EMFA and its Uphill Battle for Media Freedom and Democracy in the EU

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The European Media Freedom Act, primarily designed to safeguard the EU media market, can also serve as an important tool in preserving the rule of law in member states such as Hungary and Poland, that have experienced an alarming assault on media freedom and pluralism in the past decade. This contribution critically evaluates the potential of the proposed European Media Freedom Act (EMFA) for addressing the ongoing issues in media freedom in Poland and Hungary. It discusses specific EMFA's provisions against key persistent problems in those countries, related to independence of media regulators and public media, media capture, and boosting pro-government outlets with state subsidies. The article also proposes how EMFA could be enhanced and improved in this respect.

According to a recent press freedom ranking by Reporters Without Borders, the European Union stands out as a global leader in providing journalists and media professionals with relatively superior opportunities and conducive working conditions to fulfill their vital role as 'fourth branch'. However, significant disparities persist within the Union concerning the level of respect for media freedom and pluralism, as evidenced by Hungary ranking 72nd, Bulgaria 71st, and Poland 57th worldwide.

Over the past decade, Hungary and Poland, in particular, have witnessed a systematic erosion of democratic standards. Their governments have aggressively curtailed judicial independence, weakened, or captured key institutions, imposed restrictions on non-governmental organizations, and manipulated the media landscape. These structural problems include a lack of independence of media regulators, erosion of independence in public media, introduction of new legislative, regulatory, and administrative measures that have detrimental effects on the media market, and lack of transparency in the distribution of public funds allocated to the media sector.

The planned EMFA is primarily aimed at safeguarding the EU's internal market, including by responding to excessive media market concentration. Nonetheless, some provisions of the draft EMFA target the aforementioned critical areas in Poland and Hungary. But are they going to be effective?

Independence of public media regulators

In Poland and Hungary, there have been concerning instances where media regulators have been implicated in the restriction of media freedom. One example is the deliberate delay in renewing broadcasting licenses by the National Broadcasting Council (KRRiT) in Poland to media outlets, such as TVN channels owned by WarnerBros. Discovery and, most recently, TOK FM radio station owned by Agora.

The chairperson on KRRiT has also imposed a fine of €17,680 to TOK FM's parent company for allegedly violating broadcast law (see further here). In Hungary, the media regulator refused to renew broadcasting license to Klubrádió, which led the European Commission to starting EU law infringement action against the Hungarian government.

Article 7 of the draft EMFA underscores the imperative of safeguarding the independence of public media regulators. It draws upon established norms of EU law, specifically Article 30 of the Audiovisual Media Services Directive (AVMSD), which requires EU states to ensure that media regulators are ‚functionally independent of their governments and of any other public or private entity'. Crucially, they must not be instructed by other actors. The media regulators are to carry out their tasks impartially and transparently, respecting media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

Merely invoking the existing standard in EU law in the EMFA will prove insufficient without the political determination and actions of EU institutions, particularly the European Commission, which are entrusted with upholding the EU law in member states. Despite the transposition of the AVMSD by Poland and Hungary, the European Commission has refrained from initiating EU law infringement proceedings against the governments of these countries in relation to the subordination of media regulators to the ruling parties, except for the *Klubrádió* case, despite ample evidence.

A case could be made against Poland as there is plenty of evidence that the media regulators, the National Broadcasting Council (KRRiT) and the Nation Media Council, are not functionally independent from the government. For example, the KRRiT unjustifiably delayed extending the license of the TVN24 news channel, that was finally extended 594 days after the application was lodged, at the time when the ruling majority in Poland passed bill dubbed *lexTVN*, amending the broadcasting law to change media ownership regulations for entities outside the European Economic Area, which directly affected the American owners of TVN group. The KRRiT has fined private media that present facts and opinions inconsistent with the official ruling majority line, including against TVN24 news channel, and is investigating Radio Zet due to publications about the Speaker of the Sejm's husband. At the same time, the KRRiT has not been responding to citizens and the Ombudsman complaints on the public media reporting on the presidential campaign in 2022, the opposition, and the political groups in the European Parliament.

The EMFA itself does not provide any new instruments of pressure on member states' governments for their lack of independence in media regulators. Therefore, in its current scope, Article 7 only holds symbolic significance.

Further attention and consideration should be given to devising mechanisms that reinforce and safeguard the independence of media regulators and consequently, the European Media Services Council. Gábor Polyák has put forth an intriguing proposal for the establishment of a shadow civil society media board, composed of representatives from civil society organizations.

Independent public media

Article 5 EMFA emphasizes the need for guarantees regarding the independence of public media. It establishes three key obligations for EU member states: ensuring the independence of management and board members within public media organizations, providing adequate funding, and establishing a public media regulator.

Member states would need to incorporate into their national legislation a transparent and non-discriminatory procedure for the selection of the president and board members of public media. This process should be conducted openly, ensuring fairness and equal opportunities for all candidates. Additionally, clear, objective, non-discriminatory, and proportionate criteria should be established to guide the selection process, promoting merit-based appointments.

