

Part two:

European initiatives to develop a new democratic media order

4 Initiatives in Media Pluralism

In all member states of the European Union, the protection of media pluralism is a constitutional value, which therefore represents a significant common constitutional tradition of the Member States³⁰¹ and forms therefore part of the European 'acquis communautaire'. Both the ECtHR and the ECJ have consistently emphasised the special importance of media pluralism, the ECtHR framing it as a state obligation.³⁰² Against this background, the EU Commission took the aim of creating specific common European rules for pluralism of the media in 2020.

4.1 The development of European policy in regard of media pluralism

The question of media pluralism had originally been understood primarily as an issue of ownership concentration. However, already since the second half of the 20th century, it had also been seen in its complexity: partly as the existence of multiple different media service providers or media products on a market, and partly as diversity of content provided by one media service provider.³⁰³ The European Parliament raised the issue of pluralism several times in the past decades.³⁰⁴ The Hahn-report (1982) found that broadcasting should be used to promote the case of European integration

301 Boris Paal, „Intermediäre: Regulierung und Vielfaltssicherung“, *LfM* (2018): 43.

302 Paal (2018), *ibid.* citing Collectieve Antennevoorziening Gouda, Case C-288/89 and Veronica Omroep Organisatie, Rechtssache C-148/91, or [1994] ECR I-4795.

303 The German Constitutional Courts decisions dealt with political pluralism “Vielfältigkeit”, when dealing with the issue of external and internal pluralism. BVerfGE 12, 205 (1961); BVerfGE (1981): 57, 295; BVerfGE (1986): 73, 118.

304 Petros Iosifides, “Pluralism and Media Concentration Policy in the European Union,” (1997) <https://javnost-thepublic.org/article/pdf/1997/1/7/>.

and the formation of a European identity (consciousness).³⁰⁵ This was followed by an EP Resolution that held that broadcasting must provide all citizens of the Member States (EU citizenship was not applied as term then) with authentic information on EC policies, thereby involving them in political responsibility.³⁰⁶ It also held that the European integration should not be confined to the area defined by the Treaties, but rather should regain the whole concept of Europe, based on its cultural dimension.³⁰⁷ This concept was embraced by the Commission as well, as demonstrated in their Interim Report on Realities and Tendencies of European Television: Perspectives and Options.³⁰⁸ The Green Paper on Television without Borders has already dropped the concept of a common European Broadcaster and promoted the idea of transborder broadcasting services, their common market, and the free flow of information, ideas, opinions and cultural products in the Union.³⁰⁹ In 1985, the Parliament adopted a Resolution on the Economic Aspects of the Common Market for Broadcasting in the European Community.³¹⁰

In 1986, the EP issued again a Resolution on the Fifteenth Report of the CEC on Competition Policy, expressing concern because of the rapidly growing and increasingly complex and supranational media landscape. The subsequent two resolutions of the EP that were to amend the draft Television Without Frontiers Directive are also considered as related to the row of four Resolutions that earmarked the EP's efforts for pluralism legislation.³¹¹ The path followed is described in the next subchapter.

305 See more in: Bernd Holznagel, *Rundfunkrecht in Europa: auf dem Weg zu einem Gemeinrecht europäischer Rundfunkordnungen*. (Tübingen: Mohr Siebeck, 1996): 124. See also: Report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport on radio and television broadcasting in the European Community. Working Documents 1981–82, Document 1–1013/81, 23 February 1982.

306 Ibid.

307 Ibid.

308 Interim Report on Reality and Tendencies of Television: Perspectives and Options COM (83) 229 final. Brussels. 25 May 1983.

309 Television without Frontiers. Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable. Part Five COM (84) 300 final/Part 4, 14 June 1984 COM (84) 300. 14. June 1984.

310 EP Resolution on the economic aspects of the common market for broadcasting in the European Community, 10 October 1985. OJ No. 11.11.85. C 288/119, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1985:288:FULL&from=FI>.

311 Alison Harcourt, "Media Plurality: What Can the European Union Do?," in: *Media Power and Plurality: From Hyperlocal to High-Level Policy*, ed. Steven

In 1990, an interinstitutional Communication presented a rather ambitious audiovisual policy, including among others media concentration regulations.³¹² In its Resolution of 16 September 1992 on media concentration and diversity of opinions, the EP proposed the setting up of a European Media Council, with power on transparency and opinionating on mergers.³¹³ Reacting to these initiatives, the Commission examined the possibility of issuing a directive in the field of pluralism and media concentration. However, then it took a back turn: its 1992 Green Paper stated that the international ownership relations did not justify the need for a community level media pluralism legislation, in particular because there were emerging national laws in the field.³¹⁴ The Commission expressed its concern whether any community action would not be premature and stifling international economic development, while it admitted that the growing international dimension in the media market would add to the existing factors, which “sometimes” raise the need for more transparency. As late Karol Jakubowicz held, the 1992 Green Paper “was clearly guided by liberal pluralism with entrepreneurial freedom seen as paramount, and everything else, including democratic public policy goals, almost a distraction”.³¹⁵

Many circumstances have changed dramatically since this document was created, both in the field of media and information technology and in the political and economic realities of the European Union. Online media became dominant, platforms emerged and grew gigantic, the European Union gained sixteen new members and lost one of them, to mention just a few changes. The information environment has profoundly changed. Nothing

Barnett and Judith Townend (London: Palgrave Macmillan, 2015), 131–148. DOI: 10.1057/9781137522849_9.

312 Communication from the Commission to the Council and European Parliament on Audiovisual Policy. COM (90) 78 final, 21 February 1990. at 14. See also Holznagel 1996, at p. 126.

313 resolution of 16 September 1992 on media concentration and diversity of opinions (OJ C 284, 2.11.1992, p. 44.).

314 Commission of the European Communities. 1992. Pluralism and Media Concentration in the Internal Market. http://aei.pitt.edu/1156/1/pluralism_gp_COM_92_480.pdf at 81 (last modified on 11 July 2022).

315 Karol Jakubowicz, ‘New Media Ecology: Reconceptualising Media Pluralism,’ in: *Media pluralism and diversity: concepts, risks and global trends*, ed. Peggy Valcke, Miklos Sukosd and Robert Picard (London: Palgrave Macmillan, 2015), 23–53 at 25.

demonstrates better the sweeping transformation than the fact that the 1992 Green Paper was still produced by a typewriter.³¹⁶

Initially, concerns over media pluralism have focused primarily on the concentration of private media ownership and did not really bother about the public service broadcasting's market behaviour. However, after the 1989 Television Without Frontiers Directive, this approach changed. Private broadcasters challenged public service broadcasters' privilege, seeing them as market players that state aid. This needed specific justification under the Treaty, otherwise it counted as distorting market competition, and paradoxically, as harming media pluralism. (I describe the development of the Directive later below.)

In 2007, the Commission engaged in a three-step approach to deal with the issue of pluralism, on the basis of a broader approach. The three steps included (1) the preparation of another Commission Staff Working Paper; (2) the launching of an independent study on media pluralism to systematically identify objective indicators and measure media pluralism in the member states; and (3) a Commission Communication on the indicators for media pluralism in the EU member states with a public consultation. The first two steps were completed: the Working Paper³¹⁷ represents a constructive approach towards tackling media pluralism; a scholarly study was carried out to design the Media Pluralism Monitoring tool which has been consistently applied since then, delivering rich information about the status of media pluralism in Member States.³¹⁸ The third step, however – the Commission Communication on the indicators for media pluralism in the EU member states with a public consultation –, has never been realised.

4.1.1 The tumultuous story of the media landscape in the new millennium

Shortly after the three-step approach was launched, a series of crises followed each other. Economic crisis hit the world in 2008, causing deep

316 Now its scanned version is accessible online: http://aei.pitt.edu/1156/1/pluralism_gp_COM_92_480.pdf.

317 Commission Staff Working Document. Media pluralism in the Member States of the European Union.{SEC(2007) 32}. 16 January 2007. http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf (last retrieved on 15 June 2016).

318 'Media Pluralism Monitor' <http://monitor.cmpf.eui.eu/> (last retrieved on 15 June 2016).

restructuring in the media market: thousands of journalists lost their jobs, advertising revenues declined and mergers followed. Shortly thereafter, in 2010, the then newly elected Hungarian Prime Minister used his party's parliamentary supermajority to substantially curtail media freedom and reorganise the system of checks and balances seeking to build an illiberal, electoral-authoritarian system.³¹⁹ Within a few months after the elections, the Hungarian Parliament issued without public consultation an unprecedentedly restrictive media law which created a powerful, governmentally dominated media regulatory authority, and subsumed all public-service broadcasting and the national news agency under this regulatory authority.³²⁰ In the subsequent years, state advertising policy, and finally a voluntary donation of almost all print media to one government-friendly owner, ultimately transformed the national media landscape into a one-sided informational system, coloured with minor independent "token" media outlets.³²¹ The European Union did not find tools to intervene with this tsunami of events that eroded democracy and gave rise to a corruption scheme that is unprecedent in Europe.³²² Subsequent political developments appear to underline the assumption that without an independent media that would provide effective public criticism of the governmental actions, democracy

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- 319 Renata Uitz, "Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary," *International Journal of Constitutional Law* 13, no. 1 (2015): 279–300; Imre Vörös, "Hungary's Constitutional Evolution During the Last 25 Years," *Südosteuropa* 63, no. 2 (2015): 173–200.; Imre Vörös, "The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law," *Acta Juridica Hungarica* 55, no. 1 (2014): 1–20; Petra Bárd, "The Hungarian Fundamental law and related constitutional changes 2010–2013," *Revue des Affaires Européennes: Law and European Affairs* 20, no. 3 (2013): 457–472.; Gábor Attila Tóth, *Constitution for a disunited nation* (Budapest: CEU Press, 2012).
- 320 Polyák Gábor, "The Hungarian Media System. Stopping Short or Re-Transformation?," *Comparative Southeast European Studies, De Gruyter* 63, no. 2 (2015): 272–318.
- 321 Gábor Polyák, *Medienpolitik in Osteuropa: Theoretischer Rahmen und mediale Praxis* (Berlin: B&S Siebenhaar Verlag, 2018).
- 322 European Parliament 2013, Resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) (2012/2130(INI)) 'the Tavares Report' of 3 July 2013; European Parliament 2015, Resolution on the situation of fundamental rights in the European Union (2013–2014), (2014/2254(INI)); 8 September 2015; European Parliament 2015, Plenary debate on the 'Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015', 2 December.

gets reduced to an empty façade of elections.³²³ The years 2015 and 2016 brought an entirely new set of problems to media all over the world: disinformation and foreign manipulation of online social media content, that proved to have influenced the Brexit referendum and the US elections.³²⁴ The value of pluralism appeared again in a new light: the online universe brought about a sort of "hyperpluralism"³²⁵ where every possible scenario and opinion may be published, and is accessible. At the same time, the actual access to content is governed by intransparent algorithms, operating beyond the limits of knowledge of either users or politically responsible authorities.³²⁶ This highlighted again the importance of trustworthy, internally diverse quality media, that would serve the democratic needs of the public, whether or not organised in the form of public service media.

Meanwhile, the European Commission followed its path of working on media pluralism albeit with an even more cautious approach, being attentive to the complexity of the situation. In 2011, a High-Level Group on Media Freedom and Pluralism was asked to prepare a complex report with recommendations for the respect, protection, support and promotion of pluralism and freedom of the media in Europe. The High-Level Group Report recommended an active approach, stating that the European Union must intervene when there is a restriction of fundamental rights or media pluralism in one or more of the Member States.³²⁷ As a strong contrast to the 1992 Green Paper, the 2013 Freiberga-report found that harmonisation of the market rules would be beneficial to the EU.

323 Gábor Polyák, "Media in Hungary: Three pillars of an illiberal democracy," in *Public service broadcasting and media systems in troubled European democracies*, (2019): 279–303. See also: Attila Ágh, "The decline of democracy in East-Central Europe: Hungary as the worst-case scenario," *Problems of Post-Communism* 63, no. 5–6 (2016): 277–287.

324 Samantha Bradshaw and Philip N. Howard, "The Global Organization Of Social Media Disinformation Campaigns," *Journal of International Affairs* 71, no. 1.5 (2018): 23–32. <https://www.jstor.org/stable/26508115>.

325 Term coined by Monroe E. Price, public lecture at the Central European University, 24 April, 2017, recorded and available at: <https://cmds.ceu.edu/article/2017-05-05/public-service-media-age-hyper-pluralism>.

326 Judit Bayer, "Media freedom and pluralism: legislation and enforcement at the European level," in *ERA Forum* 19, no. 1 (2018): 101–113. (Berlin/Heidelberg: Springer, 2018).

327 Vaika Viķe-Freiberga et al., "A free and pluralistic media to sustain European democracy," *The Report of the High Level Group on Media Freedom and Pluralism*. (2013) last modified on 15 June 2016. https://ec.europa.eu/information_society/media_task_force/doc/pluralism/hlg/hlg_final_report.pdf.

4.1.2 Competence issues and new impetus to the development

With the enactment of the Lisbon Treaty and the Charter, the case of media freedom and pluralism has been significantly strengthened compared to 1992, along with other freedoms and rights. The Treaty's Article 2 declares common values,³²⁸ and the Charter became compulsory in relation to European Union law, and for European Union institutions.³²⁹ Moreover, some aspects of media have been already regulated in the Television Without Frontiers Directive and its amendments, finally called Audiovisual Media Services Directive. The change in the title was induced by the need of providing technology-neutral regulation to what was called as "television-like" content. It is within this realm that the European Parliament issued a Resolution in 2013 calling for better monitoring and enforcement of media freedom and pluralism across the EU.³³⁰ The Resolution argued that ensuring media freedom and pluralism has become legally binding with the enactment of the Charter of Fundamental Rights guaranteeing media freedom and pluralism.³³¹ Further, it urged the review of AVMSD to establish minimum standards for protecting the fundamental right to freedom of expression and information, media freedom and pluralism, and to include rules on the transparency of media ownership, media concentration and conflicts of interest. The Resolution also called for ensuring

328 Article 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

329 However, both have limited practical impact: Article 2 is enforceable only by way of the "nuclear option", Article 7, which has been finally triggered in 2017 (against Poland) and 2018 (against Hungary). The high threshold of the decisionmaking process and the high political stakes of this procedure make both triggering and coming to a conclusion an endlessly lengthy process. Whereas the Charter's applicability remains within the existing scope of competences and EU acquis. <https://www.europarl.europa.eu/news/en/agenda/briefing/2022-05-02/6/rule-of-law-in-hungary-and-poland-plenary-debate-and-resolution>.

330 European Parliament resolution of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU. (2011/2246(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0117&language=EN#title1> (last modified on 15 June 2016).

331 Citing Article 11 (2) of the Charter of Fundamental Rights of the European Union. (2000/C 364/01) https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

journalists' independence, protecting them from pressure, intimidation and harassment.³³²

The Freiberga-report acknowledged the insufficient scope of competences of the EU; however, it pointed out that guaranteeing the rights granted by the Treaties justifies EU intervention in this respect. It emphasised that the envisaged legislation would protect the European right to free movement, Treaty values such as democracy, human rights and pluralism which provide a stronger basis for legislation than the Charter only.³³³

In 2014, the member states within the Council managed to agree on some basic tenets regarding media freedom and pluralism in the digital environment.³³⁴ Although this was a very small step, its meaning should not be under-estimated. The states agreed that a high level of media independence and pluralism is essential not only to democracy, but it also contributes to the strengthening of economic growth and its sustainability. While this memorandum shows the limits of consensus-based legal harmonisation, it also points at the possibility of gradual developments of common policies by way of small steps.

The Media Pluralism Monitor project launched a successful pilot test in 2014, and an ever more crystallised monitoring process has been carried out since then annually.³³⁵ In 2014, the Commission set up the European Regulators Group for Audiovisual Media Services (ERGA), with the primary task to advise the Commission to ensure a consistent implementation in all MSs, but also with the view to allow exchanges of best practices, and provide opportunity to the less independent national media regulatory authorities (NRAs) to further distance themselves from political influences and facilitate their own independence.³³⁶

332 EP Resolution on the EU Charter: standard settings for media freedom across the EU (2011/2246(INI)).

333 Vaika Viķe-Freiberga, "A free and pluralistic media", 3.

334 Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment. 2014/C 32/04.

335 Media Pluralism Monitor: Mapping risks for media pluralism and the safety of journalists across Europe. <https://cmpf.eu.eu/media-pluralism-monitor/>.

336 Carles Llorens and Madelina Andreea, "Costache: European Union Media Policy and Independent Regulatory Authorities: A New Tool to Protect European Media Pluralism?," *Journal of Information Policy* Penn State University Press, 4. (2014): 396–420., 415. <http://www.jstor.org/stable/10.5325/jinfopoli.4.2014.0396> (last modified on 15 June 2016).

The European Parliament adopted another Resolution on media pluralism and media freedom in May 2018. In the same year, the AVMSD was revised, with the primary aim to adapt it to the digital platform environment and address problems that arose in the context of online video-sharing platforms. Among others, a requirement for the independence of regulatory agencies has been introduced, and the promotion of media pluralism has emerged as one of the objectives of the regulation. In 2020, the Council of the EU reached new Conclusions on safeguarding a free and pluralistic media system again.³³⁷ This reacted to the accumulated crisis as a result of the COVID-19 pandemics, which followed a period of sharp decline in revenues, and the data-driven business model that benefited dominant platforms. It focused on three characteristics of a healthy media system that are currently under pressure: sustainability, pluralism and trustworthiness. Furthermore, it acknowledged that the media landscape is growing increasingly complex due to digital developments and media convergence, and the tools to ensure media pluralism need to be continuously reconsidered and redefined. It also called upon the Commission to foster a holistic policy perspective, one that takes into account legal, political and economic variables that are relevant to safeguarding media pluralism and media freedom. This Conclusion was issued almost at the same time as the European Democracy Action Plan.³³⁸ This remarkable legislative programme devoted a substantial part to communication challenges, in particular – besides political advertising, countering disinformation and other important tracks –, to strengthening media freedom and media pluralism within the European Union, as one of the main pillars of democracy. The planned actions were diverse: from recommendations and structured dialogue to sustainable funding and legislative initiatives, such as the Anti-SLAPP directive and the Media Freedom Act. Among the planned measures, a Media Ownership Monitor was envisaged to make media ownership transparent, besides other measures for the transparent and fair allocation of state advertising, and further research for innovative solutions to generate a European solution for the prominence of audiovisual media services of general interest. On the same day, the Commission issued a Media and Audiovisual Action

337 Council conclusions on safeguarding a free and pluralistic media system 2020/C 422/08. 7.12.2020.

338 Communication from the Commission on a European Democracy Action Plan. COM(2020) 790 final. 3.12.2020.

Plan,³³⁹ that aimed to recover and transform the media system, by improving the financial sustainability and robustness of the media landscape, and adapting it to the needs and realities of the data-driven digital economy. In this context, it urged to create the European media data space, as well as to increase cross-border flow of content and talents. The Media and Audiovisual Action Plan set out a truly multi-angled programme for the media landscape, in order to better serve the public needs and to adapt to the digital transformation. At the time of writing, the last step of this development is the European Media Freedom Act, a European regulation that aims to lay the ground for basic standards for media freedom and pluralism across the Union.³⁴⁰

4.1.3 Understanding the obstacles of the process

Looking at the long history of striving for an increase of media pluralism by the European Parliament, among changing market and technological conditions, one could ask why did it not happen sooner, and with more tangible results? Many causes have delayed the development of policy action at the European level as the field of media is one with colliding divergent interests. Media is an economic service, in which high financial values are at stake; at the same time, it also represents a "merit" good, whose social value can be beyond its market value. Furthermore, beyond its indispensable role in the democratic functioning of societies in peacetime, recently we have witnessed how it can turn into a threat to national security or weaponised in a hybrid or actual war.³⁴¹ Media regulation is politically loaded, as media is regarded as a cultural product, representative of culture, nation, and a symbol of national sovereignty. In several states it is also treated as a vehicle of political success. Neither politician decisionmakers, nor market actors were clearly interested in its regulation (until recently, see

339 Communication from the Commission on Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation. COM(2020) 784 final. 3.12.2020.

340 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.

341 Sanda Svetoka, *Social media as a tool of hybrid warfare*. NATO Strategic Communications Centre of Excellence (2016). See also: Flemming Splidsboel Hansen, *Russian hybrid warfare: A study of disinformation* (2017): 06. DIIS Report.

below for reasons), what is more, national interests were – and still are – directed at defending national media's sovereignty.

