

RECOMMENDATIONS FOR THE UPCOMING EUROPEAN MEDIA FREEDOM ACT



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Executive Summary

Liberties' policy paper on European media legislation focuses on the problems of the European media sector and offers recommendations on how to address them.

The paper outlines the various legal bases and tools available to the EU to safeguard media freedom and pluralism. These include the Commission's annual Rule of Law Report, the Audiovisual Media Services Directive, the draft Digital Services Act package, the Recommendation on the protection, safety, and empowerment of journalists and the initiative to protect journalists and rights defenders from abusive litigation (SLAPPs). We also list the need for EU-level regulation, the European Media Freedom Act, to ensure proper functioning media systems across Europe.

The EU is committed to the values of the rule of law, democracy and fundamental rights as enshrined in the Charter of Fundamental Rights. A free and plural media system is integral to implementing these values. A properly functioning democracy relies on balanced and well-informed public debate, which is in turn made possible through a free and plural media. The media make use of, but also help to fulfil for the general public, the right to access information and freely exchange opinions and information. It is through healthy public debate that citizens can exercise their right to vote in a meaningful manner and exercise other rights, such as freedom of expression, association and assembly in order, to participate in democratic life.

A free and plural media requires not only a media market that is free from state interference and measures to prevent concentration of ownership (such as transparency of beneficial ownership), but also the independence of national media regulators.

The distribution and financial resources of the media industry have significantly changed in the last decade. Therefore, policymakers have to rethink the economic structure of the media and the proportionate intervention needed, with a particular focus on public service media, the advertising industry, and state aid.

To facilitate the implementation of standards to protect media pluralism, the EU should require Member States to periodically report on state aid and subsidies granted to the media sector to the Board of Media Freedom. In addition, media pluralism and freedom should be part of the Commission's annual Rule of Law Report, with precisely defined benchmarks.

Key findings

- The EU should use all possible means to strengthen and improve media freedom and pluralism across the EU, as they are the cornerstones of democracy. These means are: creating new pieces of legislation; urging the implementation of existing recommendations; and working closely with all stakeholders in the media industry, including civil society, to support self- and co-regulation in the field.

- The Media Freedom Act (MFA) should lay out minimum standards for public service media's organisational principles and requirements for providing state funding to public service media.
- The MFA should explicitly define the basic principles under which governments may grant state aid and subsidies to media companies. These principles should include political impartiality, transparency of the funding, accountability, eligibility, and feasibility.
- The Commission should explore flexible digital payment solutions to encourage content distributions and provide income to media outlets, such as micro-payments, metered paywalls, partial subscriptions and journal malls.
- The MFA should require that the appointment mechanism of members of national media regulators be democratic, ensure their independence from governments, political parties and market players, and be transparent. The MFA should set out basic principles as the criteria for selection.
- The MFA should require a transparent European database that includes information about the entire beneficial ownership chain of media outlets.
- The EU should ensure the proper implementation of the Recommendation on the protection, safety, and empowerment of journalists and related EU legislation, such as the protection of persons who report breaches of Union law (Whistle-blowing Directive), in close consultation and cooperation with civil society and media representatives. New measures to protect journalists from strategic lawsuits against public participation (SLAPPs) should be adopted as a matter of urgency.
- The MFA needs to regulate consistent enforcement mechanisms at national and EU levels. We recommend full-scale, Commission-led enforcement mechanisms of overarching qualities of media freedom and pluralism.
- Annual monitoring of the status of media freedom and pluralism in the Member States, which includes the aspects of media freedom mentioned in this paper, should become part of the Commission's annual Rule of Law Report.
- The benchmarks used by the Commission in its annual Rule of Law Report regarding media freedom should be made clearer and more precise.

Introduction

Media law is a field that spans several areas of law: it carries elements of both private and public law. Constitutional law, competition law, telecommunication law, advertising law, state aid, administrative law, platform, and AI regulation are among the many fields of law that affect the operation of the media industry.

The media is a pillar of democracy in that it facilitates public discussion and political discourses. It is a cornerstone of democratic systems and serves the realisation of the right to freedom of expression and access to information. Disproportionate limitations on these freedoms are regarded as a sign of rule of law backsliding: suppressing public criticism and limiting access to public information are clear indications of a government's murky intentions. At the same time, the media is a significant economic branch that creates products and provides services across borders.

The Charter of Fundamental Rights is a binding part of European Union law. The Charter ensures the right to vote in democratic elections to the European Parliament in any Member State. Free and fair elections are based on the presumption that voters get easy access to reliable information that enables their participation in democratic discourses, enabling them to form opinions on political issues and engage them to participate in the democratic

decision-making process. In short, free and independent media is the precondition to exercise the right to vote, which is ensured in Article 20 TFEU and Article 39 of the Charter. Furthermore, it is also a logical necessity.¹

Without an independent and well-financed media system, problems like bad governance and corruption would remain hidden, and citizens could be deprived of their right to access information to make an informed decision during the elections. The Charter also ensures freedom of expression. Therefore, fundamental rights connected to media freedom should be relied on more forcefully.²

European democracy is key to Europe's political stability. The current geopolitical processes and the war against Ukraine have demonstrated how longstanding foreign interference and disinformation permeate the media and information systems and are often disguised as user content. Free and democratic media systems enable the European Union to fulfil its

1 Kochenov, D., [Augmenting the Charter's Role in the Fight for the Rule of Law in the European Union: The Cases of Judicial Independence and Party Financing](#), University of Groningen Faculty of Law Research Paper, October 11, 2020. "If the worry in Hungary and Poland is with the capture of the media, and if one agrees that even the most timid definition of EU citizens' active right to vote for European Parliament and local elections (Article 17(2) (b) TFEU, and Articles 11 and 39(1) CFR) will logically necessitate free and independent media at Member State level in the same way that independent and impartial courts at Member State level are required in a liberal democracy, it is quite clear that there are many more Union law areas than just Article 19 TEU that could be 'weaponized' to defend the rule of law in tandem with applying the Charter."

