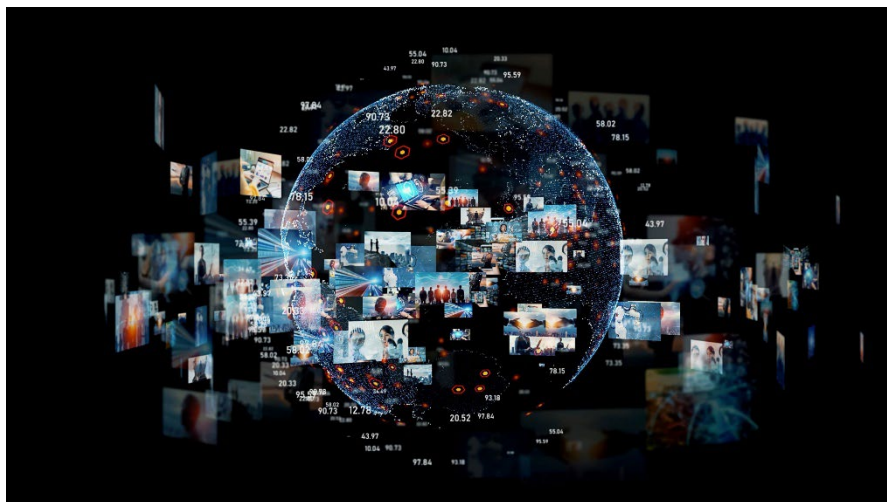


STUDY

Requested by the LIBE committee



The European Media Freedom Act: media freedom, freedom of expression and pluralism



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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EN

The European Media Freedom Act: media freedom, freedom of expression and pluralism

Abstract

This study analyses the European Media Freedom Act proposal. It provides a political and historical overview of EU policies in the field of media and on information society at large, also taking into account the debate regarding EU competences on media pluralism and media freedom. The study reasons on the legal basis of the proposed Act, and then analyses the provisions of it under each of the Chapters of the Act, basing on relevant academic literature, policy documents, and empirical data. It concludes with policy recommendations.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs

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LIST OF ABBREVIATIONS

AGCOM	Autorità per le Garanzie nelle Comunicazioni
AVMSD	Audiovisual Media Services Directive
CASE	Coalition Against SLAPPs in Europe
CFREU	Charter of Fundamental Rights of the European Union
CFSP	common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMPF	Centre for Media Pluralism and Media Freedom
CoP	Code of Practice on Disinformation
CULT	Committee on Culture and Education
DSA	Digital Services Act
DMA	Digital Markets Act
EBMS	European Board for Media Services
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDAP	European Democracy Action Plan
EMFA	European Media Freedom Act
ERGA	European Regulators Group for Audiovisual Media Services
EP	European Parliament
EU	European Union
IMCO	Internal Market and Consumer Protection Committee
GDPR	General Data Protection Regulation
MFRR	Media Freedom Rapid Response
MPM	Media Pluralism Monitor
MS(s)	Member States
MSP(s)	Media Service Provider(s)

NRA(s)	National regulatory authorities
PEGA	Pegasus and Equivalent Surveillance Spyware Committee
P2B	Regulation on Platform-to-Business Relations
PSB	Public Service Broadcasting
PSM	Public Service Media
SLAPP	Strategic lawsuits against public participation
TFEU	Treaty on the Functioning of the European Union
TUSMA	Testo Unico Servizi Media Audiovisivi
TVWF	Television without Frontiers Directive
VLOP(s)	Very large online platform(s)
VLOSE(s)	Very large search engines
VSP(s)	Video-sharing platform(s)

EXECUTIVE SUMMARY

The study aims to provide a comprehensive overview and analysis of the academic and policy debate surrounding media freedom and pluralism in Europe, starting from the definition of media and media pluralism, and addressing the challenges of the re-conceptualisation of these terms in the algorithmic society. The objective is to shed light on the debates at EU level that have characterised the choices of the European institutions so far, when addressing the issue of safeguarding media pluralism and media freedom at EU and member state levels. The EU, and before the European Community, has always acknowledged the importance of media pluralism in safeguarding democratic values and the freeflow of information; however, the political and legal debate on the division of competences between the EU and its Member States on this matter has posed a significant obstacle in progressing towards a common set of rules to support media freedom and media pluralism.

With this perspective in mind, the study then offers an overview on the EU legislative and soft law measures that are in place to enhance and support journalists and media outlets, focusing also on the measures deployed to fight disinformation. Particular attention is paid to the development of the EU policy coping with the digital revolution, intervening on the regulation of big tech, building of the e-Commerce Directive liability regime that was deemed unfit for to tackle the challenges posed by the services provided by very large online platforms and very large search engines. Ultimately, this study recognises that the European Media Freedom Act (EMFA) does not exist in isolation but is part of a broader context shaped by various policy and legislative initiatives that affect media freedom and pluralism of the media. Therefore, it is essential to examine these initiatives in order to better understand the background against which the EMFA operates, the policy needs, and the appropriate measures to deploy to support media pluralism and media freedom in the EU.

The study, then, focuses more in depth on the EMFA proposal: it reasons on the legal basis (Art. 114 TFUE), and then analyses the provisions of the Act under each of the Chapters composing it. The EMFA Regulation Proposal aims to tackle some of the main issues for media pluralism and freedom as identified by scholars, journalists, policymakers, the industry and a wide range of stakeholders over the years. In particular, it offers definitions of key terms - expanding the scope of previous media policies and taking in consideration provision of media services in the digital environment. It defines rights and duties of media service providers, calling for approximation of the Member States (MSs)' standards in guaranteeing ownership transparency and editorial independence; it innovates the governance structure of media policies establishing a new European Board for Media Services; it opens the way for new methodologies for assessing media market's concentration, taking into account their impact on media pluralism; finally, it seeks to establish more open and harmonised methods for audience measurement. Welcoming these objectives and the overall design of the Act, this study aims to give a detailed account of the debate that emerged between media professionals and experts, adding further inputs at this stage of the legislative proposal.

Lastly, building on a comprehensive research and analysis and highlighting the diverse viewpoints from scholars, experts, policymakers, and civil society actors, the study provides a set of recommendations to the EU policy makers. The suggestions take into account the complexities and nuances of the media landscape while considering the evolving technological and societal dynamics. The recommendations are grouped into three categories: intervention at the EU level, improvements to the EMFA, and additional issues impacting media systems.

i) The first group of recommendations supports the choice of EU-level intervention and regulation to address media systems. The report emphasizes the importance of maintaining a proactive approach to safeguard media freedom and pluralism in the European Union.

ii) The second group of recommendations focuses on improving the proposed EMFA by addressing specific aspects of the regulation and potential shortcomings in its implementation. One key recommendation is to strengthen the inclusivity of protections and safeguards by expanding the definition of media service providers to include new forms of professional journalism beyond traditional newsroom employees. Additionally, the study suggests enhancing transparency obligations for media service providers by requiring disclosure of ownership information to both the public and relevant public authorities. This includes the creation of publicly available registers at national and EU levels. The recommendations also highlight the need for the independence of the European Board for Media Services from the European Commission, along with better agency-based secretariat and consultation with civil society organizations. Furthermore, the study proposes an independent monitoring system for the implementation of Article 17, which pertains to the relationship between media service providers and very large online platforms and search engines. Other recommendations focus on issuing transparent and objective guidelines for assessing media market concentrations, including stakeholders and civil society organizations in the assessment process, monitoring media market concentration on a regular basis with EU-level peer review, and adding safeguards for media market plurality at the local level.

iii) The third group of recommendations addresses issues not covered by the proposed Regulation but that significantly impact media systems and the promotion of media freedom and pluralism. The recommendations draw on the results of the Media Pluralism Monitor project and additional research conducted by the Centre for Media Pluralism and Media Freedom. Key recommendations here include strengthening the political independence of the media by introducing rules to prevent conflicts of interest between media ownership and high-ranking political roles. Another recommendation is to create a more balanced and transparent environment for relationships between media content providers and digital intermediaries, considering the specific challenges posed by digital platforms. The study suggests providing financial support to journalism as a public good, potentially increasing funding for news media through programs incentivizing innovation, journalistic cooperative initiatives, investigative journalism, and local and community media. It also proposes the establishment of a European Fund for Journalism to support media pluralism and transition in the digital environment. Additionally, the study suggests considering the use of revenues from the taxation of digital companies' profits to support media production and pluralism. Finally, the recommendations emphasize the importance of monitoring and ensuring exposure diversity in media content, and to support independent monitoring initiatives when it comes to practices adopted by very large online platforms addressing systemic risks affecting media pluralism and freedom of the media. In conclusion, need for evidence-based research and a re-conceptualization of media diversity in the digital age is underlined.

1. INTRODUCTION

Media freedom and pluralism are essential requisites of a democratic society, allowing for the free flow of information, fostering public debate, and empowering citizens to make informed decisions. It is widely known that the media landscape has undergone significant transformations in recent years, fuelled by rapid advancements in technology and changing consumer habits. The digital revolution, with a proliferation of online intermediary platforms, and in particular very large online platforms, as now defined by the EU Digital Services Act, has contributed to the disruption of the media market, leading to a profound crisis of the media sector. Recent years have witnessed a steady decline in the sustainability of traditional business models in the media. The media market in the EU and worldwide has rapidly and dramatically changed in the last decades. In 2020, in the European Union, the sum of advertising revenues collected by all media sectors (television, radio, newspapers, cinema) was lower than the advertising revenues in digital, dominated by social networks and search engines, and with the first two operators – Alphabet and Meta – which account for two thirds of the market (Irion et al, 2022): this trend has dramatically compromised the traditional business model of the media that was mostly relying on advertising as a mean to monetise the attention of the media service recipients.

This evolving media landscape presents both opportunities and challenges for media freedom and pluralism in the EU. The specific nature of the media, as a vital pillar of democracy and a crucial source of information, makes it imperative to ensure its independence, diversity, and accessibility. Within the EU, there has been an ongoing debate surrounding media pluralism and how to support it, that dates back at least to the 80's and had its first concrete acknowledgement with the publication by the European Commission of the 1992 Green Paper on "Pluralism and Media Concentration in the Internal Market: An Assessment of the Need for Community Action"¹. While Member States have traditionally held the primary responsibility for safeguarding media freedom and media pluralism, as part of their exclusive competences, the political and academic debate has been revolving over the need for a coordinated approach at the EU level, as a needed measure to tackle the internal market barriers and to enhance the free flow of media services across the EU (see below Section 3.1). Establishing rules for the media industry entails fostering common standards for the regulation of peculiar services, as the media services, that are instrumental to democracy, and entails consequent considerations of media plurality too. One of the main obstacles to a level playing field in the media sector has been the controversial issue around the existence of competences of the European Union in legislating on media freedom and pluralism, as media regulation has largely been left within the domain of national governments.

Recognizing the importance of addressing the challenges faced by the media market, the European Commission, with the European Media Freedom Act proposal, has taken a significant step forward by initiating an ambitious project. This legislative initiative aims to harmonise national rules that are affecting the functioning of the internal market for media services and of media service providers. While benefiting the internal market, the Act should strengthen media pluralism and enhance media freedom within the EU, acknowledging the need for a coordinated and comprehensive framework to safeguard these fundamental principles. The European Media Freedom Act seeks to foster harmonised rules for the internal market, and, along this, also to favour a healthy media industry, including diverse

¹ Commission of the European Communities (1992), Pluralism and media concentration in the internal market: an assessment of the need for Community action : Commission green paper, Luxembourg, OOPEC, 1992.

voices, protect independent journalism, and, lastly, ensure more transparency and exposure of media services to all citizens.

This study aims to delve into the multifaceted aspects of policies within the European Union that are touching upon media pluralism and media freedom. By examining the changing media market, the specific challenges faced by the media sector, the ongoing debate on media pluralism, and the implications of the European Media Freedom Act, it seeks to analyse the old and ongoing debate on how to ensure media freedom and pluralism in the EU, touching upon the debate on the competences of the EU in dealing with media freedom and pluralism. In order to do so, the study will provide a theoretical framework, an overview on the EU legislative and soft law measures that are in place to enhance and support journalists, and also on the measures deployed to fight disinformation, in particular in the online environment. Through a comprehensive analysis of relevant academic literature, policy documents, and empirical data, this study aims to contribute to the existing body of knowledge on media freedom and pluralism.

The study provides, moreover, an analysis of the European Media Freedom Act proposal, including insights into potential trajectories to amend and ameliorate it, and policy recommendations to Member States and the EU on measures to strengthen media freedom and media pluralism.

2. THE THEORETICAL BACKGROUND: DEFINING MEDIA PLURALISM IN THE EUROPEAN CONTEXT

2.1. Re-conceptualising media pluralism in the digital environment

As a premise to the analysis on media freedom and media pluralism policies in the European Union, this and the next section of the study summarise the academic and policy debate on the two relevant notions at the basis of the discussion itself: media pluralism and media freedom.

Freedom of expression, freedom of the media and, consequently, media pluralism, in all its faceted definitions and interpretations, are cornerstones of contemporary democracies. They are key for ensuring an open public debate, and are basic preconditions for enjoying other rights, such as the right to vote and freedom of assembly.

Media pluralism should be considered to be an essential characteristic of contemporary democracies, and a primary policy objective: it is enshrined in Article 11.2 of the Charter for Fundamental Rights, it is a corollary of the right to freedom of expression (as guaranteed under Art. 10 the European Convention on Human Rights (ECHR)). As mentioned in the Recommendation (2018) 1 of the Council of Europe on media pluralism and transparency of media ownership, media freedom and pluralism “ensure the availability and accessibility of diverse information and views, on the basis of which individuals can form and express their opinions and exchange information and ideas”. Thus, media pluralism is a key feature for the rule of law in democratic countries, a precondition for a sound debate on politically and socially relevant themes.

While there is general agreement on the key democratic value of media pluralism, definition of media pluralism is subject to considerable debate and is shaped by various political, economic, and legal contexts, as well as market and technological advancements (Brogi, 2020). The European debate on the notion of media pluralism is linked to the definition of representative democracy, able to represent various social actors and their stances; moreover, the debate expands on considerations related to the understanding of deliberative democracy, implying that citizens should have access to a great variety of information in order to be able to participate in the democratic debate and ultimately validating different points of view on matters of public interests (Klimkiewicz, 2019). From a sociological perspective, media pluralism could also be interpreted as ensuring the representation in the media of geographical and cultural diversity, for example guaranteeing a non-biased representation of minorities, or the possibility to access news in minority languages. From this point of view, media pluralism can also be considered a fundamental feature in the remit of public service media, who should provide plural information in the public interest. This notion, together with the one ensuring diversity of voices during electoral campaigns, can be subsumed under the concept of “internal pluralism”. Internal, or content-related, diversity, refers to a variety of contents, perspectives and representations of social groups provided by a single media outlet. It becomes particularly relevant when considering the diversity of content offered in oligopolistic media markets. It also “consists of representation requirements within media companies’ management and/or workforce. Such rules oblige media companies to reflect the various political, ideological, or social groups in the composition of their management boards and/or staff” (Valcke, 2011).

From a market perspective, instead, media pluralism is associated with diversity and transparency of media ownership. Concentration in the media market is considered to be a risk for the democratic

debate as potentially limiting the diversity of voices offered by the market itself; simultaneously, transparency of media ownership is a key instrument to evaluate, on one hand, the concentration of the market, and on the other, to unveil vested interests of (also, beneficial) media owners and a consequent potential bias in the editorial line of a media outlet. This definition of media pluralism referring to the structure of the media market is actually the most employed interpretation of the concept by policymakers: for many years, media pluralism has just been related with external pluralism. External pluralism is a useful notion for measuring the market power: namely, the number and diversity of media owners, media companies or channels: the higher their number in each market, the better for the possibility of having a public debate including diverse viewpoints. In other words, structural diversity, and particular structural conditions of media systems, are more likely to lead to a diverse production of content quality (Voltmer 2000). While policy endeavours to ensure external market pluralism hold significance, they alone are not sufficient in attaining comprehensive pluralism within individual countries². The current global communication environment requires to re-conceptualize external media pluralism, not only considering media ownership, but also communicative power and conflict of interests, given the increasing number of oligarchs owning media companies (Dragomir, 2019) and state domestic and foreign interference in media activities (Schiffrin 2017; Lucas, 2020).

From both an academic and a policy perspective, due to the technological development and the rise of digital platforms intermediating media content, the concept of media pluralism has to be re-interpreted. New technologies spreading information sparked initial optimism, because of the growing possibilities to produce and disseminate information, quickly and with lowered costs. However, the consolidation of big digital companies as gatekeepers of online information have raised concerns on the actual pluralism in the digital environment, and whether the democratic discourse really benefits from it (Moore and Tambini, 2018), also in light of the enhanced risks of manipulation of internet users and spread of disinformation (Parcu, 2019). Noting this, many authors and policymakers have engaged in a re-interpretation of the meaning of media pluralism, and an analysis of the emerging threats to it.

The deployment of algorithmic systems has been disruptive in the ways news are produced, disseminated and consumed. The personalisation of online news is one of the main concerns. Indeed, it has been widely argued that users may confine themselves inside “filter bubbles” (Pariser, 2011) where they are exposed to a narrow pool of information, and in “echo chambers” where they are mainly confronted with like-minded users (Sunstein, 2017). The consequences of these intertwined phenomena may be various: reduced exposure to alternative viewpoints and worldviews, politically fragmented and polarized audiences more vulnerable to disinformation, censorship and propaganda and, more broadly, weakened informational self-determination.

In this context, the notion of “exposure diversity” (Helberger et al., 2018) has become relevant for elaborating a new definition of media pluralism: exposure to different content and perspectives is not anymore only a matter of external and internal pluralism, but it also needs to take into account the design of the personalization algorithms and platforms’ interfaces. It is indeed currently a common belief among academics and policymakers that improving source and content diversity could be achieved by promoting variety of exposure. Understanding the normative justifications for this belief, however, is essential. There are indeed at least two fundamental issues that need to be resolved.

On the one hand, there is insufficient evidence of the existence and the risks of filter bubbles and echo chambers, and therefore of the consequent presumed reduction of diversity. To this date, research has been somewhat contradictory and, ultimately, inconclusive (Reviglio, 2022). Given the heterogeneity

² As noted by the EC, “political power can occur through the lobbying of powerful interest groups—whether these are political, commercial, or other” (Commission of the European Communities, 2007, p.5).

of online platforms and users, causes and effects of personalization algorithms vary widely. Many users also seem to benefit from a more diverse exposure. Empirical research has even suggested that personalization algorithms may become better than human editors in promoting diversity (Möller et al., 2018). Personalization algorithms in theory adapt to the preferences of users so that more diverse content is recommended if more diverse content is consumed. Also, exposure diversity is mediated not only by users' interactions with recommended content, but also by sharing practices, content moderation, and design affordances³.

On the other hand, there is no consensus on what "diversity" really means and, eventually, how to support it. Media diversity can indeed refer to a variety of notions such as source diversity, content diversity, diversity exposure, diversity consumption, viewpoint diversity, individual diversity, diversity among individuals etc. (Napoli, 1999; Loecherbach et al., 2020; Bernstein et al., 2020). It is indeed a multifaceted and complex concept that can be achieved in many different ways, and whose interpretation differs according to the research area considered. It remains unclear, then, how much exposure to what kind of diversity would be normatively sufficient to preserve media pluralism. Information abundance in the digital age, in fact, resulted in an endless array of diverse content, blurring the boundaries of what diversity could mean. Also, different theories of democracy conceive and, therefore, would promote media pluralism in different, and at times, conflicting ways (Helberger, 2019). There are, in fact, various trade-offs in the design of diversity; for example, does the exposure to false conspiracy theories promote diversity? Beyond cultivating diversity by design, there are also a variety of other public-oriented principles that could complement this endeavour such as fairness, autonomy, inclusiveness, journalistic authority, serendipity and deliberation (see Stray, 2023). Also, the problem of "preferences alignment", that is, how to assure that algorithmic systems infer the actual preferences of users, is particularly relevant in this context (Thorburn et al., 2022).

All in all, a variety of approaches have been proposed to promote media pluralism in digital environments. Generally, the development of parameters that optimize personalization algorithms for preferences alignment, medium-term goals, and the realization of public values is essential. By doing this, not only users could be exposed to more diverse content but also to trustworthy and general public-interest content, assuring the exposure to a variety of viewpoints (especially in times of elections). At the same time, it is suggested to develop and improve tools to control these personalization algorithms. More broadly, it is crucial to raise algorithmic awareness and literacy as well as to regulate the most perverse effects of the business models driven by users' attention.

What is clear is that the notion of media pluralism, in parallel to that of "media", is changing together with the increasing complexity of the information society. Section 2.2 will offer some reflections on what ought to be considered "media" nowadays.

³ Other scholars, in fact, minimise the above concerns arguing that filter bubbles are poorly defined and can be easily burst (Bruns, 2019); echo chambers have always existed as long as human beings have a homophily bias (i.e. they tend to prefer like-minded people); that personalization could foster "expert citizens" with stronger group identities; and, finally, that even political polarisation, if properly channelled, could eventually become beneficial to democracies (especially from an agonistic theory of democracy) (Stray, 2021). Beyond reduced diversity, the most compelling concern is the platforms' business model based on the so-called "attention economy" and the "optimization of engagement" that eventually promote incendiary and polarized content, distraction, superficial news consumption, addiction and manipulation.

2.2. Rethinking media in the digital society. The standards of the Council of Europe

The re-conceptualisation of media pluralism finds in the re-conceptualisation of media its logical precondition. In the rapidly evolving digital age, the traditional concept of media has undergone a profound transformation. The rise of digital platforms, social media, and online content distribution has revolutionised the way information is created, consumed, and shared.

In this new media landscape, it is crucial to stress once again that the free flow of information, media freedom and media pluralism are essential for a democratic debate, for the existence itself of contemporary liberal democracies. From this assumption we can derive that information can be seen as a public good that is instrumental to democracy. This premise is the basis for recognising the rationale of entrusting media with certain privileges (Tambini, 2021a), and that it is crucial to redefine the status of media in the digital society.

Traditionally, media referred to established institutions such as newspapers, television, and radio, which served as gatekeepers of information. These entities have always played a vital role in shaping public opinion and facilitating democratic discourse, leading to recognise that media are not common goods/services in the market, but they fulfil a democratic role that needs to be recognised in order to shape meaningful media policies.

The digital revolution has blurred the boundaries of media, enabling anyone with an internet connection to create and disseminate content. Individuals, social media influencers, bloggers, and citizen journalists now play significant roles in the media landscape. Moreover, nowadays, media operators are no longer the gatekeepers and no longer the masters of a two-sided market, monetising the attention of the users and sustaining their business mainly with advertising. The media market has dramatically changed, and it is a market that is increasingly suffering from the competition of big tech companies that benefit from lower distribution costs, provide users with content collected from others, and monetise the attention of the users. The imbalance of market power between the media and the online platforms and search engines is currently one of the main issues to be addressed when defining policies to support media freedom and media pluralism. That is the reason why so many relevant policies that have an impact on media pluralism have been developed aiming to fix this imbalance (see, for instance, the various policy measures developed worldwide to protect news content from the perspective of copyright in the digital society, or from the competition perspective (see also Section 4.2.4.1 on Article 17 EMFA).

Given the evolving media environment and considering that media freedom, and in particular news media freedom, is connected with privileges and responsibilities (deontological standards for the journalistic profession, rules on liability, on sources disclosure, funding, tax status, copyright and news revenues, distribution rules such as must carry rules ensuring the delivery of some kind of content e.g., public interest content) there is a pressing need for a "new social contract" (Tambini, 2021a) that defines the status of the media in the digital society and is mindful in avoiding the definition of the media privilege comes with control (Tambini, 2023).

