

Research for CULT Committee – European Media Freedom Act - Background Analysis



KEY FINDINGS

- The Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (EMFA) is accompanied by a Recommendation which needs to be considered already now. The EMFA addresses a variety of different issues with very diverse provisions and several institutional mechanisms attached. Ensuring practical coherence with existing EU and national laws is therefore a key concern.
- Regulating the media sector, characterized by its dual nature of cultural and economic components, needs careful attention not only of the principle of limited conferral of powers, but especially subsidiarity and proportionality in the relationship between EU and Member States. Rules have to be clear, precise, effective and necessary on EU level, which is why invoking only the single market clause as legal basis raises concerns not only about the allocation of competences, but also the choice of legal instrument.
- The proposed substantive rules have some definitional ambiguities that make it difficult to assess the intended scope and actual impact. This concerns, for example, the concepts of editorial decision in Art. 4 in contrast to Art. 6 or the concept of independence of the privileged media service providers in Art. 17.
- Questions about the formulation of the provisions extend to their enforceability and thus the possibilities of protection for media service providers and recipients as is the aim of the proposal. For example, in Art. 5, 6, 17 and 20, it is not clear to what extent monitoring of compliance shall take place or how different appeal bodies interact with national regulatory

The present document is the executive summary of the study on “European Media Freedom Act - Background Analysis”. The full study, which is available in English can be downloaded at: <https://bit.ly/43AFMBY>

authorities and bodies or the newly established Board, as the EMFA does not contain a specific allocation of supervisory tasks or a sanctioning regime.

- The coordination of supervisory measures, both within the EMFA and the Audiovisual Media Services Directive (AVMSD), is of particular importance in today's media landscape. The independent Board is assigned an important role, although concerns arise in the interplay with the powers of the Commission.

Background and overview

The media and information landscape in its constantly changing state as well as recent crisis situations demonstrate the sensitivity and importance of the media sector and its regulation for the formation of public opinion, but also highlight protection gaps in light of guaranteeing democratic principles and fundamental rights. There are concerns when analysing national frameworks within the EU with regard to a sufficient protection of the independent functioning of media regulatory authorities, media pluralism in light of media ownership developments as well as potential political influence on the media. The EMFA aims to establish EU-wide harmonised rules to tackle these issues and overcome fragmentations in the national frameworks identified by the Commission. The wide range of rules covered by the Proposal must be considered in the overall concept of regulatory initiatives at EU level that the EMFA is integrated into. They also necessitate a detailed consideration of the potential impact on fundamental rights and demand particular precision and clarity. This applies to the substantive rules and the institutional system, as only an effective cross-border enforcement framework justifies the creation of rules in a Regulation with EU-wide unified binding force. This requirement is to be considered in light of the allocation of competences between EU and Member States concerning a sector characterised by its twofold economic and cultural nature.

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

Legal basis and coherence

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

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

the AVMSD is of particular relevance which is not addressed besides mentioning the amendments to the Directive.

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

Selected substantive issues

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

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

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

Institutional issues

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

national rules implementing the AVMSD could lead to tensions with Member States competences and the tasks of independent national regulatory authorities.

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

Further information

This executive summary is available in the following languages: English, French, German, Italian and Spanish. The study, which is available in English, and the summaries can be downloaded at: <https://bit.ly/43AFMBY>

More information on Policy Department research for CULT: <https://research4committees.blog/cult/>



Disclaimer and copyright. The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament. Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy. © European Union, 2023.
© Image on page 1 used under the licence from Adobe Stock

Research administrator: Katarzyna Anna ISKRA

Editorial assistant: Anna DEMBEK

Contact: Poldep-cohesion@ep.europa.eu

This document is available on the Internet at: www.europarl.europa.eu/supporting-analyses