

OPINION ON THE PROPOSAL FOR THE EUROPEAN MEDIA FREEDOM ACT

POLICY BRIEF

The Civil Liberties Union For Europe

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I. Executive Summary

The Civil Liberties Union for Europe (Liberties) welcomes the Proposal by the European Commission for a European Media Freedom Act¹ (EMFA). This proposed Regulation has the potential to strengthen media freedom and pluralism across the European Union. However, the Proposal contains shortcomings that risk undermining its objectives. This paper identifies those issues and offers recommendations to consolidate the Regulation's robustness.

Journalists perform a key function in our democracies by acting as watchdogs and informing people on matters of public interest. We welcome the Proposal's aim to protect journalists, including their sources, as well as safeguard against the arbitrary deployment of spyware. However, the Commission should limit the circumstances under which these safeguards can be waived. The ban on spyware should be further broadened to include other forms of surveillance techniques.

The Proposal recognizes the importance of public service media (PSM) as a provider of impartial information and has introduced safeguards to ensure their independence and provide them with more financial resources. However, the scope of Article 5 should be broadened to include all forms of management bodies, and the funding regimes for public service broadcasters should incorporate

requirements for transparency, proportionality, and accountability.

The Commission offers too little to improve media ownership transparency. To ensure proper transparency, Member States should be required to develop and maintain online databases containing information about the entire beneficial media ownership chain and task the Board with the creation of an EU-level database that draws upon the national databases.

National regulatory authorities play a key role in the enforcement of national media laws. The new EMFA-related competencies will increase their workload. The Proposal requires Member States to provide them with adequate financial resources, but the wording should be more binding. Furthermore, the Proposal should include safeguards to the appointment mechanism of board members to ensure protection against political and commercial interference.

We support the establishment of the European Board for Media Services, which will ensure the application of the Regulation across the EU. However, we are very concerned about the Board's dependency on the Commission. To work effectively, the Board must receive more autonomy and have the ability to act on its own initiative.

1 https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5504.

The power asymmetry between powerful, very large online platforms (VLOPs) and the financially struggling media service providers (MSPs) is real and must be addressed. However, we disagree with the media privilege proposed in Article 17. Furthermore, the self-identification mechanism is flawed and could be easily abused by rogue actors. We therefore recommend that the EU co-legislators to reject Article 17 in its current form altogether.

Liberties welcomes the reporting obligations that come with the distribution of state advertising in Article 24. However, the one-million-inhabitant threshold is a loophole that can be abused to allocate advertising spending to local governments. Therefore, we suggest lowering the threshold of inhabitants and introducing an advertising spending limit. Additionally, authorities should be required to provide a detailed explanation of their choice of beneficiary.

Below, Liberties sets out more specific remarks and detailed recommendations aimed at strengthening the EMFA.

II. Specific remarks and recommendations

The rights of media service providers

Article 4

1. We welcome Article 4 of the Proposal on the rights of media service providers and its objectives to safeguard editorial independence and journalistic sources across the EU. With the complementary Recitals 16 and 17, it recognizes the importance of journalists and editors as main actors in providing trustworthy information to the general public.²
2. We call for broadening the scope of Article 4 and ensuring protection to all journalists and media workers unrelated to their contractual relationship with a media service provider. To ensure the protection of freelancers, we agree with the position³ of the European Regulators Group for Audiovisual Media Services (ERGA) that Article 4 (2) b) and 4 (2) c) should include a specific reference to freelancers, as this type of employment is currently only mentioned in Recital 16 but not in Article 4.
3. We strongly support the prohibition for Member States and national media regulatory authorities or bodies (NMR) to influence and interfere in editorial policies and decisions in Article (4) (2) a).
4. The protection of journalistic sources in Article 4 (2) b) is crucial as without such protection, sources may refrain from working with the media or speaking out on matters of public interest. However, the wording of Article (2) b) is problematic. Member States may not “detain, sanction, intercept, [or] subject to surveillance”, but it provides an exemption when there is “an overriding requirement in the public interest”. This formulation lacks clarity, does not meet the requirement set out in the Charter of Fundamental Rights Article 52 (1) and can be interpreted in different ways, depending on the interests of the responsible bodies. This could possibly create an imbalance in the single market, compromising the protection of journalists and their sources in Member States where the government is hostile towards press freedom. We therefore, in accordance with the opinion of the European Data Protection Supervisor (EDPS),⁴ recommend clarifying the