Even the pure market competition angle has attracted many divergent perspectives. Several competing models are employed to measure market concentration, including the audience share model, market share model, license holder share model, capital share model and revenue share model.³⁴² Moreover, consensus is missing on how to define the scope of anti-concentration measures, the criteria used to define the thresholds and the enforcement procedures and mechanisms (such as limiting the number of licenses or imposing caps on the total shares controlled individuals or entities, or limiting the market share, etc.).³⁴³ The degree of concentration can be measured and regulated in several ways. These include vertical and horizontal concentration, as well as diagonal or cross-media concentration, and cross-sector ownership. However, there is no universally accepted standard benchmark for determining the method and the threshold of ownership ratios. The size of the market, the level of GDP and the cultural traditions of the audience all influence the desired level of ownership diversity.³⁴⁴ Member states are also divided over the issue of restricting media ownership by political parties and organisations.³⁴⁵

It would be overwhelmingly complicated to come to common terms for the purposes of a common EU pluralism regulation. Furthermore, international and supranational media enterprises are progressively establishing themselves and evolving into a distinct media system and market, distinct from traditional structures. This development is underscored by the dominant gatekeeping role of major US platforms in the sector. The EU seeks to uphold a globally competitive media market while asserting its

342 Peggy Valcke, "From ownership regulations to legal indicators of media pluralism: Background, typologies and methods," *Journal of Media Business Studies* 6, no. 3 (2009): 19–42. at 23. and Susanne Nikoltchev, 2001. 2–3.

343 Judit Bayer, "The illusion of pluralism: Regulatory aspects of equality in the new media" in *Digital Media Inequalities Policies Against Divides. Distrust and Discrimination*, ed. Josef Trappel (Nordicom, University of Gothenburg, 2019): 127–140.

344 Pier Luigi Parcu et al., *Study on media plurality and diversity online* Brussels: European Commission, (2022): 369–370. <https://data.europa.eu/doi/10.2759/529019>.

345 Some countries (Austria, Belgium, Bulgaria, Denmark, Germany, Greece, Hungary) exclude political actors from acquiring broadcast licenses or impose obligations of political independence on broadcast organizations, while others (Cyprus, Finland, France, Italy or Sweden) do not impose such restrictions at all. In Malta, the three political parties all own their own radio stations and the two largest parties even own their own television station. See Valcke, "From ownership," 26.

independence from these US behemoths. Simultaneously, it aims to meet the diverse requirements of its audience in a manner that garners approval from national governments.

In sum, any regulatory change in the media market will obviously disadvantage media incumbents and their political allies. A change depends largely on political interests, almost independently of rational arguments.³⁴⁶ A fragile balance must be found between the interests of citizens, companies and the states.

4.2 European efforts to regulate the broadcast media

In the previous chapter, we have reviewed how the European Union's attitude towards media pluralism has developed in the past decades. The lack of competences in the field of media was a key hindrance in this respect. Clearly, the European Union is an economic union, that has strictly defined legislative competences in the Treaties that are mainly concentrated around economic policies, in particular market integration instruments. As said above, media has traditionally been regarded as a cultural activity, and hence fell outside of the community competences in its entirety. However, this strict status has been gradually loosening already since the 1970s, and an important legislative instrument has regulated the media at the EU level since 1989. Below, I will show the development of this Directive from its drafting phase until today.

4.2.1 Opening the box of Pandora: the transformation of broadcasting's interpretation in community law

The Sacchi case in 1974³⁴⁷ signalled the first step when the ECJ declared that transmission of broadcasting signals falls under the scope of services

346 Richard Collins and Martin Cave, "Media pluralism and the overlapping instruments needed to achieve it," *Telecommunications Policy* 37, no. 4 (2013): 311–320, at 312.

347 C-155/73, Sacchi [1974] ECR 409. "In the absence of express provision to the contrary in the treaty, a television signal must, by reason of its nature, be regarded as provision of services..." it follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the treaty relating to services."

as regulated by the Treaty of Rome, establishing the EEC. This meant that the principle of free flow of services applied to broadcasting services as well. Apart from exceptional examples,³⁴⁸ European broadcasting was still mainly public service until the 1980's when private commercial television started to spread across Europe. While this was certainly influenced by the technological development that enabled cable and satellite distribution of television signals, the first European legislative instrument applied only to terrestrial television, then called "broadcasting".³⁴⁹ The Television without Frontiers Directive (TWFD) aimed to ensure the free movement of broadcasting services within the internal market, i.e. to ensure that Member States do not restrict retransmission of television programmes from other Member States on their territories. To ease this harmonisation, the Directive also set out certain public interest objectives, such as cultural diversity, the right of reply, consumer protection and the protection of minors. The Directive was issued almost at the same time as the European Convention on Transfrontier Television (ETS No. 132) by the Council of Europe. These documents were reinforced by the European Court's of Human Rights (ECtHR) *Lentia v. Austria* decision in 1993 (the procedure started in 1989). The decision declared that the prohibition of establishing a private channel was disproportionate to the aim pursued and therefore not necessary in a democratic society.³⁵⁰ By this time, some of the European states already had cable and satellite transmission systems of audiovisual content, among others overseas content from the US. Therefore, the argument of scarcity did no longer provide a justification, and the Austrian government accepted this.³⁵¹ Pertti Näränen called this Directive as the cornerstone of the European neoliberal audiovisual policy.³⁵² However, closely examining the policy processes within the European legislative institutions, we can come to a different conclusion.

348 Like the Tele-Saar, a German-French commercial television station the first commercial TV station in Europe. See: Andreas Fickers, "Tele-Saar. Comunicazioni sociali", no. 1 (2003): 6–19. Vita e Pensiero / Pubblicazioni dell'Università Cattolica del Sacro Cuore. 2013.

349 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (TWFD).

350 Informationsverein Lentia and Others v. Austria – 13914/88, 15041/89, 15779/89 et al. Judgment 24.II.1993, at 43.

351 *Lentia v. Austria*, at 39.

352 Pertti Näränen, "European digital television: Future regulatory dilemmas," *Javnost-The Public* 9. no. 4 (2002): 19–34.

4.2.2 TWF Directive: the Trojan Horse

The original idea behind the TWFD was not so much to liberalise television, but on the contrary: to enhance the status of public service television in order to counterbalance the spreading of private commercial channels that featured overly light entertaining content. This interpretation is apparent from the 1982 Resolution of the European Parliament (see above as well).³⁵³ The essential motivation to this Resolution was the concern about the new media of the time (private radio and television channels via cable and satellite), which they considered to be "commercialising" the genre of radio and television, thereby jeopardising the diversity of opinions.³⁵⁴ As a remedy, the Community regulator intended to support the public service model in order to bring Community policies closer to the citizens of the Member States. This would have had the mission to reduce the negative perception of the European Community, and to increase its legitimacy. At the same time, this was supposed to maintain or increase the democratic role of the public service media. This also explains why the European quota was introduced along with the other quality criteria.³⁵⁵

Actually, the European Parliament's original aim was to establish a European satellite television channel,³⁵⁶ elevating the public service television model up to the EU level. The Resolution even called on Member States to provide the necessary satellite capacity under their jurisdiction and included criteria for the public broadcasting remit.³⁵⁷ It should be noted that the Resolution raised the issue of Community regulation of media services, albeit in a very tentative manner: claiming that the issue should also be examined, with particular reference to commercial communications and the protection of minors. In stark contrast to the intentions expressed in the Resolution, the Green Paper³⁵⁸ preparing the TWF Directive clearly abandoned the vision of a common European television service, i.e. the common public service model. Instead, it laid the grounds for a common market of broadcasting services.

353 1982 Resolution of the European Parliament on radio and television broadcasting in the European Community, OJ C 08, 05/014/1982.

354 Preamble of the above 1982 Resolution.

355 Article 17 in TWFD (now AVMS Directive) on the European quota.

356 Point 2. of the Resolution.

357 Points 4. and 5. of the Resolution.

358 Communication from the Commission to the Council Television without Frontiers – Green Paper on the establishment of the Common Market for broadcasting, especially by satellite and cable COM(84) 300 final Brussels, 14. July 1984.

4.2.3 A new era for public service broadcasting

Ironically, rather than strengthening public service broadcasting, this Directive – as it was later found – significantly weakened its status, by opening the door for formulating the question of dual broadcasting as a competition issue. Following the Directive, a range of legal complaints were submitted to the Commission that questioned the justification of the state aid provided to the national public service broadcasting corporations.³⁵⁹ The first complaint was submitted by a French Television channel in March 1993, followed by several similar complaints within a few years.³⁶⁰ The complaints referred to alleged infringement of Article 85 (now Article 81 EC), Article 90(1) (now Article 86(1) EC) and Article 92 (now, after amendment, Article 87 EC) of the EC Treaty, its provisions on competition and the prohibition to provide state aid. The cascade of complaints prompted the Commission to study the problem, and led to an attempted clarification of the public service privilege in the Protocol annexed to the Amsterdam Treaty.³⁶¹ This Protocol, in one long sentence, nailed down sovereign Member States' privilege for maintaining public service broadcasting, creating a Treaty-level exception from the general Treaty provisions on the prohibition of state aid ("[t]he 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").³⁶² However, in the same sentence, it also defined the main conditions, which included references to the public service remit, and to the common interests of the

359 For example: European Court Reports 1999 II-01757, Case T-17/96. On 10 March 1993 the applicant, *Télévision Française 1 SA* ('TF1'), submitted a complaint to the Commission concerning the methods used to finance and operate the public service television channels.

360 Case T-17/96, *Télévision Française 1 SA* (TF1) v. European Commission, at 5.

361 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States. Official Journal C 340, 10/11/1997 P. 0109, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997D%2FPRO%2F09>.

362 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty of the European Community – Protocol on the system of public broadcasting in the Member States. Official Journal C 340, 10/11/1997 P. 0109, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997D%2FPRO%2F09>.

Union which would limit the possible distortion of competition.³⁶³ These conditions practically narrowed the scope of interpretation and opened the door for further questions, interpretations and limitations. Repeated complaints to the Commission were submitted regarding the compliance of certain public service broadcasting organisations with the Amsterdam Protocol, which has induced the Commission to issue a Communication on state aid to public service broadcasting.³⁶⁴ The most discussed part of the Amsterdam Protocol was its limitation to the possible distortion of competition, which should "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". Interpretation of this rule led to the introduction of the "Public Value Test", or with another name "Three Step Test" that served to examine whether the public service broadcaster is fulfilling a public need that is not otherwise fulfilled by market actors.

It should be noted that the Protocol's words on the goal and the merit of the public service broadcaster (or "public service media"³⁶⁵), and in particular the explanatory guidelines of the Communication (first 2001, updated 2009) could be potentially transformative for several public service media organisations within the EU, if they were applied consistently. These Communications offer procedures for defining and setting public service duties, for financial prudence and control of performance. Enforcement of these principles may potentially prevent the political capture of public service media and its weaponization for political propaganda, which is the case in so many states.³⁶⁶ (See more in Chapter 5.5. below.)

363 "...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." (Protocol annexed to the Treaty of Amsterdam.).

364 Communication from the Commission on the application of State aid rules to public service broadcasting (Text with EEA relevance) OJ C 257, 27.10.2009.

365 As since 2001 we can talk about hybrid institutions, partly online, often cable-transmitted, I will call it hereafter "media" instead of "broadcaster".

366 Alina Mungiu-Pippidi, (2003). *From state to public service: The failed reform of state television in Central Eastern Europe* (Budapest: CEP Books, Open Society Program, 2002/2003). Péter Bajomi-Lázár et al., "History of the media in Central and Eastern Europe," in *The handbook of European communication history*, ed. Arnold Klaus, Preston Pascal, and Susanne Kinnebrock (Hoboken: Wiley-Blackwell, 2019), 277–

To sum up, it would be important to keep in mind that the original intention of the European legislators with the Television Without Frontiers' Directive was not to weaken the public service media, but on the contrary: to strengthen what was seen as "quality broadcasting" against commercial media (broadcasting, cable and satellite). This intention was nuanced by the Commission's economic perspective, but the Parliament's approach was thought to be retained by inserting into the Directive public service obligations such as the protection of minors, restriction of advertising, and European quota. However, the interpretation of broadcasting as an economic service opened Pandora's box and triggered a chain of events.

TWFD was amended several times, primarily due to the constant technological development. In the 2007 amendment, the Directive was renamed Audiovisual Media Services Directive (AVMSD) and the name broadcasting was transformed into "audiovisual media services" which were divided into two branches: linear (TV-like) and non-linear or on-demand (internet-like). The idea behind this renaming was to create technology-neutral definition for content transmission, and to formulate the categories from the perspective of the user, whose needs were set in focus. The scope of the regulation did not grow: it remained to be limited to jurisdiction, and public service obligations in fields such as: advertising, the protection of minors, right of reply, European quota, events of major importance for society.³⁶⁷ The structure of regulation created two-tier obligations: more liberal for on-demand services, and stricter for linear services.

The next large amendment reacted to the peer-to-peer nature of the internet which made interactive social networks so popular also in the audiovisual realm. It endeavoured to extend some minimal rules to video-sharing platforms (VSP).

298. Péter Bajomi-Lázár, "The Iron Law of Public Service Television" in *Up in the Air?: The Future of Public Service Media in the Western Balkans* (CEU Press, 2021), 151. Václav Štětka, "Digital platforms and the shadow of illiberal democracy: Lessons from Central and Eastern Europe," (European Media and Platform Policy. The Euromedia Research Group, 2021)

367 Katsirea, I. "The Television Without Frontiers Directive," in: *The Palgrave Handbook of European Media Policy*, ed. Karen Donders, Caroline Pauwels, and Jan Loisen (London: Palgrave Macmillan, 2014) https://doi.org/10.1057/9781137032195_1633.

4.2.4 The AVMSD today

The AVMSD's scope was first limited to broadcasting, then to television-like services whether broadcast, distributed by cable or offered online, and in 2018 embraced platforms whose service was to facilitate the sharing of videos for users, "video-sharing platforms". As these platforms do not provide own content, merely allow the sharing of third party content, their obligations are limited to "best effort" of designing community standards that were supposed to impose "private regulation" on content providers and users.

The amendment was pioneer in addressing this "organising" activity of platforms that was later generalised in the DSA as well. Acknowledging this crucial difference between content providers and platforms was a meaningful step towards a new type of regulatory approach. As set out in its Recital 48: "In light of the nature of the providers' involvement with the content provided on video-sharing platform services, the appropriate measures to protect minors and the general public should *relate to the organisation of the content and not to the content as such*". This is the first sign of a systemic approach rather than focusing on individual pieces of content.³⁶⁸

Early critiques of this approach (who criticised this amendment and also the NetzDG) recommended that liability with the content should remain at the content provider, and warned against "outsourcing censorship" into private hands.³⁶⁹ This would have ensured that freedom of expression remains respected. However, the principle has survived and still reigns in

368 Lubos Kuklis: media regulation at a distance: video-sharing platforms in Audiovisual Media Services Directive and the future of content regulation. <https://www.medialaws.eu/wp-content/uploads/2020/05/ANTEPRIMA-Kuklis.pdf>.

369 Damian Tambini, Danilo Leonardi and Christopher Marsden, "The privatisation of censorship?: self regulation and freedom of expression," in Codifying cyberspace communications self-regulation in the age of internet convergence, ed. Damian Tambini, Danilo Leonardi and Christopher Marsden (Abingdon, UK: Routledge/UCL Press, 2008): 269–289. See also: Matteo Monti, "The EU Code of Practice on Disinformation and the Risk of the Privatisation of Censorship," in *Democracy and Fake News* (Abingdon, UK: Routledge, 2020): 214–225. See also: Heidi Tworek and Paddy Leerssen, "An analysis of Germany's NetzDG law," *First session of the Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression* (2019). See also: Torben Klausa, "Graduating from 'new-school' – Germany's procedural approach to regulating online discourse," *Information, Communication & Society* 26, no. 1 (2023): 54–69. DOI: 10.1080/1369118X.2021.2020321.

DSA. With the ubiquitous nature of online content providing, a consistent enforcement of norms would not have been possible while also preserving the anonymity of users.³⁷⁰ The complexity of regulation would have posed an insurmountable challenge, with regard to the large number of speakers and online content items. Instead, a more pragmatic approach of imposing a framework regulation on the content aggregator was chosen, and this path is followed later in the Digital Services Act (DSA). This clearly meant a compromise in fundamental rights, which ultimately even the most adamant defenders of free speech had to come to terms with.

Critiques also warned that platforms already deal with users from the position of power, and a right to decide about content would further grow this power.³⁷¹ However, the European legislation addressed this criticism with a more detailed set of safeguards and supervision mechanism that aimed at limiting platforms' power (also) in respect of content regulation, within the DSA.

Nonetheless, the AVMSD rules on video-sharing platforms contain almost everything that are the seeds of the future DSA. Even with the obvious limitations that as a Directive, it could not provide generally applicable rules, merely guidelines to the Member States, the softness of the provisions is striking in retrospect. For example, Member States were requested to "encourage" the use of co-regulation and the fostering of self-regulation. At the same time, the detailed rules set out that self-regulatory codes shall provide for regular, transparent and independent monitoring and evaluation of the achievement of the objectives; and provide for effective enforcement including effective and proportionate sanctions.³⁷² Nevertheless, as member

370 See the parliamentary debate leading to the passing of the Defamation Act 2013 UK. <https://www.gov.uk/government/news/defamation-act-reforms-libel-law>.

371 Peggy Valcke, "Accountable, not liable: Is regulating video platforms under the new AVMS Directive a slippery slope towards internet censorship?," in *57th FITCE Congress*, 2018.; See also: Krisztina Rozgonyi, "Negotiating new audiovisual rules for video sharing platforms: Proposals for a responsive governance model of speech online," *Revista Catalana de Dret Públic*, 61, (2020): 83–98.; See also: Amélie Heldt and Stephan Dreyer, "Competent third parties and content moderation on platforms: Potentials of independent decision-making bodies from a governance structure perspective," *Journal of Information Policy*, 11, (2021): 266–300. See also: Judit Bayer, "Rights and Duties of Online Platforms," in *Perspectives on Platform Regulation, Concepts and Models of Social Media Governance Across the Globe*, (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2021): 25–45.

372 Article 4a.l.c., d. AVMSD. and Article 28.b. 4. AVMSD.

states had merely to encourage the use of those codes, the chain of consequences got easily disrupted at the beginning.

However, beyond encouraging co-regulation, member states were also required to establish the necessary mechanisms to assess the appropriateness of the measures, entrusting this to the national regulatory authorities or bodies.³⁷³ They were further required to ensure out-of-court redress mechanisms without depriving users of their right of access to court.³⁷⁴

The material rules applying to video-sharing platforms remain strictly within the usual scope of AVMSD: protection of children, protection of general audiences from terrorist content, hate speech, child pornography, and advertising regulation. The measures that the video-sharing platforms were required to apply ranged from allowing users to label and to rate the content,³⁷⁵ to report or flag content,³⁷⁶ through providing feedback upon the results of reporting or flagging and complaint management systems, up to installing age verification system and parental control systems,³⁷⁷ which have not been realised.

With DSA, these rules have remained untouched, and will further serve as specific sectoral rules for some online platforms that provide primarily audiovisual content. As *lex generalis*, DSA will apply to video-sharing platforms as well.³⁷⁸ This way, the users can benefit from the additional safeguards that frame the notice-and-action procedure within DSA. Another, more general regulation would span over the rules of AVMSD with the passing of the European Media Freedom Act, extending its scope to all media outlets including the print media (see below).

373 Article 28b. 5. AVMSD.

374 Article 28b. 7–8. AVMSD.

375 Article 28b.3.a, g.

376 Article 28b.3.d.

377 Article 28b.3.f,h.

378 Lubos Kukliš, “The user, the platform and the regulator: Empowering users in the implementation of new rules for video-sharing platforms,” *Journal of Digital Media & Policy* 12, no. 3 (2021): 507–512.

5 The Media Freedom Act

5.1 Background

The Media Freedom Act is a logical next step in European media policy, but also a ground-breaking endeavour. It is ground-breaking in the European Union because it detached from treating media as a mere market product and applied the perspective of opinion pluralism:³⁷⁹ opinions and ideas flow across the borders of the EU and influence its economic and social processes. Its incentive arose from the expanding problems on the media landscape within the European Union as described above. These problems were in part caused by the digital transformation and affected all media actors across the globe, by changing the distribution patterns,³⁸⁰ the audience habits of media consumption,³⁸¹ and the advertising market.³⁸² Those profound changes deprived most traditional media companies from the revenues that financed their operation: first, subscription numbers declined because of the online access, later, even online advertising revenues sank due to the platform-dominated online traffic. Platforms are transborder per se, and major media companies are also increasingly transnational, although this is moderately so in the European market, where national policies, including divergent regulations on media ownership and concentration hinder the freedom of establishment and thus the transnational development of media firms.³⁸³

379 The term refers to the "marketplace of ideas" theory, in which marketplace opinions are exchanged similarly to market goods.