2 Kochenov, D., and Morijn, J., [Strengthening the Charter's Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing](#), University of Groningen Faculty of Law Research Paper, <https://ssrn.com/abstract=3973096>, November 28, 2021. Further reading: JAKAB, A., 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in Closa, C., and Kochenova D., (eds), *Reinforcing Rule of Law Oversight in the European Union*, pp 26, October 2016.

goal formulated in Article 3 of TEU. It is also necessary for the EU to defend itself against hybrid threats and interference through online communicative actions from outside and within the borders of the EU. Intervention on behalf of the European legislative branch is needed to ensure that reliable information sources are available for the general public across Europe.

Media freedom and pluralism as pillars for democracy

A free and diverse media system is an indispensable prerequisite for a properly functioning democracy, as well as for the rule of law and for safeguarding and allowing the exercise of fundamental rights in general. To protect the European values articulated in Article 2 of TEU, the European Union should set legal standards on the media industry.

Moreover, the promotion and protection of democracy and values set out in the TFEU includes rules that aim to prevent restrictions on and distortions of competition in the internal market. The purpose of the economic objective of media legislation is to enable the proper functioning of the EU's internal market

as a key driver for the well-being of EU citizens, businesses and society as a whole. The media industry's distribution structure of financial resources has been in continuous change throughout the past decades. Financial resources have shifted away from media outlets that report the news and towards Big Tech companies that merely collect and host the news. The economic model of media companies has altered; the advertisement market has transformed as Big Tech companies have captured the advertising industry while subscribers have vanished. Consequently, the free market can no longer sustain good quality journalism. Therefore, there is an urgent need to rethink how to ensure the financial independence of the media, as it is the prerequisite for professional, high-quality, impartial journalism.

Supporting and empowering media to foster free and pluralistic democratic debate

The European Union common market is based on four freedoms.³ The media is an important economic branch, representing itself both in

3 The principles of subsidiarity and proportionality govern the exercise of the EU's competences. In areas in which the EU does not have exclusive competence, the principle of subsidiarity seeks to safeguard the ability of the Member States to take decisions and action and authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, 'by reason of the scale and effects of the proposed action'. See [Fact Sheets of the European Union](#), 2021.

the services and products market. The trans-border nature of this market is increasing due to globalisation, which also has an impact on European integration.

However, the EU is more than an economic entity intended to stimulate commerce. It is also an organisation that guarantees the well-being of citizens by promoting respect for fundamental rights, democracy, the rule of law, and the other values listed in Article 2 of the TEU and the European Union Charter of Fundamental Rights. Media freedom and pluralism are key to the realisation of these values.

Aside from promoting and protecting a free and plural **media at national level to guarantee democracy inside individual Member States, media at the European level should also be free and plural so it can foster a European public discourse and serve people all over Europe to become well-informed in common European matters. Furthermore, it is a precondition for free and fair elections to the European Parliament**, according to Article 20 TFEU. The same level of media freedom must be ensured across Europe to guarantee the right to free movement of services (Articles 49 and 56 TFEU) and the right to vote in European Parliamentary elections and national elections in the Member States.

The right to freedom of expression, of which media freedom is one manifestation,

encompasses the right to receive accurate information. As such, measures to protect media freedom and pluralism should include measures to address the business model of spreading disinformation, as the latter is designed to distort and manipulate public debate.⁴ Events such as the Brexit vote and Russia's invasion of Ukraine highlight how disinformation has been weaponized to weaken cohesion and security between EU governments. Thus, a free, plural, and diverse media sphere are important to nurture European cohesion and fortify European security.

The role of the public service media

The democratic mission of public service media (PSM)

PSM fulfil their mission by working as pillars of trust and promoting social cohesion while fulfilling the traditional public service remit. Beyond providing information – in forms accessible to various segments of vast audiences, including children – they also need to represent cultural attitudes and values to foster and promote European values as enshrined in the Treaty and cultural heritage.

4 Khan, I., A/HRC/47/25. Disinformation and freedom of opinion and expression : report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/085/64/PDF/G2108564.pdf?OpenElement>, April 13, 2021.

European public service media

The European Union may fully realise its values and freedoms, namely the free flow of services and persons, and function as an area of democracy only if all citizens can have access to information. Public service media plays an essential role in this. Further, free and fair European Parliamentary elections also presuppose that all citizens in each Member State are informed about public matters across Europe. Informed voting and exercising full rights of European citizenship, set out in Article 20 TFEU, requires that citizens have access to good quality content. Such a common European public media needs to serve as a reference point, but also as a forum for public debate.

Therefore, we warmly welcome the European Newsroom project.⁵ However, getting access to it requires a degree of media literacy that is likely to be lacking among parts of the population. Consequently, the Commission should fund projects to boost media literacy across society, from children to older persons.

