Missing Freedom Act

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The European Commission is due to present its Media Freedom Act (MFA) this week. The European Union's regulatory entrance to the field of media is controversial. The MFA is not welcomed by several states, for different reasons. Some fear that their current system of media freedom and pluralism will be compromised. Others worry that their captured media scene will be exposed and investigated. Both types of opponents can relax because the Media Freedom Act draft is as impactful as a light breeze. It only scratches the surface, and important safeguards are missing.

First and foremost, the MFA misses the opportunity to affirm that national media markets play a formative role for media pluralism and concentration in the entire internal market. The Union obviously has its internal market and competition competency, as well as for state aid. The specific value of the MFA could have been to clarify how media pluralism is more than just market pluralism. The media market is a market of merit goods and of opinions where even one rotten apple can start the decay of the internal (opinion) market as a whole. If one national media market systematically disfunctions, it generates deficiency in the democracy of that Member State which spills over to the entire EU democracy. Hampered national media freedom and pluralism impact affects the European Union's public discourse, human rights enforcements and the rule of law. Which instrument would be more appropriate to address this than the Media Freedom Act? Below, I will address five key topics from the draft Media Freedom Act: the Board, the media privilege, national measures impacting media freedom and pluralism, and finally the issue of state aid.

The Board

The European Regulators Group for Audiovisual Media Services (ERGA) would transform into a European Board for Media Services (the Board) but its powers are not substantially strengthened. It will give opinions in more types of cases, but opinions remain just that: opinions. Apparently, the Board is expected to exercise pressure through its informal power, which may be based on its professional authority, collegiality and result from negotiations carried out in order to reach the two-thirds majority that is necessary for its decisions. This Board will not have powers to make a difference in case media pluralism is systematically curbed in one or more of the Member States.

The Board, like the ERGA, will consist of NMRAs' representatives. While the MFA reinforces Article 30 of the Audiovisual Media Services Directive that provides for the independence of NMRAs, more safeguards would be needed. Among these, it would be necessary to require explicitly that all decisions of NMRAs should comply with the requirements of media freedom and pluralism. Furnishing NMRAs with further powers and resources will be even counterproductive if those authorities are

captured by the ruling party. Such bodies may be instructed by their governments to form the media landscape according to the ruling party's direct political interests.

The media privilege

The much-debated rule on whether the media service providers shall enjoy a privilege from the online platforms' removal practice under their terms and conditions, has been incorporated into the draft MFA in a soft version. According to this, platforms have to offer media service providers the opportunity to declare themselves as such if they fulfil three conditions. First, they fit MFA's definition (provide a media service, have editorial responsibility, and they determine how it is organised). Second, they are editorially independent from any state's government, which aims to exclude privilege for state propaganda channels. Third, it subjects itself to obligations arising from editorial responsibility, whether flowing from regulatory requirements in one or more Member States, or a co-regulatory or a self-regulatory mechanism which is widely recognised and accepted in the relevant media sector in one or more Member State. The second and the third criteria are still somewhat blurry. What counts as „widely recognised" and „relevant media"?

The „privilege" itself is rather limited: it means that the platform must provide a detailed explanation for its removal or suspension decision, including „meaningful information" on the impact on freedom of expression, including from the perspective of media pluralism. Whenever possible, this information shall be communicated prior to the restriction or suspension. Aside from this, self-declared media service providers would enjoy a priority and urgent treatment in complaints procedures. Regular or frequent restrictions of this kind will oblige the very large online platform to engage in a „meaningful and effective dialogue" in good faith, with the view to finding an amicable solution. The Board has to regularly organise a structured dialogue between providers of very large online platforms, media service providers and civil society.

National measures affecting media service providers

Section 5 of the draft MFA provides for national measures and national assessment of media market concentration. The standards of national measures affecting the operation of media service providers are so basic that I do not know of a Member State where these standards are not observed, at least on paper. More concrete elaboration of the principles would have added significant value to this list, for example, that such measures may not have the effect of indirect discrimination.

Service providers shall have the right to appeal to an independent appellate body with appropriate expertise, independent of the parties involved and of any external intervention or political pressure. These more detailed rules would have benefited from further elaboration, at least in the recitals. As long as „political pressure" is not more clearly defined, the rules face the danger of remaining useless. It would require open confrontation with a state to claim that its authorities do not comply with these criteria, a move that the European Commission has consistently avoided.

The Board's competence applies only in cases where the measure is likely to affect the functioning of the internal market for media services. In that case, a) transparency obligations apply, b) the Board may issue an opinion, c) following the Board's opinion, the Commission may also issue its own opinion.

One could wonder why opinions are given repeatedly if a measure's impact is expected to be felt throughout the entire EU media market. Such a measure should trigger an investigation, one that can result in a compulsory decision because the EU common market is at risk.

National assessment of media market concentrations

The first set of common rules on media concentration within the EU, after approximately twenty years of recurring contemplation and drafting, reflect very low ambition to harmonisation. Especially after the Media Pluralism Monitor programme has systematically reviewed the EU Member States along various criteria since 2014, and delivered comparable research results, the provisions of the draft MFA are somewhat disappointing.