Starting from these premises, it is worth briefly recalling the standards stemming from the Council of Europe's work when it comes to defining media in a new digital environment. The 2011

Recommendation of the CoE's Committee of Ministers^{4 5} In fact, a variety of online intermediaries and platforms are "essential" for the media's outreach and individuals' access to media. They have become "essential pathfinders" to information, "gatekeepers", and may have an "active role"^{6 7} The 2011 CoE Recommendation stressed in particular the "specific functions in the media process" fulfilled by these actors⁸

The Committee of Ministers recommended that Member States adopt a "broad notion" of media, including "all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example, information, analysis, comment, opinion, education, culture, art and entertainment, in text, audio, visual, audiovisual, or other form) and applications which are designed to facilitate interactive mass communication (for example, social networks) or other content-based large-scale interactive experiences (for example, online games), while retaining (in all these cases) editorial control or oversight of the contents".⁹

As noted in the 2022 "Study on media plurality and diversity online"¹⁰ (Irion et al., 2022), the Appendix to the Recommendation proposes intent to act as media"; (2) having the "purpose and underlying objectives of media (Ibid)"^{11,12} (4) adhering to professional standards; (5) seeking "outreach and dissemination", where media has traditionally been defined as "mediated public communication addressed to a large"¹³ (6) meeting public expectation, where individuals expect the media to be "available", and "broadly accessible", even when paid-for services.¹⁴

The Council of Europe's Recommendation on a new notion of media fed into the broad notion of media employed in the 2018 Council of Europe's Recommendation on Media Pluralism and Transparency of Media Ownership¹⁵. It focuses on online media, defining them as a "wide range of actors involved in the production and dissemination of media content online and any other intermediaries and auxiliary services which, through their control of distribution of media content online or editorial-like judgments about content they link to or carry, have an impact on the media markets and media pluralism".¹⁶ The specification of these actors' impact on media markets and media pluralism is a key novelty. Moreover, "editorial-like judgments" by intermediaries are also taken under consideration in the 2018 Recommendation on the roles and responsibilities of internet intermediaries, which emphasised that through content moderation and ranking these intermediaries "may thereby exert forms of control

⁴ Recommendation CM/Rec(2011)7 on a new notion of media, <https://edoc.coe.int/en/media/8019-recommendation-cmrec20117-on-a-new-notion-of-media.html>.

⁵ Council of Europe, Recommendation CM/Rec(2011)7 on a new notion of media (2013), Para. 5.

⁶ Ibid., Para. 6.

⁷ Ibid., Para. 7.

⁸ Ibid.

⁹ Ibid.

¹⁰ European Commission, Study on media plurality and diversity online, 16 September 2022, <https://digital-strategy.ec.europa.eu/en/library/study-media-plurality-and-diversity-online>.

¹¹ Ibid., Recommendation's Appendix, Para. 23.

¹² Ibid., at Appendix, Para. 34.

¹³ Ibid., Appendix, Para. 43.

¹⁴ Ibid., at Appendix, Para. 50.

¹⁵ Council of Europe (2018), Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13 https://coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsUJ/content/recommendation-cm-rec-2018-1-1-of-the-committee-of-ministers-to-member-states-on-media-pluralism-and-transparency-of-media-ownership.

¹⁶ Recommendation CM/Rec (2018)1 of the Committee of Ministers to Member States. On Media Pluralism and Transparency of Media Ownership. Council of Europe. 7 March, 2018, Appendix.

which influence users' access to information online in ways comparable to media, or they may perform other functions that resemble those of publishers"¹⁷ (see Valcke, 2019).

In 2022, the Council of Europe adopted a Recommendation on principles for media and communication governance, which also elaborated on the "new notion of media"¹⁸. It emphasised the "heavy dependence" of media on platforms, calling for a "differentiated approach" to media policy when dealing with different actors. In the last 20 years, the notion and definition of media have gradually evolved, with a broad notion of media characterizing the standard-setting instruments of the Council of Europe. In parallel, the notion of journalism has also evolved.

A new notion of media considering online media actors and intermediaries also emerges from the case law of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union (CJEU). The ECtHR has confirmed that Article 10 ECHR also guarantees the right to freedom of the media¹⁹, issuing many judgments on online news media and the role of online platforms in the media ecosystem, and in a 2019 judgement, the CJEU expressly confirmed that Article 11 of the EU Charter of Fundamental Rights should be given the "same meaning and the same scope" as Article 10 ECHR, "as interpreted by the case-law of the European Court of Human Rights"²⁰

¹⁷ Recommendation CM/Rec (2018)2 of the Committee of Ministers to Member States. On the Roles and Responsibilities of Internet Intermediaries. Council of Europe. 7 March, 2018, Para. 5.

¹⁸ Council of Europe, (2022). Recommendation CM/Rec (2022) 11 of the Committee of Ministers to Member States on principles for media and communication governance. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712.

¹⁹ For example, *OOO Regnum v. Russia*, Application no. 22649/08, 8 September, 2020, Para. 67.

²⁰ Case C-345/17, Judgement of the Court (Second Chamber) of 14 February, 2019 *Sergejs Buivids v. Datu valsts inspekcija*. Court of Justice of the European Union. 9, Para. 65.

3. MEDIA PLURALISM AND THE EUROPEAN UNION

3.1. The ongoing debate on the legal basis for an EU legislation on media pluralism

The fundamental relevance in safeguarding media freedom and media pluralism in the European context, entails, as seen above, a complex definition and conceptualisation of the terms that is very peculiar of the European approach to the issue, and at the core of any media policy. Based on the interpretation of Art. 10 ECHR, Member States have obligations to go beyond refraining from interference and are required to take proactive measures in order to create the conditions for media to operate and to guarantee pluralism, either in the market or during election campaigns, or in ensuring access to the media to citizens.

Whether the European Union, and before the European Community, has always acknowledged the importance of media pluralism in safeguarding democratic values and the free flow of information, the political and legal debate on division of competences between the EU and its Member States on this matter has posed a significant obstacle in progressing towards a common set of rules to support media freedom and media pluralism. Differing are the positions among Member States regarding the appropriate level of EU involvement in media regulation, with some advocating for stronger central oversight, while others emphasising the need to preserve national sovereignty in this domain.

The legal complexities surrounding competences, and the political resistance to vote EU rules on media pluralism and media freedom, perceived as a limitation of national sovereignty have often led the EU to enact diluted or fragmented initiatives that fall short of addressing the core challenges of media concentration, diversity, and independence at the EU level. Nonetheless, it must be acknowledged that the EU has enacted several legislative policy measures that affect media and media pluralism mostly using indirect approaches, such as regulations on digital platforms, transparency requirements for companies in general, and for online platforms, initiatives to combat disinformation online, rules to protect whistleblowers (see below Sections 3.2.4, 3.3, and 3.4). While these measures indirectly touch upon media pluralism, they do not provide a comprehensive and targeted approach to addressing the core challenges faced by media diversity and independence. Despite the challenges posed by the legal debate, there is growing recognition of the need to address media pluralism at the EU level. The increasing influence of digital platforms, the cross-border nature of online media, and the threats posed by disinformation have highlighted the importance of coordinated efforts. The Digital Services Act itself demonstrates a willingness to concretely tackle aspects related to media pluralism in particular in Artt. 34 and 35, where risks for "freedom and pluralism of the media, enshrined in art 11 of the Charter" should be taken into account in cases of risk assessment and risk mitigation by very large online platforms and very large online search engines.

The debate on EU powers on media freedom and pluralism is centred on the allocation of powers and responsibilities between the EU and its Member States (for an extensive analysis see Cole et al. 2021; Irion, et al, 2022; Bard et al., 2016).

The EU operates under a system of attributed competences, where the EU has only the competences conferred upon it by the Treaties, while others remain within the jurisdiction of Member States. The EU's competences are classified into three main types: exclusive competence, shared competence, and supporting competence. Exclusive competence refers to areas where only the EU has the authority to

legislate and adopt binding measures²¹. Shared competence means that both the EU and Member States can legislate and adopt measures, but the EU sets the minimum standards. So, Member States exercise their competence if the Union has not exercised its own ones. Supporting competence allows the EU to coordinate, or supplement the actions of Member States without replacing their competences. Regarding media freedom and pluralism, there is no explicit competence of the EU over them: just Article 167 TFEU refers to a supporting competence limited to culture, including its audiovisual media dimension, that does not create a specific competence, nor allows for the harmonisation of national measures. Due to the lack of explicit competences, the debate is mainly revolving on the legitimacy, scope and limits of using the horizontal competence under Art. 114 TFEU, based on which the European Parliament and the Council may adopt measures of approximation of national provisions for the establishment and functioning of the internal market, to regulate media policy.

Critics (Cole et al 2021) argue that media policy is a matter that refers to the national constitutional order and should remain within the exclusive competence of Member States, as there is no explicit legal basis in in the Treaties. The intention of the Member States in negotiating the Treaties can be interpreted as excluding media and media pluralism from the remits of the European supranational level of intervention, and internal market competences do not entitle the EU to harmonize legislation in the area of media pluralism. A supporting argument in this sense is also the interpretation of Protocol 29, annexed to the Treaty of Amsterdam, on the system of public broadcasting in the Member States²², that underlines that Public Service Broadcasting (PSBs) remit is conferred, defined and organised by each Member State and that the Treaties do not prejudice "the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit". Art. 167 TFEU, mentioning explicitly audiovisual media, must be interpreted as limiting the competence of the EU to the supporting activities there foreseen, and only in the audio-visual sector. Based on these assumptions, considering the diversity of media landscapes, cultural differences, and national specificities, the EU involvement in media regulation could undermine diversity, and the independence of national media.

Against this thesis, it must be acknowledged that Article 167(4) does not avoid, nonetheless, the possibility of proposing an EU action on media under a shared competence, and in particular under Article 114 TFEU. Moreover the Protocol on the systems of public broadcasting can be interpreted as limited to the public funding dimension of Public Service Media (PSM), and as indirectly including PSM in the scope of the internal market.

The possibility and legitimacy of using Article 114 TFEU as a legal basis to act to indirectly support media pluralism gained support (Irion et al 2022) amongst academics and commentators, also in light of the case law of the European Court of Justice consolidated jurisprudence affirming that through article 114 the legislature can also pursue 'non-market' objectives, and that in fact that these objectives can even be the core of the piece of legislation as long as the conditions for the use of Article 114 TFEU are fulfilled (see e.g. De Witte, 2012 or Kosta, 2015). Recently, also the legal service of the Council of the EU (Council, 2022/0277 (COD) has endorsed this possibility for the European Media Freedom Act. The legal service explains (and verifies in the specific case of EMFA) the conditions that allow for the use of Article 114 TFEU in the specific matter, namely "the existence or likely emergence of disparities

²¹ To be noted that Art. 11(2) of the European Charter for Fundamental Rights states that "The freedom and pluralism of the media shall be respected". Nonetheless, this article does not grant the EU competence over media pluralism. Based on Art. 51(2), the Charter itself states that it "does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

²² (OJ C 340, 10.11.1997)

between national laws which are such as to obstruct fundamental freedoms and thus have a direct effect on the functioning of the internal market or to cause significant distortions of competition; the fact that purpose of the measure is to improve the conditions for the establishment and functioning of the internal market; and the lack of another appropriate legal basis” and concludes that Art. 114 TFEU could be used as a legal basis of the EMFA. The opinion underlines “while some media services are indeed cultural in nature, the exclusion of certain measures from the actions which can be taken under Article 167 TFEU does not affect the scope of Union competence under Article 114 TFEU.”

Additionally, it must be highlighted how the EU may claim a role to play in the media sector, in safeguarding media pluralism, particularly in the digital age. Indeed, the cross-border nature of online media requires a coordinated approach to address challenges such as media concentration, the opinion power of digital platforms and disinformation. The EU action can complement national efforts and contribute to a more cohesive and diverse media landscape.

Provided that the principle of conferral does not hinder the possibility of a legislation to harmonise the internal market in the media sector and benefit media pluralism, nonetheless, the legal challenge consists in striking the right balance between EU-level intervention and Member States' autonomy. This balance is crucial to legitimise the EU actions by demonstrating that legislating over media freedom and pluralism respects the principles of subsidiarity and proportionality. It involves assessing whether EU measures are necessary, proportionate, and respectful of the diverse media landscapes across Member States. One of the main points of contention in the legal debate is, therefore, the principle of subsidiarity, which stipulates that decisions should be taken at the most appropriate level, be it national or European.

3.2. Throwback: the debate on media pluralism from a historical perspective

In the previous sections of the study an overview of the theoretical debate on media freedom and pluralism was provided, including an analysis on the much-debated issue of the EU competences on media pluralism. It must be stressed, nonetheless, that, along with the discussion on the competences, the European political debate has been lively on the issue across the last decades, and that, indeed, the European Media Freedom Act proposal is not conceived in a vacuum: this legislative initiative is rooted in a longstanding debate and shaped by political considerations and positioning.

Reconstructing some of the trends in the political discourse on media pluralism and media freedom at European level, some specific streams of debate can be analysed: the discussion in the 1990's stemming from the Green paper on Pluralism and media concentration; the debate on the so called “three-step approach”, started in 2007 with the Commission Staff Working Document²⁵, to advance the debate on media pluralism; the debate on the compliance with the rule of law, an approach to safeguarding media pluralism that is very much influenced by the need to tackling specific country cases of backsliding compliance with media pluralism (in particular Hungary and Poland, see Holtz-Bacha, 2023), but that is also complemented by a broad set of measures to support journalists, to cope with the digital developments and to fight disinformation online.

These streams of debate went in parallel with the related debate on the evolving definition of media and media pluralism, with as well with the the approval and enactment of the Council Directive 89/552/EEC, Television without Frontiers Directive (TWFD) and of the Audiovisual Media Services

Directive (see section 3.2.4), with the debate on role and funding of the public service broadcasting and of competition law in the media sector.

In this context, the driving role of the European Parliament must be acknowledged, as the EP has served as a catalyst for the debate on media pluralism and media freedom, contributing to highlight national cases that could not be considered compliant with fundamental standards on freedom of expression and media pluralism, suggesting alternative policy options, and co-legislating on acts that regulate the information sector, keeping a special eye on media pluralism and media freedom considerations.

Understanding the historical context and the ongoing discussions surrounding media freedom and pluralism is essential for understanding the significance and implications of the European Media Freedom Act draft, which cannot be perceived as a proposal targeting a specific country situation in the EU, but aims at providing a common ground for media to freely operate in the internal market, as it has been requested for long time by part of the European policymakers. In this section, we will briefly delve into the political landscape and historical backdrop that have influenced the development of this Act, shedding light on its origins and the broader discourse on media freedom and pluralism in Europe.

3.2.1. The debate in the 80's and 90's

The political debate on media policy at European level dates back in the 80's when a pillar of the European audiovisual policy was discussed and approved, Directive 89/552/EEC, better known as Television Without Frontiers Directive²³ (see Section 3.2.4).

The first bold initiative of the Commission regarding media freedom and pluralism can be traced back to 1992, which adopted an approach focusing on market and ownership aspects: in response to increasing concerns regarding media concentration and due to numerous requests by the European Parliament (Brogi and Gori, 2013), the Commission, in fact, launched an extensive consultation process (Green Paper) on "Pluralism and media concentration in the single market" (CEC, 1992). The Green Paper made several recommendations aimed at promoting media pluralism and preventing excessive concentration, having as a starting point the market dimension of plurality. The Commission indicated, choosing among three possible options, the main path of a directive or regulation aimed at eliminating legislative disparities among Member States in the interest of competition protection and strengthening the single market.

Opposed to this economic perspective, the Parliament embraced a partially different approach to media freedom and pluralism, supporting, on top of the measures to limit ownership concentration, the adoption of standards based on human rights and media pluralism (for an overview of the resolutions of the Parliament in this regard, see Brogi and Gori, 2013; K.U. Leuven and ICRI, 2009; Iosifides, 1997).

In 1995, former-Commissioner for internal market, Mario Monti, chose to address the protection of media pluralism through two proposals with the aim of regulating media ownership to safeguard pluralism of information (Brogi and Gori, 2013; Citino, 2022). A draft directive was initially presented in 1996, but it was rejected with the claim the European community lacked competence; this led to the formulation of a new proposal in 1997. This new proposal abandoned the notion of pluralism and

²³ 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, *Official Journal L 298*, 17/10/1989 P. 0023 - 0030

focused solely on the ownership structure of European media, but it was, in the end, withdrawn (Citino, 2022).

3.2.2 The three-step approach and the risk-based approach

Acknowledging the failure of the previous attempts to harmonise rules on media ownership and concentration, the rapidly changing media environment, and partially addressing the political requests by the European Parliament²⁴, in 2007, the European Commission launched a new initiative with a Staff working document - Media pluralism in the Member States of the European Union (European Commission, 2007) that introduced a so-called 'three-step approach' on media pluralism. This approach would entail: (1) the same a Commission staff Working Document on Media Pluralism; (2) an independent study on media pluralism, and (3) a Commission Communication on the indicators to be open to public consultation (Brogi and Gori, 2013; Galik, 2010). The Staff Working Document (the first step) indicates the future stage of this policy process. The document underlines the different levels of commitment for the the EU (and CoE) institutions to preserve and foster media pluralism (Brogi and Gori, 2013). The Working document of the Commission proposes a holistic definition of media pluralism, that does not encompass only media ownership and market considerations, but that covers broader meanings of it, including political, cultural, technological perspectives. In the same document, the Commission stressed the need to monitor media pluralism closely and proposed a risk-based approach to media pluralism²⁵. The Document also urged for the adoption of indicators to measure media pluralism in Member States, to assess policies and legal instruments supporting media pluralism, the range of media available to EU citizens, and supply-side indicators on the economics of the media (Galik, 2010).

Following the proposal for a risk-based approach to assess the risks for media pluralism in Member States, as a second step, in 2009, the EC commissioned an independent study (K.U.Leuven – ICRI, 2009) on indicators for media pluralism in the Member States. The study identified several indicators for media pluralism, including the concentration of media ownership, the degree of political independence of media outlets, the level of diversity in media content, and the existence of regulatory safeguards to protect media pluralism. The study also identified specific risks to media pluralism, such as the increasing role of the Internet and the need for greater transparency in media ownership. The "third step" was meant to be a Communication of the Commission based on the Study on the Media Monitor indicators, but it was not pursued (Brogi and Gori, 2013).

In order to provide additional guidance on policies on media freedom and pluralism at EU level, a High Level Group on Media Freedom and Pluralism was also established, in 2011. The remit of the Group was

²⁴ Such as European Parliament resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI)).

²⁵ In the following year, 2008, the EP passed another Resolution on the concentration, and pluralism of the media in the EU (2007/2253(INI)). The resolution highlighted the need to promote transparency in media ownership, prevent media concentration, cross-ownership, and undue influence, and ensure editorial independence and media pluralism. The resolution called on the European Commission and the Member States to take action to safeguard media pluralism, and diversity, including the promotion of a stable legal framework, supporting greater cooperation between European regulatory authorities, and supporting high-quality public broadcasting services. The resolution also emphasized the importance of ensuring access to media for all citizens, including those from disadvantaged backgrounds. Moreover, in 2013, The European Parliament resolution on the EU Charter (2011/2246) highlighted the importance of media freedom and pluralism in promoting democracy, the rule of law, and fundamental rights in the European Union. The resolution calls for the adoption of common pan-European minimum standards and best practices, and emphasises the importance of promoting media literacy and education, ensuring the independence and plurality of media outlets, and promoting transparency in media ownership. The resolution also calls upon the EU and the Member States to ensure that media regulation is compatible with international human rights standards, and to provide adequate resources and support to independent media organisations and journalists.

to examine the state of media freedom and pluralism in Europe, and make recommendations for how these values could be strengthened. The European Commission invited them to provide recommendations on issues such as, inter-alia, limitations to media freedom deriving from state or commercial interference; the concentration of media ownership; actual and potential legal threats to journalists' rights; the role and independence of regulatory authorities; and identifying measures, either existing or potential, that could promote quality and ethical journalism, and media accountability (European Commission, 2011). To this end, in 2013, the High Level Group published its final Report, identifying several recommendations, such as, amongst many, making it mandatory for media organisations to make their codes of conduct for journalists and editorial lines publicly available, introducing media literacy into the national school curriculum, and enshrining net neutrality within EU law (Viķe-Freiberga et al., 2013)²⁶.

3.2.3 The Rule of law report and the European democracy action plan

The European Parliament has always played a pivotal role in keeping at the forefront in the political agenda the issue of media pluralism in Member States. Numerous recommendations have triggered the European Commission to act, starting from those in the 90's that led to the 1992 Green paper²⁷. The European Parliament has asked both for overarching policies and legislation confronting the need to safeguard media pluralism and media freedom in the EU, and also has addressed in its resolutions specific national cases for their lack of compliance with the values set in Treaties (Art. 2 TEU) and in the CFREU (Art 11.2). In doing so, the European Parliament abided by standards that are very much in line with those of the Council of Europe on the same matters, raising the bar for the requested action at EU level, including legislative, in terms of respect of fundamental rights.

The actions of the European Commission (EC) as regards media pluralism and freedom are, largely, initiated at the impulse of the European Parliament. In 2011, the European Parliament adopted a resolution on media law in Hungary (2011/2510(RSP)), expressing concerns about the potential impact of a newly drafted Hungarian media legislation coverage and imposing punitive penalties on media outlets for displaying certain types of content. It also called on the Hungarian government to engage in dialogue with the Commission, and the European Parliament, and address the concerns raised about its media laws²⁸.

²⁶ In 2013 the European Commission accepted a proposal for a citizens' initiative called "European initiative for media pluralism" and asking for an amendment of the AVMS directive or a new directive "aiming at introducing harmonised rules with regard to the protection of media pluralism as necessary step towards the correct functioning of the internal market." https://europa.eu/citizens-initiative/initiatives/details/2013/000007_en. The proposal did not succeed as it was not signed by the requested number of citizens (1 million).

²⁷ Resolution of 15 February 1990 on media takeovers and mergers; Resolution on media concentration and diversity of opinions, 16 September 1992.

²⁸ In the following years, the EP passed other similar resolutions: in 2017, it expressed concern about the recent changes to media ownership, and regulation in Poland and the general situation of the rule of law and democracy in Poland (2017/2931(RSP)). The resolution called on the Polish government to ensure that the media remains independent and asked the Polish Government to take steps to protect and promote media freedom, and diversity. The European Parliament also called on the European Commission to closely monitor the situation in Poland, and act, if necessary, to protect media pluralism and freedom. In 2018, the European Parliament passed another resolution raising concerns about the deteriorating situation regarding media freedom and pluralism in Hungary (2017/2131/INL). The resolution noted that the Hungarian government had taken measures that had reduced the plurality of the media, and had undermined the independence of the national media authority. The European Parliament urged the Hungarian government to take corrective action, and threatened to invoke Article 7(1) TEU if no action was taken.

The adoption of the Hungarian media law sparked intense international criticism and posed a real challenge to the European Union, caught between being a space of freedoms and human rights and the ineffective measures to tackle national behaviours against its values enshrined in Article 2 of the TEU. It became evident that the EU lacked an effective mechanism to address restrictions on media freedom within a member state, as Article 7 of TEU proved politically impracticable, while, nonetheless, having a clear soft power that led to certain amendments of the Hungarian media law. Sadly, the concerns on media freedom and pluralism in the EU were dramatically confirmed also on the side of safety of journalists, by the murders of European investigative journalists, on European soil: the assassination of Daphne Caruana Galizia, journalists, in 2017, the assassinations of Ján Kuciak and Martina Kušnírová in 2018.

With the first report on the State of the Rule of Law in the European Union published in September 2020, it was clear that the European Commission, influenced by the Parliament²⁹, was advancing perspective and tools, introducing a fresh outlook to media policy, by including media pluralism within the “pillars” to be assessed to measure the compliance of a Member State with the rule of law³⁰. Annually, the European Commission produces reports on the state of the rule of law as part of the rule of law mechanism³¹, which works alongside other measures to uphold the rule of law within EU Member States. Additionally, the Regulation on the Protection of the EU Budget and European Values³² became operational on January 1, 2021. This Regulation grants the Council the authority to decrease or halt payments from EU funds to Member States that infringe upon the fundamental values of the EU. (Holtz- Bacha 2023), “The hurdles for such sanctions remain high and the Regulation so far does not refer to the media sector, but it is nevertheless conceivable that it could one day also be applied to infringements of media freedom”, as noted by Holtz-Bacha (2023).

