# Freedom Governed by Brussels

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With its EMFA proposal, the Commission is pursuing objectives that are beyond doubt: the safeguarding of plural, independent media in the Union. But no matter how noble an objective may be, it is still not a legal basis. Furthermore, European media supervision shouldonly be linked to the Commission if its oversight Board can provide independent supervision. Finally, the regulatory approach as such has to be questioned: Shall media freedom be secured through media supervision?

## Stepping outside competence

With its proposal for a Europea Media freedom Act (hereafter, EMFA), the Commission is pursuing noble goals: ensuring media freedom and pluralism in the EU. However, in a community, founded upon the principle of the rule of law (Art. 2 TFE), the end should not justify the means. No matter how noble an objective may be, it is still not a legal basis. The Commission bases the EMFA proposal solely on the internal market competence of Art. 114 TFEU (see COM (2022) 457 final, page 7). This legal basis is very questionable as also Christina Etteldorf will point out in her blog post. According to the European Treaties, cultural sovereignty and thus competence for media regulation remains in the competence of the Member States. The "excluding any harmonisation" clause of Art. 167 (5) TFEU prohibits the EU from basing harmonisation measures to achieve the objectives set out in Art. 167 TFEU on general competence titles – such as the internal market competence of Art. 114 TFEU. This does not mean that Art. 167 (5) TFEU would limit or even block the internal market competence as a legal basis if harmonisation measures can be based on it. Given the doctrinal elasticity of the internal market competence, it is in its very nature that it affects other areas of regulation. However, Art. 114 TFEU can serve only as a legal basis for secondary legislation that is primarily intended to regulate the internal market and only covers cultural aspects as incidental objectives. On the contrary, Art. 114 TFEU cannot be invoked as legal basis for secondary legislation that primarily addresses media pluralism and merely has positive side effects for the internal market (Kraetzig).

What does that mean for the EMFA? The title itself – "European Media Freedom Act" – already shows where the regulatory focus of the proposal lies. It is not the implementation of the internal market. Large parts of the proposal cannot be based on Art. 114 TFEU (such as Art. 3-6, Art. 8-12, Art. 21-22 and Art. 23-24 of the proposal). Even if some of the provisions may have positive effects on the internal media market by reflex, its achievement is certainly not their main objective. The proposal's main objective is, rather evidently, to safeguard media freedom and media plurality in the EU. To underline this once again: These objectives as such are in no way to be questioned, only whether they contribute to the achievement of the internal market. Insofar, the Commission's proposal is based on a false premise: there is no causality between free, independent media and a functioning internal media market that would justify the internal market competence as a legal basis. But even if so: the level would not be reached at which the internal market competence could be used as legal basis for the EMFA. It is not a *carte blanche* for measures to optimise the functioning of the internal market or to counter only potential barriers. Any EU legislation could be linked to that. Such understanding would in fact remove the principle of enumerated powers (Cole and Etteldorf (2023), page 16).

In its Rule of Law Report, the Commission itself mentioned the now in the EMFA addressed independence of media regulatory authorities, transparency with regard to ownership in the media sector as well as transparency and fair distribution of state advertising

not for a functioning internal market but as conditions for media freedom and plurality (2021 Rule of Law Report, page 19 et seq.). If the Commission is concerned with safeguarding media pluralism as a precondition for democracy and the rule of law, it ultimately wants to ensure the values laid down in Art. 2 TEU. The EU may be understood as a union of values (v. Bogdandy). The CJEU may – invoking Art. 2 TEU in connection with Art. 19 TEU and Art. 47 CFR – see itself as the guardian of these values (critical on such „*Wertekonstitutionalismus*", Schorkopf). Nonetheless, the EU does not have the competence to harmonise values – as important as they might be.

## Independence of the Board?

The Commission could also exceed its competence in another other respect – namely, in terms of its influence on the Board that is to be established under Art. 8 of the proposal. It shall be closely interlinked with the Commission, might in some regards only act "in agreement with the Commission" (see i.e. Art. 10 (6) and (8)) and the role of the Commission's representative seems somehow nebulous – in any case, his/her independence is not explicitly guaranteed. However, it is common practice that Union law requires national regulatory authorities to coordinate each other in a European board that is cooperating with the Commission. One example is the European Regulators Group for Audiovisual Media Services (ERGA), which brings together representatives of national regulatory bodies in the field of audiovisual services to advise the Commission on the implementation of EU's AMSD ( according to Art. 8 (2) of the Commission's proposal for the EMFA, it is now to be replaced). Or think of the European Board for Digital Services established under Art. 61 DSA.