Public service platform

Information consumption is overwhelmingly taking place through social media platforms. Big Tech companies have become gatekeepers, as addressed in the Digital Markets Act. The success of distributing public service content

online depends mainly on social media platforms' recommending systems. Moreover, the EU should support and encourage initiatives to create a European PSM platform. Such initiatives should also include interoperability requirements to allow easy connection between the PSM platform and the social media platforms. An accessible European PSM would help citizens access reliable information even in those EU countries where PSM is biased and captured by the national government. As part of this comprehensive set of advantages, it would enable the distribution of public service content and quality journalism products to everyone with a smartphone.⁶ The European common market will immensely benefit from the services and security provided by such a platform as it serves to protect against foreign interference. In addition, the platform will enhance the efficiency of sharing media content, including but not limited to news and audiovisual cultural content.

5 European Commission, [Commission announces European Newsroom project at the European News Media Forum](#), November 29, 2021.

6 As an example of such an initiative, see: Kagermann, H. and Wilhelm, U. (eds), [European Public Sphere: Towards Digital Sovereignty for Europe](#), Acatech: National Academy for Science and Engineering, July 15, 2020.

Independence of National Media Regulatory Authorities

The MFA should contain requirements to guarantee the independence of National Media Regulatory Authorities (NMRA)⁷ from the government, political parties and industry,⁸ reviving the idea of the dropped amending proposals to Article 30 and the new 30a of the Audiovisual Media Services Directive.⁹

Independent NMRAs should have an enhanced role in the new media environment. They may need to supervise some of the online platforms if the Digital Services Coordinators defined by the draft Digital Services Act will be connected to media authorities, even though the Member States may choose different authorities, such as those responsible for telecommunications or competition.

All responsible decision-makers in the relevant authorities, including the Digital Services Coordinators, should be required to have proven expertise in their fields, as prescribed by the Council of Europe's Recommendation 2000(23) on the independence of regulatory authorities to the broadcasting sector.¹⁰ Member States follow various traditions in the selection and appointment mechanisms of their authority members. In all cases, this **appointment should take place democratically and transparently, ensuring that all members of the authority remain free from the influence of political power.** The criteria set by Article 30 of the Audiovisual Media Services Directive should also be fully respected. It is crucial to ensure that NRMAs are well-financed and well-staffed to ensure independence and high expertise.

7 See more on independence of regulatory authorities, among others, in: Irion, K. et al., [The independence of regulatory authorities in Europe](#), 2019.

8 Valcke, P., [AVMS Review and Media Regulator's Independence: The Dancing Procession of Echternach](#).

9 Directive (EU) 2018/1808 of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L1808&from=EN>, November 14, 2018.

10 Council Of Europe, [Recommendations Rec\(2000\)23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector](#), December 20, 2000.

Ensuring media pluralism and sustainable financing

Media ownership¹¹

Pluralism, both external and internal, is an important part of media freedom. It has many faces and preconditions, as the various indicators applied by the Media Pluralism Monitor¹² project show. However, media ownership has been constantly one of the indicators. Understanding ownership concentration and the extent of genuine competition are crucial to measuring pluralism in traditional and online media.¹³

Transparency of beneficial ownership, accessible to the public, is crucial for the regulator and the audience to inform themselves about potential biases that might influence media content. For this reason, it is **necessary to maintain a publicly available database about both the vertical and horizontal chain of beneficial ownership¹⁴ in media companies, including non-media owners, such as infrastructure providers.** The influence of

non-media owners may carry the potential of negatively influencing independent reporting. Transparency of ownership is also crucial to allow market analysis and competition-related decisions.

Market dominance, concentration, and merger conditionality should be calculated in national, regional, and European economies with a special focus on small linguistic markets.

Media companies in dominant positions should be more closely monitored to ensure rigorous compliance with rules relating to consumer protection, fundamental rights and ethical and professional standards.¹⁵

The structure of media financing

The European media financing structures need to be recalibrated to the online ecosystem, which significantly altered television, radio, and print financing. Therefore, alternative funding sources, with consideration to retaining inclusiveness, spontaneity, and flexibility of access to content, such as micro-payments, cross-medium reader-passes, and other innovative solutions, should be encouraged.

11 Legal basis: [Article 106 TFEU](#), [Article 114 -118 TFEU](#), [Article 6 TEU](#).

12 European Centre For Media Pluralism And Media Freedom, [MPM2021 Results](#), 2021. Starting with 6 indicators in 2014, the MpM now uses 4 indicators.

13 OECD, [Competition issues in News Media and Digital Platforms](#), December 2021 .

14 Full transparency would be desirable, even though some media companies may have a long list of shareholders. However, an online database would be capable of dealing with even long lists.

15 Medvegy, G., [Orban's Media Empire Unlawfully Given Green Light](#), January 30, 2020.

We can detect two main fields where regulatory intervention is needed: state aid and subsidies, and advertising.

State aid and subsidies¹⁶

EU Member States differ according to their population, GDP, the size of their media market, and the cultural background for consuming and financing. In some countries, advertising, donations, and subscriptions would finance the media market insufficiently. In these countries, it is beneficial to provide state subsidies, especially to media outlets of merit that are less viable commercially. However, the grounds for allocating subsidies and the decision-making process should be transparent, inclusive and non-discriminatory to ensure diversity and media pluralism.