The toolkit of the European Union to support media freedom and pluralism was also enhanced under the European Democracy Action Plan (EDAP)³³. The Plan was designed to address the challenges posed by disinformation, election interference, and the erosion of media freedom and pluralism. The EDAP set out a range of actions to support media pluralism, including promoting transparency in sponsored

²⁹ Report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, A8-0283/2016.

³⁰ Since 2020, the European Commission has been issuing an annual Rule of Law Report, which assesses developments in the Member States concerning the rule of law in several key areas. These areas include the anti-corruption framework, the justice system, media pluralism, as well as other institutional issues related to checks and balances. Within the domain of media pluralism, the report examines specific aspects such as the independence of media regulatory authorities, the safety of journalists, access to information, transparency of media ownership, and fairness in the allocation of state advertising. Starting from 2022, the report also provides systematic coverage of the independence of public service media, which has been reinforced through reforms implemented in various Member States. The most recent report from 2022 indicates a decline in the risks faced by the journalistic profession, an improvement in the transparency of media ownership due to the implementation of EU legislation by several Member States, and a high level of news media concentration across the continent. However, there has been no progress in terms of the political independence of the media, which remains at a medium risk level. The report emphasizes that the independent functioning of media regulators is not always guaranteed. It raises concerns about the effectiveness and functional independence of regulators in practice in some Member States, including potential undue political influence in the nomination process or the functioning of regulators, as well as insufficient resources allocated to them (Rule of Law report 2022, p. 18).

³¹ The rule of law mechanism is a “for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process.” https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

³² Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.433.01.0001.01.ENG&toc=OJ:L:2020:433:TOC>.

³³ European Commission, European Democracy Action Plan, 2020, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en.

political content (i.e., political advertising'), increasing the safety of journalists and other media actors, enhancing EU and Member States' capacity to counter disinformation, and empowering citizens to make informed decision through better education and media literacy.

Among the many initiatives, the European Commission adopted in 2021 a Recommendation (C/2021/6650) on the protection, safety, and empowerment of journalists³⁴. Addressing the threats journalists have been facing, including assassinations in the most tragic cases, the Recommendation aims to strengthen the protection of journalists and ensure their safety, particularly in the face of increasing threats, harassment, and violence. It highlighted the importance of media pluralism as a key factor in promoting a safe and diverse environment for journalism. Adopting a proactive stance, in line with the European approach that foresees a "positive obligation" for the states to ensure an enabling environment for journalists to operate without fear³⁵, the Recommendation set out a range of actions that Member States can take to protect and empower journalists, including ensuring effective investigation and prosecution of attacks on journalists, providing training and support to journalists on issues such as safety, digital security, and ethics, and promoting gender equality in journalism.

In the same year, the European Commission published its proposal for a Regulation (European Commission, 2021d) on the transparency and targeting of political advertising (COM/2021/731 final). It is hoped that this Regulation will help combat information manipulation, disinformation, and interference in elections, and contribute to an open democratic process in the EU Member States (see section 3.4).

The European Commission (2021a) also adopted the Media and Audiovisual Action Plan to support the recovery and transformation of the media and audiovisual sector. The Action Plan focused on several concrete actions such as providing equity investment to foster production and distribution strategies, providing better access to finance for the news media sector, supporting innovation, improving access to and the availability of audiovisual content across borders in the EU, providing training and development for media professionals, and empowering citizens through initiatives aimed at fostering media literacy.

In 2022, several important measures were introduced to promote media pluralism and media freedom in Europe. The EU Commission proposed an anti-SLAPP Directive (2022/0117(COD)), further analysed in this study in Section 3.2.2. The proposed Directive would allow judges to expeditiously dismiss unfounded lawsuits brought against journalists and human rights defenders. It also puts in place various procedural protections and remedies.

³⁴ European Commission Recommendation (C/2021/6650) on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=PL_COM%3AC%282021%296650.

³⁵ Dink vs Turkey, Dink v Turkey (2010) European Court of Human Rights. Application no. 2668/07. Judgment 14 September 2010; See also recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the protection of journalism and safety of journalists and other media actors: https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2016-4-of-the-committee-of-ministers-to-member-states-on-the-protection-of-journalism-and-safety-of-journalists-and-other-media-.

3.2.4 The TVWF and AVMSD

In parallel to the debate on media pluralism and media freedom, the EU approved in 1989 the Directive on Television Without Frontiers (TWFD), amended later in 2007 into the current Audiovisual Media Services Directive, that constitutes a milestone in European media policy³⁶. It is not strictly linked with a media pluralism objective, but contains some provisions can be read also in the light of promoting non-market objectives. The intervention of the EU in this regard is based on the Union's competences to coordinate the legislative provisions of the Member States in order to implement the free provision of services in the internal market. The Directive acknowledges that the significance of audiovisual media services extends beyond their economic value to encompass their cultural significance, as they play a vital role in societies, contributing to democracy by upholding freedom of information, promoting diverse opinions, and fostering media pluralism. Recognizing that audiovisual media services have both cultural and economic dimensions, the Directive aims to establish a level playing field and a genuine European market for such services. The AVMSD provides a framework for Member States to regulate audiovisual media services while allowing for cross-border cooperation and harmonisation (Broughton Micova, 2021; Valcke and Lambrecht, 2021). The Audiovisual Media Services Directive (AVMSD) represents a significant acknowledgement by EU legislation of the technological developments, and of an evolving definition of media, paired with rules that are proportionate to the audiovisual media service regulated, in line with a graduated approach, as foreseen also by the Standards of the Council of Europe (see in Section 2.2 the “graduated and differentiated” approach to regulation). While the TVWF primarily focused on traditional linear television broadcasting, the AVMSD expands its scope to encompass both linear and non-linear audiovisual media services³⁷. The AVMSD has recognised the growing significance of non-linear services in the media landscape and regulates them to ensure compliance with specific standards and public policy objectives. Moreover, with the 2018 revision, the Directive introduced the notion of Video Sharing Platforms (VSPs)³⁸, anticipating the systemic regulatory approach further developed in the DSA, building on the liability system provided for online intermediaries in the e-commerce Directive, and imposing on these operators a duty of care as regards harmful content (Kuklis, 2021). These obligations primarily focus on the protection of minors and combating hate speech and incitement to violence, aiming to ensure a safer and more responsible online environment. By encompassing both linear and non-linear services, as well as introducing provisions for Video Sharing Platforms, the AVMSD represents a comprehensive and forward-thinking framework that adapts to the evolving media landscape. It strives to strike a balance between promoting the free circulation of audiovisual content, protecting consumers, and upholding public policy objectives such as the protection of minors, cultural diversity, and combating harmful content.

³⁶ See also https://ec.europa.eu/archives/information_society/avpolicy/reg/history/index_en.htm for additional references on the history of the audiovisual regulatory framework.

³⁷ Linear services refer to television broadcasts transmitted at scheduled times, similar to traditional TV channels. These services follow a predefined program schedule and are subject to the regulations set forth by the AVMSD. They include terrestrial, satellite, and cable television channels that deliver content to viewers in real-time. Non-linear services, on the other hand, encompass on-demand audiovisual media services provided via the internet. This category includes video-on-demand platforms, streaming services, and other online platforms that allow users to access content at their convenience. These services offer a wide range of content, including TV programs, films, series, and sports events, among others.

³⁸ Art 1 of the Directive: video-sharing platform service” means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union, where the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.’

As technology continues to advance, the AVMSD remains instrumental in regulating audiovisual media services and fostering a harmonised and responsible media environment across the European Union.

3.2.5 Public service media

Public service media (PSM) is deeply rooted in the national traditions of Member States of the European Union (EU). The EU recognizes the significance of PSM in maintaining media pluralism and acknowledges its integral role through the Amsterdam Protocol on public service broadcasting. Adopted in 1997, the Protocol emphasises the connection between public broadcasting and the democratic, social, and cultural needs of each society, as well as the preservation of media pluralism. The preamble of the Amsterdam Protocol underscores the overall role of PSM in society, highlighting its importance in meeting the diverse needs of the public. It recognizes the competence of Member States to define the public service mission of PSM and to determine their funding mechanisms. Member States, nonetheless, must ensure that such funding does not unduly impact trading conditions and competition in the EU, provided that it aligns with the common interest. Within the EU legal framework, the Amsterdam Protocol affirms the autonomy of Member States in shaping their national PSM landscape. It recognizes that PSM serves as a cornerstone of democratic societies by catering to the unique needs of their respective populations. The Protocol respects the diversity of cultural, social, and linguistic contexts within Member States, allowing them to design and support their own PSM models.

While acknowledging the role of national public-service broadcasting (now media) systems in promoting pluralism and recognizing the competence of Member States in regulating their organisation and funding, the Amsterdam Protocol also establishes certain limitations on the national funding system to ensure compliance with European rules. The European Commission has played a significant role in interpreting the provisions of the Protocol through two key Communications issued in 2001 (European Commission (2001a)) and 2009 (European Commission 2009a). According to the Communications and the decisions made in individual cases, Member States are required to establish a precise definition of the public service remit and clearly assign the responsibility for delivering that service to a specific entity. Additionally, any compensation provided should not exceed the net costs associated with providing the public service.

3.3 Other initiatives at EU level touching upon media freedom and media pluralism

3.3.1 Tackling disinformation online and offline: from Member States' initiatives to EU policies

Disinformation is increasingly seen as a threat to media pluralism and to the formation of an informed citizenry (Parcu, 2020, Sadiku et al., 2018, Mason & Stoddard, 2018). Especially in the context of elections (Baptista & Gradim, 2022, Pierri & Cherri, 2020, Sharma & Liu, 2022) and states of emergency (Gottlieb & Dyer, 2020, Vese, 2020), untrue statements amplified by social media or messenger services have a potential to inflict harm on societies and individuals. In their own way, many EU Member States started coming up with regulatory or policy responses to deal with this problem. We start with those dealing with disinformation on online platforms.

One of the first national laws generating an EU-wide resonance was Germany's so-called Network Enforcement Act (NetzDG) in 2017. It required social media providers to proactively remove certain kinds of 'clearly illegal' content, but only very few of these were in fact linked to disinformation – mainly in cases when a piece of disinformation would also qualify as hate speech. In the next year, France passed a law to tackle disinformation during election campaigns. The 22 December 2018 law (no. 2018-1202) for 'the fight against information manipulation' asked online platforms and other media to come up with measures to tackle 'the dissemination of fake news likely to disturb the peace' or to alter the 'sincerity of elections'. The law also dealt with the transparency of the algorithms of online platforms and established a civil procedure that allowed judges to order online service providers to block specific content prior to elections. Both the German and the French law were criticised (see Heldt, 2019; Pielemeier, 2020 & Zurth, 2020) for the possible chilling effect they might have on freedom of expression, which had shaped the EU-wide discussion and encouraged the use of new approaches, among others also in these two countries where new proposals had paid more attention to the protection of fundamental rights (Bleyer-Simon, 2021).

Another set of controversial anti-disinformation policies emerged during the COVID-19 pandemic, when disinformation with a possible impact on national crisis measures was rampant. Some EU Member States had proposed, or even passed, laws that risked penalising people for exercising their right to freedom of expression. Often, the laws were planned amendments to the Criminal Code. In Hungary, Section 10(2) of Act XII of 2020 on the containment of Coronavirus stated that people who were seen as spreading the kind of 'untrue fact or [...] misrepresented true fact' that could jeopardise the government's crisis response could face prison terms of up to five years (Polyák, 2020). Later, Bulgaria, Greece and Slovakia had also unveiled plans to change their Penal Code (see Bleyer-Simon et al., 2022). It was a common thread of these laws that disinformation and misinformation were not properly defined, and their wording made arbitrary application possible while the potential penalties were extremely disproportional. At the same time, it is important to highlight that, in many cases, the threats related to these controversial laws didn't materialise, to a great extent, thanks to the attention these laws received due to scrutiny by policymakers and campaigns of civil society organisations. There were cases when controversial proposals didn't even get passed as a law in the end – as it was the case in Bulgaria (see Bleyer-Simon et al., 2022).

In general, it can be said that legal responses against disinformation in the EU Member States are still limited and controversial (see Bleyer-Simon et al., 2022). At the same time, media literacy is successful in increasing a society's resilience (UNESCO, 2020) – but not a standalone solution – and so is a strong and independent PSM (Humprecht et al. 2020). Over the years, some countries included disinformation in their national defence approaches (i.e., Finland and Slovakia), institutions to analyse disinformation and coordinate responses have been created (such as in Slovakia), and some national regulators were given additional powers to act on the spread of disinformation.

Another test of EU responses to limit disinformation was in the context of Russia's war of aggression in Ukraine – in this case, measures were introduced against media outlets whose contents were associated with a third country. European Commission President Ursula von der Leyen announced (Wintour et al. 2022) on 27 February that two Russian-origin outlets, RT and Sputnik would be banned in the EU. The sanction was published in the Official Journal on 2 March, in the form of a Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP, integrated in the Council regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014. The legal basis of the regulation is Art. 215 TFEU under the EU's external action and the common foreign and security policy (CFSP). The ban is part of the economic sanctions imposed on Russia for attacking Ukraine and breaking international law. But compared to clearcut measures such as freezing assets or

banning the use of EU airspace, the suspension of the (initially only two, later more) Russian state-owned outlets is complicated by the fact that this must be interpreted in connection with freedom of the media and media pluralism, principles that are at the core of European democracy³⁹.

In general, limiting the reach of Russian-origin outlets with a possible harmful effect on public discourse and democracy can be done in Europe without major controversy, as was the case in some EU Member States in the past (see for example European Commission, 2019). The AVMSD was already effectively used in previous years to limit Russian broadcasting, as it allows for the suspension of transmitting programmes that incite hatred, as seen in the case of *Latvia and 'Rossiya RTR'*. At the time, the European Regulators Group for Audiovisual Media Services (ERGA, 2021) found that the Latvian National Electronic Mass Media Council's decision No. 68/1-2 on temporarily restricting the retransmission of Rossiya RTR was compatible with the AVMSD, as the Russia-based service provider had repeatedly infringed the material provision of Art. 6(1) of the AVMSD, and as such, in the specific context of a former member of the Soviet Union with a significant ethnic Russian population was 'suitable to aggravate tensions impeding a peaceful coexistence of sovereign nations and ethnicities'.

At the same time, the EU ban was more complicated, to a great part because this measure doesn't originate from regulatory authorities, but from the Council. The most vocal critics of the ban (Voorhoof, 2022a) emphasise that such procedures need to be based on specific legislation and be imposed by either a court or a regulator. Basing the measure on a Decision and a Regulation, and allowing political rather than judicial authorities to 'impose a ban on certain media outlets, on the basis of rather vague and ambiguous grounds, is unprecedented' (Voorhoof, 2022a). Despite this objection, propaganda can be legitimately restricted, not only within the meaning of EU law, but also within the meaning of international human rights law under Art. 20 of the International Covenant on Civil and Political Rights. The measure comes with another risk as well: 'the concept of war propaganda is a particularly vague one and also quickly threatens to lead to arbitrary applications, certainly if it is interpreted by political authorities' (Voorhoof, 2022a).

In addition, in expert discussions (among others organised by the CMPF), critics have also pointed towards the problems of properly enforcing the ban. Some Member States didn't act against the online editions of the banned media providers, in Hungary, the PSM continued to rely on RT as a major source of information about the war (Kapronczay, 2022) and some social media and messaging services continued to host the profiles set up by the banned media on their platforms (Killeen, 2022, The Cube, 2022). While the ban of Russian-origin disinformation was by some commentators accepted as a legitimate measure (Baade, 2022), the criticism it received, and the limits of its enforcement showed that the EU still lacks a mechanism against disinformation that is effective in limiting the extent of disinformation while acting in respect of fundamental rights.

That doesn't mean there isn't a process under way, with a web of EU-level measures that aim to provide a solution to the problems associated with disinformation, especially in the online environment. Already prior to the Covid pandemic and the war in Ukraine, first steps were taken to come up with a European solution to the problems caused by disinformation. Given the possible risk emerging from a fragmented regulatory environment, in 2017, the European Commission established (European Commission, 2018a) the High Level Expert Group on Fake News (later renamed to High Level Expert Group on Fake News and Online Disinformation), which brought together a wide range of experts and stakeholders. It produced a report (European Commission, 2018b), which recommended a multidimensional approach, focusing on increasing the transparency of online news, the promotion of

³⁹ See the referenced CMPF workshop Media freedom and the war in Ukraine. How to act against propaganda during international conflicts?.

media literacy measures, the development of tools to empower internet users, safeguarding the diversity and sustainability of the news ecosystem in Europe, as well as the promotion of disinformation research.

In its final report, the Expert Group also recommended to come up with a new term instead of “fake news” (European Commission, 2018b). Instead of the old term misused by politicians, the report argues in favour of the typology of Claire Wardle and Hossein Derakhshan (2018) that differentiates between three key forms of information disorders: misinformation (information that is untrue, but there is no intent of doing harm), disinformation (untrue content that was created and shared with the intent of doing harm) and malinformation (factually true information that is shared with the intent of causing harm).

As the 2019 European elections were approaching, the EU sponsored a ‘European approach’ to tackle disinformation. This led to the signing of the Code of Practice on Disinformation (CoP), the first major initiative developed at EU level to deal with disinformation, which followed the Expert Group’s recommendations (European Commission, 2018b) and encouraged online platforms, among others, to ensure the transparency of political advertising and restrict the use of disinformation bots (European Commission, 2018b). This approach builds on the liability regime foreseen by the e-Commerce Directive and creates a self-regulatory mechanism based on which the platforms commit to provide their services adopting measures that can limit the risk of spreading disinformation content. In its Code, disinformation is understood as false or misleading information that is created and shared for economic gain or to intentionally deceive its audiences. It also emphasises the component of ‘public harm’ as a threat ‘to democratic political and policymaking processes as well as public goods such as the protection of EU citizens’ health, the environment or security’. However, the Code did not have a focus on the news media ecosystem, despite the Expert Group’s recommendation.

Overall, the Code of Practice of 2018 was a key step towards defining a European policy against disinformation, as its signatories had committed to obligations that were not required from them by law. Still, the impact of the Code was limited due to its self-regulatory nature. With the 2020 Democracy Action Plan, the European Commission started a process that would turn the Code of Practice on Disinformation into a co-regulatory framework, with clear obligations for online platforms, as well as measures that guarantee accountability and transparency. While the CoP’s focus was on disinformation, the Commission’s guidance on strengthening the CoP emphasised the need to include specific forms of misinformation as well, in cases when those contents can cause public harm.⁴⁰ In 2022, the new Code of Practice on Disinformation was published (European Commission, 2022) with the clear aim of addressing the shortcomings of the earlier version of the Code. It puts a greater emphasis on key performance indicators (called qualitative reporting elements and service level indicators) and monitoring mechanisms to make sure that the Code contributes to meaningful and measurable results⁴¹.

In addition, the Digital Services Act (DSA) establishes a framework for transparency and accountability, which enables oversight over online platforms, especially those that fall into the category of ‘very large online platforms’ such as Facebook or Youtube. The DSA describes the obligations of online platforms to identify and mitigate systemic risks (one of them being disinformation), emphasises the need for a code of conduct for online advertising and introduces a yearly audit requirement. The Preamble of the

⁴⁰ This extension of the CoP’s approach has been criticised for posing threats to freedom of expression and information pluralism (Nenadic 2021).

⁴¹ On structural indicators see Nenadic, I., Brogi, E., Bleyer-Simon, K., (2023) Structural indicators to assess effectiveness of the EU’s Code of Practice on Disinformation, EUI RSC, 2023/34, Centre for Media Pluralism and Media Freedom - <https://hdl.handle.net/1814/75558>.

2022 Strengthened Code of Practice acknowledges that the actions under the Code 'will complement and be aligned with regulatory requirements and overall objectives' of the DSA, once it enters in force. Moreover, it is to become a Code of Conduct under the DSA for the so-called 'very large online platforms'.

Moreover, the European Commission's proposed Artificial Intelligence (AI) Act (European Commission, 2023) formulates a set of binding regulatory standards that would enable an ethical artificial intelligence environment – having impact, among others, on algorithmic recommendation, content moderation systems and new technologies such as synthetic media generation systems (deepfakes). In the latter case, however, there are still many concerns, as the main approach to dealing with deepfakes is increased transparency, but the enforcement of transparency obligations is still unclear (Fernandez, 2022). AI-driven services play a key role in the way audiences consume news, and thus the AI Act will be of great importance in making sure that the utilisation of these services (either by news media or intermediaries) doesn't contribute to risks, among other things, related to freedom of expression, journalistic standards, data protection, data bias or information manipulation (see Helberger & Diakopoulos, 2022). Amendments by the European Parliament's Internal Market Committee (IMCO) and the Civil Liberties Committee (LIBE) ([European Parliament, 2023](#)) classified algorithmic recommender systems and systems that can influence voters as high risk, which means that they would receive extra scrutiny, by having to comply with specific requirements and undergoing an ex-ante conformity assessment.

The strong connection between the EMFA and the disinformation and AI policies is clear, as the EMFA proposal builds on the Democracy Action Plan that includes disinformation among its priority areas, and mentions as its aim to promote approaches that protect audiences from illegal and harmful content.

3.3.2. An overview of "Strategic Lawsuits Against Public Participation" (SLAPPs) in the EU, and of the measures to prevent them

SLAPPs are "Strategic Lawsuits Against Public Participation", aimed at silencing the free expression of ideas through intimidating and harassing the target into silence, with the threat of an often long and expensive lawsuit. Thus, the term generally refers to a lawsuit filed by powerful subjects (e.g., a politician, businessman or corporation) against people who expressed a critical position on a public interest issue. SLAPPs thus constitute one of the main threats for the safety of journalists (Zuffova and Carlini, 2021), and each country's context can be more or less fertile for SLAPPs: influential factors include the legal framework for opinion crimes (especially defamation), the thresholds for damages imposed by law, and the existence of safeguards (e.g., anti-SLAPP statutes or fines for abuse of process) (Verza, 2018).

According to the data elaborated by the Coalition Against SLAPPs in Europe (CASE) Coalition and the University of Amsterdam, SLAPPs are on the rise in Europe, considering a trend of 570 cases between 2010 and 2021, registering a peak in 2020, and finding that Poland is the country where the higher number of SLAPPs are taking place (CASE, 2022). This increasing trend is also confirmed by the 2023 Media Pluralism Monitor final report (CMPF, 2023b).

Since February 2018, the has been calling for an EU anti-SLAPPs legal framework: the murder of Daphne Caruana Galizia, in 2017, was one of the events that pushed the urgency of acting against pretentious

lawsuits higher in the European agenda. At the time of her murder, her bank accounts were frozen with precautionary warrants for ongoing libel suits⁴².

In December 2020, the European Commission established an “Expert group against SLAPPs”⁴³, and since then various European-funded initiatives related to monitoring, reporting and formulating recommendations around the issues of safety of journalists and SLAPPs were established: among them, the Media Freedom Rapid Response (MFRR) consortium and the CASE Coalition (Coalition Against SLAPPs in Europe).⁴⁴

Acknowledging the extent of this issue for the free expression of ideas at large, and for journalistic and media freedom, and acknowledging that until 2021 none of the EU MSs had adopted legislation explicitly aiming at combating SLAPPs⁴⁵, the EU Commission elaborated in 2022 a Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation” (2022/0117(COD))⁴⁶, which is currently under discussion at the European Parliament and Council. The Proposal builds on the 2021 Recommendation on “ensuring the protection, safety and empowerment of journalists and other media professionals”⁴⁷

Among other things, the SLAPPs Directive Proposal’s text proposes a legally binding definition of the term, and suggests allowing judges to expeditiously dismiss unfounded lawsuits brought against journalists and human rights defenders. It also puts in place various procedural protections and remedies to deter the filing of abusive lawsuits⁴⁸.