380 Paul Bradshaw, "Mapping Digital Media: Social Media and News. Open Society Foundations," Dec, 2012 <https://www.opensocietyfoundations.org/publications/mapping-digital-media-social-media-and-news>.

381 Paul Bradshaw, "How digitisation has changed the cycle of news production," BBC blog, 25 June, 2012. <https://www.bbc.co.uk/blogs/collegeofjournalism/entries/eed7eb59-65cd-384b-b9d8-16d0f178546d>.

382 Joseph Turow, *The daily you: How the new advertising industry is defining your identity and your worth* (New Haven, CT: Yale University Press, 2012).

383 Francois Heinderyckx, "European Public Sphere. Transnational News Media and the Elusive European Public Sphere," *International Journal of Communication* 9, no. 16 (2015): 3161–3176. See also: Agnes Gulyas, "Multinational media companies in a European context," in *MECCSA and AMPE Joint Annual Conference*, Jan 2005. See also: Michael Brüggemann and Hagen Schulz-Forberg, "Becoming pan-European?"

The other part of the problem emerged in illiberal Member States whose governments reorganised the media landscape so that media pluralism and diversity of media outlets were reduced, and the independence of the remaining media, especially of public service media, were put into question.³⁸⁴ These deficiencies in one Member State are bound to spill over to the Union level through the free flow of services, persons, the common opinion market and the democratic processes that are constitutive to the European institutions. Failure of media pluralism and ruptures in the public discourse caused democratic deficiencies in some of the national electoral processes in the European Parliamentary elections,³⁸⁵ and caused shortcomings in the rule of law and democratic functioning within the European Union.³⁸⁶ National parliamentary elections define the constituency of the European Council, and indirectly also that of the Commission. All European institutions are dependent on the underlying national democratic processes, therefore, democratic deficiency at the national level will stain the entire European process.³⁸⁷

The problem of disinformation and propaganda has emerged from the combination of the two described phenomena. In an increasingly fragmented media and information environment, the news and current affairs,

Transnational media and the European public sphere,” *International Communication Gazette* 71, no. 8 (2009): 693–712.

384 Péter Bajomi-Lázár, *Party colonisation of the media in Central and Eastern Europe* (Central European University Press, 2014); Gábor Polyák, “The Hungarian media system. Stopping short or re-transformation?,” *Südosteuropa. Zeitschrift für Politik und Gesellschaft* no. 2 (2015): 272–318.; Pawel Surowiec and Václav Štětka, (2020). “Introduction: media and illiberal democracy” in *Central and Eastern Europe, East European Politics*, 36, no. 1 (2020): 1–8.

385 European Parliament (2023) Foreign interference in EU democratic processes: Second report. See also: European Parliament resolution of 9 March 2022 on foreign interference in all democratic processes in the European Union, including disinformation (2020/2268(INI)).

386 Paul Blokker, “The Democracy and Rule of Law Crisis in the European Union,” *Relatório do Projeto Reconnect* (European Commission, 2021) <https://reconnect-europe.eu/wp-content/uploads/2021/04/D14.1.pdf> See also: Laurent Pech and Kim Lane Scheppele, “Illiberalism within: rule of law backsliding in the EU,” in *Cambridge Yearbook of European Legal Studies*, 24, (2017): 3–47.

387 Petra Bárd et al., “An EU mechanism on democracy, the rule of law and fundamental rights. CEPS Paper,” in *Liberty and Security in Europe*, 2016. See also: Petra Bárd, Judit Bayer, and Sergio Carrera, *A Comparative Analysis of Media Freedom and Pluralism in the EU Member States* (European Parliament, 2016) [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU\(2016\)571376_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU(2016)571376_EN.pdf).

especially those reporting about the European Union, fell short of creating a general information basis that used to serve as a ground for democracy.³⁸⁸ Political discourse has taken avail of the informality of social media. The online platform environment favours authoritarian and populist political rhetoric,³⁸⁹ and the lower the quality, the more „honest” and therefore convincing a political content may seem.³⁹⁰ Platforms are like the dark side of the Force: not more powerful, but "quicker, easier, and more seductive."³⁹¹ A common media policy that would better represent European values, seemed like an indispensable precondition for the European integration project, and this has only increased with the deepening geopolitical crisis.

For all those reasons, the European Democracy Action Plan set out to tackle media freedom and pluralism at the transnational level, and emphasised that the independence of media should be protected at the EU level.³⁹² The plan was included to the Commission's 2022 work programme.³⁹³

As outlined previously, media pluralism has been a focal point for policymakers since the late 1980s, yet without tangible outcomes. Over time, however, pluralism evolved into a core value enshrined in Article 2 of the Lisbon Treaty, while media freedom and pluralism gained protection as fundamental values in the European Charter of Fundamental Rights. Several scholars called for redefining the basis of the EU media and communication policies, and strengthening the European public sphere.³⁹⁴ The

388 Brüggemann and Schulz-Forberg, "Becoming pan-European?," 693–712. See also: Judit Bayer et al., *Disinformation and propaganda—impact on the functioning of the rule of law in the EU and its Member States* (European Parliament, Study for LIBE Committee, Policy Department for Citizens' Rights and Constitutional Affairs, 2019).

389 Nicole Ernst et al., "Populists prefer social media over talk shows: An analysis of populist messages and stylistic elements across six countries," *Social media+ society* 5, no. 1 (2019) <https://doi.org/10.1177/2056305118823358>.

390 Gunn Enli and Linda Therese Rosenberg, "Trust in the age of social media: Populist politicians seem more authentic," *Social media+ society* 4, no. 1 (2018) <https://doi.org/10.1177/2056305118764430>.

391 Said by the character Yoda in *Star Wars: The Empire Strikes Back*. Screenplay by Leigh Brackett and Lawrence Kasdan.

392 Communication from the Commission on the European Democracy Action Plan, COM(2020) 790 final. https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en.

393 Commission work programme 2022 Making Europe stronger together. COM(2021) 645 final.

394 Beata Klimkiewicz, *Media Freedom and Pluralism: Media Policy Challenges in the Enlarged Europe*. Neuauflage [Online]. (Budapest: Central European University Press, 2010) <http://books.openedition.org/ceup/2152>; Silke Adam, "European

public discourse around European matters amounted to a mere 1–2 % of the news.³⁹⁵ The lack of the common European public sphere generated a legitimacy hiatus.³⁹⁶ As the EU is neither a state nor a nation, its development as a new kind of polity was seen as closely connected to the formation of a common communicative space.³⁹⁷

The Commission has chosen the legislative instrument "regulation" to avoid regulatory divergences and any delay in the implementation. This choice fits into the row of legal instruments that were passed in the legislative package of the European Democracy Action Plan and the overlapping digital regulatory wave that is discussed in this book. Still, EMFA contains several clauses of abstract, principle-like rules, where Member States will have the opportunity to fill the gaps. In these aspects, EMFA is often similar to a directive which sets the goals, but leaves implementation to the Member States. However, as a regulation, it is directly and literally applicable not only to Member States but to other legal subjects as well, including legal entities and natural persons.³⁹⁸ The Act is joined by a Recommendation which suggests voluntary action especially in regard of granting further safeguards of editorial independence and of media ownership transparency.³⁹⁹

The draft EMFA has attracted an exceptionally wide range of criticism in every detail. Media is an intersectional field of public and private law, where fundamental rights of several actors are at stake. The media market is specific because it is a two-sided market: advertisers sponsor the products which are consumed by the audience. Thus, the consumers and the clients are separate and are, at least partly, distinct actors. From a regulatory

public sphere," in *The international encyclopedia of political communication*, (2015): 1–9. See also: Lennart Laude, "Creating European Public Spheres: Legitimising EU Law Through a Reconfiguration of European Political Parties," *European Papers-A Journal on Law and Integration* 2, (2021): 1151–1172.

395 Hajo G. Boomgaarden and Claes H. de Vreese, "Do European elections create a European public sphere?" in (Un)intended Consequences of European Parliamentary Elections, ed. Wouter van der Brug and Claes H. de Vreese (Oxford, UK: Oxford University Press, 2016), 19–35.

396 Erik Oddvar Eriksen, "An emerging European public sphere," *European Journal of Social Theory* 8, no. 3 (2005): 341–363.

397 Erik Oddvar Eriksen, "An emerging European public sphere," *European Journal of Social Theory* 8, no. 3 (2005): 341–363.

398 Article 288 TFEU. "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

399 Commission Recommendation (EU) 2022/1634, of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector.

perspective, media entities are also specific because their employees – journalists – enjoy a protection of their professional independence that is unprecedented in other sectors. Even if telecommunication or banking is subject to sectoral regulation, no specific rights, responsibilities or protecting safeguards are attached to banking employees – in contrast to journalists and editors who have their specific rights. Also the audience have their right to be informed through a free and independent media. Media owners have their proprietary right to entrepreneurial freedom, which translates in the EU to freedom of establishment and the freedom to provide services.

This complexity is duly reflected in the EMFA. It imposes rights and obligations on a number of different actors and, as a result, it may have an erratic appearance. However, this is one possible way of creating a new media order (see the Chapter "Monitoring and enforcement"). All of its provisions have received considerable criticism, first and foremost addressing the questionable legislative competence.

During most of the time of writing, EMFA was still in the process of legislation. Although at the time of closing this manuscript, a political agreement is already available, the arguments around the proposal will still be analysed.

5.2 The question of European legislative competence

The European Union's competence is limited and does not explicitly extend to media. In fact, the media as a policy area is not even included in the Treaties. Therefore, the EU has "very little 'hard' legislation on media pluralism".⁴⁰⁰ However, as media is an intersectional field in every aspect, with economic, cultural, political and social relevance, and media market is a considerable economic branch both within and outside the EU, this brings media into the realm of EU law.⁴⁰¹ According to official statistics, the market size of European media in 2023 will be EUR 471 billion, of which EUR 42,7 billion are newspapers and magazines (both print and digital) and EUR 132 billion the TV and video market.

The EU has shared competences in the field of market regulation,⁴⁰² and exclusive competences in the field of economic competition.⁴⁰³ Competition in the field of media overlaps with the issue of media freedom and

400 Armando J. Garcia Pires, "Media pluralism and competition." *European Journal of Law and Economics* 43 (2017): 255–283.

401 Market Insights. <https://www.statista.com/outlook/amo/media/europe>.

402 Article 4 TFEU.

403 Article 3 TFEU.

pluralism. Precisely, market concentration is one specific aspects of media pluralism, among other elements of diversity.⁴⁰⁴

Even though competition law falls under the exclusive competence of the EU, harmonising media concentration laws was not a realistic goal due to the national particularities, and is still not ambitioned by EMFA. As described above under "Understanding obstacles of the process", even scholars held divergent views regarding the adequate model of regulation. Vertical and horizontal consolidation, as well as diagonal or cross-media convergence, along with cross-sector ownership, all may exert varying influences on the preferred degree of ownership diversity. This influence varies according to factors like market size, GDP levels, and the cultural traditions of the target audience.⁴⁰⁵

As earmarked by the Commission Staff Working Document in 2007, it gradually became clear that the problem with media pluralism is more complex than one simply arising from concentration of ownership. A non-transparent network of political and economic connections could be unveiled in several countries.⁴⁰⁶ These connections often existed between economic branches that were closely connected to state procurements or licensing, which created strong incentives for cooperation with political elites, such as energy production and distribution, real estate, investments, construction, etc.⁴⁰⁷ Economic, political, and communicative power rested in the hands of individuals who held substantial interests in diverse sectors, were in possession of or closely connected to political authority, and owned influential media establishments.⁴⁰⁸ Media actors entangled in such

404 Peggy Valcke et al., "Indicators for media pluralism," in *Media Pluralism and Diversity: Concepts, Risks and Global Trends* ed. Peggy Valcke, Miklós Sükösd, and Robert G. Picard (London: Palgrave Macmillan UK, 2015), 121–138.

405 Peggy Valcke, "From ownership regulations to legal indicators of media pluralism: Background, typologies and methods," *Journal of Media Business Studies* 6, no. 3 (2009): 19–42. at 23. and Susanne Nikoltchev, 2001. 2–3.

406 Petra Bárd and Judit Bayer, *A comparative analysis of media freedom and pluralism in the EU Member States* (Brussels: European Parliament, 2016).

407 Auksė Balčytienė et al. "Oligarchization, de-Westernization and vulnerability: Media between democracy and authoritarianism" in *Central and Eastern Europe Tidskrift for Medier, Erkendelse og Formidling* 3.1, 2015.; Péter Bajomi-Lázár, "Party Colonisation of the Media," in *Central and Eastern Europe* (Central European University Press, 2014).

408 Where communicative power can be defined as the capacity of a social actor to mobilize means of communication for the purpose of influencing other social actors. Karol Jakubowicz, "New Media Ecology: Reconceptualising Media Pluralism," in: Valcke, Sükösd, Picard, *Media pluralism*: 24.

relationships are disincentivised in revealing controversial information regarding their partner entities whether political parties, party politicians or other companies. Instead of acting as watchdogs, they become accomplices of muddy transactions.⁴⁰⁹ In turn, the captured political forces were unwilling to modify the regulatory framework that facilitated the proliferation of these irregularities. This provides a solid ground for the subsidiarity argument, calling for a supranational interference by the European Union institutions.

States' interference with market processes, including investments in the media market, as creating market distortions through state advertising, has created an unfavourable economic environment for investment and further weakened the competitiveness of the already shattered European media market. This also calls for an urgent intervention by the European Union, especially in the light of the disinterest by the national political elites which may have, in some Member States, captured the state institutions.

Already in 2013, the Freiberga-report held that Member States' policies that restricted media pluralism "are naturally bound to also hinder the exercise of the movement to that Member State by media companies and journalists."⁴¹⁰ The same also recommended that the EU respects cultural aspects when exercising its competence on competition matters.⁴¹¹

The proposal on EMFA defined its objective as removing barriers from the free flow of services in the EU media market, and promoting pluralism, sustainability, and independence in that market. Several authors have criticised the Commission for overreaching its competence when drafting a regulation on media freedom. Although the regulation has been based on

409 The power of the strong media outlets has been a cause for concern since the beginning of the 20th century. It was said to influence political decisions, through influencing public opinion. Contrary to this, in the Middle Ages, books were blamed for influencing public opinion despite the will of the Church, the holder of spiritual power. It might appear that the media has served the people in both times better than today.

410 The Report of the High Level Group on Media Freedom and Pluralism (Freiberga-report), 2013, at 19.

411 Ibid. p. 4. https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf See also: Kati Cseres and Malgorzata Kozak, "Media pluralism and (EU) competition law: the urgency to revisit the potential of EU competition law to protect and to reinforce media pluralism in the Member States. Background Note for conference," *Media pluralism and (EU) competition law: what role (EU) competition rules play in fostering media pluralism in the Member States?* 15 April, 2021, Amsterdam.

Article 114 of the Treaty, the competence on the common market, some reproach that the protection of the media market has been a mere secondary purpose behind the true intent: promoting media independence, media freedom and pluralism within the EU, for pure political considerations, as it is held, which may be important values protected by the Treaty, but do not create competences.⁴¹² And, while the internal market competence may radiate into other regulatory areas,⁴¹³ it cannot, as a secondary objective, justify a harmonisation in a field that falls outside the Union's competence,⁴¹⁴ and only incidentally have an impact on the media market,⁴¹⁵ and in parts not at all.⁴¹⁶ It is sometimes held that Article 167 of the Treaty should apply, which addresses cultural policy and explicitly refers that policy in the competence of Member States. However, the cultural aspect of the media is merely one among many, more important faces, and one that remains specifically unaddressed by EMFA (unlike the AVMS Directive, which requires certain quotas⁴¹⁷). The other faces of media, which are indeed addressed in EMFA, are the representation of facts and opinions on matters of public interest and controlling power. Free and diverse media is an essential prerequisite for democratic states, and for the Union to maintain among its members. Clearly, this cannot be interpreted as forging competences where there are none. However, freedom and diversity are as essential qualitative elements of media services as safety and applicability are for tools. Some views hold that "as long as there are so many products on the market that competition can arise, it is irrelevant for the market what media products

412 Viktoria Kraetzig, „Europäische Medienregulierung – Freiheit durch Aufsicht?“, *NJW* (2023): 1485.

413 Christina Etteldorf, *Why the Words „But“ and „However“ Determine the EMFA's Legal Basis*, *VerfBlog*, last modified 2023/6/13, <https://verfassungsblog.de/why-the-words-but-and-however-determine-the-emfas-legal-basis/>, DOI: 10.17176/20230613-111130-0.

414 Kraetzig, citing Callies/Ruffert *EU Recht Kommentar AEUV*, Art. 167 Rn. 146; See also: Schröder, M. in *Streinz AEUV Art.* (2002): 30.; Markus Möstl, „Grenzen der Rechtsangleichung im europäischen Binnenmarkt. Kompetenzielle, grundfreiheitliche und grundrechtliche Schranken des Gemeinschaftsgesetzgebers“, *EuR* 318, (2002): 320.

415 Stephan Ory, *Medienfreiheit – Der Entwurf eines European Media Freedom Act*, *ZRP* 2023, 26.

416 Mark Cole and Christina Etteldorf, „EMFA – Background Analysis“ *Research for CULT Committee*, 2023, [www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU\(2023\)733129_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU(2023)733129_EN.pdf).

417 Articles 13, 14, 17 AVMS.

are traded."⁴¹⁸ Could we really accept that these features are non-essential characteristics for the economic product of media services, in other words, would the product quality be irrelevant for the EU? To provide a basis for the mutual recognition in the internal market, traded goods must fulfil certain basic production standards, such as food safety regulations, as well as other requirements for the protection of consumers.⁴¹⁹ Assuming that consumer products would be falsified (be different from what they claim to be), could they be neutrally treated in the EU's internal market? Independence and freedom are just as essential as quality criteria for media products as cleanliness and trustworthiness are for other consumer products. For example, the food safety approach, which is based on risk assessment, risk management, and the precautionary principle, also relies heavily on transparency.

Several other arguments support internal market competence's firm hold in this respect. Malferrari divides these in three categories.⁴²⁰ First, digitalisation and the changing media landscape have generated a more international media landscape. They changed the function and the business model of media. The dismissal of the first EU legislative attempt on harmonisation of media concentration rules was mainly reasoned by the insufficient relevance of cross-border media within the EU.⁴²¹ This reason is no longer valid, because platformisation and digitalisation created an international media sphere. With the automatisisation of translation, language barriers will rapidly fall in the close future. Secondly, Malferrari highlights the threat of media manipulation, which curtails the freedom to provide services and distorts competition in the internal market. If any other product category in a particular Member State were systematically subsidized up to 80 % by public funds, resulting in their dominance of the market segment within that Member State and potentially or practically excluding other interna-

418 Viktoria Krätzig, „Europäische Medienregulierung – Freiheit durch Aufsicht?“, *NJW* (2023): 1485.

419 Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

420 Luigi Malferrari, “Der European Media Freedom Act als intra-vires-Rechtsakt,” *EuZW* (2023): 49.

421 European Commission (1992) Pluralism and Media Concentration in the Internal Market. An Assessment of the Need for Community Action. Green Paper. Annexes. COM (92) 480 final/annex, 23 December 1992.

tional investors from that market, would this not be regarded as an internal market issue?⁴²² Malferrari's third argument points to the security threat posed by strategic disinformation as a hybrid threat, especially in times of war – but it should be noted that this argument falls outside the scope of the internal market concern and underlines political considerations that are theoretically irrelevant to legal dogmatics.

Any legislative initiative by the European institutions must respect EU values and the human rights enshrined in the Charter of Fundamental Rights. Even though the values and the Charter do not establish competences in themselves, they set up requirements against legislation whenever it is passed based on other, established competences. When the EU is passing a law on internal market, it must always pay respect to applying the EU values as expressed in the Treaty and the standards as laid down in the Charter. In addition, Article 167(4) TFEU and Articles 11(2) and 51(1) of the EU Charter of Fundamental Rights require the Commission to take non-economic objectives into account when implementing EU competition policy.⁴²³ Therefore, although the proposal is designed to harmonise internal market law, it must pay regard to the enforcement of these foundational constitutional values. Moreover, the quality standards of media services must also be taken into account. In every instance where the free flow of goods or services is guaranteed, basic quality standards are essential to ensure fair competition and align with the requirements of mutual trust.