This minimalistic set of rules provide that all Member States shall ensure by their national law that media concentrations that could significantly impact media pluralism and editorial independence, undergo assessment.

Some novelty is offered by the three elements for the assessment that are required to be taken into account, and which would ensure that market concentration reviews differ from classic competition law. The elements infuse the perspective of the opinion market into the market concentration assessments: the effects on the formation of public opinion and on the diversity of media players, taking into account the online environment (1), the safeguards for editorial independence including the measures taken by media service providers to guarantee this (2), and whether the alternative way would leave the merging entities economically sustainable, with regard to other alternative options as well (3).

The third element reacts to the economic reality that denying merger can potentially and indirectly lead to a diminishing of the opinion diversity on a weak media market. Further elements may be included in the guidelines that may be issued by the Commission, assisted by the Board.

The Board and the Commission would become involved in an individual case only where a concentration could affect the functioning of the internal market. In this case, the NMRA must consult the Board in advance as regards the impact on media pluralism and editorial independence. The Board will draw up an opinion which the NMRA must take „utmost account of" and in the case of departure from it, must provide a reasoned justification. The Commission is informed by the Board and may issue its own opinion.

We may ask here again: if a measure is likely to impact the functioning of the EU internal market, then why limit the competences to mere opinions? Relying on this soft tool is understandable where the EU has no clear competences but issues of competition that affect the internal market are not one of those. Obviously, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1) will not be affected. The MFA was expected to clarify that in the case of media companies, there is more at stake than economic competition, and that the opinion market is more subtle and fluid than the commercial, „hard" market of companies and their assets. This is reflected in Recital 42 which states that the internal market is affected where „such concentrations […] result in media service providers having a significant influence on formation of public opinion in a given media market." This statement connects the dots: if media service providers gain dominance on the opinion market of one state, that is bound to impact the internal market. However, this statement is overly subtle, only careful syntactical analysis can extract this meaning. Moreover, this is in a Recital, whereas it could be in the main text, or even among the definitions. And the question is still valid: if this affects the internal market, why should the power of the Board and of the Commission be limited to issuing an opinion? Is there a tacit reference that the Commission – given that this is indirectly defined as an internal market competition issue – may deal with this under the scope of the Merger Regulation? Even if this were the case, the threshold of controllable mergers should be significantly lowered. Currently, the aggregate EU-wide turnover of at least two of the undertakings concerned should exceed EUR100 million, and each of the undertakings should achieve less than one-third of their aggregate EU-wide turnover in the same member state. This threshold was not reached by the Hungarian giant merger into KESMA, when more than 470 government-friendly newspapers were donated to one foundation, creating an unprecedented monopoly of printed press in the member state. The transaction was worth 90 million Euros according to estimates.

State aid

The Memorandum of the draft MFA mentions state aid rules as being insufficient to address the problems created by the unfair allocation of state resources to the media service providers (page 7). However, the main text does not even mention state aid, while it provides for the transparency of state advertising. Without the inclusion of state aid in parallel with state advertising, the rules can easily be evaded by simply not requiring advertising service, just labelling the money as aid. And again: the amounts awarded to media service providers do not reach the threshold that would trigger an EU investigation under current rules, but may be enough to distort media freedom and pluralism within one or more Member States. To reinforce a questionable practice, a new de minimis rule is added to the transparency obligations: local governments of places with less than one million inhabitants are exempted from the yearly reporting obligation about their advertising expenditure. This limits the circle to the capital cities in most Member States, including Poland, France, Greece, Sweden, with two cities in Italy and Spain, and three in Germany.

Conclusion

In sum, the MFA in this form is unlikely to bring meaningful change. It is declarative and consists of soft measures which is rather unusual for a regulation. It is extremely gentle in formulating requirements against national regulation, even though its Memorandum cites evidences that European media faces increasing editorial interference, driven by fragmented safeguards to prevent interference and uneven independence guarantees for public service media (page 4.). It also clearly sets out that „media companies face obstacles hindering their operation and impacting investment conditions in the internal market such as different national rules and procedures related to media freedom and pluralism.“ (page 2. Ibid.). We wonder how would these problems be addressed if not by the MFA? Where the rules are more elaborated, they include flexible exceptions. For example, the prohibition to detain, sanction, intercept, surveil, search and seizure or inspect a media service provider or their family members is limited to the case where they refuse to disclose information on their sources, and even that is excepted for the „public interest“ which makes for an unacceptably wide loophole. The deployment of spyware in any device used by media service providers or their family members is more robust, as an exception is allowed only for investigation in serious crimes (defined in Article 2), and only if the former measures would be inadequate. (But see criticism here.)

On a positive note, even small steps may be meaningful in the field of media freedom and pluralism. This regulation may serve at least as a reference point to improve consistency in legal approaches to media pluralism and editorial independence. Its declaration of the rights and duties may feed into judicial procedures, even if it is not yet clear how and in which court these may become relevant. The Commission’s envisaged monitoring practice might be a game changer but no details are given as to how, by whom, in what frequency this monitoring shall take place.