⁴² Moreover, the EP’s resolution of 19 April 2018 on the protection of investigative journalists in Europe was focused on the tragic murders of the Slovak investigative journalist Ján Kuciak, and his fiancée Martina Kušnírová (2018/2628(RSP)). The resolution condemned the murders and called for a thorough investigation and prosecution of those responsible. It also emphasized the need to protect investigative journalists, and media freedom throughout the EU. The resolution called on the European Commission to create a comprehensive EU-wide mechanism for protecting journalists, and whistleblowers, and urged EU Member States to strengthen their efforts to prevent attacks on journalists, and safeguard media pluralism and independence.

⁴³ For more information: <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupId=3746>

⁴⁴ See Media Freedom Rapid Response. (n.d.) and CASE. (n.d.).

⁴⁵ No national anti-SLAPP legal framework was enacted at MS level in 2022 too (MPM Final Report, 2023). However, some countries have legal provisions that can prevent SLAPPs. For instance, the existing Danish and Finnish legislation is deemed sufficient to deal with SLAPPs if filed (Simonsen 2023; Mäntyoja and Manninen 2023).

⁴⁶ European Commission (2022b) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”) COM/2022/177 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0177>.

⁴⁷ Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union C/2021/6650 EUR-Lex - 32021H1534 - EN - EUR-Lex (europa.eu).

On the Anti-SLAPP compromise proposal, see the statement of EFJ and CASE

<https://europeanjournalists.org/blog/2023/03/14/letter-to-the-swedish-presidency-anti-slapp-compromise-proposal-raises-serious-concerns/>.

3.4 The current EU legislative framework on media freedom and pluralism on which the European Media Freedom Act builds on

As described by the previous sections of this study, the EU has been intervening for several years in media policy, in a broad sense, with a set of diverse initiatives, with a particular acceleration in the last decade. Many are the measures that, in various fields and aiming at different goals, the European Union has deployed to provide rules for the information society. The supranational and global character of the information society prompted and justified an intervention at the European level, which is what the European Union is pursuing combining a corpus of new regulations (either already in force or in the pipeline) with soft-law, self and co-regulatory initiatives and policies (see, above all, Code of Practice on Disinformation⁴⁹) that try to create a European model for governing the digital environment, also through supporting a structured dialogue between relevant stakeholders.

With regards to legal instruments, those who have a scope of application that has or is expected, once approved, to have interactions and/or overlaps with the European Media Freedom Act scope⁵⁰ can be clustered into four main types:

1) Those that contribute to defining the media policy of the European Union in a direct manner, addressing media services or news content, such as: the Amsterdam Protocol on the system of public broadcasting in the Member States. As already mentioned, it acknowledges the integral role of PSM in maintaining pluralism in the media. The EMFA's Explanatory Memorandum (Para.1, p.4) states that the proposal is consistent with the Protocol, which "implicitly confirms that public service media are within the scope of the internal market"; The AVMSD (2010/13/EU), revised in 2018 (2018/1808/EU), to harmonise national legislation on audiovisual media services. As already mentioned above, AVMSD is a cornerstone of media policy at European level and sets out a level playing field on advertising, the protection of minors, and the promotion of European content, introduces a "country of origin" principle, as well as provisions for the protection of human dignity, prohibition of incitement to hatred, and the promotion of cultural diversity. The revised Directive adds three new components related to new obligations for video-sharing platforms, signal integrity and for transparency of audiovisual media beneficial ownership. EMFA complements the existing framework "by requiring all media service providers providing news and current affairs content to provide information on media ownership in particular on direct, indirect and beneficial owners, to recipients of media services" (Explanatory Memorandum, Para. 1, p. 5). EMFA explicitly builds on the revised AVMSD Directive, amending it. Specifically, moreover, it "steps up cooperation within the European Regulators Group for Audiovisual Media Services (ERGA) set up by the Directive by transforming it into the European Board for Media

⁴⁹ See, in particular, the strategy under the 2022 Strengthened Code of Practice on Disinformation (European Commission, 2023).

⁵⁰ Other legislative instruments that can be deemed relevant in the debate on media pluralism and media freedom are: the Net Neutrality Regulation (No 2015/2120). This Regulation aimed to ensure that internet service providers treated all internet traffic equally, and without discrimination, thereby help maintain a diverse range of content and sources online; The European Commission also introduced the Directive establishing the Electronic Communications Code (2018/1972) in 2018 (EUR-Lex, 2018). Under the EC electronic communication rules, the rights to use radio frequencies must be assigned based on "objective, transparent, non-discriminatory and proportionate criteria" (European Commission, 2022). This Directive posits that national regulatory and competent authorities should meet clearly defined general interest objectives, such as promoting social, regional, and territorial cohesion, and promoting cultural and linguistic diversity and media pluralism (Article 3); GDPR; Whistleblowers Directive.

Services and giving it a broader scope of action and additional tasks” (EMFA’s Explanatory Memorandum, Para.1, p.4).

EMFA’s Explanatory Memorandum, when outlining the “Consistency of the proposal with other Union policies”, mentions that “the proposal builds on the European democracy action plan in which the Commission proposed a set of measures to promote democratic participation, fight disinformation and support free and independent media. The Commission initiated a EU Draft Directive on SLAPPs: “by strengthening the protection of journalistic sources and communications, the initiative complements the Recommendation on the protection, safety and empowerment of journalists, as well as the proposal for a Directive and Recommendation on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (“Strategic lawsuits against public participation”)” (EMFA Proposal, p. 6). The different focus of these two tools (EMFA Regulation and SLAPP Directive) is worth underlining: while both are ultimately aimed at protecting the free and independent circulation of ideas and information, the EMFA is designed to address issues of editorial independence and focusing on media service providers as main subjects, the SLAPP Directive is mainly aimed at equipping the judiciary in case of abusive lawsuits, and takes under consideration more actors (not only the newsrooms and journalists, but also e.g. activists and civil society organisations).

Finally, it is important to note an underlying commonality between these two legislative tools proposed by the European Commission, as well as with other recently enacted acts (e.g. the DSA), namely the recognition of the necessity of monitoring the situation on the ground, caring on such monitoring through an independent body that could regularly report on relevant issues for the information society, and effectively making sense of these data for refining or proposing sound policies.

2) Those that are regulating platforms and indirectly deal with media freedom and pluralism, such as:

- The Directive on Electronic Commerce (2000/31/EC). The Directive regulates a diverse typology of information society services. It was recently amended by the Digital Services Act that adopts and develops the liability regime for digital intermediaries already established by the Directive. The Explanatory Memorandum of the EMFA Proposal (Para. 1, p.4) mentions EMFA as consistent with and complementary to the e-Commerce Directive;
- The Regulation on platform-to-business relations (P2B) (2019/1150/EU). The P2B Regulation on promoting fairness and transparency for business users of online intermediation services aims to establish a regulatory framework that ensures online platforms treat ‘business users’ fairly and transparently, whilst also giving them effective means for remediation, if they encounter difficulties. The Regulation also seeks to create a predictable, and innovation-friendly environment for online platforms operating within the EU. In the context of EMFA, Article 4(1) of the P2B Regulation is especially relevant, as it requires online platforms to provide their business users with a ‘statement of reasons’ prior to, or, at the time of any restriction of content relating to services takes effect (Buijs, 2022). Amongst the online platforms, the P2B Regulation includes social media and creative content outlets. In the EMFA Proposal explanatory memorandum (p.4), reference is made to this Regulation, with the Proposal deemed consistent with, and complementary to it.
- The Digital Market Act and Digital Services Act. In November 2022, the EU Digital Services Package entered into force, consisting of the Digital Markets Act (2022/2065) and the Digital Services Act (2022/1925). The Digital Markets Act (DMA) is considered as a significant step towards curtailing the market dominance of gatekeeper platforms. The DMA imposed new obligations for gatekeepers, such as requirements to provide third-party businesses with access to their data and services, on fair and non-discriminatory terms. It also established new powers for the European Commission to enforce these obligations. The Digital Services Act

(DSA) asks platforms to be more transparent to users about their terms and conditions, recommender systems and content moderation decisions. Very large online platforms (VLOPs) and very large search engines (VLOSEs), as defined by the act itself, are required to conduct regular assessments for 'systemic risks' (Article 34) and take appropriate measures to mitigate them (Article 35). In these assessments they have to take into account fundamental rights, such as freedom of expression, and media pluralism. The EMFA proposal Explanatory memorandum mentions these Regulations saying the Proposal is consistent with and complements them (p.4). The relationship between DSA and EMFA is regulated in Art 17 EMFA which is probably one of the most debated articles of EMFA and is becoming the focal point of debate when discussing how to regulate the dependency of media from online platforms.

3) Those that define specific regulations for services or rights that have a clear impact on the plurality of the online environment and deal with the role of online platforms: EU Draft Regulation on the transparency and targeting of political advertising (COM/2021/731 final): in 2021, the European Commission published its proposal for a Regulation on the transparency and targeting of political advertising. The proposed rules would require political advertisements to publicly declare information about the sponsors, financing, and any links to specific elections, or referenda. It is expected that this Regulation will help limit disinformation, information manipulation, and interference in elections, and contribute to a more open democratic debate in the EU Member States. EMFA's Explanatory Memorandum (Para.1, p.5) already states that the Proposal, and in particular the state advertising provisions, are consistent with the Draft regulation on Political Advertising.

The Directive on Copyright in the Digital Single Market (2019/790) was enacted in 2019. Amongst other things, the Directive aims to protect publishers and their publications from unauthorized use, which may, in turn, improve their ability to recover their investments. As publishers of press publications were not recognised as rightsholders, it created difficulties for them to enforce their rights regarding online uses by information service providers in the digital environment. The Directive also sought to enhance the position of creators, and publishers, by ensuring that they are properly remunerated for their work in the digital environment. The Copyright Directive sets a very important turning point in the debate on defining liability regimes for online platforms. It establishes a specific liability regime for online content-sharing service providers in relation to the protection of copyright. The Copyright Directive is mentioned by EMFA as an instrument supporting the financial sustainability of the press, that will be complemented by EMFA as a proposal that "lays down new rules related to media services, such as those on the protection of journalistic sources and communications, state advertising and audience measurement" (EMFA explanatory memorandum, p. 4).

4) Horizontal rules

Competition rules and state aid regulation: EMFA's Explanatory Memorandum states that the Proposal "complements the EU competition rules, which do not directly address the impacts that market concentrations could have on media pluralism or independence, and State aid rules, which are applied on a case-by-case basis (often *ex post*) and do not sufficiently address the problems created by the unfair allocation of state resources to the media service providers" (Para. 1, p. 4). In particular, it is worth considering Art. 21 (4) of the Council Regulation on the control of concentrations between undertakings (the EC Merger Regulation, n. 139/2004), which states that "Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph".

The Anti-Money Laundering Directive (2015/849/EU as amended by Directive (EU) 2018/843): it is an important instrument to ensure financial transparency, especially prescribing beneficial ownership transparency information to be held in each Member State in a central register. EMFA's Explanatory Memorandum affirms the Proposal complements and does not affect the related existing rules (Para. 1, p.5).

4 THE EUROPEAN MEDIA FREEDOM ACT: AN ANALYSIS OF THE PROPOSAL

Based on what described in the first part of this study, it is evident how the Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022) 457 final 2022/0277(COD), 16.9.2022)⁵¹ emerged as a response to a long-standing debate on media freedom and pluralism within the European Union. As the media landscape continues to evolve, it is crucial to address the challenges and opportunities that arise concerning media freedom and pluralism. The European Commission, recognizing the need for EU action, has taken a proactive step with the European Media Freedom Act to address some of these challenges.

By way of an outline of the EMFA proposal, Chapter I sets out the scope, subject matter, (Article 1), and key term definitions used in the Regulation (Article 2). Chapter II contains the rights (Articles 3-4) and duties of media service providers (Article 6), and safeguards for the independent functioning of PSM (Article 5). Chapter III lays out a framework for regulatory cooperation and a well-functioning market for media services. Section 1 stipulates that independent national regulatory authorities are responsible for the application of this Chapter, granting them appropriate powers of investigation to carry out their tasks effectively (Article 7). Section 2 establishes an independent (Article 9) European Board for Media Services (Article 8) and outlining the organisational structure (Articles 10-11) and tasks of the Board (Article 12). Section 3 lays out the regulations and procedures governing regulatory cooperation and convergence, and comprises structured cooperation (Article 13), requests for enforcement measures of obligations by video-sharing platforms (Article 14), guidance on media regulation matters (Article 15), and coordination of measures concerning media service providers established outside the Union (Article 16). The provisions in Section 3 aim to foster enhanced cooperation among national regulatory bodies. Section 4 outlines the provisions of media services in the digital environment, specifying the obligations of VLOPS regarding the declaratory status of MSPs, the rules related to content suspension, complaint handling, dialogue mechanisms, and public reporting (Article 17). Section 4 also states that the Board shall regularly organise a structured dialogue between VLOPs, MSPs, and representatives of civil society whose results are reported to the Commission (Article 18). Section 4 also provides for the right of customisation of the audiovisual media offer in any device or user interface accessing audiovisual media services (Article 19). Section 5 sets out the requirements for well-functioning media market measures and procedures, regulating national measures that affect the operation of MSPs in the internal market (Article 20), and establishing criteria for national regulations and procedures related to media market concentrations on media pluralism and editorial independence (Article 21). Section 6 focuses on the fair and transparent allocation of economic resources, focusing, in particular, on audience measurement, emphasizing transparency, impartiality, inclusiveness, proportionality, non-discrimination, and verifiability, and requiring providers of audience measurement systems to share accurate information with MSPs, advertisers and authorised third parties (Article 23). The article also prescribes codes of conduct, and independent audits for compliance. The Commission and the Board provide guidelines and facilitate best practice exchange. Section 6 also sets out common requirements on the allocation of state advertising

⁵¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0457>.

expenditure to MSPs. Finally, Chapter IV sets out the Regulation's final provisions related to its reporting, monitoring and evaluation.

The scope of application of the Act is broader than the AVMSD (media and not only audio-visual media services). The Regulation, therefore, adopts a "convergent" approach. The boundaries between Audiovisual media services and non-Audiovisual media services are increasingly blurring over time. This makes the approach of the Act less conservative than as it looks at first sight, and appropriate for regulating the developments of the media market towards full convergence.

The rationale of the EMFA proposal, within this composite context, is supporting the functioning of the internal market. By setting common rules for the proper functioning of the internal market, the proposal, as a consequence, benefits media freedom and media pluralism. The Explanatory Memorandum stresses how media freedom is important in the new digital ecosystem, that media are essential for a healthy civic sphere and for economic freedoms and fundamental rights, including equality. The European Media Freedom Act creates the conditions to support professional and trustworthy media (against disinformation - that is a complementary policy), avoids the fragmentation of laws when it comes to protecting journalists, media, and the media market, creates the conditions for the implementation of those standards that are already common across EU Member States, and defines new standards to limit the structural dependency of the media service providers by the online platforms in distributing media content.

As a general remark, it must be stressed, also to better grasp the relevance of the proposal, that a supranational approach, harmonising the rules on the media market, would be beneficial to the media industry. Acknowledging the dual nature of the media, the importance of media services in the internal market and for the democratic debate, is a precondition to think of ways to re-balance the relationship between media and platforms, to argue for a special treatment for the media also vis-à-vis the new actors of the information system, that are, increasingly, the main channels of distribution of media content. These are subjects that have a supranational, indeed global, dimension, are now bound to horizontal rules (DSA and DMA) that do not fully take into account the specificities of the media sector (see Article 17 and Article 23 EMFA). Furthermore, these companies often base their business model on the resources which, for about a century, have ensured the economic sustainability of commercial media, i.e., advertising.

The proposal for a Regulation is complemented by a Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector (Commission Recommendation (EU) 2022/1634 of 16 September 2022 - C/2022/6536) that seeks to promote media self-regulation and standards of journalistic ethics and high levels of media ownership transparency across the Union. This recommendation may provide useful elements to interpret EMFA itself, as it recognises the peculiar nature of the media enterprise and supports the implementation of measures and practices on the editorial independence in the newsrooms, and relevant standards on media ownership transparency.

4.1 Legal basis

Building on the Treaties and on the case law of the CJEU, the legal basis of EMFA is Art. 114 of the TFEU (see Section 3.1 on the debate on EU competences on media freedom and pluralism) which provides for the adoption of measures aimed at the establishment and functioning of the internal market, for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

The objective of the proposal is to tackle the existing disparities in national regulations concerning media freedom, pluralism, and editorial independence. By promoting a unified approach and coordination at the EU level, it seeks to enhance the efficiency of the internal market for media services and prevent potential barriers that could hinder the operations of media service providers throughout the European Union. The 2022 Study on media plurality and diversity online outlined a great fragmentation of regulatory measures in the 27 EU Member States, the field of media policy (Parcu et al., 2022). This seem even more pronounced, when considering, on a national level, the policies explicitly aimed at protecting media pluralism and media freedom: in fact, the level of media pluralism is evaluated using a very fragmented set of criteria from MS to MS (when criteria and methods for measurement are actually in place): the Study mapped 142 different methods of collecting and evaluating data on concentrations in the media sector in the 27 countries of the Union. Such methods are modelled on traditional media (especially audiovisual) and rarely include online media; and they are not effective in measuring, and tackling the actual power over public opinion, and exposure diversity, which should be evaluated by taking into account the methods of access, consumption and the online environment.

As outlined in the bullet list at pp. 7-8 of the Proposal, the issues hindering the provision of media services lay in between rule of law questions and market-related questions (e.g., interferences in the editorial decisions, advertising allocated to certain outlets only, media capture): as a matter of fact, since media are "special goods" and media freedom represents a cornerstone of democracy shaping public opinion and the consequent political decisions, the mis-functioning of the media market (e.g., little investments and viability in certain areas or countries) might go hand-in-hand with breaches to the rule of law in that particular context. Increased trust in the media would lead to increased consumption of news by citizens, and thus benefit the internal market. This logic is also well explained at p. 8 of the Proposal, and supported by the CJEU case law: "The EU legislator must not only comply with fundamental rights when regulating the internal market, but also balance competing fundamental rights. The present Regulation proposal constitutes a harmonious, coordinated and multi-pronged legislative framework by which the legislator contributes to the development and protection of the internal market for media services, thereby also pursuing several further legitimate public interests (including the protection of users) and reconciling in a fair manner the fundamental rights of all the individuals concerned".

Once defined the legal basis lies in Article 114 TFEU, it is important the legislative act finds the right balance between the EU and MS actions. This means assessing whether the subsidiarity and proportionality principles are respected.

As regards the respect of the principle of subsidiarity, the argument that the local and national media market would not require a European intervention seems weak, since, as well explained in the explanatory Memorandum of the EMFA Proposal, "production, distribution and consumption of media content, including news, is increasingly digital and cross-border as the internet continues to propel the transformation of the media industry's traditional business models. The provision of media services in

the EU is increasingly driven by global platforms which act as gateways to media content, while being prominent online advertising providers” (p.8). Moreover, cross-border investments and acquisitions of media companies increasingly take place and are required to be evaluated and governed under a European framework. Thus, coordinated action at European level is inevitably beneficial for a harmonised internal market, improving predictability and legal certainty, while fragmented regulatory efforts would lead to discrepancies in the chain of production and distribution of journalistic content between Member States, adding burdens for media service providers who will have to comply with different legal regimes and thus hampering a level playing field in the internal market.

EMFA will very likely have a marginal impact on the more advanced national legal systems that already abide by the standards proposed in the Act and will have a more pervasive effect on those countries that have greater difficulties introducing rules supporting media services free circulation, media pluralism and media freedom. This is the primary objective of the recent European processes of approximation of legislation (especially after the enlargement of the Union), or that of harmonising towards already existing national best practices and not distorting and imposing rules completely detached from national legal systems. In this sense, the proposed Regulation respects the principle of subsidiarity, as this generalised result would not be achievable as an output of action alone at the level of each Member State (Manganelli, Hearing at the Italian Senate, 2023).

In any case, the EMFA Proposal is a text based on principles that can be declined in individual Member States on the basis of their regulatory traditions in the media sector. Similar considerations are also the basis of the assessments on compliance with the principle of proportionality: in fact, this initiative limits itself to acting on issues for which the intervention of individual Member States would not be effective enough, when carried out in a fragmented way and without the guidance of common principles (see also Cole and Etteldorf, 2023).

The legal instrument chosen for the scopes of harmonisation under Art. 114 is a regulation instead of a directive. This is a choice that has been widely supported by the stakeholders consulted during the drafting of the Impact Assessment of the EMFA Proposal⁵². The use of a regulation would in fact be justified by timing and regulatory linearity and consistency reasons. Instead, splitting the Proposal in various parts and implementing it through various types of EU acts could be detrimental for the coherence of the proposal itself and for its implementation. From the point of view of timing, a regulation allows the problems in the media market identified by EMFA to be addressed in the shortest possible time, avoiding slow and divergent national transpositions, which would end up re-proposing the original problems of regulatory fragmentation that is harmful to the internal market and that the use of Article 114 TFEU aims to avoid. Furthermore, from the point of view of regulatory linearity and consistency, a Regulation would be in line with the entire package of recent European regulations in the digital sector, approved and in the pipeline, such as the DSA, the DMA, the Data Act and the AI Act. For the coherence of the legal order and for a better safeguard of the media market itself, it is important the EMFA can rely on the same strength of other acts that potentially have to deal with media and media pluralism issues (CMPF, 2023a).⁵³

⁵² The consultations conducted before issuing the Proposal resulted in the preference by most stakeholders for “a balanced legislative intervention as opposed to no action or detailed standard setting”. Only publishers would prefer a recommendation, although they do support measures on audience measurement, state advertising and protection of journalistic sources. See <https://digital-strategy.ec.europa.eu/en/library/european-media-freedom-act-impact-assessment>.

⁵³ A different position is taken by the Committee of the Regions, which adopted its opinion on 16 March 2023. CoR fully shares the objectives of the proposal, but stresses that a legal act of a Directive, instead of the Regulation, would better

Over the last months, the EMFA Proposal's text has also been object of debate, regarding the respect of the principles of subsidiarity and proportionality, within the MSs' national parliaments⁵⁴. The MSs whose Parliaments submitted a contribution are Czech Republic, Germany, Italy, the Netherlands and Ireland. It must be acknowledged that within parliamentary debate, concerns have been raised by some Members of the European Parliament regarding the legal basis of the European Media Freedom Act, questioning its classification under Article 114 of the TFEU. Once considered art 114 TFEU applicable, the debate has also revolved on the choice of the legislative act, whether it should be a directive or a regulation⁵⁵.

The opinion of the legal service of the Council of the European Union (Council, 2022/0277 (COD))⁵⁶ seems to pave the path for the adoption of a regulation under Art. 114 TFEU, as it recognises that in general the justification within the proposal for the use of Art. 114 TFEU is sufficiently based on the case law of the CJEU, whether for specific articles the justification for provisions relating to harmonising measures on cross-border services is less evident. The opinion gives a green light to the proposal, conditional upon a stronger justification for some provisions "either that they genuinely aim to improve the functioning of the internal market for media services or that the divergence of national rules obstructs or is likely to obstruct the functioning of the internal market for media services or to distort competition."⁵⁷

The EMFA Proposal has currently started its legislative procedure within the European Parliament. Parliament's Committee on Culture and Education (CULT) has been designated as the committee responsible, with the Committees on Civil Liberties, Justice and Home Affairs (LIBE) and Internal Market and Consumer Protection (IMCO) as associated committees (under Rule 57 of the Rules of Procedure of the European Parliament). The following section, dedicated to a more detailed analysis of the single provisions, will also take into account in some instances the proposed amendments by the Committees, when useful for the general reasoning hereby elaborated.

Whether it does not directly refer to the EU competences in the matter, a landmark case (C-719/18 *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni*) is ruling⁵⁸. The judgement, subsequent to the so-called Mediaset-Vivendi dispute⁵⁹, eventually declared part of the Italian anti concentration/pro

serve the subsidiarity, proportionality, and multilevel governance principles. According to CoR, threats to the independence of EU media ecosystems must be addressed through diversified approaches that cannot rely solely on the legal basis of EU's internal market competence.