2 <https://europeanjournalists.org/blog/2023/01/16/efj-publishes-position-on-the-european-media-freedom-act/>

3 <https://erga-online.eu/wp-content/uploads/2022/11/EMFA-ERGA-draft-position-adopted-2022.11.25.pdf>.

4 https://edps.europa.eu/system/files/2022-11/2022-11-11-opinion-on-european-media-freedom-act_en.pdf.

wording and further restricting the possibility of waiving the protection of journalists and their sources. Additionally, Article 4 (2) b) should contain subsidiarity and proportionality criteria for cases in which the disclosure of sources is justified.

5. Disclosure of the identity of a source should only be ordered by an independent court if the following conjunctive criteria exist: there is an overriding public interest; and the disclosure is necessary to prevent, investigate or prosecute serious crime. The court decision should be subject to appeal to a higher court.
6. The Proposal offers protection against the deployment of spyware in Article 4 (2) c). We support the legal response to the Pegasus scandal. However, the solution overlooks other surveillance methods beyond spyware. We need future-proof regulations to protect journalists from eavesdropping and ensure their encrypted communications remain secure from all types of surveillance, not only certain forms of it. Therefore, we suggest broadening the scope of Article 4 (2) c) to include other forms of surveillance techniques.
7. To prevent arbitrary uses of surveillance against journalists or other media workers and their sources, Article 4 (2) c) should be complemented by a mandatory requirement

for judicial ex-ante assessment and approval that authorizes the use of surveillance.

Safeguards for the independent functioning of public service media providers

Article 5

8. Public service media (PSM) is an important source in offering access to impartial information and diverse opinions and promoting social cohesion and cultural diversity. We welcome the safeguards introduced to ensure the independence of PSM, including the requirements to appoint board members in a transparent, open, and non-discriminatory procedure in Article 5 (2) and to provide PSM with adequate financial resources in Article 5 (3). Nonetheless, certain paragraphs could provide further detail and would benefit from clarifications so that Member States cannot circumvent their obligations.
9. Article 5 (1) should formulate obligations on Member States to review, and strengthen as appropriate, the external governance framework for PSM so it safeguards editorial and operational independence and appropriate funding. Correspondingly, PSM should ensure that their internal

governance arrangements guarantee the same.⁵

10. The scope of Article 5 (2) should be broadened to include all forms of management bodies of PSMs, not just limited to the head of management and the governing board, to ensure that those appointed to management positions are qualified for the role.
11. Resources and the way they are allocated should ensure that editorial independence and institutional autonomy are safeguarded. PSM should be consulted to determine the adequate level of funding.⁶ Article 5 (3) could be improved by clarifying that Member States should ensure that PSM have sufficient, stable, predictable funding on a multi-year basis to fulfill their mission. Article 5 (3) should incorporate requirements for transparency, proportionality, and accountability of the funding regimes for public service broadcasters.⁷ Therefore, the basic requirements of the EC state aid rules should be set as requirements in the law with reference to the EC state aid rules: they should offer a clear and precise definition of the public service remit; proper entrustment required

with the public service mandate and supervision that public service tasks are provided as required; the requirement to separate the accounts for commercial and public service activities and impose a limitation of public funds towards the net public service costs; and adequate ex-post control mechanisms.⁸

Duties of media service providers in providing news and current affairs content

Article 6

12. Liberties welcomes the requirements introduced to media service providers to disclose information on media ownership in Article 6 (1) and the suggestions for measures to ensure editorial independence in Article 6 (2). Transparency is key to informing the public about possible political interference and allowing regulators to prevent media ownership from being excessively concentrated in the hands of too few owners, which can have undue influence over democratic debate - a real risk in the EU, as the

5 [Recommendation CM/Rec\(2012\)1 of the Committee of Ministers to Member States on public service media governance](#) (Adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers' Deputies).