In addition, a free media that caters for pluralistic opinions is "closely intertwined with healthy and resilient economies", and correlates with a good investment climate, and low corruption levels.⁴²⁴ The state of the media both directly and indirectly affects the functioning of the EU internal market. While an indiscriminate conflating of disparate elements only to assert that everything is interconnected with the internal market should

422 For example, one of the two national television channels in Hungary was owned by Pro7-Sat1 between 1997–2013. Between 2013 and 2016 it was, in more steps, transferred into the ownership of a governmental commissioner Andrew Vajna, and counted as openly government-supportive since then. After 2019 the channel was transferred into the ownership of the persons and companies related to the conglomerate. See more on the story in footnotes 538–539 and 540–541 below.

423 Konstantina Bania, "European merger control in the broadcasting sector: Does media pluralism fit?" *Competition Law Review*, 9, no. 1 (2013): 49–80.

424 European Commission, DG Connect (2022) Study on media plurality and diversity online, p. 40. https://cadmus.eui.eu/bitstream/handle/1814/75099/Study_on_media_plurality_and_diversity_online-KK0722202ENN.pdf?sequence=1&isAllowed=y.

be avoided, distinct and robust connections need to be acknowledged, especially when developments in one sector can affect another.

Besides, strong criticisms of the lack of EU competence were also defused by an EU Council Resolution of March 2023, which analysed the draft point by point and concluded that it rests firmly on internal market competence.

5.3 *The scope of EMFA*

The declared scope of the Act extends to establishing common rules for the internal media market, the establishment of the Board for media services, and to preserve the quality of the media services. This is achieved by addressing four areas: media market pluralism, cross-border regulatory cooperation, guarantee of editorial independence (as part of professional freedom) to editors and journalists; and setting standards for audience measurement and state advertising, with the view to prepare the ground for a transparent and fair subsidizing system.

As a key distinction to the AVMS Directive, EMFA applies to both print and audiovisual content. It defines "media service" as a service under the Treaty⁴²⁵ whose principal purpose, or a dissociable section, is to provide programmes or press publications by any means to the general public. A key definitional element is that this activity is pursued with editorial responsibility. The definitions create a circular reference, as media service is one that is carried out under the editorial responsibility of a media service provider; whereas a media service provider is a natural or legal person who has editorial responsibility for the choice of the content of the media service and determines the manner in which it is organised, and who provides a media service as a professional activity.

It appears certain that the definition aimed at distinguishing media service providers from platform providers. However, it became sufficiently wide to touch upon platform providers, in case they have responsibility for the choice of content and in determining the manner in which it is organised. To this day, platforms are still officially treated as intermediaries that neutrally transmit ideas without imposing their own agenda, whereas this may not be the case in reality, and in the future. It will be necessary to

425 Articles 56 and 57 of the Treaty of the European Union.

clarify the legislative intention behind the words "editorial responsibility".⁴²⁶ Is it an obligation determined voluntarily by the provider? Or would the fact of determining the choice of content and the manner in which the content items are organised, create responsibility? This discussion cannot be avoided in the future, as platform providers govern content with their algorithms. According to the EMFA definition, editorial responsibility means the exercise of effective control both over the selection of the programmes or press publications and over their organisation, finishing the sentence with another circular reference: "for the purposes of the provision of a media service".⁴²⁷ Recital (8) acknowledged that platform providers play a "key role in the content organisation", but claims that they do not exercise editorial responsibility over the content to which they provide access – unless they start to exercise "real editorial control" over a section or sections of their services. In that case, a video-sharing platform or a VLDP could qualify as a media service provider, while also remain a platform provider.⁴²⁸ With the transparency obligations imposed by DSA⁴²⁹ the depth of this governance may be clearer. Besides choosing between walking the path of editorial responsibility, or steering clear of content governance, a third option should be created: taking responsibility for the algorithms and recommender systems. The bricks for this "intermediary liability" system have already been laid down by DSA and by EMFA's Article 17 which governs the relationship of platforms and media. However, the exact content of these obligations and their enforcement falls short of being as clear as a legal liability should be. To define the content of this responsibility, standards and goals need to be developed, in which the journalistic community will need to take an active role.

At the same time, the Recital (7) suggests that the definition "media service" excludes user-generated content uploaded to online platforms, unless it constitutes a professional activity normally provided for consideration (be it of financial or of other nature). Thus, influencer activity which is

426 Daniel Holznagel, "Political Advertising and Disinformation: The EU Draft Regulation on Political Advertising Might De-Amplify Political Everyday-User Tweets – and Become a Blueprint for Stronger Online Platform Regulation," *VerfBlog* 2023/3/23, <https://verfassungsblog.de/political-advertising-and-disinformation/> DOI: 10.17176/20230323-185217-0.

427 Article 2 (1) and (9) of EMFA.

428 See also: Joan Barata, "Protecting Media Content on Social Media Platforms: The European Media Freedom Act's Biased Approach," *VerfBlog* 2022/11/25, <https://verfassungsblog.de/emfa-dsa/> DOI: 10.17176/20221125-121603-0.

429 Article 27 DSA.

normally provided for material consideration (even if barter), should be considered media service, and carry the obligations with it.

5.4 Rights and duties

5.4.1 Rights of the audience

The Act starts with principled declarations of rights and duties of the parties in the media landscape: providers and recipients. The original wording of Article 3 declared that recipients of media services in the Union shall have the right to receive a plurality of independent news and current affairs content, for the benefit of the public discourse. The weight of the provision was primarily in regarding European media consumers as an entity which has the collective right to enjoy a diversity of information on public matters – a first legal declaration of the collective right to media freedom as a right of the collective body of a (albeit here undefined) political community.⁴³⁰ This right were not as content neutral as the right to freedom of expression: it is not just any content that should be accessible to persons who exercise this right. For instance, disinformation is, in fact, the opposite of information because it veils information from the receiver and brings her into a less informed state than without. For the right to information and the right to a plural media to be exercised, the accessed information should be broad and adequate.⁴³¹ This is reflected by the provision's requirement of "plurality", and that the content in question should respect editorial freedom. The requirement is narrowed to "news and current affairs". Mentioning the benefit of public discourse as a societal goal of this right is the first European legislative expression of the right to information, although it resonates with Article 10 of the European Convention on Human Rights which sets out the right to "receive [...] information and ideas without interference by public authority and regardless of frontiers", and Article 11 of the Charter, as well as Article 19 of the International Covenant on Civil and Political Rights. Those sources, however, merely oblige states and not directly private actors.

430 Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government*. (Clark, NJ: The Lawbook Exchange, 2004).

431 Thomas I. Emerson, "Legal foundations of the right to know," *Washington University Law Review* 1 (1976).

A Council amendment replaced the subject of the sentence from recipients to Member States, which shall "respect the right of the general public", later "respect the right of recipients of media services". With this amendment a distinct legal entity, a state, can be held accountable. At the same time, the extent of the state obligations have also been limited: states are obliged to respect, but not required to protect, or even to ensure this right. Still, in this respect the EMFA goes into more concrete terms than the Charter, which says: "The freedom and pluralism of the media shall be respected."⁴³² While the interim version which would have granted the right to the general public, would have entitled the community of citizens as a collective in contrast to freedom of expression which is an individual right, the final version focuses again on the individual recipients of the media services.

The amended text provides additional specifications. Recipients will be entitled to "a plurality of editorially independent media content," a specification that underscores the notion that the quality of media as a product is inherently non-neutral. Indeed, solely editorially independent media content holds value for citizens, and their plurality is also a necessary precondition for having a well-functioning internal market.⁴³³ Moreover, the final text also delineates the exact, positive state obligation of ensuring that framework conditions are in place to safeguard that right, to the benefit of free and democratic discourse. With this, the positive state obligation to ensure media freedom and pluralism has become part of secondary European law, after being a common principle fostered by the jurisprudence of the European Court of the Human Rights.

The more detailed text also clarifies that the Act refers not to internal but to external pluralism (which means that the entirety of media services should deliver a diverse news offer). The ubiquitous presence of content on the internet does not make the requirement of external pluralism against broadcasting channels obsolete, on the contrary.⁴³⁴ As opposed to this, internal pluralism would mean that each media service provider alone

432 Article 11. Freedom of expression and information of the Charter.

433 Recital 2, 14 EMFA.

434 Rundfunkbeitragsentscheidung 2018. BVerfG, Urteil des Ersten Senats vom 18. Juli 2018 – 1 BvR 1675/16 –, Rn. 1–157, https://www.bverfg.de/e/rs20180718_1bvr167516.html See also: Dieter von Dörr, Bernd Holznagel, and Arnold Picot, *Legitimation und Auftrag des öffentlich-rechtlichen Fernsehens in Zeiten der Cloud* (Frankfurt am Main, Bern, Bruxelles, New York, Oxford, Warszawa, Wien, 2016).

should do so, which,⁴³⁵ considering the abundance of information services, is neither justified, nor realistic as an expectation. Internal pluralism can merely be expected from public service media providers⁴³⁶ and very large media service providers who have a market dominance.

5.4.2 The rights of media service providers

Similarly ground-breaking and controversial is the declaration of rights of media service providers. First, no restrictions may be applied other than those allowed under Union law. While this notification, (like some others in EMFA), may lack practical relevance at the moment, the Copenhagen dilemma⁴³⁷ has planted cautiousness in the European institutions.

Further, Member States shall respect the effective editorial freedom and independence of media service providers. The prohibited interference includes two large categories. First, it is prohibited to interfere with or to influence editorial policies and decisions, whether directly or indirectly. Second, any activity that can lead to the breach of confidentiality of journalistic sources is prohibited. The latter includes that Member States shall not oblige media service providers or related persons to disclose journalistic sources or confidential communications. The related persons include editorial staff and any person who is in regular or professional relationship with the media service provider or its editorial staff. Furthermore, it is prohibited to detain, sanction, intercept or inspect media service providers and their editorial staff, and any related person. This includes the prohibition of surveillance and search and seizure of them or their premises, whether corporate or private, to get access to their information.⁴³⁸

Finally, and most importantly, it is prohibited to deploy intrusive surveillance software (spyware) on any device, whether material or digital,

435 Beata Klimkiewicz, "Structural media pluralism and ownership revisited: The case of Central and Eastern Europe," *Journal of Media Business Studies* 6, no. 3 (2009): 43–62.

436 BVerfGE 57, 295 Third Broadcasting Decision of the German Constitutional Court, and BVerfGE 73, 118 Fourth Broadcasting Decision of the German Constitutional Court.

437 The Copenhagen Dilemma" means that after accession, the European Institutions run out of tools to enforce the rule of law and other democratic standards, as the rule of law backslide of certain Member States illustrates.

438 Article 4 (3b, c) EMFA.

machine or tool, used by media service providers, their editorial staff or any related persons who might have information related to journalistic sources or confidential communications. This provision was necessary because of the Pegasus and similar spy software that had been applied in several Member States against politicians and journalists.⁴³⁹

However, significant exceptions have watered down the protective prohibition. Member States may exceptionally take the first and second type of prohibited measure, if provided for by national or Union law including the Charter, justified on a case-by case basis by an overriding reason of public interest and proportionate; and subject to prior authorisation by a judicial authority or an independent and impartial decision-making authority. In justified cases of urgency, the authorisation may take place subsequently.⁴⁴⁰ This set of requirements largely suits the standards of lawful secret surveillance, with one exception. It is unclear why prior authorisation by a judicial authority can be replaced by authorisation by any other decision-making authority. Notably, authorities lack the same level of independence as the judicial branch, as they are part of the administrative branch of the executive power.

Although they are required to be "independent and impartial", these traits are inherently subjective, subject to debate, and susceptible to political influence. The current formulation permits media authorities to undertake the authorization process instead of courts. Such a scenario would vest media authorities with disproportionate and inadequate power over media service providers and their editorial personnel. This arrangement, particularly in states where regulatory bodies are susceptible to capture, would effectively render the prohibition ineffective.

Departure from the prohibition of deploying spyware requires additionally, that it is necessary for investigation of a crime under the European Arrest Warrant Framework Decision⁴⁴¹ and punishable in the respective Member State by a custodial sentence for a maximum period of at least

439 MFRR: Mapping Media Freedom: Monitoring Report. January-June 2022. https://ipi.media/wp-content/uploads/2022/09/MFRR-Monitoring-Report_2022.pdf. See also: European Parliament: Investigation of the use of Pegasus and equivalent surveillance spyware. At a Glance. June 2023. [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/747923/EPRS_ATA\(2023\)747923_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/747923/EPRS_ATA(2023)747923_EN.pdf).

440 Article 4 (4d) EMFA.

441 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).

three years, or other specific offences punishable in the Member State by a custodial sentence for at least five years. This type of surveillance may be used only if the first two types are insufficient.

In the course of the legislative procedure, a new exception raised serious concerns ("This Article is without prejudice to the Member States' responsibility for safeguarding national security.")⁴⁴² This insert has been unequivocally criticised by scholars and civil society, among others in an open letter signed by 80 civil society and journalistic organisations, accusing the legislator with eliminating legal safeguards that protect journalists against the deployment of spyware by Member States.⁴⁴³ The final legal text refers to Member States' responsibilities "as laid down in the Treaty on European Union and the Treaty on the Functioning of the European Union" as "respected".⁴⁴⁴ The Recitals refer to the Member State's responsibilities under the Treaty in another context, there mentioning in particular their powers to safeguard essential state functions.⁴⁴⁵ These references likely pertain to Article 4 of the Treaty, which stipulates that the Union shall respect essential State functions, including the safeguarding of national security. Moreover, it underscores that national security remains the sole responsibility of each Member State.

The original text of the Proposal stipulated that Member States should designate an independent authority or body tasked with addressing complaints in this domain. However, the powers were limited to issuing a mere opinion upon the request of the media service provider – which seemed almost ridiculous considering the coercing power of a Regulation and the gravity of the issue at hand.⁴⁴⁶ Furthermore, the already mentioned structural problems which encompass insufficient independence of such a body remain unaddressed in this case, as in other parts of EMFA (see

442 Interim Article 4 (4) EMFA (Council version).

443 ECPMF (2023) Civil society and journalists associations urge the Council to protect journalists against spyware and surveillance in the EMFA. <https://www.ecpmf.eu/civil-society-and-journalists-associations-urge-the-council-to-protect-journalists-against-spyware-and-surveillance-in-the-emfa/> See also: Dick Voorhoof, "European Media Freedom Act and the protection of journalistic sources: still some way to go," *Inform's blog* (2022).

444 Article 4 (9) EMFA.

445 Recital 8 EMFA.

446 See the similar evaluation by Dirk Voorhoof, "Will the EU Media Freedom Act (EMFA) be able to strengthening the protection of journalistic sources," *Communications Law—The Journal of Computer, Media and Telecommunications Law* 1, (2023): 16–22.

below). The final version of EMFA requires Member States to entrust an independent authority or body to provide assistance to persons in relation to their rights to protect confidentiality of journalistic sources, if such authority or body exists. Alternatively, affected persons may seek assistance from self-regulatory bodies.⁴⁴⁷

Voorhoof reminds that according to existing international standards, at least four cumulative conditions need to be fulfilled for the justification of actions that interfere with the protection of journalists' sources; a) the interference is, *ex ante*, ordered by a judge, a court or another independent and impartial body; b) the interference is justified and crucial for the prevention, investigation or prosecution of major crime; c) the interference with journalists' rights is prescribed by law and is proportionate; and d) there are no alternatives for the public authorities to obtain the information sought. We see the conditions addressed in EMFA, but for respect of state sovereignty, significant loopholes were left.

5.5 Safeguards for public service media

Public service providers, as distinct categories of media service providers, possess their own set of rights vis-à-vis Member States. This is another point where the amended version specified the obliged entity: rather than the providers themselves, the Member States are obliged to ensure that public service media providers are editorially and functionally independent and provide in an impartial manner a plurality of information and opinions (Article 5). This shall be in accordance with their remit which is to be defined at national level in line with the Amsterdam Treaty Protocol. This Protocol defined public broadcasting as a sovereign competence of the Member States, but by specifying what is understood by public broadcasting, it established criteria that must be met to qualify as such. These were further elaborated by the Commission Communication on public broadcasting and state aid in 2001 and 2009.⁴⁴⁸ Despite repeated incentives, the Commission has yet to demonstrate its intention to effectively give

447 Article 4 (8) EMFA.

448 Commission Communication public broadcasting in 2001 and 2009.

weight the Communication beyond strictly financial matters.⁴⁴⁹ The detailed technical expectations towards financing public service programmes along with the linkage between public service funding and the parameters outlined in competition law and state aid regulations, may be construed as *de facto* safeguards. Hence, these specifications could potentially provide a policy foundation for mandatory legislation, such as the EMFA. Those requirements seem to be fully in line with the European competences and yet they would be capable to ensure transparent and prudent functioning of public media providers, which would potentially serve as a barricade against state capture.⁴⁵⁰ Consecutive amendments to the original Proposal (which missed reference to this set of rules), gradually incorporated more and more of the principles of the Communication. The final text requires Member States to ensure that funding procedures are based on transparent and objective criteria defined in advance, and to guarantee that public service media providers have adequate, sustainable, predictable and stable financial resources, which correspond to the fulfilment of their remit, and their capacity to develop it. In addition, the resources shall be "such that editorial independence of public service media providers is safeguarded." These, along with other safeguards for the independence, need to be monitored either by independent authorities or bodies, or other mechanisms free from political influence by the government, and the results of the monitoring shall be published.⁴⁵¹ With this, at least the major tenets of the Communication have found their way into EMFA, in particular the necessary correspondence between the funding and the remit, and some accountability has been incorporated.

The other measures for independence related to the appointment and dismissal of the head of management or the members of the management board of the public service media. These rules set very basic formal standards and functional independence will depend on how effectively the rules will be implemented.⁴⁵² As of the oversight by the independent authority or body, the usual objection applies: in case of structural deficit of media

449 IPI (2021) European Commission must urgently address media market distortion in Hungary. Feb. 26, 2021. <https://ipi.media/european-commission-must-urgently-address-media-market-distortion-in-hungary/>.

450 Judit Bayer, J. „Public Service Television in a Changing Technological and Legal Environment,” *Communication, Politics & Culture* 43, no. 2 (2010): 6–22.

451 Article 5 (4) EMFA.

452 As pointed out by: Gábor Polyák, “Too Much for Others, too Little for Us: The Draft European Media Freedom Act from a Hungarian Perspective,” *VerfBlog*

freedom and independence, this would not create an external control (see more on the problem of independence below). For example, in Hungary, the head of the Fund (MTVA) which manages the PSM provider is appointed and subordinated by the Head of the Media Council (who is also head of the Authority), and the Fund itself is managed by the Media Council.⁴⁵³ The judicial oversight that has been inserted at the latest stage of the legislative procedure holds greater promise as an effective safeguard.

5.6 Transparency of media service providers

Media service providers also get their share of obligations, at least those that provide news and current affairs content.⁴⁵⁴ Those media service providers that provide news and current affairs content shall take appropriate measures to guarantee the independence of editorial decisions within the established editorial line of the media service provider.⁴⁵⁵ During the legislative phase, intense discussions surrounded the question of how deeply media owners can influence the content of their media outlet. On the one hand, such influence can be viewed as undue pressure from the economic power that maintains the press, assuming that the owner has financial interests in maximising revenues and generating profits. On the other hand, owners have a reasonable expectation of defining the quality and the content guidelines of the media outlet that they own. Especially so in the case of smaller media outlets with flatter management structures. Even if an owner has political interests – for example being a political organisation – it has a reasonable expectation to represent its own worldview. In some Member States this is even a constitutional right of the media owners.⁴⁵⁶ This, of course, should not extend to false representation of facts, biased reporting or silencing criticism. Journalistic, ethical, and professional standards demand that reporting is free from representing or protecting corporate

2023/3/15, <https://verfassungsblog.de/too-much-for-others-too-little-for-us/>
DOI: 10.17176/20230315-185204-0.

453 § 136 (6), (11) Mttv. Hungarian Media and Mass Communication Law.

454 Article 6 EMFA.

455 Article 6 (2) EMFA.

456 "Tendenzschutz", Michael Kloepfer, *Freedom within the press «and» Tendency protection «under Art. 10 of the European Convention on Human Rights* (Berlin: Duncker und Humblot, 2021): 1–104. See also: Martin Plum, *Presstendenzschutz in Europa. AfP.* (2011): 227.

interests, but this has not been laid down in law as yet. Those standards are particularly important for investigative journalism, where revelations would often touch upon high-profile economic or political matters that in one way or the other may be connected to the ownership of the journal. This correlation is recognised and addressed by requiring disclosure of any actual or potential conflict of interest that may affect the provision of their news and current affairs content.⁴⁵⁷ This disclosure is beyond the basic publication obligation which requires media service providers to publish the names of their owners (direct or indirect) with influential share.⁴⁵⁸ (See more on this below.) Thus, ownership by political figures is further allowed, but transparency is required about both ownership and other type of conflict of interest. Exactly how and when such disclosure should take place, is likely to need further interpretation and the development an exchange of professional best practices.