Furthermore, the Act would require that the length of the term of office for public media officials be fixed, preventing arbitrary interruptions. Dismissals would be subject to review and potential legal remedies. Reasons for dismissal would be made public. These standards, if enforced, would have an impact in Poland, compared to current practice. The takeover of public media by ruling parties often entails the appointment of individuals with party affiliations to management positions, as well as the replacement of journalists. Substantial amounts of public funds are directed towards the restructured public media.

The management boards, supervisory boards and programme boards of public television, the Polish Radio and the Polish Press Agency, are elected and dismissed by the National Media Council created in 2016 by PiS ruling majority. The still-independent Constitutional Tribunal in 2016 ruled that the constitutionally established media regulator, the National Broadcasting Council (KRRiT), not the National Media Council, has the right to appoint the management of public television. To date, the Polish authorities have not implemented this judgment.

The Polish National Media Council has appointed and twice dismissed Jacek Kurski, formerly a PiS party MP and MEP, from the post of the public television president. The reasons for his dismissal have not been made public. The procedure of Kurski and his successor Mateusz Matyszkowicz appointment has not meet transparency requirements. Under Article 5.2 EMFA, such information would have to be public. Article 5.2 EMFA should be improved by extending these requirements to to all organs and leadership positions in public media, and advisory bodies such as programme boards. Article 5 could also introduce an apolitical requirement, understood in the sense that a person applying for a position in the public media could not have been an MP, MEP or candidate on political party lists for the past ten years, for example. This would prevent a situation that has occurred in Poland: Jacek Kurski was MEP until 2014 and two years later he has taken over the presidency of the Polish public broadcaster. Article 5.3 EMFA requires member states to provide sufficient financial support to public media organizations, ensuring their sustainability and independence from undue external influences.

In Poland and Hungary, government-controlled public media are generously funded. It is hard to deny that they receive sufficient financial resources. However, it is questionable whether they fulfill the „public mission." However, EMFA does not define „the public mission" and it leaves national law to define it, leaving a broad leeway (and thus control) to national governments. For instance, the public mission of the national broadcaster in all member states could be linked to promoting core EU values listed in Article 2 Treaty of the EU.

Openness of the allocation of advertising resources by the state

The allocation of public funds for advertising in private media in a vague and biased manner serves as a potent tool for exerting influence or ‚capturing' the media. Under Article 24 EMFA member states would be obliged to establish common requirements for transparency and non-discrimination in the allocation of public funds for advertising, and for the purchase of other goods and services from the media. The state will have an obligation to provide publicly accessible electronic information regarding the regulations governing the distribution of public funds for these purposes. National, federal, and regional government authorities, state-owned companies, other state-controlled entities, local authorities of administrative units with a population exceeding one million, will be required to disclose their expenditures on advertising, the procurement of services and other goods from media.

This is a step in good direction. In Poland, state-controlled companies or entities, such a oil and gas state-controlled companies (PKN Orlen, LOTOS Group, PGNiG), state owned bank (such as PKO Bank Polski), and Polish Forests would be obliged to disclose their media funding. Investigative journalists have alleged these entities are leading supporters of pro-government private media.

However, Article 24 EMFA should be improved by extending these reporting obligations to all units of local government. Otherwise, in Hungary and Poland the provision in its current form could be easily bypassed by transferring public funds from local governments other than the capital cities.

Media pluralism test

A further concern lies in the diverse range of state actions that negatively affect media freedom, pluralism, and editorial independence. Article 20 EMFA imposes an obligation on EU member states to evaluate the impact of such state actions on media freedom and pluralism. Legislative, regulatory, and administrative measures would be assessed based on criteria such as due justification, transparency, non-discrimination, and proportionality. Additionally, member states would be required to establish clear timeframes for the implementation of these measures and provide the media with avenues for recourse to the competent authority.

Article 21 EMFA specifies that member states bear a particular responsibility to evaluate the impact of their actions on media concentration, especially if these actions are likely to endanger media pluralism and editorial independence. European Commission would issue guidelines for the media concentration assessment. National bodies authorizing the concentration would be obligated to consult the European Media Services Council. The mechanisms presented in Articles 20 and 21 are promising because they would follow criteria for assessing government actions regarding media freedom and pluralism. They would also provide legal grounds for initiating proceedings against member state governments that engage in such actions despite negative assessments of their effects.

Currently, in countries like Poland, there is no statutory obligation to consider the protection of media freedom and pluralism when assessing the effects of media market concentration, as the Ombudsman warned. Article 20 and 21 would provide such standard on the EU level.

What is needed

To conclude, Articles 5 (independence of public media), 7 (independence of media regulators), 20 and 21 (media pluralism test and impact on market concentration), and 24 (state advertising in media) of EMFA could help addressing longstanding structural risks to media freedom and pluralism in Poland in Hungary.

Now it is crucial that member state governments, withstanding pressure from media owners, do not dilute the effectiveness of the EMFA. Reports suggesting that the German Chancellor is considering yielding to such pressure from media publishers are alarming. On May 15, 2023, journalists and media freedom advocacy organizations sent an open letter to Chancellor Olaf Scholz, urging him to review Germany's stance on the EMFA and demonstrate the country's sincere commitment to the defense of democracy.

A stronger and robust, not a weaker version of the European Media Freedom Act is needed to protect media freedom and pluralism in backsliding democracies such as Poland and Hungary.