6 Ibid 4

7 https://competition-policy.ec.europa.eu/system/files/2021-09/competition_policy_newsletter_2008_3_81.pdf.

8 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2009:257:FULL&from=EN>.

Media Pluralism Monitor (MPM) 2022⁹ has found.

13. However, to ensure proper transparency, Member States should be required to assign to NMR the task of developing and maintaining an online database containing information about the entire beneficial ownership chain of media at national, regional, and local levels. All media outlets should be obliged to provide reliable and up-to-date information about their beneficial ownership structure and financial background. The databases should be regularly updated and freely accessible to the general public.
14. The EMFA should also require the creation of an EU-level database that draws upon the national databases. An EU-level database would ensure transparency of media ownership and also support the analysis of cross-border ownership cases and national and regional media concentration.
15. We strongly support the Euromedia Ownership Monitor project¹⁰ conducted by Paris Lodron Universität Salzburg, financed by the European Commission, to map out the beneficial ownership chain in the field of media across the EU, which is crucial for the European single market. The database must be accurate and updated near real-time, which requires stable financing.
16. The recent judgment by the Court of Justice of the European Union (CJEU)¹¹ is worrisome in that it could hinder efforts in the field. We strongly believe that everyone should have access to information on beneficial ownership of media service providers.
17. The CJEU C-37/20 case reasoning underscores the importance of appropriately balancing privacy concerns with the public interest benefits arising from public access to beneficial ownership information. The ruling is specific to the EU context and legislation in relation to the EU 5th Anti-Money Laundering Directive, arguing that the law does not appropriately balance privacy and public access and that public access was not sufficiently justified. The ruling underlines that civil society organizations and the press have a legitimate interest in accessing the information on beneficial ownership. In order to avoid legal uncertainty, we suggest the legislators specifically determine the requirement for a publicly available media ownership database. We recommend explicitly specifying the objective of public interest that counterbalances privacy and data protection interests because the media helps form public opinion and has a direct influence on the outcome of elections. By doing so, EU legislators could prevent further limiting access to information and forming an opinion of media ownership.

9 <https://cmpf.eui.eu/mpm2022-results/>

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

11 [CJEU In Joined Cases C-37/20 and C-601/20.](#)

National regulatory authorities or bodies

Article 7

18. The NMRs play a key role in the enforcement of national media laws, the Audiovisual Media Services Directive (AVMSD), and the upcoming EMFA. Independent and impartial NMRs are the precondition for media freedom and pluralism to protect the media from undue political and commercial interference.
19. We are concerned about the transposition and application of the AVMSD regarding the independence of NMRs (Articles 30 and 30a of the AVMSD). In more than half of the EU Member States, the appointment mechanisms of heads of NMRs or members of the bodies are considered medium or high risk, according to the Centre for Media Pluralism and Media Freedom data.¹²
20. The Proposal refers to Article 30 of the AVMSD, leaving the implementation process to the Member States. However, the analysis of the implementation process (CULT) of the AVMSD shows clearly that stronger rules are needed. Liberties agrees with ERGA that the EMFA should include more binding language on the

financial resource for the newly established competencies, tasks, and workloads of NMRs.¹³ Further, mandatory safeguards to the appointment mechanism of the members of the board of the NMRs are necessary, and their independence must be strengthened, to ensure protection against political and commercial interference and full operational autonomy. It is also crucial in light of the Digital Services Act enforcement mechanisms, in which NMRs will play a key role in many Member States.