5.6.1 How useful is transparency?

Disclosures may become necessary when a sudden change happens in the circumstances. For example, if an owner suddenly gets involved in political or commercial matters, or such matters become suddenly newsworthy whereas they were not earlier, a conflict of interest may arise. For example, being involved in a regional food company that also caters for schools may not count as a conflict of interest until a poisoning incident occurs in regional schools.

Nevertheless, the obligation on editorial independence and disclosure of conflict of interest only applies to media providers offering news and current affairs content, without offering sufficient rationale for this limitation. Tabloids, history channels, and various other media outlets possess similar potential to exert a significant influence on public discourse. They also hold a crucial role in promoting media diversity, ensuring information accessibility, and shaping the political atmosphere.⁴⁵⁹

457 Article 6 (2)(b) EMFA.

458 Article 6 (1) EMFA.

459 Lucie Rohrbacherova and Eva Simon, *Transparency of Media Ownership within the EMFA Proposal* https://dq4n3btxm8c9.cloudfront.net/files/3rgtsq/Media_ownership_within_the_EMFA.pdf.

Journalistic associations warned that the requirement to disclose conflicts of interest risks undermining existing mechanisms for editorial control and liability, without providing a more effective solution. They perceive that an undesirable consequence could be the transfer of liability from publishers onto journalists, a scenario that could foster self-censorship. The organisation Reporters Without Borders (RSF) recommended establishing concrete mechanisms to secure the adequacy of the mechanisms rather than erasing the provision.⁴⁶⁰ They recommended that EMFA provides for the mandatory adoption of internal codes for all media service providers, to be jointly developed by publishers, editors and newsrooms, with the highest standards of journalistic ethics, and defining the rights of an editorial teams in appointment of the editor in chief. The Recommendation that is joined to the Act provides a list of self-regulatory safeguards to protect editorial freedom.⁴⁶¹

As indicated in Recital 21, owners will retain their liberty, also under the EMFA, to set strategic objectives. Balancing the legitimate rights and concerns of private media owners could also involve granting them the right to establish the political editorial direction, as long as this role remains distinct from daily editorial decisions.⁴⁶² The question might arise whether an owner has the right to completely alter the editorial line? For example, from being Christian-conservative and supporting political party "A", turn into left-liberal, and support political party "Z"? While this may be a surprising turn, it is not without precedent.⁴⁶³ A "reconciling" of the journalistic editorial freedom and the owner's right to define the product would be

460 RSF (Reporters Without Borders (2023) Increase ambition and consistency of the European Media Freedom Act (EMFA). <https://rsf.org/sites/default/files/medias/file/2023/05/RSF%20-%20position%20paper%20EMFA%20-%20May%202023.pdf>.

461 Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector.

462 As approved also by IPI (International Press Institute) (2023) IPI position on the European Media Freedom Act. <https://ipi.media/ipi-position-on-the-european-media-freedom-act/>.

463 HírTV, a Hungarian news channel, was under government influence until 2016, when its owner changed the editorial line. Later it was taken over by a new owner, who changed the editorial line back to pro-government. Budapest Beacon (2015) Orbán government influenced HírTV content prior to fall-out with Simicska. Toth, Borbala (2016) A shift in the audience of the Simicska media empire, Mediaobservatory.net, <https://mediaobservatory.net/radar/shift-audience-simicska-media-empire-0>. <https://budapestbeacon.com/orban-government-influenced-hirtv-content-prior-to-fall-out-with-simicska/> Atlatzo (2018) Pro-Orban forces take over news

exceptionally difficult in such a situation. With due regard to the interests of the recipients of the media services, as already protected in Article 3 of EMFA, it can be said that as a minimum, the media service provider should be transparent about its decision and duly inform the recipients about the turn. After all, freedom to pursue business would also allow the owner to wind up or sell its company and start a new one. Therefore, a change in the editorial policy should be within the privilege of the owner as long as it is transparently announced, and the consecutive "daily" decisions of the editor are respected.

Of particular concern are entangled financial and political interests, such as when large industries and political parties enjoy the mutual benefits of supporting each other. This is the logic behind the EMFA requirement that obliges media service providers providing news and current affairs content to publish the names of their owners. The disclosure should encompass the names of beneficial owners and direct or indirect ownership by state or public authority or public entity. The circle of beneficial owners is defined under the Money Laundering directive⁴⁶⁴ including among others natural persons who control the entity through any means, even where shareholding ratios are held by multiple entities which are controlled by the same natural person. The original text envisaged the creation of a media ownership database as planned by the Commission in its Democracy Action Plan. However, the path is not without complications, as discussed next.

5.6.2 The conundrum of the ownership database

The 2021 annual report of the Centre for Media Pluralism and Media Freedom⁴⁶⁵ classified the transparency of the media ownership structure as medium risk, with a slight improvement attributed to the implementation of the 5th Anti-Money Laundering Directive into national law, which required disclosure of beneficial ownership data. As described above, while it may

channel, cancel a dozen shows, <https://english.atlatszo.hu/2018/08/05/pro-orban-forces-take-over-news-channel-cancel-a-dozen-shows/>.

464 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.

465 "CMPF: Monitoring Media Pluralism in the Digital Era," <https://cadmus.eui.eu/bitstream/handle/1814/74712/MPM2022-EN-N.pdf?sequence=1&isAllowed=y>.

constitute a disproportionate interference into entrepreneurial freedom to prevent enterprises or persons with political affiliation or with a dominant economic influence from owning media service providers, but at least the public is entitled to know if that is the case. The ownership ties can in some cases have a dominant influence on the representation (or withholding) of facts, and of opinions.

This is in particular so in those media systems which, according to the typology of Daniel Hallin and Paolo Mancini, fall into the democratic-corporatist and the polarized-pluralist model, and even more so in the Eastern European models⁴⁶⁶ – in fact, in any other model than the liberal, which, according to the original authors, is typical in Britain, United States, Canada and Ireland, the latter being the only EU Member State.⁴⁶⁷

This is the reason why a transparent, continuously updated EU database, which would also reveal the political and ownership dependency regimes, was deemed to greatly support the media in fulfilling its democratic role. Therefore, as part of the European Democracy Action Plan 2020–2024, the European Commission planned to establish greater transparency in the ownership and control of the news media, and later resolved to fund the Euromedia Ownership Monitor (EurOMo) project. The aim of EurOMo is to make ownership and control of the news media more transparent.⁴⁶⁸ In a first round, 15 EU Member States were included, registering the personal data of media owners and supervisory board members.⁴⁶⁹

In this setting, a decision of the Court of Justice came as a blow in November 2022. The case was initiated in Luxembourg by WM, a CEO of a private aircraft manufacturing company, himself involved in the discovery of the Pandora documents. WM argued that access to his personal data by the public under the 5th Anti-Money Laundering Directive "would expose him and his family to a substantial, real, and disproportionate risk, and to

466 Laia Castro Herrero, „Rethinking Hallin and Mancini beyond the West: An analysis of media systems in Central and Eastern Europe,” *International Journal of Communication* 11, (2017): 27. See also: Alina Mungiu-Pipidi, “Freedom without impartiality: The vicious circle of media capture,” in *Media transformations in the post-communist world: Eastern Europe’s tortured path to change*, ed. Peter Gross and Jakob Jakubowicz (Lanham, MD: Rowan and Littlefield-Lexington Books, 2013): 33–47.

467 Daniel C. Hallin and Paolo Mancini, “Ten years after *Comparing Media Systems*: What have we learned?,” *Political Communication* 34, 2 (2017): 155–171.

468 <https://media-ownership.eu/>.

469 “Countries in focus”, 2022, <https://media-ownership.eu>.

the risk of fraud, kidnapping, extortion, coercion, harassment, violence, or intimidation."⁴⁷⁰ Upon appeal, he added that "as a director and beneficial owner of a business, he is often required to travel to countries with unstable political regimes and where there are significant numbers of public offences, which may result in a significant risk of kidnapping, imprisonment, violence or even death."⁴⁷¹

In a preliminary ruling that assessed the concepts of "exceptional circumstances" and "risk" in the Directive, the court weighed whether access to the records by any member of the public would violate Articles 7 (right to privacy) and 8 (data protection) of the Charter of Human Rights of the European Union and the GDPR rules. The case of WM got consolidated with the case of Sovim SA (C-601/20), and the Court concluded that public access to beneficial ownership information violates Articles 7 and 8 of the Charter, the fundamental rights to privacy and personal data, and repealed the provision of the EU's 5th Anti-Money Laundering Directive that required Member States to ensure that any member of the public has access to information on the beneficial owners of companies and other legal entities registered in their territory.⁴⁷²

Although the ruling represents a clear regression in terms of transparency, it does not entirely obstruct access for the press and non-governmental organizations engaged in combating money laundering and terrorist financing; the same applies for persons seeking to ascertain the identity of beneficial owners for transactional purposes; as well as for financial institutions and public authorities involved in combatting money laundering and terrorist financing offences.⁴⁷³ However, the judgment excluded not only the general public from accessing information regarding the actual ownership of individual companies, but also restricts access for academics, policy makers, and even cross-border law enforcement authorities not directly involved with matters of money laundering and terrorist financing.

Within twenty-four hours of the judgment, Austria, Luxembourg and the Netherlands had already blocked access to their records, and also the

470 Judgment C-37/20 at 20.

471 Judgment C-37/20 at 21.

472 Judgment of the Court (Grand Chamber) Joined Cases C-37/20, C-601/20, WM and Sovim SA v. Luxembourg Business Registers, 22 November 2022, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=9E2F2F8AF4B0C04A464912FB4D7B1671?text=&docid=268059&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=697182>.

473 C-37/20 Luxembourg Business Registers, at 70.

database maintainer of the EurOMo project, fearing possible legal consequences, made a significant part of the personal data inaccessible.⁴⁷⁴

However, the CJEU judgment did not invalidate the demand for a media ownership database. The ruling held that the transparency must be reconciled with the fundamental rights affected by the measure, and that a balancing exercise must be carried out between the public interest objective on the one hand and the individual rights at stake on the other, in order to ensure that the harm caused by this measure is not disproportionate to the objectives pursued.

Thus, it remains feasible to devise such a database in a manner that adheres to the CJEU verdict. The final EMFA text requires Member States to entrust national regulatory bodies or other competent authorities or bodies to develop national media ownership databases containing the basic information on ownership and state advertising.⁴⁷⁵ Thus, albeit not at EU level, but the ownership database has been realised. However, access to such database is not regulated by EMFA. In the worst case, they should be accessible under the general access to public information rules.

Further measures are set out in the Recommendation accompanying the legislative proposal, to increase transparency on media ownership. The scope of the data that is to be published is significantly wider than in the Regulation, including whether and to what extent they are directly or effectively owned by government, public institutions, state-owned enterprises or other public bodies; cross-ownership information (the interests, links or activities of their owners in other media or non-media enterprises), and any other interests that could influence strategic decision-making or editorial direction; finally, any change in their ownership or control.⁴⁷⁶

The Council of Europe has already recommended States Parties to promote transparency in media ownership, to ensure the public availability and accessibility of accurate, up-to-date data on the direct and effective owners of the media, as well as on the owners who influence strategic

474 Éva Simon, “A média tulajdonosi szerkezetének átláthatósága az európai tömegtájékoztatás szabadságáról szóló jogszabálytervezetben: szabályok és hiányosságok,” *Médiakutató*, 24, no. 3 (2023): 35–42. DOI: 10.55395/MK.2023.3.4.

475 Article 6 (1) (1a) EMFA.

476 Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector.

decision-making or set editorial direction.⁴⁷⁷ Such a database would not only be a valuable tool for journalists, researchers and policy makers to ensure that the media are transparent and accountable, but would also be key to disseminate information about potential political interference. Furthermore, it would enable media authorities and other regulatory bodies to carry out informed regulatory and decision-making processes, to prevent excessive media ownership concentrations that unduly limit democratic discourse. Thus, it could lead to an overall increase in media freedom and independence.⁴⁷⁸ It is regrettable that the proposed establishment of an EU-wide harmonized database has not been realised, particularly given the comprehensive exploration of both its rationale and national implementations in a 2021 study.⁴⁷⁹

5.7 The Board

One of the major novelties brought by EMFA is the European Board for Media Services.⁴⁸⁰ This will replace ERGA, the European Regulators' Group for Audiovisual Media Services, that was created by the AVMS Directive. Its scope extends beyond audiovisual media also to issues regulated by EMFA in regard to the printed press and online media, as well as the relationship with online platforms. Its constitution has remained almost identical: it consists of the representatives of NRAs, with each member having one vote, plus one Commission representative with consultation rights (without a vote), and "consent" right for structured cooperation. The Board decides with two-thirds majority of its members with voting rights.⁴⁸¹ The Board's main task is to promote cooperation and exchange of information,

477 Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, point 4.1.

478 Simon, *ibid.*

479 18 of the (then) 28 Member States had regulation on ownership transparency, see: Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD) Final report. Media ownership and transparency in the EU pp. 128–231. See also: Heritiana Ranaivoson and Krisztina Rozgonyi, "The Audiovisual Media Services Directive and the effectiveness of media transparency requirements," in *European Audiovisual Policy in Transition*, ed. Heritiana Ranaivoson, Sally Broughton Micova and Tim Rats (London, UK: Routledge, 2023), 135–153.

480 Section 2, Articles 8–13 EMFA.

481 Article 10 (7) EMFA.

experiences and best practices between NRAs, and to serve as a forum for discussion and opinion-formation in several issues.

EMFA provides procedural rules for a "structured cooperation" (Article 14). These set out how NRAs are entitled to request cooperation or mutual assistance from each other, even an accelerated procedure in case of serious and grave risk or risk of prejudice to the functioning of the internal market for media services, or to public security and defence. The requested authority may refuse the request only if it is not competent, or if it would infringe EMFA or the AVMS Directive. If authorities disagree, any of them can refer the case to the Board, which may mediate and seek an amicable solution, or issue an opinion and recommended actions in agreement with the Commission.⁴⁸²

The Board also fosters the exchange of best practices related to audience measurement systems.⁴⁸³ It coordinates national measures related to third state media providers which present a serious risk to public security and defence, and mediates in cases of disagreements between NRAs. It is further responsible for organising a structured dialogue between very large online platforms, media service providers and civil society.⁴⁸⁴ It shall support cooperation between media service providers, standardisation bodies or any other relevant stakeholders in order to facilitate the development of technical standards related to digital signals or the design of devices, and so forth.

Even though the Board lacks "hard" powers, and its role is limited to consulting, opining, and advising, it is expected to stimulate supranational discussions on independence of the media, and matters related to the media market, including financing and merger questions.

5.7.1 NRA Independence

The constituents of the Board, independent national authorities are the cornerstone of EMFA's regulatory model. These are entrusted with ensuring the application of Chapter III of EMFA, which includes concentration issues, structured dialogues, enforcement regarding video-sharing platforms,

482 Mediation and amicable solution are foreseen only for requests for enforcement of obligations by video-sharing platforms, Article 13, request for opinion and recommended actions in both Article 14 and Article 15.

483 Article 13 (b), (m) EMFA.

484 Article 19 EMFA.

state advertising and some more. Independent authorities would function as the interfaces between the EU policy and the national sovereignty which is to be preserved in media matters.

EMFA requires that adequate financial, human and technical resources should be ensured for NRAs to carry out these tasks. They need to have appropriate powers of investigation, including the power to request information. However, if an authority is captured, and serves the particular interests of a ruling government, as in illiberal systems, then these powers and resources serve that capturing power, and further aggravate the rule of law situation within the Member States, and on the affected media market. Their switchboard function threatens with the unintended result that instead of implementing the European principle of media freedom and pluralism at the national level, they will either block the process⁴⁸⁵ or – even worse – one bad apple can put the whole barrel in danger.⁴⁸⁶

The regulation refers to and builds upon Article 30 of the AVMS Directive which had established the requirement of independence of NRAs in its 2018 amendment. The fact that not all Member States have complied with this requirement appears to be ignored. In particular, the Media Pluralism Monitor has found in each year of its investigation that the Hungarian Media Authority, although it formally fulfils most criteria of Article 30, is not *de facto* independent.⁴⁸⁷

Independence of regulatory authorities in other sectors have been subject to scrutiny for several decades.⁴⁸⁸ In the audiovisual media sector, the aca-

485 Judit Bayer and Kati Cseres, “Without Enforcement, the EMFA is Dead Letter: A Proposal to Improve the Enforcement of EMFA,” *VerfBlog* 2023/6/13, <https://verfassungsblog.de/without-enforcement-the-emfa-is-dead-letter> DOI: 10.17176/20230613-231137-0.

486 Von Wolfgang Kreissig, „Die EU zerstört die staatsferne Medienaufsicht“, *Franfurter Allgemeine Zeitung*, *faz.net* 28. February 2023. <https://www.faz.net/aktuell/feuilleton/medien/medienpolitik-die-eu-zerstoert-die-staatsferne-medienaufsicht-18710065.html>.

487 Gábor Polyák and Krisztina Rozgonyi, “Monitoring media regulators’ independence—Evidence-based indicators, Hungarian experience,” *International Journal of Digital Television*, 6, no. 3 (2015): 257–273. MPM 2016: 5–6, 2017: 7, 2018–19: 11, 2020: 11–12, 2021, 2022: 17. See also: Adriana Mutu, (2018): “The regulatory independence of audiovisual media regulators: A cross-national comparative analysis,” *European Journal of Communication* 33, no. 6 (2018): 619–638, DOI: 10-1177/0267323118790153.

488 Imelda Maher, (2013): “The institutional structure of competition law,” in *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law*, ed. Michal Dowdle, Jonathan Gillespie, and Imelda Maher

demic debate on the links between independence and institutional structures has only recently become intense.⁴⁸⁹ Thus, relatively few studies have focused on a comparative analysis of the independence of media regulatory authorities, although a systematic comparative study has already been published in 2011, which developed a scientific methodology to assess the formal and actual independence of regulatory authorities ("INDIREG").⁴⁹⁰

Despite its user-friendly methodology, which facilitates both self-assessment and independent evaluations of regulatory authorities,⁴⁹¹ the tool has only been applied in a few empirical studies so far. Among those few are the Center for Media and Communications Studies' (CMCS) study on the reform of the Hungarian media law in 2012,⁴⁹² the ERGA report on the independence of national regulators⁴⁹³ and the European Council evaluation of the Albanian, Serbian and Ukrainian regulators.⁴⁹⁴

(Cambridge University Press, 2013), 61. See also: OECD "Independence of competition authorities," Background Paper by the Secretariat DAF/COMP/GF(2016)5.

489 Karol Jakubowicz, "Post-communist political systems and media freedom and independence," in: *Central and Eastern European Media in Comparative Perspective: Politics, Economy and Culture*, ed. John Downey and Sabina Mihelj (Aldershot: Ashgate Ltd., 2012): 15–40. Anna Herold, "From independence of audiovisual media regulators to Europeanization of audiovisual media regulation: Reaching for the apples of the Hesperides?" in: *Private Television in Western Europe*, ed. Karen Donders, Caroline Pauwels & Jan Loisen (Basingstoke: Palgrave Macmillan, 2013), 260–272. Adriana Mutu and Joan Botella Corral, "Broadcasting regulation in Europe. A theoretical design for comparative research," *Tripos*, 1, no. 32 (2013): 13–28.

490 Hans Bredow Institute, *Indicators for Independence and Efficient Functioning of Audiovisual Media Services Regulatory Bodies for the Purpose of Enforcing the Rules in the AVMS Directive* (INDIREG). (Brussels: European Commission, 2011).

491 Kristina Irion et al., "The independence of media regulatory authorities" in Europe. Iris Special (2019) <https://rm.coe.int/the-independence-of-media-regulatory-authorities-in-europe/168097e504>.

492 Center for Media and Communications Studies (CMCS) (2012): *Hungarian Media Laws in Europe: An Assessment of the Consistency of Hungary's Media Laws with European Practices and Norms*. <https://cmds.ceu.edu/article/2014-03-09/hungarian-media-laws-europe-assessment>. See also: Wolfgang Schulz, Peggy Valcke, and Kristina Irion, *The Independence of the Media and its Regulatory Agencies. Shedding New Light on Formal and Actual Independence against the National Context*. (Bristol & Chicago, IL: Intellect, 2013).

493 European Regulators Group for Audiovisual Media Services (2015): *ERGA Report on the independence of NRAs*. ERGA (2015)11, 15 December, http://erga-online.eu/wp-content/uploads/2016/10/report_indep_nra_2015.pdf.