⁵⁴ "Protocol 2 of the Lisbon Treaty sets out a review mechanism involving national Parliaments regarding proposed legislation, which does not fall under the exclusive competence of the European Union. Thus, national Parliaments/Chambers may review within eight weeks of transmission such proposed legislation and issue a "reasoned opinion" if they consider that a draft EU legislative act does not comply with the principle of subsidiarity. Reasoned opinions are translated into all EU official languages (with the exception of Gaelic and Maltese). In the majority of cases, submissions from national Parliaments go beyond the issue of subsidiarity, discussing the substantive merits of proposals. These submissions are called "contributions" https://www.europarl.europa.eu/cmsdata/237427/SOP_July2021.pdf.

⁵⁵ All the national Parliaments' contributions can be found here:

[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0277\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0277(COD)&l=en).

⁵⁶ Opinion of the legal service of the European Union to the Audiovisual and Media Working Party, 2022/0277 (COD), April 3, 2023.

⁵⁷ This is asked in particular for art 5 on safeguards for the independent functioning of public service media providers, for art 21, and for the inclusion of non-audiovisual services to justify better in the preamble; "In respect of Article 25, to delete the references in paragraphs 1 and 3 to the "resilience" of the internal market and to redraft the proposal in respect of paragraph 3(c) so as to link the monitoring by the Commission of the media market to risks for the functioning of the internal market for media services.; to adjust the wording of Article 1(3) and the preamble by allowing Member States to adopt "more detailed or stricter rules".

⁵⁸ Case C-719/18, *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni* [2020] ECLI:EU:C:2020:627, paragraph 81.

⁵⁹ Case C-719/18, *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni* [2020] ECLI:EU:C:2020:627, paragraphs 14-29.

pluralism framework contrary to the principle of freedom of establishment contained in Article 49 of the Treaty on the Functioning of the European Union (TFEU), stressing the principle that “national laws can limit freedom of establishment defined by TFEU to preserve media pluralism” and anchoring this restriction to its suitability and proportionality to the achievement of the pluralistic objective; ultimately, requiring that the limits set by national laws effectively protect and guarantee pluralism (Trevisan, 2022; Carlini, 2022). As evidenced by the results of the Media Pluralism Monitor (CMPF, 2023b) and the Study on Media Plurality and Diversity Online (Parcu et al., 2022), in a context of fragmentation of the anti-concentration frameworks at the EU level, the CJEU’s judgement emphasises “a principle that is valid for all Member States” and represents “a reference point for the relationship between national law and the internal market” (Trevisan, 2022).

When it comes to ensuring media pluralism and media freedom, the CJEU has been playing a relevant role over the years: in pursuing this objective - and long before the entry into force of the EU Charter of Fundamental Rights in 2009 - the action of the Court accounted not only for the economic perspective of the Single Market and the free movement of services across the EU, but also for the importance of “a pluralism in views”, ultimately interpreting EU legal provisions under the lens of fundamental rights and democracy. By specifically considering concentration issues, in 1991 already the Court underlined in case *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* (C-260/89) that a monopoly is “unacceptable not only in the context of the freedom to provide services but also to ensure a range of voices are available to the public” (European Parliament, 2015).

Over the years, the CJEU jurisprudence further consolidated, emphasising through a series of case-law that media pluralism is “incontestably” an objective of general interest⁶⁰ with overriding capacity against freedom of establishment defined by Articles 49 and 54 TFEU⁶¹, while anchoring the restriction to the appropriateness and proportionality in the achievement of the objective.⁶² Moreover, with a 2019 judgement (*Google*, C-193/18), the CJEU further clarified how existing directives on electronic communications services (i.e. Directive 2022/21/EC, as amended by Directive 2009/140/EC the “Framework Directive” and Directive 2022/77) clearly distinguish “the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility, content and transmission being covered by different measures which pursue their own specific objectives” (CJEU, 2019).

The distinction between production of content and distribution of content - and, subsequently, the focus on editorial responsibility - represented the core discriminant in the judgement of the Court on the case in question, as in *Vivendi v Mediaset* the CJEU ruled the unlawfulness of the Italian anti concentration framework against EU Treaty principles precisely on this point, since it neglected the dimension of editorial control (Apa, 2021).

⁶⁰ As suggested by Apa (2021), for an assessment on CJEU case law, see F. Barzanti, *La giurisprudenza della Corte di giustizia dell’Unione europea in tema di pluralismo dell’informazione: acquisizioni e prospettive*, in R. Pisillo Mazzeschi, *On information pluralism in European Union law and as an overriding reason of general interest*, see R. Mastroianni, *La dimension européenne de la régulation audiovisuelle: vers une nouvelle directive sur le pluralisme de l’information?*, in *Astrid – Rassegna*, 17, 2013, 1 ss. e P. Caretti, *Pluralismo informativo e diritto comunitario*, in M. Cartabia (a cura di), *I diritti in azione*, Bologna, 2007, 415 ss.

⁶¹ See the judgement of 22 January 2013, *Sky Österreich* (C-283/11). As referred to by Jan von Hein (2017), “according to the CJEU “the concept of “establishment” within the meaning of these Articles 49 and 54 TFEU is a very broad one, allowing a Union national to participate, on a stable and continuous basis, in the economic life of another Member State and to profit therefrom” (CJEU in *Gebhard*, C-55/94, para. 25 and *Almelo*, C-470/04, para. 26).

⁶² In this regard, see judgement of 25 October 2017, *Polbud – Wykonawstwo*, (C-106/16) and, by analogy, judgement of 23 December 2015, *Scotch Whisky Association and Others*, C-333/14, EU:C:2015:845.

The judgement was the final result of a long-standing process started with the toehold acquisition by French media giant Vivendi against Mediaset, which followed the failed attempt to create a pan European pole able to compete with extra EU platforms such as Netflix (Zaccaria et al., 2021). The acquisition⁶³ urged Mediaset to report the Italian media regulator *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) the violation of the anti-concentration framework, and specifically the provision defined by Art. 43 of the Consolidated Text on Audiovisual Media Services (TUSMAR) para. 11, establishing an economic limit for electronic communications network suppliers who obtained revenues exceeding 40 percent of the total revenues of the reference sector (telecommunications) and who, at the same time, held revenues exceeding 10 percent of the entire Integrated Communication System (SIC).⁶⁴ Given the participation of Vivendi in Telecom Italia, according to the TUSMAR the market position gained by Vivendi was a harmful one to pluralism (AGCOM, 2017).

The exceeding of the threshold thus activated the AGCOM, who ordered Vivendi to move and freeze its shares in Mediaset in the trust *Simon Fiduciaria* (Resolution 178/17/CONS). Vivendi appealed to the Lazio Regional Administrative Court (TAR of Lazio), which in turn referred the final decision to the European Court of Justice over three prejudicial issues based on TFEU: free movement of capital (art.63), free movement of services (art.56) and freedom of establishment (Art.49) (TAR of Lazio, 2018; Apa, 2021).

Finally, the CJEU declared the provision of the Italian law which prevented the French company Vivendi from acquiring 28% of the capital of Mediaset to be contrary to Community law (Article 49 TFEU), where it precludes national measures that are liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment.⁶⁵ In fact, the Italian anti concentration framework did not make it possible to determine whether, and to what extent, a company was actually capable of influencing media content, ultimately neglecting the dimension of editorial control over content and resulting incapable of detecting the actual occurrence of consequences detrimental to pluralism (Apa, 2021). On that basis, the ruling importantly clarified the necessity to establish a clear connection between thresholds established by law and the actual risk on media pluralism, taking into account not only market shares when assessing the occurrence of a dominant position, but a wider range of criteria also in light of the digital environment.

This case well illustrates that national rules that pursue media pluralism objectives can cause disruptions and fragmentation in the internal market; that there are disparities between national provisions that hinder free movement, and that, as a far-reaching consequence, there is room for EU intervention to harmonise these rules. Moreover, the case highlights that a relevant 'non-market value', media pluralism could be considered as a limit to freedoms (in this case right of establishment) within the internal market under EU law.

⁶³ The French conglomerate secured 28.8 percent of the share capital and 29.94 percent of the voting rights of the Italian giant.

⁶⁴ Even through subsidiaries or associated companies.

⁶⁵ The CJEU (2020) ruled that "Article 49 TFEU must be interpreted as precluding legislation of a Member State which has the effect of preventing a company registered in another Member State, the revenue of which in the electronic communications sector, as defined for the purposes of that legislation, is in excess of 40% of the total revenues generated in that sector, from earning, within the integrated communications system, revenue which exceeds 10% of the total revenues generated in that system".

4.2 Analysis of the provisions of the European Media Freedom Act

This section of the study aims to analyse the provisions of the European Media Freedom Act proposal, with a specific focus on identifying elements that could be potentially improved to enhance the effectiveness and impact of the act, other than those already identified in the previous section. The objective of this analysis is to provide specific constructive recommendations for amending the EMFA proposal, thereby contributing to the development of a robust framework that ensures and promotes media freedom and pluralism within the European Union and assess the coherence, effectiveness, and compatibility with existing legal frameworks and common standards on freedom of the media and media pluralism.

4.2.1 Chapter I - General Provisions (Artt. 1-2)

4.2.1.1 Article 1 - Subject matter and scope

Article 1 of the EMFA proposal states that the regulation aims to establish common rules for the proper functioning of the internal market for media services and the establishment of the European Board for Media Services, while stating that the regulation “shall not affect” the EU rules on e-commerce, on copyright in the digital age, on promoting fairness and transparency for business users of online intermediation services, the DSA, the DMA, the Regulation on the transparency and targeting of political advertising (once approved). It emphasises the importance of preserving the quality of media services within this framework. Furthermore, the article recognizes the possibility for Member States to adopt more detailed rules in the areas covered by Chapter II (Rights and duties of media services) and Section 5 of Chapter III (“requirements for well-functioning media market measures and procedures”). It emphasises that these rules must be in compliance with Union law, ensuring consistency and coherence with the broader legal framework established by the European Union.

As a general remark, the proposal lacks clear guidelines regarding the priority of rules in case of conflicts that may arise with other legislation. In particular, the relationship between the Proposal and the Audiovisual Media Services Directive holds significance, but the Proposal does not thoroughly address this connection, apart from mentioning amendments to the Directive.

EMFA should be considered as *lex specialis*, as the most appropriate choice to guarantee media pluralism and freedom in the EU (see Cantero, 2023 p. 11), for instance when defining its relationship with the online players (ERGA, 2022)⁶⁶.

⁶⁶ EU-level rules on media ownership and independence of the regulators can create uniformity across the EU and can contribute to overcome the reported deficiencies of the implementation of the AVMSD rules by the Member States. EU intervention can contribute to reducing existing barriers to internal market freedoms and prevent anti-competitive behaviour where competition law alone is not enough. The DMA does not seem enough to address the impact on media freedom because ‘fairness’ requires a different treatment in the media sector due to the influence and power of platforms. A *lex specialis* on media freedom would establish a framework of minimum set requirements to specifically protect media freedom in traditional and new media. and ERGA 2022: “online content platforms are already foreseen to be covered by the future DSA and DMA as *lex generalis*. The EMFA should therefore take this into account and concentrate on adequately complementing these texts as a *lex specialis* when it comes to these players, while duly noting the relevance of the AVMSD’s article 28b to this respect” (ERGA, 2022, p.2).

Article 1(3) states that the EMFA “shall not affect the possibility for Member States to adopt more detailed rules in the fields covered by Chapter II and Section 5 of Chapter III, provided that those rules comply with Union law.” This paragraph should be interpreted in order to include, along with more detailed rules, additional measures that Member States could adopt in the fields covered by Chapter II and Section 5 of Chapter III. It must acknowledge the possibility of additional measures that do not only detail the EMFA ones, but go beyond them, remaining in line with the rationale and the aim of the Act and comply with European law and principles. For instance, a national registry on media ownership is not a hurdle for the internal market, but is instead a good instrument to boost ownership transparency, relevant for the free market of media services (see Section 4.2.2.4 commenting Article 6).

As mentioned also by the opinion of the legal service of the Council “should this intention of minimum harmonisation be confirmed by the legislature, Article 1(3) of the proposal would need to be reworded to allow Member States to adopt “more detailed or stricter rules” and the understanding be reflected that the free movement of media services which comply with the harmonised rules is not thereby restricted and that these stricter rules comply with Union law”.

4.2.1.2 Article 2- Definitions

Article 2 is key for the interpretation of the whole legal text of the EMFA Proposal, outlining how some key terms should be interpreted. In particular, Art.2 deals with the much-debated definition of media (see the debate on this point outlined in Section 2.2).

Some definitions provided by art. 2 of the EMFA Proposal may need a fine-tuning, or some definitions of terms used throughout the rest of the legislative text might be missing. The considerations hereby outlined are not exhaustive.

Art. 2 (1) describes a “media service” as “providing programmes or press publications to the general public, by any means, in order to inform, entertain or educate, under the editorial responsibility of a media service provider”.

Leaving to the next bullet points the analysis of what is the meaning to be attributed to the notions of “media service provider” and “editorial responsibility”, here it is evident, as mentioned above, that non-audiovisual media are added to the scope of this legislative proposal, contrary to the scope of the AVMS Directive amended by this proposed Act. Moreover, it has to be noted that art. 2 (1) considers media services not only as aimed to inform (in art. 3 and 6 of the Proposal, described as “providing news and current affairs content”), but also as services aimed to entertain or educate the public. The lack of mention of these kinds of services from the articles prescribing the “Rights of recipients of media services” (art. 3) and the “Duties of media service providers” (art. 6) might be worthy of specification within the Proposal’s text.

Art. 2 (2) crucially defines what has to be considered as a “media service provider”, stating that:

“‘media service provider’ means a natural or legal person whose professional activity is to provide a media service and who has editorial responsibility for the choice of the content of the media service and determines the manner in which it is organised”.

The provision of a definition of media entails the inclusion of new actors, as to define media or media service providers in the context of convergence and aiming at technological neutrality. This approach

is to be welcomed, considering that a significant amount of information in the public interest comes, increasingly, from beyond traditional formats (CMPF, 2023a). This broader definition seems to be in line with the three key Recommendation drafted by the Council of Europe: the 2011 CoE Recommendation on a “new notion of media”, the 2018 Recommendation on Media Pluralism and Transparency of Media Ownership and the 2018 Recommendation on the Roles and Responsibilities of Internet Intermediaries.

The definition of what a “media service” and a “media service provider” are, is crucial for the interpretation and subsequent implementation of the whole European Media Freedom Act. In particular, this cross-cutting issue is key when referred to certain sections of the EMFA Proposal, namely Chapter II- “Rights and duties of media service providers and recipients” and Section 4 “Provision of media services in a digital environment”, as well as Art. 20 (“National measures affecting the operation of media service providers”) and Art. 23 (“Audience measurement”).

On this line, a debate is ongoing related to the absence of an explicit mentioning of “journalism” and “journalists” in the Act (for example, Seipp and Fahy, intervening at the CMPF’s conference on “Reframing media pluralism online”, 13 December 2022⁶⁷). Focusing again on Art. 2 (2), the mentioning of “natural persons” could be interpreted “as recognising the crucial role of individual journalists, also when working independently from a newsroom and/or as freelancers” (CMPF, 2023a). Opinion papers on the EMFA Proposal published by a range of civil society organisations suggest explicitly mentioning the word “journalist”, “journalistic activity” and a reference to “freelancers” too in art. 2(2) of EMFA (European Federation of Journalists, 2023).

The 2022 “Study on media plurality and diversity online” (Irion et al., 2022) offered a categorisation of media actors, defining as “other media actors” non-conventional information providers who contribute to public debate or fulfil public watchdog roles (e.g. NGOs conducting public interest investigations, bloggers and influencers covering public interest issues). According to Art. 2 of the Proposal and Recital 7 (hereby reported), these “other media actors” appear to be excluded from the definition of “media service providers”, and thus from enjoying the related privileges. Recital 7 states: “This definition should exclude user-generated content uploaded to an online platform unless it constitutes a professional activity normally provided for consideration (be it of financial or of other nature)”. The detractors of excluding “other media actors” from enjoying the guarantees provided by EMFA sustain this is in contrast with the ECtHR case law on Art. 10 ECHR; those convening with the EMFA’s approach, instead, agree on the fact that excessively enlarging EMFA’s scope of action would not be feasible in terms of legal basis of the Act, ex Art. 114 TFEU, as well as making EMFA’s enforcement very difficult and hindering the legal certainty in the application of the related provisions.

The distinction between “media actors” and “other media actors” strongly lies upon the fact that newsmaking in the public interest is performed as a “professional activity”, a term employed by art. 2 (2), associated with the offer of services by media service providers. It could be questioned if this refers only to situations when such services represent the provider’s main source of income, or if it should be interpreted as referring to media actors respecting journalistic professional standards. More generally, the news producers or disseminators should be required to adhere to clearly identified professional standards. The Act could thus benefit from an explicit reference to what is meant by “professional activity” in light of the standards elaborated by Recommendation 2022/1634, accompanying the EMFA proposal: the addition should clarify the interpretation of such standards (see also Section 4.2.2.4 on

⁶⁷ Conference “Reframing media pluralism online. New findings and policy approaches”, European University Institute, 13 December 2023 <https://cmpf.eui.eu/event/reframing-media-pluralism-online/>.

Art. 6). The latest proposed amendments to the Act (423, CULT⁶⁸) do not seem to address this issue: in fact, it proposed to substitute the definition of “media service provider” as “a natural or legal person whose professional activity is to provide a media service” with “who is regularly or professionally engaged in the provision of a media service”.

These considerations are again relevant when noting a lack of explicit reference to the activities of non-commercial (or non-profit) media. In fact, Recital n. 7 (p. 16 of the EMFA Proposal) states that “For the purposes of this Regulation, the definition of a media service should be limited to services as defined by the Treaty and therefore should cover any form of economic activity”. Also, Art. 2 (1) recalls the definition of “service” as provided by the Treaty on the European Union, that in art. 57 provides that “Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration”. These references have led to a debate upon the inclusion or not of non-profit media within the scope of application of EMFA: in fact, as prof. Damian Tambini raised during a CMPF seminar on 28 April 2023, it could lead to excluding media outlets and journalists working on a voluntary basis, or basing their activities on non-profit based business models (e.g. grants or donations), despite their services serving the public interest to quality information and respecting professional standards, or adhering to journalistic ethical codes. The adherence to professional standards could indeed be the basic requirement for the identification of the media service providers that will enjoy the guarantees granted by the EMFA Regulation, as confirmed in the same occasion by the European Commission’s representative, Lubos Kuklis. In conclusion, explicit reference to “non-commercial media” could be added in the text of Art. 2, proposed the Director of the European Federation of Journalists, Renate Schroeder. A similar suggestion has been advanced with regard to the reference to MSPs in Art. 4 (Cole and Etteldorf, 2023). Considering non-commercial media within the scope of EMFA would be in line with a variety of MSs’ policies granting subsidies to non-commercial media, and a number of other projects- also EU funded- aimed at enhancing the sustainability and viability of non-profit media (e.g., community media, supported by the funding scheme provided by the Local Media for Democracy project⁶⁹), recognising their crucial role for the democratic debate.

Art. 2 (7) (8) and (9) offer definitions of “editor”, “editorial decision” and “editorial responsibility”. Before analysing more in depth the definition of “editorial responsibility” as provided by the EMFA Proposal, and in light of the definitions provided in the Proposal at this stage, it is worth to note that adding more definitions in this section might be needed. In particular, the Proposal might benefit from defining in art. 2 the notion of “editorial independence”, as elaborated and described in the Commission Recommendation 2022/1634 accompanying the EMFA text. Also, defining it as “autonomy” instead of “independence” would be welcomed and helpful in highlighting the deontological aspect that is linked with this concept, while limiting the concerns of the publishers who claim that the term “editorial independence” can expose them to excessive risks, as, in some countries, publishers are liable for the activities of the newsroom.

Additionally, the definitions of two key figures in newsrooms and for in the information industry could be added, namely that of “editor in chief” and of “publisher”. This would be particularly important considering the different liability regimes in force at national level in the EU MSs, as probably referred to by art. 2 (9). These additions should eventually also be reflected in the phrasing of other EMFA’s

⁶⁸ Committee on Culture and Education, Amendments 278- 507, 2022/0277(COD), May 5, 2023, [AM Com LegReport \(europa.eu\)](https://www.europarl.europa.eu/legifreg/com/legreport/2023/05/05/am-278-507-2022-0277-cod).

⁶⁹ See Local Media For Democracy - Project. (n.d.).

articles (e.g. art. 6 (2) guaranteeing the independence of individual editorial decisions). In this regard, the most recently proposed amendments to EMFA propose to integrate this section.

Art. 2 (9) of the EMFA proposal defines the concept of “editorial responsibility”:

“editorial responsibility” means the exercise of effective control both over the selection of the programmes or press publications and over their organisation, for the purposes of the provision of a media service, regardless of the existence of liability under national law for the service provided.

The reference to “selection” and especially “organisation” of programmes and publication, seem to expand the attribution of editorial responsibility beyond “traditional” media actors, taking also to account the distribution side of news and information. Whether the terms used and the context point to the definition of editorial responsibility, more than to content moderation or curation Barata (2022) notes that “as such, certain types of online services would become ‘traditional’ media services. [...] . Yet, this recital looks more like an aspirational statement or, perhaps an invitation for further amendments in this direction than an actual legal determination”⁷⁰. CULT⁷¹, LIBE⁷² and IMCO⁷³ Committees’ proposed amendments to the Act suggesting to making some reference to editorial responsibility over “content”, probably to dissipate doubts over the actors to be considered “editorially responsible”⁷⁴.

The “existence of liability under national law” seems to refer to the different legal frameworks around the EU, where the attribution of liability (and of consequent sanctions) is entrusted to different subjects, sometimes in addition to the journalist(s) who wrote the article/ created the content for programmes, such as editors in chief or even publishers. On this line, Amendment n. 422 of the CULT Draft Opinion (May 5, 2023⁷⁵) suggests substituting in art. 2 (1) “under the editorial responsibility of a media service provider” with “under the editorial responsibility of a designated editor”. Also, Amendment 424 suggests to avoid mentioning “editorial responsibility” in art. 2 (2) (currently defining a MSP as having “editorial responsibility for the choice of the content of the media service) with “who decides the overall editorial line of the content”.

Art. 2 (13) defines the meaning of “media market concentration”. The main issue here appears to be related to the risk that the “media pluralism test” provided by art. 21 of the Proposal could be enforced

⁷⁰ On this point, it is worth considering the exemption from liability for the content shared on the services of hosting providers (online intermediaries, platforms) ex e-Commerce Directive and DSA. The distinction between production of content and transmission of content - and, subsequently, the focus on editorial responsibility - also represented the core discriminant in the judgement of the Court on the case in question, as in *Vivendi v Mediaset* the CJEU ruled the unlawfulness of the Italian anti concentration framework against EU Treaty principles precisely on this point, since it neglected the dimension of editorial control (Apa, 2021).

⁷¹ Committee on Culture and Education (CULT) 2022/0277(COD) 31.3.2023, DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022)0457 – C9-0309/2022 – 2022/0277(COD)).

⁷² Committee on Civil Liberties, Justice and Home Affairs (LIBE) 2022/0277(COD) 9.5.2023, Proposal for a regulation (COM(2022)0457 – C9-0309/2022 – 2022/0277(COD)) https://www.europarl.europa.eu/doceo/document/LIBE-AM-748952_EN.pdf.

⁷³ Committee on the Internal Market and Consumer Protection (IMCO) 2022/0277(COD) 13.4.2023, Proposal for a regulation (COM(2022)0457 – C9 0309/2022 – 2022/0277(COD)).

⁷⁴ IMCO, AMENDMENTS 173 - 421 - Draft opinion Establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU April 13, 2023 https://www.europarl.europa.eu/doceo/document/IMCO-AM-746660_EN.pdf.