Information about state aid should be reported to the Commission and examined for compliance with the Treaty, focusing on practices that conceal state aid as payment for advertisements made by state-owned companies.¹⁷

Advertising

Addressing the data harvesting business model

Following the decline in advertising in traditional media, online media is also losing advertising on platforms¹⁸ because social media took the dominant share of the advertising budget. The principle of curating content follows the method: content “serves” to sell the ad space, and users’ attention is the commodity marketed to advertisers. Moreover, the available online tools to measure the audience are incomparably more sophisticated. The data harvesting business model leaves users exposed to attention harvesting.¹⁹ We strongly believe that **regulatory intervention in advertising practices is necessary, with a particular focus on protecting the personal data of the users** and introducing strict limitations on the data harvesting business model and online targeting techniques. Targeting advertising, especially political advertising, can also be used to mislead, manipulate, discriminate against or demobilise voters. Targeting techniques can be used to say different things to different people. It creates echo chambers and increases

16 Legal basis: [Article 109 TFEU \(ref. Articles 107-108\)](#), [Articles 114-118 TFEU](#).

17 Shinar, A., [Democratic Backsliding, Subsidised Speech, and the New Majoritarian Entrenchment](#), *American Journal of Comparative Law*, April 11, 2021. see also: MÜHELY, M., [State advertising spending in Hungary an unlawful form of state aid](#), <https://mertek.eu/en/2019/01/29/state-advertising-spending-in-hungary-an-unlawful-form-of-state-aid/>; <https://mertek.eu/en/our-works/projects/ec-complaints/>, January 29, 2019.

18 See figure: [Estimated advertising and circulation revenue of the newspaper industry](#), in Pew Research Center, [‘Newspapers Fact Sheet’](#), July 9, 2019.

19 Van Dijck, J., Poell, T., and De Waal, M., [The Platform Society](#), October 2018.

polarisation, instead of enriching political debate.²⁰

Solidarity tax or quota

The primary aim of advertising regulation is to protect consumers.²¹ However, recognising advertisement income as a key resource for sustaining online media justifies regulatory intervention to allocate or redistribute advertisement revenues among players in the online ecosystem, namely big platforms and online media. In other words, **regulatory intervention should divert a part of the advertising revenues that shifted from media companies to platforms.** Such redistribution could take place either in the form of a media quota²² for large advertisers or a platform “solidarity tax”²³ that allows central redistribution in forms of non-discriminatory subsidies. All methods need careful consideration of possible negative side effects. Regulating the business model of platforms could also improve the possibility that media have access to advertising revenue.

Demonetising disinformation

The attention-driven advertising model plays a role in spreading disinformation and aggravating the post-truth nature of public discourse. Sensational content receives more attention and a higher click rate. Disinformation campaigns are partially driven by economic interests. **Depriving disinformation of advertisement revenues would disempower disinformation and contribute to ‘cleaning’ the ecosystem from the harmful effects of targeted advertising.** This would require that all actors across the value chain of advertising carry responsibility to refrain from participating in spreading or promoting disinformation. Advertising retailers should refrain from sponsoring disinformation and hate speech. At the same time, creative agencies should reject participation in such advertising, and media outlets should reject advertisements and sponsorship that would carry disinformation or discriminatory content. Even though disinformation is not illegal per se, the principle and professional standard should be declared in a self-regulatory

20 Galaski, J., Simon, E., [Solutions for Regulation Targeted Political Advertising on Online Platforms](#), Civil Liberties Union for Europe, November 2, 2021.

21 [Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual services](#), March 10, 2010. [Directive 2006/114/EC of the European Parliament and of the Council on misleading and comparative advertising](#), 2006. [Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation \(EC\) No 2006/2004 of the European Parliament and of the Council](#), May 11, 2005.

22 Bayer, J., et al. Disinformation in the light of freedom of expression, in [The fight against disinformation and the right to freedom of expression](#), July, 2021, pp. 81, 88-89.

23 BBC, [Australia news code: What’s this row with Facebook and Google all about?](#), February 18, 2020.

code of conduct. Furthermore, DSA Article 24 offers the possibility to limit the targeting methods that online platforms make available to advertisers. **Targeting people according to their sensitive data and using inferred data - assumptions that algorithms make about users' preferences based on their online activity - should be prohibited by the DSA.**²⁴

Subscription/crowdfunding

Several online newspapers have attracted a stable subscriber base and flourished.²⁵ However, putting all quality information behind paywalls limits access to information and hinders participation in public discourse. We suggest **more research on flexible digital payment solutions that could be encouraged to serve people's browsing and reading habits and provide sustainable income for content media enterprises**, such as micro-payment or cross-media readers' passes.²⁶ Research and

action should be encouraged and financed in this direction.

Financing Public Service Media²⁷

Human attention has become a scarce resource in the media system, where we all face information overload.²⁸ As a result, trust in the media has declined, and people are more vulnerable to extensive and technology-supported disinformation campaigns. As a result, public service media has gained a new importance and relevance in this information environment. We discuss PSM in two different sections, both under economic and democratic objectives.

The Television Without Frontiers Directive,²⁹ adopted in 1989, defined broadcasting as a service. Since then, the funding of PSM has been at the heart of the discussion. The Directive cast public service broadcasting as a subsidised service and called for scrutiny of unpermitted

24 [Open letter: Civil society call for a Digital Services Act that benefits people and is compatible with human rights](#), March 1, 2022.