494 Kristina Irion and Roxana Radu, "Delegation to independent regulatory authorities in the media sector: A paradigm shift through the lens of regulatory theory," in *The Independence of the Media and its Regulatory Agencies. Shedding New Light on Formal and Actual Independence against the National Context*, ed. Wolfgang Schulz,

The INDIREG study also contributed to the introduction of the requirements for an independent regulator in the 2018 amendment of the AVMS Directive. According to the Council of Europe, each requirement outlined in Article 30 can be correlated with one of the INDIREG criteria. Their list shows that Article 30 has incorporated most of the formal criteria, with only functional independence and accountability among the *de facto* independence criteria. No new empirical studies have been published under this set of criteria since the entry into force of Article 30.

The detailed analyses, which examined the authorities according to formal and practical (*de iure* and *de facto*) criteria, revealed an interesting paradox. Many of the old democracies scored poorly on formal indicators, yet scored highly on practical aspects. In the new democracies, the opposite was true: with a high level of formal regulation, the actual functioning of the authorities showed signs of lack of independence. While the sub-scores were rather inconsistent, they essentially identified two groups of countries: on the one hand, countries with poor indicators but modern laws, and on the other hand, countries with older laws and a high degree of independence.⁴⁹⁵ This provides empirical support for evaluations and theories that see the functioning of the media as determined by political culture.⁴⁹⁶ These findings underscore the importance of distinguishing between "regulation" and "independence" as separate matters that may not necessarily correlate. Moreover, they suggest that solely relying on the enforcement of the AVMS Directive may not inevitably lead to enhanced regulatory independence, particularly not before the interpretation of the rules is completed with the *de facto* criteria of independence. A further polishing of the INDIREG criteria, in the light of the implementation of Article 30

Peggy Valcke and Kristina Irion (Bristol & Chicago, IL: Intellect, 2013), 15–45.; Kristina Irion et al. (2014): *The Independence and Functioning of the Audiovisual Media Authority in Albania*, <http://www.indireg.eu/wp-content/uploads/AMA/Indireg-AMA-Report-Nov11.pdf>; Irion et al., "The independence of media," 14., 32.

495 Adriana Mutu, "The regulatory independence of audiovisual media regulators: A cross-national comparative analysis," *European Journal of Communication*, 33, no. 6 (2018): 619–638, DOI:10.1177/0267323118790153.

496 Daniel C Hallin and Paolo Mancini, *Comparing Media Systems beyond the Western World* (Cambridge: Cambridge University Press, 2011). See also: Péter Bajomi-Lázár and Áron Monori, "A Medgyessy-Gyurcsány-Kormány Médiapolitikája II.," *Élet és Irodalom* 2006. január 20.

AVMS Directive, would serve this goal.⁴⁹⁷ The resulting monitoring methodology could function as a common benchmark across EU countries and beyond. The methodology might find application within the framework of the MPM, or by the Fundamental Rights Agency (FRA) as indicated by Polyák,⁴⁹⁸ or possibly within the context of the rule of law monitoring.⁴⁹⁹

But does the monitoring of independence alone really offer benefits? Can a violation of Article 30 trigger an infringement proceeding? How can a Member State prove that it has restored lawful implementation when such transgressions pertain not to formal infringements but to substantive (*de facto*) deviation, while the formal criteria are upheld? Recalling that independence is not in itself an end, but a means of establishing and preserving media freedom and pluralism,⁵⁰⁰ the monitoring of *de facto* independence only makes sense in relation to specific cases.⁵⁰¹

Given these considerations, replicating Article 30 of the AVMS Directive, whether through a mere reference in the EMFA or by directly copying it, appears to provide limited value. Instead, enhancing Article 30 of the AVMS Directive with provisions addressing *de facto* independence criteria would have been more beneficial. Regardless, the issue of National Regulatory Authority (NRA) independence would be better addressed within the scope of the EMFA, rather than the AVMS Directive, considering the respective scopes of both regulations and the powers vested in NRAs. These tend to extend beyond audiovisual media, and embrace more fields of the media or even platforms, depending on the future appointment of Digital Services Coordinators. In fact, Article 30 has already been criticised as being alien to the logic of the AVMS Directive, which discusses merely specific problem areas, and only of audiovisual services, whereas the requirement of independence extends to all activities of NRAs, including merger control.⁵⁰²

497 Eugénie Coche and Kristina Irion, *How independent are you really? Updating the INDIREG methodology for future assessments of media regulators' independence*. Workshop Report. (Amsterdam: University of Amsterdam, 2018).

498 Gábor Polyák, "Monitoring the independence of the media regulatory body as an effective enforcement mechanism for the implementation of the AVMS," *Journal of Digital Media & Policy*, online first 4 August 2022., https://doi.org/10.1386/jdmp_00106_1.

499 Bárd and Bayer, *A comparative analysis*: 185.

500 Irion et al. 2019.

501 Polyák, "Monitoring the independence".

502 Polyák, "Monitoring the Independence".

Just as ERGA was extracted from the AVMS Directive and subsequently elevated to a higher level by evolving into a distinct entity under EMFA, the issue of independence could have similarly been extracted from the AVMS Directive and more comprehensively elaborated within EMFA. One element is already present in EMFA which plants the root for *de facto* independence criteria. Regulatory or administrative measures taken by NRAs that are liable to affect media pluralism or editorial independence of media service providers in the internal market shall be duly justified and proportionate, reasoned, transparent, objective and non-discriminatory.⁵⁰³ An amendment by the LIBE Committee proposed that such measures "shall not disproportionately disrupt the operation of media service providers and shall follow the principle of non-regression on EU values in Member States with respect to media freedom and independence".⁵⁰⁴ Through reference to the principle of non-regression, the Copenhagen-dilemma and the non-enforceability of EU values would have been addressed,⁵⁰⁵ however, this amendment did not become part of the final text.

As regards enforcement, currently we cannot recognise a clear difference between the AVMS Directive and EMFA. Both can potentially give rise to infringement procedures, and in absence of enforcement, none of them would make any difference. Mutual consultative mechanisms between NRAs, the Board and the Commission, as outlined in EMFA, might push the development towards a smooth approximation of media law standards.

5.7.2 The Board and the Commission

The NRAs, the Board and the Commission will have a meticulously elaborated relationship. The Board, like ERGA, is envisaged as a peer group of NRA representatives, endowed with soft powers confined to providing opinions, recommendations, and engaging in consultations. It is foreseen as

503 Article 21 EMFA. Effective accountability mechanisms to assess the performance of NRAs, rather than their legal basis, as well as the introduction of enforceable normative criteria have also been recommended by: Gábor Polyák and Krisztina Rozgonyi, "Monitoring media regulators' independence—Evidence-based indicators, Hungarian experience," *International Journal of Digital Television* 6, no. 3 (2015): 257–273.

504 Amendment 199 of LIBE opinion, proposed insertion Article 20 (1) EMFA.

505 Mathieu Leloup, Dimitry Kochenov and Aleksej, *Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?* All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru. 2021.

a forum for cooperation, and its effectiveness is expected to be contingent upon the actions and initiatives undertaken by its members.

The Commission's representative participates in the deliberations of the Board without voting rights. The Commission has consultation rights in adopting the Board's rules of procedure, and provides the secretariat to the Board. The Board's independence has been a matter of concern during the legislative phase and is reinforced through several factors. It is emphasised also by an explicit statement,⁵⁰⁶ by clarifying that the representative participates merely in deliberations not in decisions,⁵⁰⁷ and by stipulating that the secretariat shall act on the sole instructions of the Board.⁵⁰⁸

The Board may invite experts and permanent observers to attend its meetings. For the former, the Commission's agreement is necessary. Besides, if the Board deals with matters beyond the audiovisual media sector, it shall consult representatives from the relevant media sectors.⁵⁰⁹ This is necessary because the Board consists of representatives of media authorities that are likely to have expertise and legitimacy (as an authority) only in the audiovisual media field.

The tasks of the Board are diverse. Similarly to its predecessor, the ERGA, it provides technical expertise to the Commission in ensuring the consistent application of EMFA and of the Audiovisual Media Directive. It serves as a forum for the national regulatory authorities for cooperation, exchange of information and best practices. For some of its opinions, it needs to consult the Commission, such as to request cooperation between national regulatory authorities in case they disagree, then request for enforcement measures of its recommended actions, and in relation to services originating from outside the Union.

In some other issues, it is entitled to opine independently. Such is the case if an NRA's individual measure that applies to a media service provider is likely to significantly and adversely affect the operation of the media service providers in the internal market. The Board may issue an opinion on its own initiative, and also media service providers may initiate with a duly justified request that the Board gives an opinion.⁵¹⁰ The Board will also

506 Article 9 EMFA: "The Board shall act in full independence when performing its tasks or exercising its powers."

507 Article 10 (5) EMFA.

508 Article 11 (2) EMFA.

509 Article 12 EMFA.

510 Amendment 201 of the LIBE Opinion, proposed insertion to Article 21 (4) EMFA.

need to give an opinion upon request of the Commission. This represents a clear informal pressure on national measures; however, no other intervention is foreseen. The publicity of the opinions is expected to generate a public discourse on the debated measure and enhance transparency at the international level.⁵¹¹ Still, as decisions are taken with two-thirds majority of the Board members, it seems likely that many politically sensitive measures will escape the scrutiny of the Board. A crucial question would be whether representatives from the affected state retain the right of exercising their voting rights. It appears inherently logical that they should be precluded from voting on measures directly pertaining to their own measures.

Further, the Board will draw up opinions on draft assessments or draft opinions of national regulatory authorities, where a media market concentration would affect the functioning of the internal market for media services. In this case, the NRA should consult the Board before taking any decision or opinion, and take utmost account of the Board's opinion. It is supposed to give a reasoned justification if it departed from the opinion.⁵¹² The Board may also issue an opinion where the concentration is likely to affect the internal market of media services, but the NRA is not planning on any assessments or opinions. The Board may draw up its own opinion *ex officio* or upon request of the Commission. The Commission retains the option to issue its own opinion in both scenarios, and all opinions should always be made public.⁵¹³

Furthermore, the Board can coordinate measures by the NRAs related to service from third states which present a risk of prejudice to public security, and organise a structured dialogue between VLOPs, media service providers and civil society (see more on both questions below)

5.8 EMFA's approach to the "Russia Today" problem

One of the coordinative functions of the Board relates to media services that originate, or are provided from outside the European Union. The need for such a provision has emerged during the intense debates around the

511 Article Article 13 (1)(f) and 21 (4) EMFA.

512 Article 22 (4–6) EMFA.

513 Article 23 EMFA.

appropriate action in regard of the RT channel.⁵¹⁴ What has been justified by the Commission as fight against propaganda and justification,⁵¹⁵ was laid on the legal bases of interrupting international relationships with third countries.⁵¹⁶ The ban was put through by an amendment to a Regulation that has banned trade with "dual use" products, that are applicable in both civil and military operations. Thus, the media outlet was indirectly defined as a weapon. Disinformation campaigns have been used by Russia as hybrid war instruments since 2014, the Crimean war.⁵¹⁷ They were defined by the Russian Defence Ministry as part of the "information war strategy",⁵¹⁸ "to destabilise a society and a state through massive psychological conditioning of the population, and also to pressure a state to make decisions that are in the interest of the opponent".⁵¹⁹

5.8.1 The background of the ban

Both Russia Today and Sputnik were integral components of such coordinated information manipulation efforts, and the European External Action Service's East StratCom Task Force's documented this with ample evidence.⁵²⁰

Several critical voices questioned whether the ban was compatible with the principles of protecting freedom of expression under international and

514 Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

515 EC Press Release (2022) Ukraine: Sanctions on Kremlin-backed outlets Russia Today and Sputnik. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1490.

516 Article 215 TFEU.

517 Judit Bayer et al., (2021) Disinformation and propaganda: impact on the functioning of the rule of law and democratic processes in the EU and its Member States – 2021 update. A study requested by the European Parliament's Special Committee on Foreign Interference in all Democratic Processes in the European Union, including Disinformation (INGE) and.

518 The Digital Hydra: <https://www.stratcomcoe.org/digital-hydra-security-implication-s-false-information-online>, at p. 23.

519 Martin Russell, "Russia's information war: Propaganda or counter-propaganda?," *EPRS European Parliamentary Research Service. Members' Research Service PE 589.810*. (2016): 2. [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589810/EPRS_BRI\(2016\)589810_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/589810/EPRS_BRI(2016)589810_EN.pdf).

520 <https://euvdisinfo.eu>.

European human rights law.⁵²¹ Most commentators raised the point that disinformation alone is not a sufficient ground to pass such a restrictive regulation. Whether a propaganda for war at times of an aggressive war provides this ground, was rarely subject to the scrutiny.⁵²²

A state of war is one circumstance in which the Convention (ECHR) permits a reduction in the level of protection, subject to certain exceptions.⁵²³ However, the EU itself, under international law, was not engaged in a state of war, even if several Member States or the EU as a whole, had reason to fear from the threat of war. Moreover, the EU as such is not a party to the Convention. Member States, such as Ukraine have the right to derogate, but are obligated to notify the Secretary General of the Council of Europe and provide justification.⁵²⁴ Soon after the commencing of the war, Russia was excluded from the Council of Europe, but this affected neither Russia's obligations, nor the EU's or its Member States' obligations to uphold

521 D Voorhoof, "EU silences Russian state media: a step in the wrong direction," (*Inform's*, 8 May 2022) <https://inform.org/2022/05/08/eu-silences-russian-state-media-a-step-in-the-wrong-direction-dirk-voorhoof>

See also, Natali Helberger and Wolfgang Schulz, "Understandable, but still wrong: How freedom of communication suffers in the zeal for sanctions," *Media@LSE*, 10 June 2022. <https://blogs.lse.ac.uk/medialse/2022/06/10/understandable-but-still-wrong-how-freedom-of-communication-suffers-in-the-zeal-for-sanctions/>; I Popović, 'The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression' *EJIL:Talk!*, 30 March 2022. <https://www.ejiltalk.org/the-eu-ban-of-rt-and-sputnik-concerns-regarding-freedom-of-expression/>; Björnstjern Baade, "The EU's "Ban" of RT and Sputnik: A Lawful Measure Against Propaganda for War" *Verfassungsblog*, 8 March 2022. <https://verfassungsblog.de/the-eus-ban-of-rt-and-sputnik/>; S Bundtzen and M Dorn, "Banning RT and Sputnik Across Europe: What Does it Hold for the Future of Platform Regulation?" *DigitalDispatches*, 5 April 2022. https://www.isdglobal.org/digital_dispatches/banning-rt-and-sputnik-across-europe-what-does-it-hold-for-the-future-of-platform-regulation/; European Federation of Journalists, "Fighting disinformation with censorship is a mistake" *EFJ*, 1 March 2022. <https://europeanjournalists.org/blog/2022/03/01/fighting-disinformation-with-censorship-is-a-mistake/>; Jacob Mchangama, "In A War of Ideas, Banning Russian Propaganda Does More Harm Than Good" *Time*, 12 August 2022. <https://time.com/6205645/russian-propaganda-censorship-history/>.

522 Björnstjern Baade, "The EU's "Ban" of RT and Sputnik: A Lawful Measure Against Propaganda for War," *VerfBlog* 2022/3/08, <https://verfassungsblog.de/the-eus-ban-of-rt-and-sputnik/>, DOI: 10.17176/20220308-121232-0; See also: I Popović, 'The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression' *EJIL:Talk!*, 30 March 2022. <https://www.ejiltalk.org/the-eu-ban-of-rt-and-sputnik-concerns-regarding-freedom-of-expression/>.

523 Article 15 ECHR.

524 Article 15 (3) ECHR.

their standards on their territories.⁵²⁵ Nevertheless, it prevented Russia initiating complaints at the Court (ECtHR) or having its representatives in the decision making bodies.

A complaint was submitted by RT France against the Regulation and the European Court of Justice (General Court) decided that the ban was proportional. It was found to respect the “essence” of free expression, because it was “temporary and reversible”, (as it applied until 31 July 2022), and it was subject to constant monitoring.⁵²⁶ Also, the ban did not prevent the complainant from carrying out activities outside the EU.⁵²⁷ The goal to protect EU’s public order and security, and to preserve peace, prevent conflicts and strengthen international security were legitimate goals in the meaning of the UN Charter, as provided in Article 21(2) TEU.⁵²⁸ The Court also found it substantially proven that RT France was influenced by the Russian state, as its owner was financed from Russian state budget, as Russian officials endorsed the channel, and that the channel did not show up any regulatory or institutional framework demonstrating its editorial independence. Reference was made to Article 20 of the International Covenant on Civil and Political Rights that provides that “[a]ny propaganda for war shall be prohibited by law”. Besides, also Article 19 provides that the protection of national security or the public order can be justified aims to apply restrictions.⁵²⁹

The question is really, whether a media outlet, when used as a tool for war propaganda, can be identified as a weapon and thereby be deprived of the international human rights protection regime which protects them not only in declarations and treaties, but also in established standards? Such a standard is for example, that broadcasting rights can only be withdrawn by courts or independent authorities.⁵³⁰ The ban on RT was imposed by

525 <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights>.

526 *RT France v Council* Case T-125/22 (Order of the President of the General Court, 30 March 2022), at 154.

527 Ronan Ó. Fathaigh and Dirk Voorhoof, “Freedom of Expression and the EU’s Ban on Russia Today: A Dangerous Rubicon Crossed,” *Communications Law* 27, no. 4 (2022): 186–193. Available at SSRN: <https://ssrn.com/abstract=4322452> or <http://dx.doi.org/10.2139/ssrn.4322452>.

528 *RT France v. Council* at 163–167.

529 Article 19 (3) (b) of the United Nations International Covenant on Civil and Political Rights.

530 United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom

an executive legal instrument, by a body comprised of EU government ministers (the Council).⁵³¹ While this was a legitimate legal rule, it was a prior restraint for which the strictest scrutiny should apply. According to Voorhoof and Fathaigh, a regulatory authority with appropriate expertise would have been better placed to impose the restriction. However, there is no such EU authority which could have passed such a decision at the EU level. National regulatory authorities have previously banned RT in some Member States, such as in the UK, Lithuania, Latvia and Germany.⁵³² They all had their particular reasons based on national law and the activity of the specific RT outlet established in that Member State. A common action at the EU level seemed impossible in that field – even though the AVMS Directive allows for the suspension of audiovisual programmes if they incite hatred, but taking action is up to the national authorities.⁵³³ This is where EMFA becomes relevant in beating a new path to deal with such controversial dilemmas in the future (see in Chapter 5.8.2).

The remaining question still revolves around whether a media outlet can be categorized as a dual-use instrument, which can serve the purposes of war, thereby potentially forfeiting its coverage under the international human rights protection framework. Qualification as a weapon must be based on its impact, and not on its content. In the RT case, we deal with a perceived impact rather than a measured one: a perceived imminent danger that RT's propaganda messages fall onto fertile ground and incite for war. Such a precautionary stance is justified in the heated situation of a new aggressive war, but only for a limited time. The impact of disinformation relies on the element of surprise. Once the audience has acquired a plethora of facts about the war and is likely to have formed their opinions, it becomes unreasonable to uphold the executive ban. In the meantime, there is time to assess it in the conventional way, whether the content constitutes incitement to war, which is a prohibited act under international

of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda*, FOM.GAL/3/17 (3 March 2017) s 1(h).

531 Ó Fathaigh, Ronan and Voorhoof, Dirk, Freedom of Expression and the EU's Ban on Russia Today: A Dangerous Rubicon Crossed (December 2022). Communications Law, 2022, Volume 27, Issue 4, pp. 186–193, Available at SSRN: <https://ssrn.com/abstract=4322452> or <http://dx.doi.org/10.2139/ssrn.4322452>.

532 Judit Bayer, Hungarian Journal of Legal Affairs? Forthcoming. (2023).

533 Baade, supra note 2022.

law. NRAs should then enforce a ban if they deem it necessary. Also, online platforms would then – also in absence of a lawful ban – have the option to restrict it in accordance with their existing risk management obligations. DSA inclines them toward such a choice, even hosting providers, once they have been notified about the potentially illegal nature of the content.

5.8.2 Treatment of the problem by EMFA

The solution for the legitimacy problem would be that a European authority or body can take a common decision. EMFA, however, does not empower the Board to pass such a decision, merely creates a mechanism to support NRAs in reaching a common ground for their respective decisions. Upon request of at least two Member States' NRAs, the Board will coordinate the measures that NRAs are to take, if they present a serious and grave risk of prejudice to public security. The Board is not entirely autonomous in taking this opinion: it needs to consult the Commission. Then it may issue opinions on appropriate national measures and may set up a list of criteria outlining what is considered as an appropriate action. Given the diplomatic sensitivity of the matter, whereas the original wording obliged NRAs to take into account the opinion, the final text requires Member States merely to ensure that NRAs are not precluded from taking it into account.⁵³⁴ The set of criteria shall be taken into account with utmost care by NRAs. These are likely to focus, in accordance with freedom of expression standards, not on the content, but on the ownership, management, financing structures, editorial independence from third countries or adherence to co-regulatory or self-regulatory mechanisms governing editorial standards in one or more Member States.⁵³⁵ In addition, it might be useful to consider also criteria such as impact, and other meta-characteristics of the content, such as amplification, inauthenticity, lack of editorial independence.