⁷⁵ Committee on Culture and Education , Amendments 278- 507, 2022/0277(COD), May 5, 2023, AM_Com_LegReport (europa.eu).

only when media companies *strictu sensu* are involved. For this reason, the formulation could instead refer to “market concentration that may have an impact on media pluralism”.

Probably driven by the same purposes, both the amendments proposed in first instance by the CULT and the LIBE Committees suggested to add a mention of concentrations that involve VLOPs and VLOSEs: more in detail some members of CULT suggests to add to “media concentrations [...] involving at least one media service provider”, also a reference to “at least one provider of very large online platform or at least one provider of very large online search engine, and which has a significant impact on the structure and pluralism of the media market” (CULT, 31 March, 2023, p. 3876), while LIBE suggests to add a reference to the fact that these concentrations “may include providers of very large online platforms or of very large online search engines”.

Finally, some observations regarding the possibility of adding in Art. 2 the definition of “recipients of media services” is to be made. As a matter of fact, it is used in a different way in art. 3 (Rights of recipients) - where it seems to refer generically to citizens seeking and accessing information- and art. 17 - where it is stated that the recipient of services of VLOPs can declare to be MSPs. In this case, “recipient” seems to be juxtaposed to the concept of “user”. A definition seems to be offered by Recital 6, stating that “Recipients of media services in the Union (natural persons who are nationals of Member States or benefit from rights conferred upon them by Union law and legal persons established in the Union) should be able to effectively enjoy the freedom to receive free and pluralistic media services in the internal market”, but this could be re-stated in the legislative section of the Act, harmonising the use of this terminology throughout the text.

4.2.2 Chapter II - Rights and duties of media service providers and recipients (art. 3-6)

4.2.2.1 Article 3 - Rights of recipients of media services

Article 3 provides an indirect definition of media pluralism, limited to news and current affairs content. Having regard to an evolving notion of media pluralism, as described in Section 2.1, maybe this article could benefit from a referral to the fact that media pluralism in the new digital ecosystem entails technological neutrality and citizens exposure to a broad and diverse range of information sources.

It has to be noted that this right is entrusted limiting it to the recipients’ access to “news and current affairs”- similarly to what is done framing the duties of MSPs in Art. 6 of the proposal; this right could thus be interpreted as not including “entertainment and education”, as included instead in the definition of “media service”, ex Art. 2 (1) (programmes and publications aimed to “inform, entertain or educate”).

4.2.2.2 Article 4 – Rights of media service providers

In essence, the central aim of Article 4 is to protect journalistic sources (as highlighted in Recitals 16 and 17) by means of prohibiting, or restricting, as much as possible, state interference. Article 4 is,

⁷⁶ Committee on Culture and Education, 2022/0277(COD), Marcg 31, 2023, [PR_COD_1amCom \(europa.eu\)](#).

arguably, an attempt by the EU to respond to the increasing usage of sophisticated (yet controversial) spyware technology, which has strengthened the states capacity for intelligence gathering, and surveillance. Spyware technology represents a Janus-faced phenomenon, because, although, this technology might strengthen a state's ability to fight terrorism and crime, it has provoked some controversy because of allegations related to human rights abuses, such as the targeting of journalists and political activists, and the lack of oversight and accountability relating to its deployment⁷⁷. The overarching aims of this provision is to safeguard personal data protection (Article 8 CFREU), and freedom of expression (Article 10 CFREU). In particular, this provision seeks to safeguard editorial freedoms and independence, prohibiting state intervention (Article 4(2a)) unless it complies with Article 52(1) of the Charter of the European Union and other Union law.

Article 4 builds upon several EU directives, Council of Europe conventions, and ECtHR case law, that, to varying degrees, addresses the issue of journalistic source protection⁷⁸. We can trace back the objective of protecting journalistic sources to the ratification of the Council of Europe's 'Convention 108', in 1981 (2016a). Even though the Convention did not address journalistic sources, explicitly, it established, for the first time, a legal framework for data protection. The overarching aim of this Convention was to protect individuals against potential abuses during the collection and processing of personal data. Moreover, the Convention, via Article 12, outlawed Member States from limiting the transborder flow of personal data, which, indirectly helped to foster an information ecosystem favourable to cross-border exchange. Whilst the Convention's central aim was to protect personal data from unauthorised access (as per Article 7 of the Convention), certain derogations were established, such as those pertaining to state security interests.

The Privacy and Electronic Communications Directive 2002/58/EC also aimed to protect privacy in the handling of personal data in electronic communications, although it does not address journalistic sources, specifically. It included, nonetheless, provisions that indirectly contributed to safeguarding the confidentiality of sources, in particular, that of Article 5(1), which prohibits the "listening, tapping, storage or other kinds of interception or surveillance of communications [...] without the consent of the users concerned". Like the Convention (see above), certain derogations, such as supporting criminal investigations, and handling national security concerns, were established (see Article 15). In 2016, the General Data Protection Regulation (GDPR) was adopted in the EU. Under this Regulation, MSPs are expected to apply the appropriate safeguards in maintaining the confidentiality of journalistic sources, whilst complying with the obligations and principles set out in the GDPR. Whilst it introduced measures to safeguard personal data, journalists have been granted certain exemptions. Nevertheless, these exceptions are subjected to a balancing test, which must consider both the overall public interest, and rights and freedoms of individuals (Recital 153). In 2019, the Whistleblower Protection Directive (2019/1937) came into force, which strengthened the protections of whistleblowers in a further push to support journalistic sources (Recital 46). More recently, the European Commission Recommendation (C/2021/6650) aims to protect the safety of journalists, which is an important aspect of journalistic source protection.

To summarize the main provisions, Article 4(1) grants MSPs the right to conduct economic activities in the internal market freely save for those allowed under Union law (Article 4(1)). Member States are

⁷⁷ A notable case was that of Jamal Khashoggi, a Saudi Arabian journalist who, in 2018, was murdered in the Saudi consulate in Istanbul. Allegedly, Pegasus spyware was used to target and monitor his communications leading up to the murder (Guardian, 2021).

⁷⁸ Standout cases include *Sanoma Uitgevers B.V. v. the Netherlands* (2010), *Szabó and Vissy v. Hungary* (2016), *Goodwin v. UK* (1996), and, *Telegraaf Media Nederland Landelijke Media v. the Netherlands* (2012).

prohibited from interfering with MSPs' editorial policies, and decisions (Article 4(2(a)), and they cannot detain, sanction, intercept, surveil, or search MSPs, solely based on their refusal to disclose sources, save for in cases where there is an overriding public interest, in accordance with Article 52 of the CFR, and relevant Union law (Article 4(2(b))). In general, the deployment of spyware by Member States is prohibited, unless justified on the grounds of 'national security' or 'serious crimes' investigations, provided other measures are inadequate (Article 4(2(c))). Article 4 also obliges Member States to establish an independent authority to handle complaints lodged by MSPs regarding breaches of this provision, and MSPs have the right to request an opinion from an independent authority, and the opinion must be communicated within three months of the request being made (Article 4(3)).

Endeavouring to harmonise legislation on the protection of journalistic sources is a welcome development particularly in light of the increasingly cross-border nature of journalists' work. The inclusion of Article 4 is positive, furthermore, insofar that explicit safeguards are provided against spyware (Voorhoof, 2022b).

In addition to not providing additional protection beyond what is already guaranteed by Article 56 TFEU, the emphasis on 'economic activities' in Article 4(1) could result in excluding non-profit media actors, involved in activities with a more cultural emphasis, from the scope of this provision (Cole and Etteldorf, 2023 p.26). According to some commentators, the scope of Article 4(2) concerning the entities obligated to adhere to its provisions is, arguably, overly restrictive. While Recital 15 cites "other actors, including public authorities, elected officials, government officials and politicians", this would not cover instances in which national governments delegate the deployment of spyware, or other illicit practices to non-state actors⁷⁹. In cases such as these, the state would not be directly deploying spyware, but would be posing a risk to journalistic sources, nonetheless. For similar reasons, it may also be recommended to extend the scope of this provision to quasi-state actors or 'quangos', as well⁸⁰. Similarly, Article 4(2(b)) imposes a restricted scope concerning the intended beneficiaries of this provision. Currently, only MSPs would stand to benefit from the provision, and citizen journalists or freelancers, audio/video technicians, editors, production staff, administrative personnel - or other individuals involved in the media service providers' support network - would not be protected. Therefore, some commentators argue that scope should be broadened to other media professionals (Bettoni, 2023; EDRI, 2023).

Article 4.2(b) includes a restricted prohibition that solely applies when MSPs refuse to disclose information regarding their sources (Article 4.2(b)). However, the prohibition's scope is maybe too narrow, and would fail to include the following three situations: (1) when MSPs are unaware of any interception taking place, (2) have not refused disclosure, or (3) have not received a prior request for disclosure (Voorhoof, 2022b). EMFA should, thus, consider providing a broader protection that covers such situations (*ibid.*). Moreover, some commentators argue that Article 4 should do more to protect the rights of journalists and MSPs that utilise encryption technology, and Member States should be

⁷⁹ There is mounting evidence that other illicit activities (e.g., disinformation) are delegated by national governments to other organised private entities with specific expertise. For example, in the context of disinformation, the Russian government is alleged to have funded "troll farms", that is, organised private entities whose *raison d'être* is to spread disinformation (Euractiv, 2022). This is not engaging directly in the dissemination of disinformation *per se*, but it is delegating the act to other entities which may (or not) be public, semi-private or commercial entities. This is why it may be advisable for the article to explicitly encompass non-state or private entities.

⁸⁰ This point builds on a similar one made by one researcher from the Osservatorio Balcani e Caucaso Transeuropa during an internal seminar with the CMPF on 22.5.23 (Bettoni, D., personal communication, May 22, 2023).

prohibited from accessing encrypted communications, in order to provide additional safeguards of journalistic sources (Bettoni, 2023; Edri, 2023; Voorhoof, 2022b).

Article 4.3(c) offers the chance to clarify the boundaries of its application, particularly in relation to the 'national security' derogation⁸¹. Until now, the scope of what pertains to 'national security' has not been clearly defined (Bettoni, 2023). The definitional scope of 'national security' remains unclear in both the Convention 108 and Directive 2002/58/EC⁸². The EU Agency for Fundamental Rights, in its 2017 report, had already expressed concern regarding the same, and advocated for an expanded definition of it to include 'major threats to public safety and including cyber-attacks on critical infrastructures' (EU Agency for Fundamental Rights, 2017 p.53). This ambiguity is, perhaps, not surprising as 'national security' predominantly remains a national competence (as per Article 4(2) TEU) meaning that each nation has sovereignty in defining and safeguarding its own national security interests⁸³. This makes the need to establish a common EU-wide definition of 'national security' even more pressing. The lack of clarity regarding the term of "national security" could be problematic as it gives Member States more discretion to justify interferences under the pretence of 'national security', even when it is unfounded. According to the PEGA Report spyware is often justified citing 'national security' concerns, but is frequently employed for other purposes, such as quelling dissent, or advancing political interests (PEGA Committee Report, 2023). To circumvent these issues, in Article 4, some commentators argue that the term 'national security' should be defined more narrowly, or, at the very least, the text of EMFA should specify clearly the boundaries of its application – either in Article 4 directly, or, in the recitals or 'definitions' sections of the Act (Ibid.,).

Some commentators argue, furthermore, that Article 4 - particularly ex post judicial review - falls short of the procedural safeguards already secured by Article 10, and recent ECtHR case law judgments (Voorhoof, 2022b; Cole and Etteldorf, 2023, p.27). For instance, the ECtHR case of *Sergey Sorokin v. Russia* emphasises the need for an ex ante judicial review mechanism to safeguard journalistic sources. In fact, several observers argue that an ex-ante judicial review would provide enhanced safeguards for MSPs, and mitigate against the risks of illegitimate state interference (Voorhoof, 2022b; EDRi, 2023). Such a development is not only desirable from a normative perspective, but is also in accordance with ECHR case law related to Article 10 (Voorhoof, 2022b). It can reasonably be argued that the Article also falls short in terms of justificatory, proportional and subsidiarity safeguards related to state interference (Voorhoof, 2022b). Some commentators are, thus, advocating that any state interference must be a crucial measure of last resort - when all other less intrusive measures are exhausted - and proportionate to the seriousness of the issue at hand (i.e., the prevention of a serious crime)⁸⁴. It is argued that these changes would help align it with the level of protections already guaranteed in existing legislation and human rights case law (Voorhoof, 2022b).

⁸¹ This is not a problem exclusive to EMFA as the European Convention on Human Rights (ECHR) and the EU Charter also do not elaborate on the scope of "national security".

⁸² That said, the explanatory report of the revamped "Convention 108+" elaborates a definition (Council of Europe, 2016). According to Para.91 of the explanatory report, "the notion of national security should be understood in the sense of protecting the national sovereignty of the concerned Party interpreted having regard to the relevant case-law of the European Court of Human Rights".

⁸³ Currently, whilst Member States have the most discretion in the determination of what qualifies as a "national security" risk, they are also obligated to consider the EU Charter and ECHR case law. Article 4(3) of EMFA will, it is hoped, provide additional safeguards in this regard.

⁸⁴ Some members of the CULT Committee also seem to be in favour of this (Amendment 517, CULT draft opinion, May 5, 2023).

4.2.2.3 Article 5 - Safeguards for the independent functioning of public service media providers

Article 5, on top of recalling standards of impartiality and internal pluralism within the PSM mission, provides some rules on appointment and dismissal of PSM management and members of the governing bodies, asks Member States to ensure adequate and stable resources to PSM, and ask the MSs to designate an independent body or authority to monitor compliance with the provision of the article.

While very often the letter of it is considered an argument against envisaging a general competence of the EU on the media sector, the Amsterdam Protocol can be read, instead, as a confirmation of the inclusion of PSM in the internal market. It affirms that the Treaties will not preclude the competence of MSs to provide for the funding of public service broadcasting as far as this is not affecting trading conditions and competition in the Union contrary to the common interest, while the realisation of the remit of that public service shall be taken into account. The EMFA proposal seems to rely on the interpretation that includes PSM funding within the application of EU rules on state aid, and sanctions MSs when they "over-fund" beyond the public service remit, but does not exclude EU measures to avoid under-funding (see also Opinion of the legal service, Council of the European Union 8089/23, 4 April 2023⁸⁵). In this regard, article 5 seems consistent with the standards and objectives of the Council of Europe, and in particular with the Recommendation CM/Rec(2018)11 of the Committee of Ministers to Member States on media pluralism and transparency of media ownership, "States should also ensure stable, sustainable, transparent and adequate funding for public service media on a multiyear basis in order to guarantee their independence from governmental, political and market pressures and enable them to provide a broad range of pluralistic information and diverse content. This can also help to counterbalance any risks caused by a situation of media concentration. States are moreover urged to address, in line with their positive obligation to guarantee media pluralism, any situations of systemic underfunding of public service media which jeopardise such pluralism."

Art. 5 EMFA was, instead, criticised as it deals also with appointments and dismissals of the PSM management, elements that can be interpreted as non-relevant within the internal market competence (Cole and Etteldorf, 2023, pp.32-35): it must be noted nonetheless that the rules on appointments and dismissals of the governance bodies of PSM aiming at a management that is more independent from political pressures, can be legitimised under Article 114 TFEU too, as necessary requirements for PSM to properly work and fulfil its remit in the internal market. Nonetheless, the criteria mentioned seem, to some extent vague, for instance where they do not mention any professional standard for the candidates to be appointed.

A last remark could be done on art. 5(4) concerning some vagueness on what type of independent authority or body that could monitor compliance of PSM with the standards in 5 1-3. This provision could benefit from some more detailed requirements, also having in mind the sensitive nature of the requested monitoring.

⁸⁵ "The wording in the Amsterdam Protocol "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, while the realisation of the remit of that public service shall be taken into account" and its nature as an interpretative provision support the reading that the Amsterdam Protocol cannot be understood as excluding the funding of public service media operators from the Union internal market rules. The Amsterdam Protocol therefore does not preclude a potential Union competence based on Article 114 TFEU for the adoption of the measures relating to funding of public media service providers proposed under Article 5(3) of the proposal.

4.2.2.4 Article 6 - Duties of media service providers providing news and current affairs content

Article 6 is extremely important to the proper provision of media services and to the good functioning of the media market. By imposing different transparency obligations on media providers, such as the disclosure of ownership information and of conflicts of interest, the proposal demonstrates its commitment to the principle of transparency in its different aspects. Transparency is not only a fundamental principle but also a requirement in democratic societies; it enables individuals to make informed decisions about the exercise of power and hold governments accountable for their exercise of power.

Article 6(1), the proposal introduces a requirement for media service providers that offer news and current affairs content to disclose information about ownership and beneficial ownership⁸⁶. This provision mandates these providers to ensure that their users can readily and directly access details about the individuals or entities with beneficial ownership. By emphasizing the significance of media ownership transparency, the proposal recognizes its role in promoting media pluralism, safeguarding editorial independence, and ultimately, fostering democracy. Art. 6(1)(c) asks the media providers to share the information on the beneficial owner as defined by the Directive 2015/849 (Anti-money Laundering Directive).

Media ownership transparency is relevant for a good functioning of the internal market and an essential requirement to ensure media pluralism and democracy. On the one hand, the disclosure of ownership information to the public allows individuals to make informed choices when selecting their source of information. Moreover, the disclosure of ownership structures to public authorities helps reinforcing the effectiveness of the rights of the recipients of services, to avoid conflicts of interest, editorial influence, abuses of media power and media concentration. In the context of EMFA, it would be also relevant for the implementation of Article 21. Furthermore, transparency contributes to reinforce public support and respect for high-quality journalism (Borges and Carlini, 2022).

⁸⁶ According to Article 3(6) of Directive 2015/849/EU, 'beneficial owner' is defined as "any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:

(a) in the case of corporate entities:

(i) the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information.

A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership. A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership. This applies without prejudice to the right of Member States to decide that a lower percentage may be an indication of ownership or control. Control through other means may be determined, inter alia, in accordance with the criteria in Article 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council;

(ii) if, after having exhausted all possible means and provided there are no grounds for suspicion, no person under point (i) is identified, or if there is any doubt that the person(s) identified are the beneficial owner(s), the natural person(s) who hold the position of senior managing official(s), the obliged entities shall keep records of the actions taken in order to identify the beneficial ownership under point (i) and this point;".

The wording and requirements of Article 6(1) shows that the objective of ensuring ownership transparency in the media market is not restricted to the economic/criminal aspect, as is the case of commercial and anti-money laundering laws, such as Directive 2015/849. As claimed by Craufurd-Smith, Klimkiewicz and Ostling (2021), corporate transparency requirements are not specifically tailored to address media-related concerns. The idea behind Article 6 is mainly to protect the readership and audience, reinforcing the right of citizens to choose their source of information freely and consciously and allowing also other actors, such as journalists, watchdogs and researchers, to independently monitor possible misconduct, conflicts of interest and abuse of power in the media sector.

Media Pluralism Monitor data regarding 'transparency of media ownership' reveals that the situation in the EU has worsened since 2016. Currently, most of the EU Member States score medium risk for this indicator (see MPM data from 2016 onwards), which aims to assess the existence and implementation of regulatory safeguards regarding transparency of news media ownership and to assess the effectiveness of transparency rules on ownership disclosure with regard to the ultimate and/or beneficial owner of news media businesses. If in one hand it is true that some countries have improved their media ownership transparency requirements by adopting/changing their laws - for instance, to comply with the Anti-Money Laundering Directive - on the other, the effectiveness of these provisions in terms of disclosing to the public, in practice, ownership information up to ultimate or beneficial owners is often not a reality in most of the EU Member States. In effect, according to the Media Plurality and Diversity Online Study (2022), the situation is fragmented across the EU in terms of the existence of media specific rules on ownership transparency. Another problem pointed out by the study is the difficulty in identifying the beneficial owners due to the absence of rules, loopholes or ineffectiveness of the rules in force. Therefore, problems such as missing information; information not made available to the general public; or information not presented in easy-to-find files are found across EU Member States.

The possibility of having a more structured system, justified by media policy standards, could be welcomed as an improvement of this article: it would be important for the sake of clarity and effectiveness of the rule, to define some standards for format and updating the data published by media service providers. Moreover, considering the standards on media ownership transparency also provided by the Council of Europe⁸⁷, it would be important to add at least a referral to the possibility, for instance, of Member States having also national and publicly available registries to collect data on media ownership. The system that is provided by Article 6(1) to enhance transparency looks a low standard. It could be relevant that, at least, Article 1(3) will allow for additional measures, such as this one, consistent with the aim of the Act and Council of Europe standards.

Therefore, although Article 6(1) could apparently cover some of the gaps currently existent across EU Member States in terms of media transparency, by harmonising the ownership information that should be provided to the general public, this does not seem to be sufficient to address the problem regarding the discrepancies on the type/level of information required and provided to national authorities. Given the relevance of ownership transparency for the media sector also with regards to media pluralism and market concentration, it would be recommended also to harmonise the type/level of media ownership information required within the internal market. For this purpose, an option would be the requirement that media businesses operating in the EU provide an essential list of media ownership information,

⁸⁷ Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to Member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies) https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13.

preferably following the parameters established by the 2018 Council of Europe Recommendation (Recommendation CM/Rec(2018), updated on an annual basis. This information should be preferentially collected by a national media authority, but in any case, available in a cross-country/cross-jurisdiction media repository, in the same lines as the registry provided for in Article 30 of the Anti-Money Laundering Directive (Directive 2015/849/EU).

It must be noted that it is important and welcome that the Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector, which accompanies the EMFA proposal, in its Section III, encourages Member States to effectively implement Recommendation CM/Rec(2018)¹ and to maintain ownership databases, “containing disaggregated data about different types of media, including at regional and/or local levels, to which the public would have easy, swift and effective access free of charge, and producing regular reports on the ownership of media services under the jurisdiction of a given Member State.”

However, considering that the Recommendation (EU) 2022/1634 is not binding, the different implementation of provisions on the collection and disclosure of media ownership information across Member States may turn unfeasible the maintenance of databases and the possibility of exchange of this type of information on a cross-country/cross-jurisdiction basis. Consequently, this would make difficult or even impossible the exchange of best practices between Member States (as provided in Section III, Recital 22 and the effective disclosure of information in the context of the internal market. Therefore, our recommendation is that Article 6 (1) EMFA includes a provision on the obligation for Member States and/or NRA’s to create and maintain media ownership databases in line with Section III of Recommendation (EU) 2022/1634, following some of the amendments already proposed.⁸⁸

Verifying beneficial ownership remains a major challenge for authorities, as the issue poses a variety of questions in terms of defining the goals that this transparency should serve - anti-corruption, anti-money laundering, avoiding oligopolies/monopolies, ensuring pluralism etc. In the case of EMFA, it seems clear that the focus is on the market functioning and, as a consequence, media pluralism. By requiring media service providers to give their users easy and direct access to information about the beneficial owners, Article 6 reinforces the right of citizens to choose their source of information freely and consciously, being aware of the potential leaning or bias (political or economic) of a media service considering the ownership, allowing also other actors, such as journalists and researchers, to monitor independently possible misconduct or abuse of power in the media sector. One of the risks for the full enforcement of this new provision in EMFA is the argument raised in the recent decision of the Court of Justice of the European Union (CJEU) on Joined Cases C-37/20 and C-601/20 which declared invalid point (c) of the first subparagraph of Article 30(5) of the Anti-Money Laundering Directive requires Member States to ensure that information on beneficial ownership is accessible to the general public in all cases. However, it is important to note that granting the general public access to information on beneficial ownership can potentially interfere with fundamental rights, such as the protection of personal data and the respect for private life. Although ownership transparency in EMFA has a broader scope than combating money laundering, as explained above in Section 4.2.2.4, and journalists are not affected by the mentioned CJEU decision, there is a possible risk for the future enforcement of EMFA’s Article 6 when it comes to the disclosure of media ownership to the general public.

⁸⁸ See the amendments on Article 6 in European Parliament, Committee on Culture and Education (2022) Amendments 508-877 (Draft report, Sabine Verheyen, Proposal for a regulation (COM(2022)0457 – C9-0309/2022 – 2022/0277(COD)), p. 36-7.