In Germany, there are nevertheless concerns that with the set up structure of the Board the principle of distance from the state ("*Grundsatz der Staatsferne*") is at risk. To begin with, German constitutional law does not bind European institutions. But even if one wants to read the proposal through the German lens and measures it against this principle, it does not seem to be in danger. The principle may not be understood in such a way that it requires supervisory boards to be free of state authorities but only distant from them. As long as a certain proportion is respected, even the participation of state or state-affiliated representatives in such bodies is permitted (BVerfG, Judgment of the of 25 March 2014 – 1 BvF 1/11, para 51 et seq.). Rather, the principle, as developed by the Federal Constitutional Court, aims at prohibiting state influence on editorial content. Article 12 of the proposal sets out the tasks of the Board, which is to promote the effective and consistent application of the regulation. According to Articles 3 to 6 of the proposal, the regulation is intended to ensure the editorial freedom of media service providers; it prohibits state influence on editorial strategies or decisions. Hence, the regulation is intended to protect what the German principle of state distance is intended to safeguard: editorial independence. The German *Angst* that Brussels could have too much influence, that a future Commissioner from a Member State with rule of law issues could possibly take advantage of it is groundless. The Commission cannot give any orders to the Board. It is true that, for example, in the case of the Body of European Regulators for Electronic Communications (BEREC), whose independence is explicitly laid down in Art. 8 of Directive (EU) 2018/1971, the CJEU has ruled that the Commission was acting outside its supervisory role ( Case C-632/20 P, para 120; opinion of AG Kokott, para 129). This case shows the danger of the Commission interfering after all. Yet, even if in practice the Commission were to influence the Board's work and steps outside competence: the Board has no possibilities to intervene in media regulation since it cannot in any way give media service providers instructions on editorial content.

## Media freedom through media supervision?

Besides doubts about individual provisions, the regulatory approach of the Commission's proposal as such raises fundamental questions – Jannis Lennartz addresses them in his contribution. Only one shall be hinted at here: According to Article 2 TEU, one of the values on which the Union is founded is respect for democracy. But in a community that is based upon the

values of democracy, shall media freedom be secured through media supervision? The EMFA proposal shows distrust in the governments of the Member States. We do see an alarming *rule of law backsliding* in some Member States, for example in Poland or Hungary (see Anna W. contribution). If we look at these Member States, distrust is reasonable. Yet, just as worrying as some developments are, Brussels shows a lack of trust in the citizens of Europe, and thus little trust in its own values, as set out in Article 2 TEU. In a democratic state, individuals are trusted to form their own opinions, their own political will. Responsible citizens do not have to be taken by the hand of Brussels bureaucrats for the democratic will-forming process. Pluralism and freedom of the media means that not only "good" but also "bad" media *can* be published and consumed. A democratic community should have faith in democratic resilience. But recent legislative actions indicate that the Union legislature wants to hold a protective hand over the citizens of the Union: in order to achieve a safe and trustworthy online environment, the DSA is designed not only to protect the citizens from "illegal" but also from otherwise harmful content – such that falls within the scope of freedom of speech (see Peukert). Do the citizens of the Union need to be protected from "bad" content? Shall media be filtered in a democratic society? By no means. An EU act that seeks to protect against "bad" media is not only paternalistic. It shows distrust in the values on which the Union wants to be based upon.

To end with, the EMFA proposal is hardly compatible with Art. 11(2) CFR. It replaces true pluralism (often achieved through federalism) in most Member States with a European authority that has a unitarizing effect at the domestic level. Media pluralism should be ensured within the Member States, without interference from a regulator furthest away: Brussels. The EU should limit itself to regulate big tech and leave the multi-layered media landscape to the federal layers of the Member States. European harmonization of media pluralism leads to less media pluralism in the Member States (Lennartz/Kraetzig).

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