The Recitals clarify that the focus is on tackling "systematic, international campaigns of media manipulation and interference with a view to destabilising the Union as a whole or particular Member States".⁵³⁶ This ground ("destabilising the Union") is lighter than the justification for banning RT which goes beyond this to RT meaning a "significant and direct threat to

534 Article 17 (3) EMFA.

535 Recital 49 EMFA.

536 Recital 47 EMFA.

public order and security in the EU".⁵³⁷ Regardless, the coordinated actions of Member States facilitate the necessary measures against "rogue" media service providers without the EU engaging in questionable legislation that raises concerns regarding overstepping its competences as in 2022.

5.9 Media concentration

Merger control plays a vital role in controlling and preventing the accumulation of significant economic power in media markets. EMFA lays down basic rules for standardisation to approximate the assessment of media concentrations.⁵³⁸ The difficulties of divergent traditions and preferences in measuring media concentration have been discussed above. Harmonisation of these would have been too ambitious, or perhaps will never be practical. Therefore, EMFA's harmonisation is limited to some fundamental principles and procedural requirements.

Under the general rules of merger control in the internal market, the Commission may assess whether mergers significantly impede effective competition in a way that affects European markets and citizens. However, such assessment would remain confined to economic aspects, and on the media market it would not pay sufficient attention to the cultural and fundamental rights aspects of media pluralism. This is where EMFA could make a significant change in internal market regulation: by establishing sectoral specifications for assessing mergers and concentrations in the market of media services.

5.9.1 New aspects to assess in media concentration

The sectoral specifications by EMFA bring new factors into the assessments of mergers and concentrations: the specific aspects of media as "merit good", a product of social value. At this point, EMFA is similar to a directive: it sets goals for the Member States to provide for harmonised rules in

537 Explanatory Memorandum of the Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

538 Article 21 EMFA.

their national law. Besides procedural requirements (below), it defines five qualitative elements that should inform the decision on concentration.⁵³⁹

The first factor is opinion diversity in the media market: the impact of the concentration on the formation of the public opinion and on the diversity of media players on the market, with regard to the online environment, and activities in other businesses as well, whether in- or outside the media branch. This is in correlation with the factor listed as fourth, to consider the findings of the annual rule of law report concerning media freedom and pluralism. In other words, the concentration should be regarded in the context of what service the media companies provide to their consumers and society: their cultural and democratic function. The question remains, how exactly commitments by participating parties can be followed up and enforced.

The second element requires considering safeguards for editorial independence, including the measures taken by media service providers with a view to guaranteeing the independence of the editorial decisions. This is closely related with the fifth element, which provides for taking into account the commitments of any party offering safeguards of media pluralism and editorial independence. While it may seem like an overlap, the first condition focuses on existing safeguards while the second on commitments taken in connection with the merger.

In cases of corporate mergers, the autonomy of the individual media outlets may be preserved. If their editorial independence is guaranteed, the change in the opinion market is not inherently destined to be negatively affected. Especially considering the next, third aspect: the recognition of the paradox wherein concentration might actually be necessary for the economic viability of the merging media entities and may indirectly foster pluralism. There are situations where refusal to authorise a merger would lead to the bankruptcy of one of the prospective participants of the merger, and consequently diminish media pluralism.⁵⁴⁰ For example, in 2010, the media companies Axel Springer and Ringier decided to merge their Central-Eastern-European branches.⁵⁴¹ In Poland, the Czech Republic, Slovakia

539 Article 21 EMFA.

540 Mihály Gálík and Artemon Vogl, "Az új médiakoncentráció-szabályozás első vizsgálata: az Axel Springer és a Ringier kiadói csoport megghiúsult összeolvadása a magyar piacon," *Médiakutató*, 12, no. 3 (2011) https://www.mediakutato.hu/cikk/2011_03_osz/06_mediakoncentracio_szabalyozas.

541 Axel Springer and Ringier to pursue merger (2013) CMDS News. <https://cmds.ceu.edu/article/2013-04-28/axel-springer-and-ringier-pursue-merger>.

and Serbia the authorities have approved the merger, because one group with a large market share merged with a modestly sized one. However, in Hungary, both groups were of considerable market size, and the Hungarian NRA refused the licence. The Hungarian Media Council deemed the market for general news sources as the relevant market, relegating electronic media to a marginal position in its assessment. It focused exclusively on concentration within the news market and neglected to consider the advertising market. As Gálik and Vogl argued, the prevention of merger would prove harmful to diversity, because the weaker player could not sustain its operation on the meagre advertising market, or they would have to cut costs which would dilute content, and lead ultimately to national and county daily newspapers mainly featuring the news provided free of charge by the official (state-owned) agency (MTI). The print sector's crisis caused political newspapers struggle for survival, therefore, mergers should have been viewed as a form of crisis management. They argued that the loss of a previously popular title may result in a much larger gap in content diversity than the loss of diversity resulting from a merged editorial team. They proved to be right: the biggest Hungarian daily broadsheet paper⁵⁴² was subject to a hostile takeover by a Fidesz-friendly company in 2015 which shut the paper down in 2016.⁵⁴³

As a fourth element, the annual rule of law reports' finding concerning media pluralism and media freedom shall be taken into attention. These can provide important contextual information on the state of the media market and the diversity of the opinion market in the Member State. Finally, parties involved in the media market concentration may offer their commitments to safeguard media pluralism and editorial independence, which, according to EMFA, should be taken into attention. How these commitments are followed up, remains for the future questions of implementation.

542 The number of sold copies were 37.164 daily, double the size of its competitor with 17.390 copies. Nyugat.hu (2016) A Népszabadság kétszer annyi példányszámban kelt el, mint a Magyar Nemzet. https://www.nyugat.hu/cikk/politikai_lapok_nepszabadsag_peldanyzam_matesz.

543 IPI (2017) Orbán vollendet Übernahme der ungarischen Regionalmedien. <https://ipi.media/orban-vollendet-ubernahme-der-ungarischen-regionalmedien/> See also: Profil: Wurde die ungarische Zeitung „Népszabadság“ aus politischen Gründen verkauft? (2016) <https://www.profil.at/wirtschaft/wurde-die-zeitung-nepszabadsag-aus-politischen-gruenden-verkauft/400901927>.

For precise interpretation of the described rules, the Commission shall issue guidelines, with the assistance of the Board, which, with the participation of all NRAs, is expected to assume a significant role in developing common European standards.⁵⁴⁴

5.9.2 The procedural rules on assessment of media concentration

As a principle, all Member States should have national legal rules in place for an assessment of media market concentrations that could make a significant impact on media pluralism and editorial independence.⁵⁴⁵ The rules must be transparent, objective, proportionate and non-discriminatory, and require the parties involved to notify the concentration in advance to the national authorities or bodies, or provide these bodies the necessary powers to obtain information from those parties.

Importantly, the assessment shall be distinct from the competition law assessment. Member States should designate the NRAs or similar bodies as responsible for such assessment or ensure their substantive involvement in such. However, EMFA does not explicitly rule out that a Member State might withdraw a specific concentration case from the scrutiny of the NRA with reference to "national economic interests", as it happened in the Hungarian case of KESMA. The mere existence of such procedural rules in the national system risks remaining useless if exceptions are allowed on a case-by-case basis.⁵⁴⁶ However, the rules also have to define objective, non-discriminatory and proportionate criteria for both stages: for notifying the concentration and for assessing its impact on media pluralism and editorial independence. Moreover, timeframes need to be specified for completing the assessment.

As described above, NRAs have to consult the Board before taking a decision on a concentration that would affect the functioning of the internal market, and take utmost account of the Board's opinion. The primary key question remains, how to identify instances where concentration affects the

544 LIBE further proposed that post-merger assessments should be enabled, also in the light of the additional criteria, but that amendment was not passed in the final version. Amendment 209 of the LIBE Opinion, Article 21 (6a) (new).

545 Article 22 (1) EMFA.

546 Elda Brogi et al., "Assessing certain recent developments in the Hungarian media market through the prism of the Media Pluralism Monitor" https://cmpf.eui.eu/wp-content/uploads/2019/07/Report_KESMA_Hungary_A2.pdf CMPF (Apr 2019).

national, but not the internal market? Given the pervasive cross-border trade in media services and the escalating internationalization of such services, nearly all national media market developments inherently impact the internal market. Only in minor scale local mergers can one confidently assert that the international market would remain unaffected. Still, a larger number of minor local mergers, as exemplified by cases like the Hungarian merger of 500+ papers into KESMA, has the potential to adversely influence pluralism on a broader scale.⁵⁴⁷

In any case, national NRAs remain free to take their decisions without interference by EU bodies: EMFA seems to envisage merely a soft impact. The consultation with the Board, the publicly issued opinions of the Board and of the Commission are expected to generate a public debate on issues of media concentration and pluralism, and accelerate approximation of the assessments and practices of NRAs.

5.10 State advertising

Since the advent of the digital age, advertising revenues have dramatically declined for traditional media companies, because advertising shifted first to online websites, then to online platforms. For example, only in 2008–2009, TV advertising expenditures fell by an average of 16 % in Europe (in some states more than by 30 %), whereas between 2009 and 2014, print advertising revenues of European newspaper publishers declined by 25,6 % and another 39,5 % by 2018.⁵⁴⁸

Especially in smaller language markets, this brought media service providers into a difficult situation. Therefore, state advertisements or subsidies have largely contributed to the viability of media companies in the past decade. However, state advertisements are highly susceptible to being influenced by political considerations. A discriminative allocation of the advertising can largely distort media pluralism, and adversely impact inde-

547 “Political capture of media is often more pronounced at the local level where local governments can exert much greater influence on media that are more dependent on public advertising for survival due to the smaller market size.” IPI (International Press Institute) (2023) IPI position on the European Media Freedom Act. <https://ipi.media/ipi-position-on-the-european-media-freedom-act/>.

548 Tom Evens, “Media economics and transformation in a digital Europe,” in *Comparative media policy, regulation and governance in Europe: Unpacking the policy cycle*. ed. Leen d’Haevens, Helena Sousa and Josef Trappel (Bristol: Intellect, 2018), 41–54.

pendence and freedom of the press.⁵⁴⁹ Therefore, an important element of EMFA is laying down the standard principles of state fund allocation, including state advertising and supply and service agreements.⁵⁵⁰

According to experts, the significance of public advertising within a functional media market should be not more than approximately 2–3 % of the advertising landscape. Hungary stands out to the extreme: the Hungarian advertising sector is overwhelmingly dominated by the state, primarily through government-sponsored advertisements and promotions from state-owned companies.⁵⁵¹ Even the largest market advertisers appear insignificant in comparison to the state. Further, it has been established that 80 % of the state-sponsored advertising is allocated to pro-government aligned media outlets.⁵⁵² Consequently, state-led advertising not only serves as a conduit for political propaganda, but also effectively shields pro-government media from the uncertainties of market dynamics.⁵⁵³

EMFA requires that any public funds, or other material advantages that are granted to media service providers or online platforms by public authorities, for the purposes of state advertising or supply and service contracts, shall be awarded according to transparent, objective, proportionate and non-discriminatory criteria, and through open, proportionate, and non-discriminatory procedures. The criteria need to be made publicly available in advance by electronic and user-friendly means.⁵⁵⁴ Besides the formal criteria, public expenditure on state advertising must be dispersed, on a yearly average, among a diverse array of media service providers within the market. For transparency reasons, the yearly information on advertising expenditure to media service providers shall be publicised in an accurate, comprehensive, intelligible and detailed manner, including the

549 Attila Bátorfy et al., *Monitoring media pluralism in the digital era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the year 2021. Country report: Hungary* (European University Institute, 2022).

550 Article 25 EMFA.

551 Szalay Dániel, “A Miniszterelnöki Hivatal maradt a legnagyobb hirdető a magyar reklámpiacon,” *Media1.hu*, 2022.12.07, <https://media1.hu/2022/12/07/a-miniszterelnoki-hivatal-maradt-a-legnagyobb-hirdeto-a-magyar-reklampiacon/>.

552 Bucskay Péter, “A követhető állami reklámpénzek 84 százaléka NER-cégekhez kerül,” *G7.hu*, 2020.07.03, <https://g7.hu/adat/20200703/a-kovetheto-allami-reklampenzek-84-szazaleka-ner-cegekhez-kerul/>.

553 Polyák Gábor, “Az állami hirdetések szabályozása az Európai Médiaszabadság Törvény tervezetében,” *Médiakutató* 24, no. 3 (2023).

554 Article 25 (1) EMFA.

total amounts and the amounts spent per media outlets or providers of on-line platforms, and the legal names of the business groups that they are part of.⁵⁵⁵ An earlier text version would have exempted local governments from the obligation, the final text merely exempts sub-national governments with less than 100.000 inhabitants and only from the obligation to identify the umbrella business group.⁵⁵⁶

NRAs or other competent independent bodies in the Member States are mandated to oversee and annually report on the allocation of state advertising to both media service providers and online platform providers. These annual reports must be made publicly available in a readily accessible manner. An additional, desirable element of transparency regulations would mandate that media outlets that receive state advertising also disclose the revenue generated from such advertising.⁵⁵⁷

The final text of EMFA closed two important loopholes. First, by not exempting contracts under national public procurement rules from the obligation as in the original Proposal. Instead, it limited the exception to contracts subject to European public procurement and state aid regulations. National public procurement alone doesn't provide a guarantee that advertising distribution will adhere to transparent, objective, proportionate, and non-discriminatory standards.⁵⁵⁸ Even a fair public procurement process doesn't ensure immunity from state influence, potentially leading to media agency bias toward specific outlets. In Hungary, the predominant practice entails the state awarding public procurement contracts to three media agencies, conferring upon them exclusive rights to sell state advertising. This arrangement often benefits a pro-government business group, which previously lacked relevant media agency expertise before acquiring these advertising rights.

Second, the exception to local governments under one million inhabitants could have led to a dispersal of centrally coordinated funding among local governments to avoid accountability. Local level clientelism carries an

555 Article 25 (2) EMFA.

556 Ibid. The original exemption would have exempted local governments with less than one million inhabitants, restricting the scope to one or a few local governments in several European Member States, including not only the smaller states but also Poland, France, Greece or Sweden, and to a few in the largest countries like Italy, Spain and Germany.

557 Polyák Gábor, "Az állami hirdetések szabályozása az Európai Médiaszabadság Törvény tervezetében," *Médiakutató* 24. no. 3 (2023).

558 Polyák (2023) *ibid.*

enhanced risk due to its opacity and deep roots in the community.⁵⁵⁹ While the possibility remains, its feasibility has significantly diminished due to the reduction of the population threshold to 100.000 and the limitation of the exception to only one aspect of the transparency obligation rather than the entirety thereof.

One loophole can still be identified: state advertising in practice is often a disguise of state subsidies.⁵⁶⁰ Hence, as long as state aid remains exempt from the overarching provisions of EMFA concerning state advertising, they provide a loophole to circumvent the law. Ideally, any allocation of public funds, whether designated for advertising or other purposes, should adhere to uniform criteria and procedures, characterized by transparency, objectivity, proportionality, and non-discrimination. This standard should apply irrespective of whether the funds are allocated for advertising purposes, provided as aid or subsidy to newspapers, or for any other purpose.⁵⁶¹

As regards the effectiveness of transparency, the Hungarian case underscores that transparency doesn't always present a solution. Despite regular analyses and articles scrutinizing the allocation of public advertising, their influence on government action remains limited. Transparency's effectiveness is most pronounced in those democratic systems where institutions which function as constitutional checks and balances pick up such information and fulfil their role of controlling the power. In addition, a free and plural media environment offers reasonable chances that voters' decisions are influenced by fact-based reporting and critical opinion. However, in a captured media environment and in the absence of constitutional checks and balances, transparency remains toothless.⁵⁶²

559 IPI (International Press Institute) (2023) IPI position on the European Media Freedom Act. <https://ipi.media/ipi-position-on-the-european-media-freedom-act/>.

560 Attila Bátorfy and Ágnes Urbán, "State advertising as an instrument of transformation of the media market in Hungary," *East European Politics* 36, no. (2020): 44–65, DOI: 10.1080/21599165.2019.1662398.

561 This is also in line with RSF's Opinion: Increase ambition and consistency of the European Media Freedom Act (EMFA), May 2023, <https://rsf.org/sites/default/files/medias/file/2023/05/RSF%20-%20position%20paper%20EMFA%20-%20May%202023.pdf>, and with IPI opinion (IPI (International Press Institute) (2023) IPI position on the European Media Freedom Act. <https://ipi.media/ipi-position-on-the-european-media-freedom-act/>).

562 Hammer Ferenc, "Amikor a tények valahogy nem harapnak. A kis következményekkel járó újságírást övező körülmények mintázatairól," *Médiakutató* 24. no. 3 (2023) On Hu media capture, see: I IPI (International Press Institute) (2023) IPI position on the European

In this regard, some progressive amendment proposals have been made, which have not been passed in the final vote. For example, a European Database of State Financial Support was suggested, to aggregate the submitted information biannually, and that the Board be empowered to assess the allocation of EU funds by national governments and issue an opinion on the application and compliance with the objectivity criteria.⁵⁶³ A further suggestion proposed that the allocated funds shall not exceed 15 % of the total budget allocated by the same public authority to the totality of media service providers operating in the corresponding European, national or local market. Such a rule would have ensured that state advertising budget is divided between at least seven media outlets, but would not have affected the discriminative nature of such allocations.⁵⁶⁴ RSF proposed that public funds should prioritise those media service providers that comply with the highest standards of journalism, where the recommended ISO standards should be taken in regard.⁵⁶⁵ Neither of those suggestion have been incorporated into the final text of EMFA.

5.11 Media content and online platforms

The introduction of a privileged status for media content on very large online platforms was accompanied by significant controversies.⁵⁶⁶ In an ideal scenario, trustworthy and high-quality media content given prominence by online social media platforms, particularly on the largest ones, would improve the informational environment. Such content could serve as pillars of trust, assisting users in navigating through the deluge of information. This follows the logic that social media providers carry a wide range of user-generated content, that is spontaneous, personal, uncontrolled, and that a large number of users acquire their information only from these platforms. Before the Ukraine invasion, traditional media consumption

Media Freedom Act. <https://ipi.media/ipi-position-on-the-european-media-freedom-act/>.

563 LIBE amendment proposals 228 and 227, proposed Article 24 (3b) (new) and 24 (3a) new.

564 LIBE amendment proposal 222.

565 Reporters Without Border: RSF's proposals for ambitious, innovative European Media Freedom Act. <https://rsf.org/en/rsf-s-proposals-ambitious-innovative-european-media-freedom-act>.

566 Article 18 EMFA.

like TV and print continued to decline in most markets over 2020–2021. Online and social media usage didn't compensate for this gap. While many users remained highly engaged, large groups were disengaging or even disconnecting from news sources. Interest in news has significantly dropped across markets, falling from 63 % in 2017 to 51 % in 2022.⁵⁶⁷

Media service providers that invest resources in authoring, editing, and fact-checking media content often encounter challenges in reaching their audiences who have migrated to online platforms. When dominant social media companies remove or diminish the visibility of edited content from media service providers, the investment made by these providers effectively goes to waste. This situation not only constitutes a loss for the providers themselves but also for society at large, as fewer citizens gain access to the diversity and depth of information that these media services aim to deliver.

At the same time, appearing on social media as a media service provider does not require any authorisation, and this principle should persist. However, it's essential to acknowledge that content presumed to be "high quality and trustworthy" media content, can be just as biased, distorted, or inaccurate as any user-generated content. The lines between such genres are increasingly blurred. We see scholars share their research in the form of user-generated posts, and occasionally encounter established media service providers promote disinformation and propaganda. John Stuart Mill's classic theory that the audience would work out on its own who is right and who is wrong, is seen to fail among the conditions of unregulated market conditions. Apparently, the opinion market needs similar interventions for the sake of preserving fair competition – and thus pluralism, as the economic market.