The same Article 6 could also be considered to introduce some specific rules on conflict of interest (for instance, for high-ranking government politicians who are also owners of media services). Conflict of interest measures perfectly fit the rationale to favor the internal market, as they could be seen as preventing possible interferences with free movement caused by undue interventions of these high-ranking officials in the media market. Those rules would therefore contribute to improving the conditions for the establishment and functioning of the internal market by ensuring fair and smooth competition and tackling disruptions caused by political influences.

Article 6(2) defines some rules when it comes to guarantees for the independence of editorial decisions. This article stresses an important principle that is linked with the definition of a special status of the media company. It appears to be one of the most controversial parts of the EMFA, as opposed by many publishers on the ground that the publishers have the right to define the tendency of a newspaper, and, in some countries, are liable for the content.

The principle set in Art. 6(2) is in line with standards to ensure the editorial autonomy of the newsroom, independently from defining who is liable for the content, but its clarity could be improved. The Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector is clearer in defining those tools and practices to be used in order to ensure newsroom work is based on professional standards abiding to freedom of expression. EMFA could be amended with the goal of mandating a self-regulatory approach that should involve publishers, editors in chief, and journalists, to ensure that editorial and management decisions follow ethical and professional standards. Such an obligation could be complemented by the measures defined in the Recommendation, that are clearly referring to good standards (they could be mentioned in the Act). These measures to be adopted in the newsroom could include conscience clauses, internal codes of practice, ethics or supervisory committees, collective agreements that take into account the specificities of the work in the media enterprise (and more).

4.2.3 Chapter III - Framework for regulatory cooperation and a well-functioning internal market for media services (Artt. 7-24)

Section 1 - Independent media authorities

4.2.3.1 Article 7 - National regulatory authorities or bodies

Article 7 builds on the AVMSD by referring in Art. 7(1) and (2) to Art. 30 AVMSD. These paragraphs declare that the national regulatory authorities or bodies under the AVMSD shall be responsible “for the application of Chapter III” of the EMFA and that shall exercise their tasks in the context of the Regulation. According to EMFA Article 7(3), Member States must ensure that the authorities or bodies have access to sufficient financial, human, and technological resources to fulfill their duties. The requirement to anticipate suitable investigative capabilities with regard to the actions of natural or legal persons to whom Chapter III applies is introduced expressly in Art. 7(4) EMFA, specifically, the authority to demand that information that is pertinent, appropriate, and required for performing out its activities be supplied within a reasonable amount of time.

Encouraging exchanges between regulatory authorities with different and complementary scopes, such as National Competition Authorities (NCAs) and NRAs, should also be promoted. Such interactions offer opportunities for mutual learning, as elaborated in Section 4 of this Chapter.

Section 2 and 3 - The Institutional Framework (Artt. 8-16): European Board for media services and regulatory cooperation and convergence

The Institutional Framework is defined in Artt. 8 to 16 of the proposed Act: building on the AVMSD, Art. 8 of this section establishes the European Board for Media Services (EBMS, in the text referred to as "the Board"), defining its independence (Art. 9), its governance system (Artt. 10-11) and entrusting it with specific tasks (Art. 12). This architecture grants to this new body a broader set of competences compared to ERGA, while enabling a strengthened cooperative framework among NRAs; ultimately, promoting a synergic and harmonising process befitting the characteristics of today's media environment (Cole and Etteldorf, 2023; CMPF, 2023a). Given this framework, various opinions and position papers have been expressed on the relationship between the European Commission, the newly-established Board composed by NRAs, and the Commission-based secretariat defined by Art. 11.

1. One first point concerns the independence of the Board, defined by Art. 9. The Article reads: the Board "shall act in full independence when performing its tasks or exercising its powers. In particular, the Board shall, in the performance of its tasks or the exercise of its powers, neither seek nor take instructions from any government, institution, person or body. This shall not affect the competences of the Commission or the national regulatory authorities or bodies". In analysing the characteristics of independence on which the above-mentioned article is built, it has been observed that, unlike the European Data Protection Board established in the GDPR, there are no explicit case law, for example by the CJEU or ECtHR, that could help to further detailing of what the independence of a media authority in this context would entail (Cole and Etteldorf, 2023).

The issue of the independence of the Board has been addressed by relevant stakeholders from two main perspectives: the first concerns the independence of the Board from the European Commission (both in terms of governance and performance), the second looks at the independence of the Board from the national regulatory authorities that will eventually compose it, if the proposal is passed.

As to the first point, many stakeholders, from academia to civil society organisations, as well as the industry, have raised concerns about the role of the European Commission in the framework in question (ERGA, 2022; Barata, 2023; Cole and Etteldorf, 2023; AER, 2023; Article 19, 2023). As a matter of fact, the Commission is importantly implicated in the compositional design of the EBMS, as well as when it comes to tasks assigned: in such a context, even though "the participation of the Commission is not designed in the sense of a controlling power ... it can have a de facto effect on the performance of the tasks of the EBMS", as it is reported in Cole and Etteldorf (2023). This seems in line with the position from the same ERGA, that welcomes the "strengthened coordination and collective deliberation among national regulatory authorities" provided by EMFA, while expressing concerns that NRAs' independence could be affected (ERGA, 2022). There have been proposed several amendments to limit Commission's role in the EBMS, in particular to make it resemble to ERGA.⁸⁹

⁸⁹ In more detail, it is asked to delete the sentences relating to the Commission's ability to designate board representatives who participate in all activities (Art. 10.5, amendment 57, CULT; amendment 560, LIBE; amendments 403, 404, IMCO); there are also several amendments proposing to eliminate the need for the Commission's agreement, if the EBMS wants to invite experts and observers to attend its meetings (Art. 10.6, amendment 58, CULT; amendments 569, 571-576, LIBE; amendments 409-414, IMCO), if the EBMS shall adopt its rules of procedure (Art. 10.8, amendment 59, CULT; amendments 581-585, LIBE; amendments 416-421, IMCO) or draw up opinions (Art. 12.1e, amendment 64, CULT; amendments 616-623, LIBE; amendments 444-449, IMCO); Other amendments also propose to remove that the EBMS's secretariat "shall be provided by the Commission" (Art. 11.1, amendment 60, CULT; amendments 587-589, 591-594, LIBE; amendments 423-426, IMCO); it is also proposed to remove the sentence in which the Commission, when requesting advice or opinions from the Board, "it may indicate a time limit, taking into account the urgency of the matter" (Art. 12.1c, amendment 604,

The discussion on independence also concerns the secretariat, which according to Article 11 will be provided by the Commission and tasked with administrative, organisational, and implementation support. In this regard, it has been argued that the way the secretariat is designed may “contribute to a strong position of the Commission compared to a mere administrative support structure” (Cole and Etteldorf, 2023). Whereas, on the Commission’s side, the reasons for an EC-based secretariat would lie on an efficiency and cost-effectiveness approach,⁹⁰ some stakeholders expressed their preference for an agency-based one (CMPF, 2023a; Article 19).⁹¹

Coming to the second issue related to the Board’s independence vis a vis the national regulatory authorities, a fundamental observation is that “the framework should be supported by national authorities that are independent from political interests” (CMPF, 2023a)⁹²; an aspect that, according to some observers, could be even more strengthened in the EMFA Proposal (CMPF, 2023a, Schroeder, 2022). In this context, it is important to recall the results of the Media Pluralism Monitor (2022), shedding light on the characteristics of independence of national regulatory authorities across Europe.

2. A second point of discussion concerns the Board’s competences. According to Art. 12, competences have been extended, compared to ERGA. Among other tasks, the Board is for example requested by Art. 12 to: (a) “support the Commission, through technical expertise”; (b) “promote cooperation and exchange”; (c) “advise the Commission”, upon its request on “regulatory, technical or practical aspects”; (d) provide opinions on “technical and factual issues”. In agreement with the Commission, to draw up opinions on, e.g.: (e) “cooperation and mutual assistance between NRAs”; (g) “national opinions or decisions assessing the impact on media pluralism and editorial independence of a notifiable media market concentration”. The Board is also asked to, e.g. (h) “assist the Commission” in drawing up guidelines related to “the assessment on the impact of media market concentrations”; (i) mediate in case of disagreement between NRAs; (j) “foster cooperation on technical standards related to digital signals and the design of devices or user interfaces”; (k) “coordinate national measures related to the dissemination of or access to content of media service providers established outside of the Union that target audiences in the Union”; (l) “organise a structured dialogue between providers of very large online platforms, representatives of media service providers and of civil society” (m) “foster the exchange of best practices related to the deployment of audience measurement systems”.

When it comes to the above-mentioned tasks, one main difference with ERGA is that in EMFA the Board is not only requested to provide technical expertise, but also to advise the Commission upon requests on several matters (Cole and Etteldorf, 2023). Second, compared to ERGA, the EBMS has been granted wider competences in the issuing of opinions: on the one hand, it has to be underlined that these opinions are not binding, something that “may pose issues from the side of effectiveness” (CMPF, 2023a); on the other hand, they are in major measure depending on the request or the agreement of the Commission, granting to the latter a certain level of control (EFJ, 2023; Article 19, 2023; Cole and

LIBE; amendments 434, 435, 438, IMCO), else that the EMBS can advise the Commission not only where requested by it but also “on its own initiative” (Art. 12.1c, amendments, 604, 606-609, LIBE; amendments 436, 437, 439-442 IMCO). This analysis does not consider the final compromise amendments documents of the European Parliament and the Council of Europe, pending the publication of this report. For updates on the latest publications see: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0277\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0277(COD)&l=en).

⁹⁰ See Anna Herold commenting on the issue on the Commission’s behalf in The European Media Freedom Act. Reflections on the new draft proposal (18 November 2022), <https://cmpf.eu.europa.eu/event/the-european-media-freedom-act-reflections-on-the-new-draft-proposal/>.

⁹¹ On this point, see the CMPF’s contribution to the Call for Evidence on the European Media Freedom Act (EMFA), submitted on 25 March 2022 <https://cadmus.eu.europa.eu/bitstream/handle/1814/74810/QM-07-22-735-EN-N.pdf?sequence=1&isAllowed=y>.

⁹² As already highlighted both by Nenadic I. and Brogi E. as well as in the CMPF’s contribution to the Call for Evidence on the European Media Freedom Act (EMFA). See <https://euideas.eu.europa.eu/2022/10/21/why-the-european-media-freedom-act-is-a-groundbreaking-step-for-europe/> and <https://cadmus.eu.europa.eu/bitstream/handle/1814/74810>.

Etteldorf, 2023). Moreover, the Board does not have a general right of initiative at its own discretion. In such a framework, several considerations have been expressed by involved stakeholders: to begin with, ERGA stressed that the Board should “act on its own initiative” and this should be “explicitly recognised” (ERGA, 2022). The European Federation of Journalists (2023) argued that “Their opinions and actions should not be executed ‘in agreement with the Commission’ or “at the request of the Commission”, but also at its own initiative”. Reference to the Board working “in close cooperation with the Commission” in advising national authorities on regulatory, technical or practical aspects of the European Media Freedom Act’s implementation has been suggested to be removed. The Commission might also issue guidance related to implementing the new media law and the AVMSD, but only for cross-border matters.

3. The third point refers to regulatory cooperation and convergence, addressed in Section 3 of the EMFA and involving Artt. 13 to 16, and to enforcement powers, that according to the proposed Act are left to national regulatory authorities. In the substance, Articles 13 and 14, institutionalise ERGA’s Memorandum of Understanding, that already provided shared points and a common framework for ensuring cross-border enforcement of regulation on audiovisual media services and video-sharing platforms.

Art. 13 of the proposed Act defines cooperation and mutual assistance among NRAs, or among an NRA or other bodies “for the consistent and effective application of this Regulation or the national measures implementing Directive 2010/13/EU”. Article 14 specifically defines cooperation or mutual assistance among NRAs, or among an NRA or other bodies “to take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms under Article 28b of Directive 2010/13/EU”. As for Article 15, it provides guidance to media regulation matters, defining that “the Board shall assist by providing expertise where the Commission issues guidelines related to the application of EMFA or the national rules implementing Directive 2010/13/EU”, as regards in particular “the appropriate prominence of audiovisual media services of general interest under Article 7a of Directive 2010/13/EU” and “making information accessible on the ownership structure of media service providers, as provided under Article 5(2) of Directive 2010/13/EU”.

With specific regard to Art. 13, Cole and Etteldorf (2023) have argued that the fields to which enforcement extends are not so clear. More precisely, they claim that “the lack of precise supervisory and enforcement powers can make it difficult to establish for which aspects a structured cooperation obligation exists”. Moreover, the design of the cooperation structures involves the Commission in the tasks of the EBMS: according to the above-referenced authors, in Art. 13(7), 14(4) and 16(2) there might be margin for the Commission to overrule the Board’s decision if consensus is not reached. As for ERGA’s opinion (2022), the body claimed that while broadening the reach of the Memorandum of Understanding, and making cooperation more substantive, in the framework under Artt. 13 and 14, “it would be more appropriate to provide the details of the new cooperation scheme (...) in the Media Board’s Rules of Procedures for instance, to be decided and adopted by the Board”. Specifically on Art. 14, ERGA also claimed that “the impact of the provision might be limited in practice if the requested authority only informs about the actions foreseen (and not taken), as the possibility to refer the matter to the Board for mediation, according to Art. 14(3) is only available in cases of disagreements on actions taken”, ultimately suggesting “to amend Article 14(3) in order to go beyond just planning actions and make it binding for the requested authority to take action and report on it, or justify the reasons for which action was not taken”.

Finally, Article 16 EMFA contains a coordination rule directed at MSPs established outside the EU. It seems a general response, in particular, to the challenges encountered in trying to find a way to address the dangers brought about by the spread of Russian broadcast channels throughout the EU after the

Russian Federation began its conflict with Ukraine and the criticism for the unilateral approach of the Council in the Regulation that banned RT and Sputnik in March 2022 (see above Council Regulation (EU) 2022/350 and Council Decision (CFSP) 2022/351 in Section 3.3.1). It states that the EBMS shall coordinate actions by national regulatory agencies regarding the access to or dissemination of media services provided by such MSPs that are targeted for audiences in the Union where, among other things, in light of the potential control that third country governments or other entities of the states may exercise over them, such media services prejudice or present a serious and grave risk of prejudice to public security and defense. In order to provide a more consistent and successful solution to the issue, the EBMS has the opportunity to express an opinion (i.e., recommendations) on appropriate national measures in such situations. This opinion has to be developed in agreement with the Commission. However, according to Cole and Etteldorf (2022), in the light of EBMS and other authorities' independence, such agreement may be read as a mere possibility to find a common approach. Despite not binding, Member States and all the other competent authorities and bodies will have to take into account these opinions in their actions. This could eventually enable a more effective Union-wide approach, for example for the dissemination of certain types of content which still significantly differs at Member States level. In this context, Ricart (2022) argues that EMFA should also be included as part of EU's international partnerships with third countries to promote "regulatory convergence". Even if the main core of EMFA focuses on the internal market, it has strong implications on the EU's geopolitics and, therefore, its ties with other existing EU documents may also be broadened.

4.2.4 Section IV - Provision of media services in a digital environment (Art. 17-19)

4.2.4.1 Art 17 – Content of media service providers on very large online platform

Article 17 is a very relevant provision because it recognizes the value of professional information by subjects who bear editorial responsibility for the contents they select, produce, and disseminate. The basic idea is that VLOPs should not be allowed to supervise traditional media providers that abide to journalistic standards and principles. As such, Art.17 provides a regulatory response to the dependency MSPs face *vis à vis* the VLOPs when it comes to distribution of media content, and it contributes to defining a new "status" of media service in the digital environment. The debate on the rationale of the proposal in some aspects echoes, *mutatis mutandis*, the discussion that revolved around another Art. 17, the one of the Directive EU 2019/790 regarding the change of the liability regime for online intermediaries from the one foreseen by the eCommerce directive when dealing with distribution of copyright-protected works online by online content-sharing providers.

The provision in Article 17 EMFA states that "Providers of very large online platforms shall provide a functionality allowing recipients of their services to declare" that they are media service providers. This self-declaration can be done according to three set of criteria: if they fulfil the definition of article 2 (2) EMFA, if they are "editorially independent from Member States and third countries", if they are "subject to regulatory requirements for the exercise of editorial responsibility in one or more Member States" "or adhere "to a co-regulatory or self-regulatory mechanism governing editorial standards, widely recognised and accepted in the relevant media sector in one or more Member States".

Based on Article 17(2), when a VLOP decides to suspend its services in relation to content provided by a self-declared media, according to Article 17(1), "on the grounds that such content is incompatible with its terms and conditions, without that content contributing to a systemic risk" under the DSA, "it

shall take all possible measures...to communicate to the media service provider concerned the statement of reasons accompanying that decision...prior “to the suspension taking effect”.

Art. 17 EMFA, therefore, introduces this special regime for the media regarding the moderation of content by VLOPs, adding an *ad hoc* provision supplementing the obligations for VLOPs introduced by the DSA. Despite its importance and innovativeness, the debate on Art.17 EMFA turned to be very heated. In particular, the special treatment that is diverging from the DSA rules, the criteria for the assignment of the status of MSP and the effectiveness of the dialogue between VLOPs, MSPs and the EBMS, have received criticism from a variety of stakeholders and for a variety of reasons (ERGA, 2022; Barata, 2022; Tambini, 2023 Helberger et al. 2023; Bania; 2022; Buijs, 2023).

The main argument for criticism against Art 17, is the fact that specific rules recognising the role of the media within the online ecosystem already exist, and are those foreseen under the DSA, that provides a horizontal regulation for online platforms when it comes to content moderation and a stricter one for VLOPs (and VLOSEs), who are asked to provide assessments on systemic risks stemming from the design or functioning of the services they provide (Art 34 DSA), including “any actual and foreseeable negative effects...to freedom of expression and information, including the freedom and pluralism of the media, enshrined in article 11 of the Charter...” and risk mitigation measures (Art 35 DSA) tailored to specific systemic risks. Art. 17 EMFA is seen by many as a way to repropose the so called “media exemption” already discussed and discarded during the EP debate on how to shape the rules on content moderation in the DSA (Bertuzzi, 2021): the provisions of the DSA should be deemed sufficient to ensure VLOPs are taking into account risks for media freedom and pluralism in their mitigation measures. Consequently, the inclusion of the fast-track procedure outlined in Article 17 would undermine the effectiveness of the DSA by creating fragmentation in horizontal rules, burdening it with additional procedures, creating loopholes in the regulatory system⁹³. Media providers, see, instead, in article 17 EMFA an opportunity to tackle the imbalance between the MSP themselves and the VLOPs⁹⁴.

As already mentioned in Section 2.2, a big debate exists on the criteria for the definition of media and media service provider. Any legislation that grants special protections for the media indeed requires clear definitions of who the media are. This, however, creates a potential for media control, what Tambini calls “the paradox of privilege” (Tambini, 2023), where a system of “authorised” media with special status becomes a potential danger. Yet, policymakers seem generally aware of this paradox (see the CoE new definition of media (CM/Rec(2011)7) or the more recent CoE recommendation on media governance (CM/Rec(2022)11)). The key idea is that definitions and criteria for MSPs should be “decentralised, as well as transparent and accountable” (Tambini, 2023).

Within the criteria provided in Article 17 (1) EMFA, the one on editorial independence of media services (Article 17(1)(b)) is particularly subjective. As Barata notices (2022), what degree of independence is sufficient for the purposes of the EMFA remains unclear⁹⁵. Moreover, considering the complex nature of such assessment, it would also be reasonable to expect different conclusions being adopted by different VLOPs applying the Article. The result may be a fragmentation of “media privileges”. Similarly, it is argued that the co-regulatory and self-regulatory mechanism governing editorial standards, “widely recognised and accepted in the relevant media sector” may result insufficient and ineffective. So far, only the Journalism Trust Initiative has been mentioned as a trust indicator project with a code

⁹³ See, for instance <https://www.disinfo.eu/advocacy/policy-statement-on-article-17-of-the-proposed-european-media-freedom-act/>; <https://www.article19.org/wp-content/uploads/2023/03/EMFA-17.pdf>.

⁹⁴ See https://www.ebu.ch/files/live/sites/ebu/files/News/Position_Papers/open/2023/20230118-EBU-position-EMFA.pdf.

⁹⁵ Similarly, Polyak (2023) observes that it is not clear what evidence is needed to assess editorial independence.

of conduct on self-assessment by media outlets (Recital 33). Within this debate, critics stress the uncertainty over the criteria to assess MSPs claiming that it brings to a major concern: how to prevent malicious and unreliable subjects to self-declare as news media? More broadly, it can also be questioned whether VLOPs should have further discretionary power to decide on MSPs' self-declaration. A multistakeholder independent oversight mechanism in relation to the self-declaration mechanism is needed, so that it is not abused and that it is not platforms exclusively deciding which self-declarations to accept and in what procedure. If carried out by platforms, a fundamental step is the full transparency of the procedure, and the list of MSPs who self-declare should be easily accessible.

Independent oversight in relation to "handling of complaints" under Article 17(3), and over how platforms decide on what falls under a systemic risk, as defined in the DSA, could be useful to coordinate the provisions of EMFA and DSA. In particular, interesting are the categories of systemic risks concerning the actual or foreseeable negative effects on freedom of expression, media pluralism, democratic processes, civic discourse and electoral processes, as well as public security; but also risks relating to the design, functioning or use, including through manipulation, of very large online platforms and of very large online search engines.

As mentioned, under the above contentious criteria to establish a "media privilege", Art. 17 regulates the relationship between VLOPs and media services in a specific situation, which is that of the "suspension" of the "provision of its online intermediation services" based on its terms and conditions, and outside of the systemic risk cases listed in the DSA⁹⁶. What exactly "suspensions" would entail, however, could be clarified. Following Art. 20(1) DSA, the wording "suspend" would refer to the suspension of (1) the provision of the service, in whole or in part, (2) the recipients' account, and (3) the ability to monetise information provided by the recipients. Another widespread interpretation is that suspensions relate only to the content concerned, so that the incompatible content will be suspended (i.e., taken offline or access to that content disabled). Moreover, Art. 17(5) EMFA also added to suspensions the wording "restrictions". Following the definition of Recital 55 of the DSA, demotions would indeed be included (Tambini, 2023). Certainly, there are open technical challenges to detect demotions that could impact the effectiveness of the provision (see Leersen, 2022). Nonetheless, if only suspensions, as meant in Art. 20(1) DSA, will be eventually considered, the provision might even result in the unintended consequence to incentivize VLOPs to employ undetectable demotions to avoid dealing with the obligations the Article entails. In this respect, referring to Art. 17(5) where it requires a publicly accessible reporting list of suspended content, it could be useful that cases are reviewed not on an annual basis but on a rolling basis to quickly identify abuses of Art. 17 by VLOPs. Overall, there is a fundamental need to clarify what kind of suspensions are meant in the Article and how to make them more accountable.

Similarly, the timing of notifications can be questioned as these are not defined in detail yet. Various amendments (83, CULT; 757, 761-764, LIBE; 542, 550, 552, IMCO) propose different timings for the media service provider to reply to the statement of reasons (e.g., 24 or 48 hours), and for VLOPs to address complaints from MSPs (e.g., 24h).⁹⁷ These need to be carefully weighted as timeliness for effective content moderation governance is clearly essential (see Douek, 2022). As a matter of fact, before MSPs reply to VLOPs the problematic content may become viral and cause harm shortly. Indeed, disinformation travels very fast, and often through multiple channels (e.g., messaging apps). On the

⁹⁶ The four categories of systemic risks are 1) illegal content, and actual or foreseeable impact on 2) the exercise of fundamental rights, 3) democratic processes, civic discourse and electoral processes, as well as public security, 4) the protection of public health, minors and serious negative consequences to a person's physical and mental well-being, or on gender-based violence.

⁹⁷ See amendments 542, 550, and 552 IMCO.

other hand, after MSPs issue a complaint, the content may have become already irrelevant before the eventual content resumption by VLOPs is made. Indeed, news is a perishable commodity, and this further exacerbates the inevitable trade-off between timely and correct decisions in content moderation.

