The Key to Ensure Media Pluralism in the EU? A Unified Framework

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Introduction: The European Media Freedom Act as a cornerstone of European media regulation

Media freedom is one of the necessary conditions for democracies to function. Yet media freedom is currently not guaranteed in all European Union countries. The European Media Freedom Act proposed by the European Commission in 2022 aims to protect and foster media pluralism across the EU block and, while some changes would need to be made to strengthen the proposal's efficacy, monitoring on the ground shows that a common European framework is indeed needed. While there are already several harmonisation measures that revolve around media – such as the Audiovisual Media Services Directive (AVMSD) – the EMFA is the first text that clearly and specifically addresses the media market in and of itself, which marks a paradigm shift in EU media regulation.

The proposal focuses on several issues affecting media freedom and journalists such as the protection of editorial independence, safeguarding media from surveillance and spyware, promoting independence of public service media, transparency provisions regarding state advertising and media pluralism tests, amongst others.

The regulation would be based on a newly set up European Board for Media Services, which would be composed of national media authorities that would issue opinions on regulatory matters and national measures and decisions affecting media markets. According to the proposal, the Board shall take decisions by a two-thirds majority of its members with voting rights.

This article is the first of a Symposium on media regulation in the EU, which will analyse the pivotal role of the EMFA but also look at the interaction of the proposal with other legislation affecting the media and the consequences of other regulations on the media. While the text is currently being debated by EU institutions, there are many voices in Europe discussing it, from journalists to publishers and academics, both in favour and against it.

In fact, this symposium is the result of a disagreement between the co-curators: Is the EMFA necessary to ensure media freedom in the EU? Would Europe need an even stronger proposal, as I argue here, or, on the contrary, is the EU stepping outside its competence as argued in the piece published today by co-curator Viktoria Kraetzig?

In the coming days, Verfassungsblog will publish several pieces by renowned academics and practitioners that will look, among others things, at the link between EMFA and other EU legislation (see the upcoming piece by Tobias Mast) or at how the GDPR affects journalists and media freedom, in a blogpost written by Natalija Bitiukova. Other authors and the topics of their pieces are described in the opening articles by the co-curators published today.

Ensuring media freedom and pluralism in the EU

In the past years, threats to media outlets and to journalists have been on the rise across the Union. In 2022, the Monitoring Report by the Media Freedom Rapid Response recorded 415 violations of media freedom in the EU, which involved more than 600 attacked journalists, media workers or media outlets. The report identifies several types of common violations such as reporters being attacked by protestors while covering demonstrations, sued by powerful individuals to prevent them from doing their job – in cases known as SLAPPs, to which this symposium dedicates a blogpost

written by Paulina Milewska – or outlets that had their licenses arbitrarily revoked by media regulators.

The latter is one of the most frequent traits of media capture. Others are concentration of the media market in the hands of individuals or companies close to the government, lack of independence of public broadcasters or arbitrary government subsidies (Dragomir, 2019). There are many recent examples across Europe. In April, it was announced that the chairperson of Poland's National Broadcasting Council (KRRiT) had imposed a fine of PLN 80,000 (€17,680) on the parent company of independent radio station TOK FM for allegedly violating broadcast law and "inciting hatred" (see further here). The fine was strongly criticised by press freedom groups, who said the regulator's chief was putting pressure on TOK FM as it awaited a decision from KRRiT on the renewal of its broadcast license. In 2022, Hungary's Media Council blocked the frequency license renewal of the iconic independent station Tilos Rádió. In fact, Hungary ranks among the countries with the lowest level of media pluralism in Europe, as highlighted by several media freedom organisations and by the European Commission in its rule of law reports. There, the Central European Press and Media Foundation "Közép-Európai Sajtó és Média Alapítvány" (KESMA) gathers more than 500 different media outlets and is controlled by Fidesz and allies of the Prime Minister Viktor Orbán.

Media pluralism – including plurality of opinions and plurality of media outlets – is essential to guarantee media freedom. According to the Media Pluralism Monitor 2022 by the European University Institute, only Germany is considered not to be at risk from a market plurality perspective. The indicator includes several variables such as transparency of media ownership, news media concentration, online platforms concentration and competition enforcement or commercial and owner influence over editorial content. Most EU countries are classified as either medium or high risk. The majority of highest risk countries regarding media market concentration are in Central and Eastern Europe such as Hungary, Romania, Poland, Slovakia or Bulgaria, but others in Western Europe such as Ireland or Spain are also considered high risk.

Considering the aforementioned data and examples, it is indisputable that media markets in Europe suffer from a lack of plurality that needs policy action. The European Commission based the European Media Freedom Act on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which deals with the functioning of the internal market. Barriers to media companies to enter captured markets in several countries indicate that this is an adequate basis, which has also been confirmed by the EU Council Legal Service.

Strengthening the proposal: protection of journalists and sources, transparency, and independence of the Board

The proposal is a good starting point to promote market plurality as a precondition for media freedom. However, improvements need to be made to ensure protection of journalists and media pluralism. On that note, it is important to mention the need to strengthen the protection of journalistic sources. The actual provisions in Article 4 are not in line with the protection of journalists' sources emanating from Article 10 of the European Convention on Human Rights and respective case law by the European Court of Human Rights (ECtHR). Article 4 (2) (b) should ensure *ex ante* review by a court, judge or independent body whenever journalists are forced to disclose sources. It should impose criteria of subsidiarity and proportionality in cases where a disclosure order, sanction, search, seizure, surveillance or inspection can be justified (Voorhoof, 2022).

The same guarantees should apply to the deployment of spyware, currently described in Article 4 (2) (c). Journalists are increasingly victims of surveillance and spyware across Europe, coming from private and state actors. In 2022, the Media Freedom Rapid Response tracked several cases in which journalists were snooped in countries such as Greece, Poland, Spain or Hungary and had their devices infected with spyware like Pegasus or Predator. In some cases, they even faced legal threats after reporting about wiretap-

ping, as it happened to Hungarian journalist *Szabolcs Panyi*, who was investigated by the National Data Protection and Freedom of Information Authority (NAIH), which claimed he was carrying out illegal data management. In Greece, *Grigoris Dimitriadis*, nephew and former general secretary of the Prime Minister, filed defamation lawsuits against journalists demanding they remove their articles and tweets about a major wiretapping scandal related to the Greek government and intelligence services.

Furthermore, it is also key to ensure that transparency provisions in the EMFA are enforced and apply to all public authorities. On that note, it is important to mention the need to improve Article 6 of the EMFA draft to ensure transparency of media ownership information and clear and harmonised methodology to collect and publish data. Additionally, Article 24 of the EMFA draft should be modified to ensure that all public authorities and governments are obliged to publish information about their advertising expenditure allocated to media service providers, and not just those local governments of more than 1 million inhabitants as stated in the current proposal.

Finally, it is relevant to ensure that the European Board for Media Services is independent from the Commission and as insulated as possible from interference by those Member States where media is captured. Authors Kati Cseres and Judit Bayer have written for the current symposium a proposal to modify some aspects of the EMFA to make it more effective, which will be available for all readers in the coming days.

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