25 Jenkins, J., [Publish less, but publish better: pivoting to paid in local news](#), Reuters Institute for Study of Journalism, September 24, 2020.

26 Readers' passes: professional networks of media outlets would offer a metered subscription where readers could access to a number of articles in any member of the network.

27 Legal basis: [Article 109 TFEU \(ref. Articles 107-108\)](#), [Articles 114-118 TFEU](#).

28 The scarcity of the resources to publish information, such as frequencies or financial resources, has been replaced by a scarcity of attention.

29 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. (original), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A124101>, October 3, 1989.

state aid.³⁰ The Amsterdam Treaty Protocol in 1997 outlined the justification for funding public service broadcasting and its conditions.³¹ In particular, the Protocol allows exemption from Article 107 of the TEU (prohibition of providing state aid) “in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest.” The latter were clarified by the Commission Communication on State Aid to public service broadcasting in 2001, updated in 2009.³² The guidance given in the Commission Communication provides for a prudent and task-based financing system that is transparently decided and applied and reviewed in a democratic process. The financing system should contain **safeguards to improve the chances for independent financings, such as protection against political interference, proper conformity with transparency**

rules, task-related financing requirements, and democratic cross-check mechanisms.

In some EU Member States, central-budget financing of non-independent media authorities without supervision hinders the public service from fulfilling its obligation.³³ While the primary focus of the Protocol and the related Communication is on the common market, state capture of public service media has implications on the situation of the rule of law. Discrepancies between the level of media freedom in various countries destabilise the mutual trust³⁴ between the Member States. Also, compliance by the Member States with the common values on which the European Union is founded, such as rule of law and human rights, which define the very identity of the European Union, justifies the mutual trust between those states.³⁵ Mutual trust serves as a basis of European integration. The rule of law

30 Article 107 (ex Article 87 TEC)

31 [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](#), OJ C 340, November 10, 1997.

32 See also: EUROPEAN COMMISSION, [Communication of the Commission on the application of state aid rules to public service broadcasting](#), 2009/C 257/01, October 27, 2009.

33 Bárd, P. and Bayer, J., A comparative analysis of media freedom and pluralism in the EU Member States, research paper for the [Policy Department C: Citizens' Rights And Constitutional Affairs](#), September 2016. See pages. 137-139 for an explanation on the fraudulent organisation of the Hungarian public service media.

34 Cases C-156/21 Hungary v Parliament and Council and C-157/21 Poland v Parliament and Council, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf>. See also: Bodnar, Adam - Bard, Petra: [The end of an era. The Polish Constitutional Court's judgement on the primacy of EU law and its effects on mutual trust](#). 25 October 2021., <https://www.ceps.eu/ceps-publications/the-end-of-an-era/>, February 16, 2022.

35 Ibid 33.

and democracy are common values of the EU laid down in Article 2 TEU, and as such, their protection is a common interest, which is to be protected by the Protocol as well.³⁶

Safe and enabling environment for journalists and media

Protection of journalists

Freedom of the media and the protection of journalists go hand in hand. Yet, journalists and other media actors are increasingly threatened, as happened several times during protests against COVID-19 measures. The recent revelation of the Pegasus scandal shows that journalists are subject to surveillance. Online harassment, physical abuse, and even killings of investigative journalists show that these violations are increasingly occurring. There is an

urgent need for the EU and national governments to provide systemic responses.

Recommendations both by the European Commission and the Council of Europe, with the support of other international bodies, such as the United Nations Special Rapporteur for freedom of expression, urge EU Member States to create a safe environment for media professionals. In September 2021, the European Commission published its Recommendation on the protection, safety and empowerment of journalists³⁷ to help strengthen media freedom and media pluralism in the EU. It aims to ensure safer conditions for journalists both in the online and offline environment.

The full implementation of the Recommendation CM/Rec(2016)4 of the Council of Europe's Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors³⁸ is also needed across Europe to create protective measures and a safe environment for media professionals.

36 Based on the Treaty, state financing of media is acceptable only subject to defined conditions. MFA should define these conditions as requirements from PSM, in particular its political independence, independent financial supervision, transparency, and prudence in management. These requirements should align with the [Council of Europe Recommendation 1878 \(2009\) on public service broadcasting](#), particularly its paragraphs 12, 13 and 16.2, 16.3, 16.5., June 25, 2009. In addition, the requirements on governance structure should be based on the Council of Europe Recommendation CM/Rec(2012)1 on public service media governance, in particular its "Tier 1 - Structures", or Points 21-27, https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2012-3-of-the-committee-of-ministers-to-member-states-on-the-protection-of-human-rights-with-regard-to-search-engines-adopted-by?inheritRedirect=false, April 4, 2012.. The Commission should regularly review these conditions.

37 [Recommendation on the protection, safety and empowerment of journalists](#), September 16, 2021.

38 [Recommendation CM/Rec\(2016\)4](#), April 13, 2016.

The Commission should play a leading role in urging Member States to implement the recommendations mentioned above and introduce effective protective measures and robust investigation and prosecution of criminal threats against journalists and other media workers, particularly women.