European Board for Media Services

Articles 8-12

21. We support the establishment of the European Board for Media Services (the Board), which is to ensure the application of the Regulation and to promote media freedom and pluralism across the Union.
22. However, we are very concerned about the Board's dependency on the Commission. It is hard to envision how the Board can act independently when it must first agree with the Commission before it can invite experts and observers to its meetings (Recitals 23), when its secretariat is provided directly by the Commission (Article 11), and when it

12 Centre for Media Pluralism and Media Freedom, Monitoring Media Pluralism in the Digital Media, <https://cadmus.eui.eu/bitstream/handle/1814/74712/MPM2022-EN-N.pdf?sequence=1&isAllowed=y>.

13 <https://erga-online.eu/wp-content/uploads/2022/11/EMFA-ERGA-draft-position-adopted-2022.11.25.pdf>.

is required to provide opinions on a variety of issues “upon request of the Commission” (Article 12).

23. To work effectively, the Board must receive more autonomy and have the possibility to act on its own initiative. We therefore support ERGA’s¹⁴ suggestion to amend Article 12 as follows:

- Mentions of “at the request of the Commission” should be replaced with “on its own initiative or at the request of the Commission”;
- references to “in agreement with the Commission” should be deleted.

24. Furthermore, we propose the establishment of a secretariat that is independent of the Commission and has sufficient resources to support the Board as well as the national regulatory authorities.

Provision of media services in a digital environment

Article 17

25. We disagree with the media privilege established by Article 17 of the Proposal. The core of the problem is that profit-driven content governance (VLOPs) has

an enormous influence on the public sphere and poses a serious threat to media pluralism. Media service providers (MSPs), on the other side, are suffering from financial difficulties and a drop in the visibility of their content.

26. Article 17 addresses this power asymmetry between VLOPs and MSPs. It requires VLOPs to provide a functionality that enables MSPs to declare themselves as such to receive a privileged status and more visibility on users’ news feeds. This self-identification mechanism is, however, flawed and could be easily abused by rogue media actors who want to spread propaganda and disinformation. In some EU Member States, such as Hungary or Poland, even PSM is captured by the ruling political parties and turned into a propaganda machine. These media would qualify for privileged treatment.

27. The procedure described by Article 17 also jeopardizes the effectiveness of the Digital Services Act by fragmenting horizontal rules and over-loading with new procedures.

28. We therefore ask the EU co-legislators to reconsider the aim of Article 17 and find a solution that tackles the core of the problem, namely the business model of VLOPs and the financial struggle of MSPs.

14 Ibid 12

Allocation of state advertising

Article 24

29. Liberties welcomes the principles and criteria that Member States must respect for the purposes of state advertising in Article 24 (1) and the reporting obligations that come with the distribution of such funds in Article 24 (2).

30. However, we are concerned that these reporting obligations only apply to “territorial entities of more than 1 million inhabitants”, despite the fact that only a few cities in the EU reach that threshold. Member States could easily use this loophole to allocate advertising spending via local governments. Therefore, we suggest lowering the threshold of inhabitants and also introducing an advertising spending limit over which the advertisers will have to comply with given reporting obligations. Providing information on the name of the beneficiaries and the total amount spent (the minimum reporting requirements) should not constitute a sufficiently high administrative burden to justify an exemption, even for local governments, especially considering that they are already legally required to keep records of their expenditures and are thus in possession of the relevant data.

31. Additionally, the minimum reporting requirements in Article 24 (2) b) and c) should be complemented by a detailed explanation by the public authorities or

local governments on their choice of beneficiary. Distribution criteria should be developed with the help of the Board and national stakeholders, including the media, academia and civil society organizations.

32. Furthermore, transparency requirements for state advertising should be aligned with the transparency requirements of political advertising. In some of the EU countries, state advertising and political advertising are closely interlinked and categories are misused, creating non-transparent financing of government-friendly media service providers.

III. Final remarks

The EMFA provides the EU with a great opportunity to strengthen and promote media freedom and pluralism across Europe. Ahead of the upcoming European Parliamentary elections, and in the context of a generally worsening situation for media freedom and the safety of journalists in the EU,¹⁵ legislators should view the EMFA as a tool to not only support and safeguard media freedom but to protect European democracy itself.

15 <https://www.liberties.eu/en/stories/media-freedom-report-released-2022/44117>

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