Currently, there is no widely established and easily recognisable criteria for what is trustworthy media content. Nevertheless, some initiatives are already emerging in this direction. In particular, the Journalism Trust Initiative (JTI) has decided to translate existing ethical and professional standards of journalism into an industry standard of journalistic processes. A group of international experts have come up with a general standard that is now listed as an ISO standard, one which allows media outlets to self-assess and to be certified. Over 100 media outlets worldwide have adopted the JTI standard by publishing transparency reports. It is now also

567 Reuters Institute's "Digital News Report 2021" (source: <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2021>).

a machine-readable code that allows platforms' algorithms to recognise the content and to increase its visibility. The Reporters Sans Frontiers (RSF) has promoted the use of this standard also for the purposes of this EMFA provision.⁵⁶⁸ They suggested that neither platforms, nor public authorities can decide on who should count as a media service provider, instead this certifier should attest the quality.

Another parallel idea has been to encourage media service providers to form networks where they mutually attest the other providers' quality, in the form of a constant peer-review mechanism.⁵⁶⁹ The label that attests the trustworthiness should serve as a quality label for all members of the network. This would incentivise dynamic self-regulation among the network members.

Nevertheless, EMFA did not incorporate into the core text any mutual attestation mechanism and adhered to the principle of self-declaration, with the possibility of VLOPs getting confirmation from the relevant NRA, a self-regulatory body, or through a machine-readable JTI-standard.⁵⁷⁰ The silver lining is that the content of self-declaration has broadened during the legislative phase, now encompassing a more comprehensive array of elements related to ethical standards. The statement shall include that they respect the transparency obligations prescribed by EMFA Article 6 and the principles of editorial freedom; and are editorially independent of any Member State or third state, of political parties and entities controlled or financed by third states. This comes at the cost of journals funded by US foundations or the Norwegian fund being unable to benefit from this privilege. Further, media service providers need to declare that they subject themselves to legal regulation, including the NRA or to a widely accepted self- or co-regulation regime in at least one Member State.⁵⁷¹ In addition and more specifically, they have to declare to not provide AI-generated content without human review or editorial control. Besides, they inform the VLOP of their legal name and contact information, as well as the contact information of the NRA or the representative of the co- or self-regulatory authority or body that could confirm the veracity of their statements.

568 RSF (Reporters Without Borders (2023) Increase ambition and consistency of the European Media Freedom Act (EMFA).

569 Martin Husovec, "Trusted Content Creators," *LSE Law – Policy Briefing Paper* No. 52, Dec 2022. Available at SSRN: <https://ssrn.com/abstract=4290917> or <http://dx.doi.org/10.2139/ssrn.4290917>.

570 Article 18 (1) (d) and Recital 53 EMFA.

571 Article 18 (1) EMFA.

VLOPs must provide a functionality to enable media service providers to declare themselves, and ensure that the statements are published, except for the contact information. Vis-a-vis media service providers which made the declaration, VLOPs have to obey slightly stricter standards of due process and transparency requirements than the general obligations that apply to everyone under the DSA⁵⁷² when service is suspended, or a content's visibility is restricted due to a violation of the terms of services. The privilege itself consists of getting reasons before the removal and having a 24 hour grace period within which the media service provider has the opportunity to respond. In case of crisis situation, the period can be adequately shorter. The special treatment only applies to a violation of the terms of services, and not when the content is deemed illegal, harmful to minors, or constitutes hate speech. Complaints by media service provider to the VLOP should also enjoy priority: VLOPs must take the necessary technical and organisational measures to ensure that they are decided without delay. If a VLOP repeatedly restricts or suspends the provision of its services in relation to content provided by a media service provider without sufficient grounds in the opinion of that media service provider, then it may request the platform to engage in a dialogue to find an amicable solution. This dialogue should be meaningful, effective, and led in good faith. The media service provider may try to engage the Board by reporting the outcome and the details of the process and asking for its opinion or recommended actions for the VLOP. The Board has the task to regularly organise a structured dialogue between platforms and media service providers, as well as representatives of civil society. In case of a dispute, the media service provider and the VLOP may use mediation or out-of-court dispute settlement mechanisms as prescribed by the Platform to Business Directive⁵⁷³ or the DSA.⁵⁷⁴ The platform must annually report on the statistics of their removal of media content or suspension of media service providers and include the grounds for imposing such restrictions.

The aim of the media privilege and the structured dialogue is to balance the asymmetrical relationship between media service providers, especially smaller ones, and VLOPs. Still, the question remains, whether smaller me-

572 Article 34 (1) DSA.

573 Article 12 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.

574 Article 21 DSA.

dia service providers will practically benefit from these measures. Helberger et al. point out that journalistic work does not necessarily entail editorial tasks, therefore a journalist who may deliver critical reporting, but who does not undertake editorial work, will not qualify as a media service provider and therefore Article 17 will not apply to him or her.⁵⁷⁵

Critiques have also warned that the self-declaration-based identification process can open the way for rogue actors who wish to distort democratic public discourse.⁵⁷⁶ While this remains a risk, the "privilege" is in fact not more than what fair procedure would normally require: to give a reasoned notification prior to take-down and the right to reply within 24 hours. Procedural fairness is a pre-requisite for safeguarding freedom of expression,⁵⁷⁷ and while private actors are not inherently obliged to uphold this human right, creating such obligations by the force of simple law is the most straightforward way to provide for its protection. This provision might remain useless in protecting established media content, but it provides engagement in discussions and eventually reaching consensus on a new definition of what constitutes trustworthy "media" or "journalism".⁵⁷⁸

If trustworthiness would be reliably recognisable on platforms, then stronger protective mechanisms would also be justified. For instance, RSF recommended further protection for testified media content: platforms should be allowed to suspend or restrict such content only if it is manifestly illegal or contributes to a systemic risks (and not generally if it is contrary to platform terms).⁵⁷⁹ Whether a systematic upranking could be legitimately required, is highly questionable because not all platforms wish to actively

575 Natali Helberger et al., "Expert opinion on draft European Media Freedom Act for stakeholder meeting, 28 February 2023.," *DSA Observatory*, March 29, <https://dsa-observatory.eu/2023/03/29/expert-opinion-on-draft-european-media-freedom-act-for-stakeholder-meeting-28-february-2023>.

576 AccessNow et al. (2023): Policy Statement On Article 17 Of The Proposed European Media Freedom Act. *disinfo.eu*, 25 January 2023., https://www.disinfo.eu/wp-content/uploads/2023/01/EMFA_policystatement_V3_25012023.pdf See also: International Press Institute (2023): IPI position on the European Media Freedom Act. *IPI*, January 23, <https://ipi.media/ipi-position-on-the-european-media-freedom-act>.

577 Judit Bayer, "Procedural rights as safeguard for human rights in platform regulation," *Policy & Internet* 1–17. Online first, 25 May 2022 <https://doi.org/10.1002/poi.3298>.

578 See for example exhaustively in Coe, fn. 36.

579 RSF (Reporters Without Borders (2023) Increase ambition and consistency of the European Media Freedom Act (EMFA). <https://rsf.org/sites/default/files/medias/file/2023/05/RSF%20-%20position%20paper%20EMFA%20-%20May%202023.pdf>.

contribute to the public discourse.⁵⁸⁰ The maximum that could be expected that "certified media providers" are not discriminated against other types of content.

The decision whether a user is registered as a media service provider ultimately lies with the VLOPs themselves, which carries a potential risk. The question arises whether it is appropriate and safe to grant a platform the authority to assess the trustworthiness and integrity of a media service provider, especially when platforms themselves struggle with similar issues.⁵⁸¹ Platforms may overlook or disregard the diverse political and contextual factors inherent in media content, and incline to employ uniform rules for determining outcomes in every "borderline" situation where the content contributes to systemic risk.⁵⁸² Giving media providers the status entails the media outlet's representation on a platform and potentially giving them prominence within the democratic discourse.⁵⁸³ Refusing media provider status could lead to the ostensibly justified removal of a provider from a platform. Therefore, the magnitude of risk in the VLOP's bias is substantial. This risk is somewhat mitigated through the dispute resolution mechanism, the subsequent exchange with the Board and the structured dialogue organised by the Board as well.

EMFA is inherently susceptible to the paradox of media regulation: any legislative effort aimed at affording special protection to the media requires the establishment of a comprehensive definition delineating the parameters of what qualifies as "media," which inherently introduces limitations and the potential for exerting control over the very media that were to be

580 This has also been recommended by RSF: "promote the visibility, findability and prominence, in their recommender systems or feed, of content published by media service providers that can demonstrate they comply with professional and ethical standards of journalism." RSF (Reporters Without Borders (2023) Increase ambition and consistency of the European Media Freedom Act (EMFA). <https://rsf.org/sites/default/files/medias/file/2023/05/RSF%20-%20position%20paper%20EMFA%20-%20May%202023.pdf>.

581 Savvas Zannettou et al. (2019): "Disinformation Warfare: Understanding State-Sponsored Trolls on Twitter and Their Influence on the Web," WWW '19: *Companion Proceedings of The 2019 World Wide Web Conference*, May, 2019: 218–226, <https://doi.org/10.1145/3308560.3316495>.

582 Joan Barata, "Problematic aspects of the European Media Freedom Act – old and new," LSE, May 2, 2023. <https://blogs.lse.ac.uk/medialse/2023/05/02/problematic-aspects-of-the-european-media-freedom-act-old-and-new>.

583 Gosztonyi Gergely és Lendvai Gergely, "A Critical analysis of Article 17 of the draft European Media Freedom Act," *Médiakutató* 24, no. 3 (2023).

protected.⁵⁸⁴ This paradox has been apparent in the TWFD and in the Amsterdam Treaty Protocol, which, by creating rights, also inadvertently produced limitations. Article 18 is a new manifestation of this paradox within EMFA: being qualified as a media creates new possibilities, but also limitations, constraints and potentials for abuse. At the same time, the current version of Article 18 refrains from granting extraordinary privileges, on the contrary: the right of prior informing is hardly more than a symbolic gesture to media service providers. The more future-oriented provisions are those that require the organised, structured dialogue and the mediation proceedings. These, albeit soft and without immediate benefit, may pave the way for a more plural information landscape.

5.12 Monitoring and evaluation

The Commission is required to continuously and annually monitor the internal market for media services, including the risks to its functioning as well as its progress.⁵⁸⁵ For the purpose of this exercise, the Commission shall define key performance indicators, methodological safeguards to protect the objectivity, and selection criteria of those researchers who will do the monitoring. The monitoring includes a detailed analysis of all national media markets and of the internal market for media services as a whole, also with regard to the impact of online platforms. It extends to the risks related to media pluralism and editorial independence, insofar as they may influence the functioning of the internal market. Previous references to including monitoring of the level of media concentration and the risks of foreign information manipulation and interference have been omitted in the final text. Instead, a detailed overview of frameworks and practices concerning the allocation of public funds and state advertising are to be included.⁵⁸⁶

However, the monitoring does not seem to conclude to any action, at least not in the frames of EMFA. Under general EU law, if the Commis-

584 Damian Tambini, “The EU is taking practical measures to protect media freedom. Now we need theory,” *Centre for Media Pluralism and Media Freedom*, May 9, 2023, <https://cmpf.eui.eu/the-eu-is-taking-practical-measures-to-protect-media-freedom-now-we-need-theory>.

585 Article 25 (1) and (4) EMFA.

586 Article 25 (3) EMFA.

sion establishes a violation of an EU regulation, it is entitled to initiate an infringement proceeding. However, in the context of sensitive political matters, such as media pluralism and the independence of the press, rapid enforcement has not been observed within the European Union, on the contrary.⁵⁸⁷ To some extent, the broad nature of several provisions in EMFA, which resemble principles rather than specific and pragmatic obligations, inherently sets the stage for an ambiguous implementation.

5.12.1 From mutual distrust to mutual trust

In the current situation, the media governance is characterised by a complex matrix of distrust. Generally, media is supposed keep equal distance from economic and political power, and from the society which it should serve.⁵⁸⁸ These relationships should be characterised by a healthy level of distrust. However, in the recent decades, the equal distance has become questionable, and the distrust has grown more complex. On the one hand, the internationalisation of the media landscape created a further, cross-border dimension of governance. The dominance of online platforms in the dissemination of media content necessitates elevating media governance to a supranational level. On the other hand, significant deficiencies in the media freedom and pluralism and other rule of law elements in certain Member States have eroded mutual trust between Member States.⁵⁸⁹ This underscores the necessity for supranational regulation, but also complicates matters further.

587 The observation is based on the hesitating action by the Commission in regard of the rule of law backslide that concerned Hungary and Poland. Among others, see: Sonja Priebe, “Too Little, Too Late: The Commission’s New Annual Rule of Law Report and the Rule of Law Backsliding in Hungary and Poland,” *VerfBlog* 2020/10/02, <https://verfassungsblog.de/too-little-too-late/>, DOI: 10.17176/20201002-124719-0. Mathieu Leloup, “Too little, too late: The ECtHR judgment Broda and Bojara on the premature termination of Polish court (vice) presidents,” *VerfBlog* 2021/6/29, <https://verfassungsblog.de/too-little-too-late-2/>, DOI: 10.17176/20210629-232929-0.

588 Donges applies this theory to public service media. Patrick Donges and Manuel Puppies, *Die Zukunft des öffentlichen Rundfunks. Internationale Beiträge aus Wissenschaft und Praxis* (Halem, 2003): 59–61; see more in: Bayer Judit et al., *Közzelgálatisági média és az európai versenyjog* (Budapest: L’Harmattan, 2010).

589 Petra Bárd and Adam Bodnar, “The end of an era: the Polish constitutional court’s judgment on the primacy of EU law and its effects on mutual trust,” *Pravni Zapis* 12, no. 2 (2021): 371–395.

NRAs are supposed to be independent from Member States, but in some Member States they are captive and in cahoots with the governing party. Even when NRAs do protect the freedom of the media, media actors tend to be inherently antagonistic against them because of their sanctioning and regulatory powers. Media owners tend not to trust the state, yet some media owners are overly intertwined with state institutions, politicians or investors, or benefit from support by the governing party. Meanwhile, Member States do not fully trust the Commission which is perceived as seeking to drain regulatory powers, and the Commission, in turn, does not trust all Member States equally.⁵⁹⁰ While the EU is built on the mutual trust and the principle of non-regression, this trust has been eroded, and the principle is seen as violated in some cases.⁵⁹¹

In this intricate matrix of media governance, there is a lack of mutual trust between any two actors, leading to a perception of chaos and hopelessness in the situation. EMFA creates new relationships between the actors as it imposes obligations on all parties, including media providers, platform operators, Member States and NRAs, while emphasising consultations and dialogues. Rather than isolating the media from the state or the Commission, the denser web of relationship may generate a novel, dispersed power structure. While the Commission may monitor the relationship between NRA and Member State, it is also obliged to cooperate with the Board. Above all, the Court of Justice should have the final say in disputes. Similar to the system of checks and balances, this regulated, mutually controlling relationship between the actors is anticipated to establish earned trust. Yet, EMFA falls short of establishing such institutionalised channels of distrust; as the relationships remain without consequences.

5.12.2 Possibilities: proposals for amendment

Using the energy of mutual distrust in the media landscape, a new media order could utilise a regulated matrix of justified and controlled influences

590 Laurent Pech, Patryk Wachowiec, and Dariusz Mazur, "Poland's rule of law breakdown: a five-year assessment of EU's (in) action," *Hague Journal on the Rule of Law* 13, no. 1 (2021): 1–43.

591 Dimitry Kochenov and Petra Bard, (2020). The last soldier standing? Courts versus politicians and the rule of law crisis in the new member states of the EU. *European Yearbook of Constitutional Law 2019: Judicial Power: Safeguards and Limits in a Democratic Society*, (2020): 243–287.

between the said actors in order to re-establish mutual trust. However, to achieve this, it would be recommended to incorporate specific enforcement procedures into EMFA. Below are some ideas how to give effect to the regulation.

When Member States systematically fail to comply with the Regulation and systematically enact measures or decisions that significantly impact media freedom, pluralism, or editorial independence – as well as other underlying principles stated in the current Regulation or Article 11 of the Charter of Fundamental Rights – the Board should be empowered to issue recommendations to Member States or NRAs. Unlike its opinions, a recommendation would need to be responded by the Member State, in the form of a report about the implemented actions. When the Board votes on such opinions and recommendations, the voting rights of Board representatives from Member States subjected to or affected by such decisions ought to be withheld.⁵⁹²

The Board, with its accumulated expertise and supranational character, should be empowered to deliver consequential decisions, which lead to enforcement. In instances where the Board discerns systematic non-compliance on the part of a Member State vis-à-vis the extant Regulation, the Commission should be obliged to launch an extraordinary monitoring process. This special monitoring would have the advantage in comparison to the regular process outlined in Article 25, that it could directly focus on the specific problematic area, particularly looking at the actions taken by the Member State or its National Regulatory Authority (NRA), or market actors.

The Board also has the potential to base its decision on the widest possible expertise and information basis. Before issuing a recommendation, the Board has already been engaged in a dialogue with the Member State (which, having an NRA representative as a member of the Board, has ample opportunity to convey its position). If such a dialogue did not bring a consensus, then the Board would be able to pass its decision with two-thirds majority on a recommendation. Hence, if the Commission, acting upon such a recommendation, ascertains non-compliance, a rationale for reinitiating a dialogue would be absent. Should the so-called exceptional

592 This proposal has been published: Judit Bayer and Kati Cseres, “Without Enforcement, the EMFA is Dead Letter: A Proposal to Improve the Enforcement of EMFA,” *VerfBlog* 2023/6/13, <https://verfassungsblog.de/without-enforcement-the-emfa-is-dead-letter/>, DOI: 10.17176/20230613–231137–0.

monitoring have confirmed non-compliance with the EMFA, the case would be clear for the Commission to start an infringement proceeding, without engaging in extended and fruitless political end-games.

Likewise, if, the regular monitoring identifies non-compliance with the EMFA and the dialogue between the Member State and the Commission concludes without satisfactory results, the Commission could be prompted to initiate an infringement proceeding within a defined time frame, also considering the opinions of the High-Level Expert Group, the Media Pluralism Monitoring, and other relevant bodies.⁵⁹³

The LIBE Commission proposed somewhat similar amendments which did not pass. In the LIBE version, the Commission would have been empowered to adopt delegated acts that can directly oblige certain media service providers.⁵⁹⁴ Further, it would have been entitled to lead an investigation of media market concentrations either on its own initiative, upon recommendation of the Board,⁵⁹⁵ or upon request of the European Parliament. The purpose of the investigation were to examine "whether such concentration has engaged in systematic non-compliance" with the obligations flowing from EMFA, putting in serious risk the independence, the plurality and freedom of the media.⁵⁹⁶ If the Commission established a clear risk of seriously undermining those values, it would have been empowered to impose behavioural or structural remedies by way of a delegated act, including a prohibition of existing or planned media market concentration, for a limited period, and for the specific undertakings that are subject to the investigation.⁵⁹⁷

However, employing the measure of systematic non-compliance with the media landscape as a whole would yield better results than focusing solely on individual concentrations. The status of a media landscape consists of a wide array of smaller steps, actions and measures, which individually would not reach the threshold of explicit transgression of the standards, but together contribute to a situation which may be profoundly in opposition with the goals of the Act. For example, when states or NRAs commit a

593 Bayer and Cseres, *ibid*, 2023.

594 Article 22a (new) LIBE Opinion. https://www.europarl.europa.eu/doceo/document/LIBE-AD-746757_EN.pdf.

595 The LIBE Opinion refers to Article 22 (1e) which is, however, not existing in EMFA and neither in the Opinion.

596 Amendment 214 proposed Article 22a (new) (1), of the LIBE Opinion.

597 Amendment 214 of the LIBE Opinion, proposed Article 22a (new).

series of repeated steps, actions and measures that lead to a compromised freedom and pluralism of the media in that market.

Adopted delegated acts and infringement proceedings are two distinct instruments. The first would apply directly to private market actors, who can be obligated to act or to refrain from action. The Commission has competence to impose such obligations in the field of merger or competition law. Should a national measure be in contradiction with the Commission's act, the EU law prevails without further procedural necessities. An infringement procedure would become justified in the case that a series of non-compliant actions are identified during a market investigation. Infringement proceedings are the natural consequences of violating EU law, and should not necessarily be explicitly incorporated into legislative text. Nevertheless, drawing from previous occasions of politically loaded issues, defining deadlines and a procedural framework might help to achieve results.

5.13 Epilogue

Even if the path of enforcement is not elaborated, and EMFA may well remain a "*lex imperfecta*" (a law that is not consequently enforced), it may still exercise some effect. As a seed can grow into a plant, it carries the potential to grow into a harmonised European standard of media freedom and pluralism over time. It expresses a recognition that media freedom, democracy and a free market are inseparably intertwined. Through the consultation mechanisms and fostering the exchange of information, it may enhance the flow of information between the actors, and cultivate a new media order in which the different actors are connected and mutually supervise each other. Plural, independent and resilient media markets are indispensable to uphold the rule of law and democracy, which in turn is necessary to ensure smooth economy, security and stability.