Protection of journalistic sources

The MFA should protect journalistic sources in judicial and administrative procedures by providing privileged exemption to journalists from inspection of their homes, offices, and electronic devices, secret surveillance, and interrogation regarding their information sources. Implementing the Directive on whistleblower protection³⁹ is an important step in this process. However, the recently revealed **Pegasus project clearly shows that governments unlawfully wiretap journalists and their sources**. Therefore, **legislative and procedural steps are required from the EU to protect journalists and their sources against governmental interception**.

Enhancing journalistic standards in the new media age

Media outlets and journalism associations should be encouraged and enabled to form networks, exercise ethical control and add searchable professional labels to help their readers. Besides official journalists, citizen journalists should be able to claim some journalistic privileges.⁴⁰ Journalistic standards and ethical requirements should be left to journalists associations and no lawmaking is justifiable in the field.

Countering SLAPPs

Strategic lawsuits against public participation (SLAPPs) are a form of abusive lawsuit targeting investigative journalists. According to recent developments measured by Liberties' Rule of Law Report,⁴¹ SLAPPs are on the rise, which means the media are increasingly deterred from reporting on matters of public importance. EU action needs to provide effective protection against the range of tactics used by SLAPP litigants. We support the recommendations⁴² of the Coalition Against SLAPPs in Europe (CASE), that the EU must extend protection from SLAPPs to all forms of

39 [Directive \(EU\) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law](#), October 23, 2019.

40 Court Of Justice Of The European Union, [Case C-345/17](#), February 14, 2019.

41 Civil Liberties Union For Europe, [Liberties Rule of Law Report 2022: Country & Trend Reports on Democratic Records by Civil Society Organisations Across the European Union](#), February 15, 2022.

42 Coalition Against Slapps In Europe, [SLAPPs in Europe: How the EU can Protect Watchdogs from Abusive Lawsuits](#), January, 2022.

public participation and must cover cases filed on a domestic as well as cross-border level. EU legislation on SLAPPs should be accompanied by strong procedural and other safeguards, the decriminalisation of defamation, libel, and slander and the promotion of a discussion on ethical and professional standards. The enforcement of these rules is key. Therefore, the EU should monitor and support Member States in the implementation of the EU anti-SLAPP initiative.

Monitoring challenges and taking action

A free and diverse media landscape is indispensable to checks on governmental power. Diminishing or restricting media freedom and pluralism should be interpreted as early warning signs of rule of law backsliding.

The MFA is expected to pave the way for the enforcement of standards to guarantee media freedom and pluralism. However, the enforcement mechanism should not rely on sporadic reporting only. Rather, it should also be based on inclusion of the state of media freedom and pluralism in the Commission's annual Rule of Law Report.

As well as including media pluralism and independence in the annual Rule of Law Report, the Commission should improve and elaborate on the benchmarks relevant to media freedom and pluralism which are insufficient in their current form. In particular, it was recommended by press freedom groups to pay more attention to the capture of and state control over PSM, state advertising and the status of journalists, among other important issues.⁴³

The country-specific and thematic recommendations the Commission intends to include in its annual Rule of Law Report from 2022 should be used to deliver more specific and inclusive information. In particular, closer cooperation with civil society organisations and media actors is recommended to gather more accurate information.⁴⁴

Where deficiencies are reported, the Commission should initiate action. In case of a medium threat to these values, a first stage response should be applied. In particular, the Commission could initiate a Joint Programme, similar to the Commission's Rule of Law Framework, to work with the Member State to improve the situation. However, we recommend delegating an independent body to stay within the Member State during this Joint Programme to observe the situation and provide immediate support. We recommend running the Joint Programme for two years.

43 European Partnership For Democracy, [Civil society recommendations: how the Commission can improve the credibility, inclusiveness and impact of the Rule of Law Report](#), September 22, 2021.

44 As it has been recommended in: Civil Liberties Union For Europe, [Liberties Rule of Law Report 2022](#), February 15, 2022.

If the Joint Programme is unsuccessful, or a sudden deterioration yields the conclusion that the threat to media freedom and pluralism is high, the **Article 7 procedure should be initiated**. If the risk is related to governmental interference with the media market processes or other government action affecting the financial viability of media outlets, we recommend activating the rule of law conditionality mechanism.

The Joint Programme should be a supervision mechanism that fosters mutual understanding between the Member State and the Board of Media Freedom, which should be established by the MFA. The Board of Media Freedom is a European supranational body, consisting of independent experts, who could participate in the monitoring process of the Member State-level work. In addition, the Joint Programme could offer the opportunity to invent and employ tailor-made solutions adapted to the characteristics of the specific Member State's market and the needs of its society.

Recommendations

Supporting and empowering media to foster free and pluralistic democratic debate

Public service media⁴⁵

The MFA shall lay out the requirement for PSM's organisational principles. It should be in correlation with the requirement for providing state funding to the PSM, under the criteria set by the Amsterdam Treaty Protocol, and elaborated by the Communication on state aid for public service media,⁴⁶ and as defined by the Council of Europe, including but not limited to its Recommendation CM/Rec (2012)1 on public service media governance, in particular, its "Tier 1 - Structures", or Points 21-27.

European public service content⁴⁷

The MFA should explicitly require that the Member States provide financial, organisational, and moral support to the European

45 Legal Basis: [Article 2 TEU](#), [Article 6 TEU](#), [Article 20 TEU](#), [Articles 11, 39 Charter](#), [Protocol 29 TFEU](#) (Amsterdam Treaty Protocol).

