinion on appropriate national measures. This opinion shall be developed in agreement with the Commission.

¹⁵⁶ A detailed discussion of issues related to application of these provisions of the AVMSD can be found in Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*, p. 12 et seq.; Recommending to address this issue in a future revision of the AVMSD Cole/Etteldorf, *Research for CULT Committee - The Implementation and Future of the revised Audiovisual Media Services Directive: Policy Recommendations*.

¹⁵⁷ See on this in detail Cole/Etteldorf, *Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis*, p. 45 et seq.

¹⁵⁸ On the economic sanctions-based responses cf. Cole/Etteldorf, *Future Regulation of Cross-border Audiovisual Content Dissemination* (forthcoming), p. 20 et seq with further references.

Although it is not a binding replacement of decisions taken in the Member States by the competent national authorities, these shall do their utmost to take into account the opinion in their actions. This non-binding guideline in form of the opinion shall be considered by all relevant authorities and bodies, not only those addressed by the EMFA or AVMSD.

Although this provision establishes a legal framework which shall ensure the effectiveness and possible coordination of the national measures adopted in line with media law rules, it remains rather vague with regard to what type of “coordination measures” are necessary. Thus, this assessment is up to the EBMS. The Board is indeed best placed for this task, since it is the national regulatory authorities that have specific practical expertise allowing them to effectively balance the interests of the providers and recipients of media services as well as ensuring respect for the freedom of expression in such situations, as Recital 30 rightly highlights. In this regard, 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. A mandatory solution in form of a common approach of national measures would not be achieved with this approach, thereby leaving the problems that have been identified under the AVMSD rules in the context of satellite broadcasting unresolved. However, at this point the EMFA cannot rely on a overarching framework at EU level that governs how offerings from foreign (non-EU) providers are treated, as this continues to be regulated by national law. This would remain the case in the future, because the EMFA does not follow a market location principle and its rules do not provide for enforcement actions with regard to illegal content.

The actual measures an authority can take in reaction to the dissemination of certain types of content (including illegal ones) still differs at Member State level and depends on the type of content and its channel of distribution. This can be illustrated, for example, in the case of broadcasting because the measures are linked to questions of the licensing regime, which is not harmonised at EU level. For another example, in the case of online content dissemination it depends on whether national law has established possibilities of blocking orders. Where such possibilities exist, Art. 16(2) ensures that the opinion of the EBMS is sufficiently taken into account by the relevant national authorities, thereby enabling a more effective union-wide approach. However, there is no binding character for these opinions, which would anyway be difficult to reconcile with the principle of allocation of responsibilities to the different levels of administrative enforcement as well as the division for regulatory responsibilities of different bodies for the different sectors. It should also be recalled that concerns about independence could arise if the opinion foreseen would have to be issued in agreement with the Commission, which is not entirely clear in the current formulation. This applies not only in relation to the independence of the EBMS, but also to the independence of (any) other authorities that are potentially addressed by the provision, too. These could be, for example, authorities dealing with electronic communications networks and services or with protection of minors, for which there may be separate provision in EU and national legal acts detailing more specifically their design and functioning including rules on independent decision-making. In the way Art. 16 is formulated, all of these potentially relevant authorities that would be able to contribute to making a coordinated approach vis-à-vis a non-EU provider more effective, would indirectly be bound by an EMFA provision, at least to the extent that they should pay the utmost account to an opinion that has been issued with the involvement of the European Commission as an executive body of the EU. The admissibility of such a construction, which would have to be examined with regard to all authorities that might be involved or Art. 16 – as it is currently formulated – has to be read as not requiring an agreement with the Commission on such an opinion, but leaving it as a mere possibility trying to find a common approach.

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This background analysis focusses on relevant issues to be taken into account in the discussions on the Proposal for a European Media Freedom Act (EMFA), especially from a media law perspective. Dealing with questions on the appropriate legal basis and coherence with the existing regulatory framework, as well as selected substantive issues and the proposed institutional structures, the analysis highlights possible shortcomings regarding practical impact and enforcement that should be addressed.

PE 733.129

IP/B/CULT/IC/2023-004

Print ISBN 978-92-848-0494-8 | doi:10.2861/098242 | QA-03-23-133-EN-C

PDF ISBN 978-92-848-0493-1 | doi:10.2861/914433 | QA-03-23-133-EN-N