46 See also: European Commission, [Communication of the Commission on the application of state aid rules to public service broadcasting, 2009/C 257/01](#), October 27, 2009.

47 Legal basis: [Article 20 TFEU](#), [Article 11, 39 of the Charter](#).

Newsroom project, including the sharing of information and participating in distribution. The same legal basis that serves for supporting the European Newsroom project should also set requirements for Member States to collaborate. Declaring may appear superfluous but in the light of diverse attitudes towards the EU integration among the Member States, it can have practical importance.

The idea of the European Newsroom should be developed to extend to opinion pieces and representations of the European culture, so as to also produce and distribute popularly accessible cultural products that address common experiences, concerns, and opportunities of European citizens, including “explainers” of European controversial policies, “myth debunkers” and other products to increase civic literacy. Such products should be distributed through online platforms.

Independence of National Media Regulation Authorities⁴⁸

The MFA should require that the **appointment mechanism of NMRA members be**

democratic and transparent, and it should set out basic minimum standards for selection criteria. These should include proven expertise in matters of media regulation, independence from political influence, and private interests in the related industries that could cause a conflict of interest.

The MFA should require that any decisions in their competencies, with special focus on licensing and supervision decisions by the NMRAs, shall comply with the standards and requirements of media freedom and pluralism, ensuring diversity and free expression.

Ensuring media pluralism and viability

Media ownership⁴⁹

The MFA should create rules in the field of market concentration and market dominance. Enforcement of the rules will be critical; see below in the last section.

48 Legal basis: [Article 114-118 TFEU](#), [Article 20 TFEU](#), [Article 2 TEU](#), [Article 11, 39 Charter](#).

49 Legal basis: [Article 3 \(b\) TFEU](#), [Article 106 TFEU](#), [Article 114 -118 TFEU](#), [Article 6 TEU](#), [Charter Article 11](#). Article 3 (b) TFEU provides exclusive competence to the Union for establishing competition rules necessary for the internal market. According to Article 106 (2) TFEU, “Undertakings [...] having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition.”. Articles 114-118 TFEU provide for the approximation of laws in the interest of the development of the internal market. Article 6 of the TEU provides that the Charter shall have equal value as the Treaties, and that the Union recognises the rights, freedoms and principles set out in the Charter. Article 11 (2) of the Charter provides that freedom and pluralism of the media shall be respected.

1. The MFA should provide a transparent European database that includes information about the entire beneficial ownership chain of media outlets, including owners who have an influential ratio of the shares or of the voting rights in the company. All media should be obliged to report reliable, up-to-date information to the database. **Furthermore, it is essential to publish the database free of charge and open data across the EU through the Open Data Directive and the Anti-Money Laundering Package.** The Implementation Act of the Open Data Directive and the relevant MFA rules can ensure proper enforcement and EU-level oversight.

Transparency requirements should not apply to bloggers and citizen journalists to ensure anonymity and avoid hate crimes against journalists.

2. The EU should define rules for concentration and develop merger conditionality rules for the European media market. Market dominance should be calculated in the European market and in the context of national, regional, and language markets.

Media financing

It is crucial to find new ways of media financing in order to sustain and develop a pluralistic media market.

State aid and state advertising⁵⁰

The MFA should explicitly define the basic principles of granting state aid and subsidies to media companies. These principles should include political impartiality, transparency of the funding, accountability, eligibility, and feasibility.

State aid and subsidies should be under constant review to comply with the TFEU and ensure political independence.

State aid should be defined broadly to include all costs and benefits that selectively affect competing media enterprises, including state advertising, tax exemptions, or selective taxation, and to include similar aid granted to their owner company.

The MFA should require systematic **periodic reporting from the Member States about state aid and subsidies granted to the media sector to the Board of Media Freedom.** Participation in public procurement by companies whose ultimate owner also owns a media company should be reported to the Commission and the 'Board of Media Freedom'.

50 Legal basis: [Article 107-109 TFEU on state aid](#). Article 107 provides that state aid is generally incompatible with the internal market. Exceptions may be granted conditionally under Article 107 para.3 (c) and (d). Article 108. para.1 prescribes that the Commission keeps all systems of aid under constant review.

Demonetise disinformation and hate speech⁵¹

The MFA should rely on the Code and the Guidance on Strengthening the Code of Practice on Disinformation⁵² to ensure integrity in advertising to ensure that advertisers refrain from sponsoring content spreading disinformation.

Regarding illegal speech, such as hate speech, the MFA should require that providers of advertising services (creative agencies) reject participation in such advertising. Likewise, publishers, including social media and media outlets, should reject advertisements and sponsorship that carry hate speech. These rules should not apply to disinformation or any other type of legal speech. We also believe that **decriminalisation of defamation, libel and slander would facilitate the realisation of freedom of speech and the freedom of the press.**

Explorative research into financing and digital payment solutions⁵³

Flexible digital payment solutions should be explored to encourage content distribution and provide income to media outlets, such as micro-payments, metered paywalls, partial subscriptions and journal malls. The Commission should request input from stakeholders and researchers on innovative, practical solutions.

Financing of public service media⁵⁴

The MFA should incorporate the principles expressed in the Commission Communication on State Aid to public service broadcasting in 2001, updated in 2009 as conditions of exemption from the general prohibition of state aid. Besides reiterating these principles, the Commission should also actively enforce these rules as part of its efforts to protect the rule of law.

51 Legal basis: [Article 20 TEU](#) (right to informed voting), [Article 6 TEU](#) (respect for the Charter), [Article 114 TFEU](#), [Article 10, 11, 39 Charter](#). Article 20 (b) TEU provides the right to vote and to stand as candidates in elections to the EP and in municipal elections in their Member State of residence for EU citizens. The same right is provided by Article 39 of the Charter. It is possible to exercise the right to vote only if adequate information on political affairs is accessible. Article 10 and 11 of the Charter ensures the right to hold, receive and impart opinions, information and ideas. Amplified disinformation campaigns restrict the free exercise of this right by indirectly suppressing organic, or rational voices of citizens and of quality content media. Noting that on the basis of Article 114 TFEU, the Directive 226/114/EC on misleading advertising had already laid the grounds for regulating advertising to protect rights.

52 EUROPEAN COMMISSION, [Guidance on Strengthening the Code of Practice on Disinformation](#), May 26, 2021.

53 Legal basis: [Article 167 \(4\) TFEU](#) to incentivize research and innovation in order to recalibrate media financing and demonetize disinformation.

54 Legal basis: [Article 109 TFEU on state aid](#), [Protocol 29 TFEU](#) (Amsterdam Treaty Protocol), and interpreting it: EUROPEAN COMMISSION, [Communication from the Commission on the application of State aid rules to public service broadcasting 2009/C 257/1](#), October 27, 2009.

Safe and enabling environment for journalists and media

Safety of journalists and their sources, protection of the free press

The Commission should closely monitor and report on **implementation of the EU Recommendation on the protection, safety, and empowerment of journalists** and related EU legislation, such as **the protection of persons who report breaches of Union law (Whistleblowing Directive)**, in close consultation and cooperation with civil society and media representatives. Similarly, **protection for journalists facing strategic lawsuits against public participation** is urgently needed. EU action is needed to protect journalists from all forms of litigation that hinder their possibility to work. The decriminalisation of defamation, libel and slander would be an important step towards this goal. In the meantime, journalistic standards and ethical requirements should be left to journalists' associations to set and enforce, and no lawmaking is justifiable in the field.

Monitoring challenges and taking action to timely address them

The MFA needs to regulate consistent enforcement mechanisms at the national and EU

levels. We recommend a multi-level, **Commission-led enforcement mechanism of overarching qualities of media freedom and pluralism**. A European supranational body, a 'Board of Media Freedom' consisting of independent experts, could monitor work at the Member State level.

Annual monitoring

Annual monitoring of the status of media freedom and pluralism in the Member States, which includes all the issues mentioned in this paper, should form part of the Commission's annual Rule of Law Report, along with refined benchmarks defined by MFA and elaborated by the Board of Media Freedom.

Compliance with the MFA and related laws, such as the DSA with the defined benchmarks on media pluralism, should be monitored annually by the Board of Media Freedom. The Board of Media Freedom should deliver recommendations to EU institutions, bodies and Member States.

Refinement of benchmarks

The benchmarks in the Commission's annual Rule of Law Report regarding media freedom should be clearer and more specific. In particular, the benchmark "media regulatory authorities and bodies" should clarify that these bodies should be independent of the government and major industrial actors.

The benchmark “Transparency of media ownership and governmental interference, transparent allocation of state advertisement, public information campaigns, rules governing transparency of media ownership” should be further elaborated. Transparency is a first step to reveal imbalances in influence over public debate and power, but is not sufficient to ensure media pluralism by itself.⁵⁵ As a benchmark, the Member State should have appropriate administrative procedures and legal regulations to prevent media concentration and apply those appropriately and impartially. The criteria “governmental interference” should include capture and state control over public service media. **The benchmark “Framework for journalists’ protection” should extend to revealing SLAPPs, smear campaigns against journalists, or other forms of intimidation.**

Actions to follow up on the conclusion of the Board of Media Freedom:

If the conclusion of the Board of Media Freedom indicates “medium threat”, first-stage actions would be invoked: a Joint Programme. The Joint Programme could be modelled on the Commission’s Rule of Law Framework, but with some meaningful additions. Under the Joint Programme, a body of independent experts would stay in the Member State and work with the Member State’s relevant

institutions to improve the aspects of media freedom and pluralism that have been found deficient.

If the annual evaluation concludes “high threat” to media freedom or pluralism, or if the third annual evaluation in a row – while the Joint Programme has been running for two years – concludes a persistent “medium threat”, then an infringement procedure or the Article 7 procedure should be triggered. If finances are significantly affected, for example, through serious and systemic anomalies in the financing of the PSM or providing unjustified state aid – in a manner that violates media pluralism – the rule of law conditionality mechanism should be triggered.

In case the annual monitoring or extraordinary reporting reveals a serious violation of individual rights on a mass scale related to freedom of expression, freedom of the press and the media, an urgent procedure should be initiated as recommended in the EP Resolution of 24 June 2021.⁵⁶

55 European Commission, [European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report](#).

56 European Parliament, [European Parliament resolution of 24 June 2021 on the Commission’s 2020 Rule of Law Report](#), June 24, 2021.

Reference link to study

This policy paper is available online:

<https://www.liberties.eu/f/QSGNE8>

For Media Freedom Report 2022 please visit:

<https://www.liberties.eu/f/KBEEq5>

Contact info

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