Finally, the effectiveness of a potential dialogue between VLOPs and MSPs has also been discussed. Where an MSP considers that a VLOP “frequently restricts or suspends the provision of its services (...) without sufficient grounds”, the VLOP shall “engage in a meaningful and effective dialogue with the media service provider, upon its request, in good faith with a view to finding an amicable solution for terminating unjustified restrictions or suspensions and avoiding them in the future”. Yet, no details or specific indications are defined regarding the nature and scope of such “amicable solutions”.

4.2.4.2 Art 18 – Structured dialogue

Article 18 of the EMFA proposal asks the Board to engage in structural dialogue between online platforms, news media providers and civil society about the application of Art. 17; in addition, it also highlights the need to increase the reach of independent news media through VLOPs and assigns a role to the Board in monitoring VLOPs’ measures taken to protect society from disinformation. This provision, interpreted also taking into account Recital 36, seems to mirror, to some extent, the experience of the Code of practice on disinformation (CoP) and the structured dialogue that was built around the implementation of the Code itself⁹⁸. Considering the aim of EMFA, the dialogue foreseen under Art. 18 should focus on developing how to enhance media freedom and media plurality in the online environment and, as mentioned by Recital 36 “to foster access to diverse offers of independent media on very large online platforms, discuss experience and best practices related to the application of the relevant provisions of this Regulation and to monitor adherence to self-regulatory initiatives aimed at protecting society from harmful content, including those aimed at countering disinformation”. Considering scope and signatories of the CoP, the structured dialogue under EMFA should bring into the discussion the perspective of the media. Furthermore, this dialogue could also inform the implementation of Art. 34 and 35 DSA. In particular, the dialogue envisaged in Art. 18 could inform the risk assessment and risk mitigation described in the DSA. This would improve accountability as well as prevent VLOPs from making arbitrary assessments in deciding what content falls under the systemic risks listed in the DSA and which ones under Art. 17 of the EMFA. It must be also noticed that various amendments to Art. 17 (542, IMCO; 738, 741, 749, 754, LIBE) propose to extend the scope of the Article to very large search engines too (i.e., VLOSEs), in accordance with the scope of the DSA. As such, also VLOSEs would be monitored in the application of Art. 34 and 35 DSA. It remains unclear, however, how exactly Art. 17 would be applied to VLOSEs.⁹⁹ Clarifications in this respect are needed.

A structured dialogue, including representatives of civil society as mentioned in Art. 18, could also help in better shaping the scope of Art. 17 when it comes to defining media service providers, avoiding it is interpreted either in a too restrictive sense, limited to incumbent media, or in a too loose sense, opening the path to rogue media to be included in the definition.

⁹⁸ European Commission (2023).

⁹⁹ In the proposed amendment 106 from the Committee on Civil Liberties, Justice and Home Affairs it is clarified with a new paragraph (6a) that only VLOPs and VLOSEs “shall be subject to the application of the provisions of this Article only when providing access to news and current affairs information.” Perhaps this refers exclusively to VLOSEs services such as Google News.

4.2.4.3 Art 19 – Right of customisation of the audiovisual media offer

An innovative right for consumers to customize their media offer is introduced in Article 19 of the EMFA. Users could have the choice to change any device's or user interface's default settings and tailor media content to their own tastes. Additionally, this prevents international providers from promoting their own content. It will specifically apply to audiovisual media, thus to software menus and shortcuts, smart TV interfaces and apps, and search areas (for example, remote controllers frequently feature buttons for Netflix and YouTube).

As the EMFA could provide the legal basis for a more harmonised framework for content prominence and discoverability (Mazzoli and Tambini, 2022), Art. 19 could therefore also include video-sharing platforms such as YouTube, but also cover online customisation more generally (i.e., VLOPs recommender systems and design interfaces). As the study on Media plurality and diversity online has shown (Ranaivoson et al., 2022), both non-legislative and legislative measures related to the processes of content prioritization should be made more prominent and easier to discover for users. By connecting with Art. 27 DSA on recommender systems which offers users the possibility to choose "their preferred options" without, however, making explicit which kind of "options" to implement, Art. 19 EMFA could expand its scope and clarify this ambiguity which is ultimately left to the discretion of VLOPs. What options would be offered to users are clearly hard to establish. Yet, the article could leave users the option to customise their experience by receiving content with specific features, for example content published by media service providers. In any case, further clarification is needed on how the Article, and more generally the provision, would interact with the DSA. Despite the current scope of EMFA and the DSA seem to apply to different categories (devices vs recommender systems), it is desirable to clarify and articulate these differences (and, perhaps, even complementarity) between the two regulations to avoid legal uncertainty.

4.2.5 Section V - Requirements for well-functioning media market measures and procedures (art. 20-21-22)

4.2.5.1 Art 20 – National measures affecting the operation of media service providers

It can be reasonably argued that Article 20 was included in order to address some of the implications stemming from the Vivendi SA case (see Section 4.2 above).

Article 20 of EMFA is grounded in the freedom of establishment, and media pluralism - which is a fundamental aspect of the freedom of expression. Additionally, the Right to good administration (Article 41 of the Charter of Fundamental Rights) contribute to the foundation of this Article (Cole and Etteldorf, 2023 p.35). The Article comprises the principle of proportionality as a means of evaluating and reconciling these freedoms. In principle, Article 20 protects MSPs from national measures which are considered disproportionate, and incompatible with the freedom of establishment (as per TFEU). The article establishes criteria and requirements for Member State measures that could affect the operation of MSPs in the internal market. In particular, Article 20 says that any national measures 'liable' to affect MSPs' operation in the internal market should be subject to some procedural requirements. The article emphasizes the need for such measures to be 'duly justified', 'proportionate', 'reasoned', 'transparent', 'objective', and 'non-discriminatory' (Article 20(2)), and demands clear timeframes for preparing and adopting these measures (Article 20(2)). Afterwards, MSPs have the right to appeal to an independent 'appellate body' on top of the right to judicial protection (Article 20(3)). The Board and the Commission are tasked with providing 'opinions' on any measures 'likely' to affect the functioning of the internal market for media services (Article 20(4)), and timely, and transparent communication between the Board, Commission, other authorities is also emphasised in the provision (Article 20(5)).

The Article is favourable for MSPs insofar as it provides a quasi-constitutional 'protection against the future playbook of media control' (Tambini, 2023). Moreover, under the proposed regulation, national regulatory bodies must ensure that any measures are 'reasoned, transparent, objective and non-discriminatory' which sets the normative threshold high (Article 20(1)). Furthermore, Article 20 imposes certain timeframe and transparency obligations on Member States authorities which is a welcome development. Furthermore, the involvement of multiple parties, such as the Board, Commission, and other authorities, enhances the scrutiny of national measures. MSPs also have the option to appeal to an ostensibly independent 'appellate body', which represents an alternative (or additional) recourse from only being able to appeal to national institutions, whose political independence might be compromised. However, these circumstances raise two important questions: Will there be a designated body or an ad-hoc arrangement where different bodies are assigned on a case-by-case basis? And will these bodies possess a comparable level of legal expertise to that of courts of law?

Nonetheless, there are some opportunities for improvement in the proposed Article. Further clarification regarding the specific roles and responsibilities of the national bodies, MSPs, the Board, the Commission, and 'other regulatory authorities' would, we argue, improve the provision's effective implementation and enforcement (see also Cole and Ettendorf, 2023 p.7). Furthermore, the circumstances when the Commission should communicate an opinion are not clearly specified therein. Unlike the Board whose intervention would appear to be a non-negotiable one (Article 20(4)), the Commission's role appears to be discretionary, as the phrase '*the Commission may [or not] issue its own opinion on the matter*' indicates. It is also not clear what happens in instances of disagreement between the Board and the Commission, and which of the two 'opinions' carries more weight. The same uncertainty applies to any disagreements between the courts - which are implicitly granted a role

under Article 20(3) via MSPs' additional 'right to effective judicial protection' - and the hitherto unspecified 'appellate body'.

It is also not clear which governing body is ultimately responsible for monitoring (non-) compliance of the Article: the 'appellate body', the Board, the Commission, or the courts? And what happens if the Board fails to submit an 'opinion' which itself, lacks legal enforceability. Crucially, as Cole and Etteldorf, 2023 points out, there appear to be no sanctioning regimes in place, in cases of non-compliance (Cole and Etteldorf, 2023, p.7). In sum, it is unclear what are the consequences of non-compliance (if any), and which governmental body or authority is the final arbiter in cases of disagreements.

There is, we argue, some room for improving the consistency of the terminology used in the Article. For instance, in Article 20(1), the term 'liable to affect' is used, whereas, in Article 20(4) and 20(5), the term 'likely to affect' is opted. The former, arguably, carries a more objective legal connotation to evaluate the impact on the internal market, whereas, 'likely to affect', arguably, leaves room for more subjective interpretations. Which begs the question: does this responsibility lie with the regulatory authority of a Member state, the 'appellate body,' the Board, the Commission, or a national or supranational court? The wording of Article 20(1) would imply that Member States are responsible, initially, for deciding whether a proposed measure is 'liable to affect' the internal market. In contrast, the wording of Article 20(4) would suggest that the Board has discretion, whereas Article 20(5) implies that both the Board and the Commission are jointly responsible in deciding the 'likely' impact of a measure on the internal market.

As a corollary to the previous point, the scope of this provision is potentially overreaching because it is not clear when a national measure would be 'liable' (Article 20(1)) or 'likely' to impact the functioning of the internal market for media services (Article 20(5)). It seems that the bar for impact is set relatively low, as it could be argued that any measure will have some impact (even if only to a minimal extent) on the functioning of the internal market. The scope of this provision is potentially even more far-reaching because Article 20(1) refers to the 'operation of media service providers', and not solely the service arm of their operations. The 'operation of media service providers' is a broader category, covering a wider range of activities beyond just the specific services that MSPs offer, and may refer to the overall activities, management, and functioning of MSPs, amongst other things. As Cole and Etteldorf (2023) points out, the question of scope is especially important given that Article 20(3) establishes a direct appeals process involving an 'appellate body' (Cole and Etteldorf, 2023 p.35).

4.2.5.2 Art. 21. Assessment of media market concentrations

This article focuses on the way to assess the mergers that could significantly impact media pluralism or editorial independence. It has a two-folded objective. On one hand, it sets a principle, according to which a specific assessment has to be made for this kind of mergers (it is not named as such, but it can be referred to as a "Media Pluralism Test", as defined by the Study on Media Plurality and Diversity Online, which proposes among other options for policy interventions that "It is crucial for mergers & acquisitions' assessment to effectively evaluate the impact in terms of the opinion power and the consequences for plurality of voices resulting from such mergers. In order to do so, specific competences should be assigned to NRAs, in the form of a "media pluralism test" (see European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu et al. 2022; pp. 387-388). On the other hand, it provides procedures and rules tending to a harmonisation of the existing national rules, setting peer-reviewers procedures within the new European Board for Media Services. Whereas the first objective calls for specific, harmonised, proportionate, and non-

discriminatory rules to evaluate mergers involving media (and prevent an excessive market power that could impact media pluralism or editorial independence), the second one implies avoiding that the use of the existing fragmented national rules undermines the functioning of the internal market, particularly in a context of growing cross-borders expansion of the media industry.

Rationale. The existence of a plurality of media providers is not, in itself, a guarantee of the offer of a diverse and pluralistic information. As noticed above, other factors must be taken into account, that contribute to a pluralistic media supply and consumption, in a holistic perspective (on the supply side, such as internal pluralism, the quality of the offer, political and commercial influence; but also on the demand side, such as media literacy and gateways in access to the media). Nonetheless, concentration of media ownership matters, because the concentration of power to influence the public opinion in a narrow number of hands has potential negative impact on the democratic process, furtherly exposes the media to risks of political pressure and reduces the possibility for new diverse voices to enter into the media market (Baker, 2007; Peruško, 2010; Schlosberg, 2016; Voltmer, 2020). As Baker (2007) points out, “dispersal of media ownership, like separation of powers, is a key structural safeguard for democracy” (p. 19); and the role of the market plurality as a democratic safeguard, in his perspective, goes together with (and reinforce) other reasons for a specific anti-concentration framework in the media market, more linked to the structural characteristics of this market and its potential failures.

The pursuit of external pluralism – meant as the offer of a plurality of voices by the market – motivated the creation of specific anti-concentration measures and rules in the media sector in several Member States of the European Union, to complement the economic perspective of the competition law and competition enforcement. As assessed in the Study on Media Plurality and Diversity Online (European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu et al. 2022), which mapped the measures concerning the concentration of media ownership in the EU Member States, there is a very diversified scenario, resulting in a fragmented legal framework. 21 Member States set limitations on media reach, mostly limited to traditional media; in 15 Member States there are restrictions on market shares; only 11 Member States provide restrictions on cross-media ownership. When it comes to assessment of media mergers, 5 Member States provide specific lower thresholds in their evaluation; in half the Member States there is a separate assessment by different authorities or bodies, or by a ministerial override. Finally, there is a plethora of methods in data gathering for assessing market concentration. A common feature – and limit – of these measures is that in the majority of the cases they do not include online media. The study also highlights that media pluralism is not always mentioned as an explicit goal of the measures on media ownership (specifically, pluralism is mentioned as a reason for intervention in media mergers just in 8 Member States), and also when it is mentioned as such, different notions of media pluralism are envisaged.

On one hand, this diversity respects the national competences and the specificities of each media system, reflecting the different historical, economic and social diverse backgrounds. On the other hand, it could hamper effectiveness of the same rules, in a market that is more and more interconnected and globalised; and pave the way to the risk, on the State’s side, of an use of the rules for other objectives not necessarily related to media pluralism, rising barriers to the circulation in the internal market; and, on the market’s side, of a “regime shopping” by the media companies, in search of the most favourable rules for the mergers.

In addition, it must be noticed that in spite of different national attempts to prevent/regulate excessive market power in the media sector(s), concentration of media ownership is growing (Evens and Donders 2018; Sjøvaag et al. 2021; see also the results of the implementation of the Media Pluralism Monitor, which shows a widespread high level of risk in the indicator of media ownership concentration). This tendency is consistent with the structural characteristics of the media market, and it has been

strengthened in the digital environment, with the disruption of the traditional media business model brought by the competition of the digital platforms, resulting in a severe reduction of advertising revenues and of availability of paying demand (Anderson & Julien, 2015; Parcu 2019; OECD 2021; see also Section B2 of European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu et al. 2022).

Article 21 EMFA sets a principle and the procedures for a harmonisation of the national rules, to reduce the existing fragmentation and the uncertainty that media market players actually face in cross-border operations. In Art. 21(1), the proposed regulation acknowledges the need for a specific assessment of media market concentrations, which should complement the competition law assessment. It asks the Member States to provide “in their national legal systems substantive and procedural rules which ensure an assessment of media market concentrations that could have a significant impact on media pluralism and editorial independence”. It must be noticed that the proposed regulation does not introduce directly these provisions in the national legal systems, but asks to the Member States that do not have such rules and procedures to introduce them; and to the Member States that do have specific rules and procedures to evaluate the media mergers to harmonise them, following the criteria set in the same article. In so doing, the article poses the basis for a “soft harmonization”, to be implemented by the national legal systems.

Scope. “Media market concentration that could have a significant impact on media pluralism and editorial independence” are understood as “covering those which could result in a single entity controlling or having significant interests in media services which have substantial influence on the formation of the public opinion in a given media market, within a media sub-sector or across different media sectors in one or more Member States” (Rec. 40). As can be noticed, it is a wide definition covering horizontal, vertical and cross-media concentrations. For the concentration to fall into the scope of this article, it should involve at least one media service provider (see Article 2(13)). The role of large online platforms and their impact on the media market must be taken into consideration in evaluating the power of the resulting media on public opinion, but the concentrations involving the online platform themselves are not included in the scope of this article (unless a media provider is involved). Some EP amendments propose to include online platforms in the definition of media market concentrations (Amendments 26, 98, CULT; 40, 152 and 153 IMCO). Although motivated by the new digital environment of the media, this kind of proposals should be carefully evaluated, as they would risk making the new rules very difficult to implement, to give to the new Board a role far outside its competences, and also to overlap with the specific regulation of the DMA.

It should also be noticed that the provision always links two aspects: media pluralism and editorial independence. Therefore, it can be argued that “the reduction of competing views within the market as a result of the concentration” (Rec. 40) should be interpreted not only in relation with the shares of the market and the audiences, but also taking into consideration the way in which the media provider involved operates and dependence of editorial content from the owners’ influence. Other parts of the proposal stress the relevance of editorial independence, integrity, and autonomy (see Art. 6 and the Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector). As highlighted by the results of the Media Pluralism Monitor, the risk for editorial independence both from political and commercial influence did not reduce, but increased, over the time, particularly in relationship with the economic crisis of the media. Editorial independence and integrity are aspects historically addressed by self-regulation - and the preference for this choice is confirmed by the same Recommendations, which provide some models of best practices. It is worth noticing that this provision - addressing contemporary media market plurality and editorial independence - seems to link the external and internal dimension of media pluralism. On one hand,

this concept would suggest that cutting one of the parts of the article (as proposed in several amendments that remove the words “editorial independence” from the provision (e.g., 92, 93, 94, 95, CULT) risks to undermine the whole design of the proposed regulation; on the other hand, the link between the external and internal pluralism could open interesting developments in the same assessment of media mergers, e.g. in the cases in which the reduction of external pluralism can be counterbalanced by guarantees of internal pluralism. (see below).

Procedures. The assessment of media market concentrations is to be entrusted to a national authority or body, designed by the national legal system. Thus, it remains a competence of the Member States. In addition, the article introduces a system of peer review of the Board, which should be consulted and will provide opinions in the cases in which the assessed concentration may affect the functioning of the internal market (Art. 21 co. 4). As clarified in Rec. 43, this would be the case when the concentration involves undertakings in 2 or more Member States, but also when it “results in media service providers having a significant influence on formation of public opinion in a given media market”. In all these cases, the Board must be consulted and will draft an opinion, to be transmitted to the consulting authority and to the Commission. This opinion is not binding, but in cases in which the national authority does not follow it, it shall provide a reasoned justification. Furthermore, Art. 22 regulates the case in which the national authority does not consult the Board, even in presence of a concentration that could affect the internal market: in this case the Board, upon request of the Commission, shall provide an opinion, and the Commission itself may issue its own opinion. To sum up: a review at EU level of the media mergers assessment regarding media pluralism is set; it does not substitute, nor bind, the national assessments, but it should help their harmonisation, and would increase transparency and publicity of the process.

Criteria. As assessed in Rec. 41, it is essential that the criteria based on which the “media pluralism test” is conducted are set in advance, and that they are “transparent, objective, proportionate and non-discriminatory” (Art. 21 (1)(a)). Art. 21 (2) lists the elements to be taken into account: a) the effects “on the formation of public opinion and on the diversity of media players on the market, taking into account the online environment and the parties’ interests, links or activities in other media and non-media businesses”: this is in line with the CJEU judgement in Case C-719/18, which stated that overcoming thresholds based exclusively on market shares is not sufficient to prove that there is a reduction of pluralism in terms of power on the public opinion, and confirms the need to update the existing criteria to the digital environment of the media; b) the existence of safeguards for editorial independence: here the presence of measures, in the internal functioning of the media outlet, to guarantee “the independence of individual editorial decision” is explicitly mentioned; c) the economic impact of the concentration, meaning the evaluation if, in absence of concentration, the entities involved in the merger would survive. Guidelines to detail these criteria might be issued by the Commission, assisted by the Board.

Considerations. The above-mentioned criteria clarify the scope and the potential innovative role of the media pluralism test, as they are drafted to update the old regulatory framework and to make it fit to address the new challenges in the digital environment of the media; on the other hand, they raise some doubts of interpretation. The upcoming guidelines should specify what is meant by “taking into account the online environment”: whereas it is important to consider the role of online platforms in the distribution of and access to the news, it is also crucial avoiding to do this simply adding them in the measurement of the market, as this would lead to a very wide aggregate in which it would be difficult to detect positions of market dominance. Moreover, the guidelines should clarify in which order of priority the three different groups of elements listed in Art. 21 (2) should be considered (e.g., how to evaluate a merger that substantially reduces media plurality, in case in which the resulting media entity

has full guarantees and safeguards of editorial independence); if their requirements are to be considered as alternative, or to be present jointly, e.g if the conditions of point (c) would prevail on points (a) and (b) (meaning, if the objective to preserve the economic sustainability of a media would prevail over pluralism's concerns). As assessed in the CMPF position paper on the proposed EMFA (2023), "the text leaves room to some innovative solutions, which could be specified in the guidelines and in the implementation of the Media Pluralism Test, considering together the principles set by Art. 21 and the requirements introduced by Art. 6. In other words: when a merger can be justified by economic reason but still involves a risk for the reduction of the external pluralism, a strengthened set of guarantees in terms of editorial independence, content diversity and internal pluralism can be requested and enforced. The different scope and rationale of the antitrust scrutiny and the media pluralism evaluation might avoid, on one hand, to overcharge the competition authorities of tasks that are not in their remit; on the other hand, the right to a pluralistic and diverse information would not be sacrificed to economic logic".

Some further considerations can be advanced regarding the bodies involved in the procedure. Given the role of the national authorities or bodies that will evaluate the media mergers from the perspective of media pluralism and editorial independence, it is of the utmost importance reinforcing and guaranteeing their independence from the political power. This would reflect in the independence and well-functioning of the Board. The role of the Commission in issuing the guidelines for the assessment and should be carefully evaluated, as a clearer separation of the different institutional levels would strengthen the independence of the procedure¹⁰⁰.

4.2.6 Section VI: Transparent and fair allocation of economic resources (Art. 23-24)

4.2.6.1 Art 23 – Audience measurement

Article 23 outlines the need for audience measurement systems and methodologies to be transparent, impartial, inclusive, proportionate, non-discriminatory, and verifiable (Art. 23(1)). In this endeavour, the EBMS is tasked with "assisting" the Commission in the process of drawing up Guidelines on the practical application of audience measurement (Art. 23(4)).

More broadly, Article 23 is an attempt to remedy another of the problems deriving from the interaction between digital platforms and the media, and the power and information asymmetries between the former and the latter, by requiring harmonization and transparency criteria in the measurement methodology. It is indeed a necessary measure which arises from the availability and control of users' personal data (this sector, however, may also be affected by the DMA and the Data Act, the evolution and implementation of which should be monitored specifically in view of the impact on media markets; in parallel, the cases relating to the concentration of the online advertising market, before the national and EU antitrust authorities, could lead to interesting developments).

As explained in the reasons for and objectives of the proposal of the EMFA draft (p.2), the opacity and biases inherent to proprietary systems of audience measurement eventually skew advertising revenue flows. This may affect negatively, in particular, media service providers as well as disadvantaging competitors that provide audience measurement services abiding by industry-agreed standards, such

¹⁰⁰ Despite these differing views, there are points of convergence. One such area of agreement seems to be the necessity of ensuring the independence of the future European Board for Media Services from the European Commission.

as self-regulatory Joint Industry Committees (see Recital 9). As a matter of fact, audience measurement has a direct impact on the allocation and the prices of advertising, which represents a key revenue source for the media sector, and a crucial tool to evaluate the performance of media content as well as to understand audiences' preferences. The approach outlined in the draft intends to differentiate between "proprietary audience measurement" and "industry-standard audience measurement". Yet, as CCIA Europe observes (2023), these two types of audience measurement are not separately defined in Article 23 and, therefore, clarity is needed as to what is being proposed for each. Furthermore, there are already a range of different mechanisms for audience measurement, and there is indeed competition between providers of these services in the EU market. EMFA is indeed supposed to safeguard the innovation that this competition brings about and does not disrupt the inevitable technological adaptation to measure digital media consumption (CCIA Europe, 2023). A final concern regards the need to clarify that the article is aligned with, and does not intend to contradict, other legislative frameworks that already govern the interaction between the participants of this value chain in areas such as competition and data protection.

4.2.6.2 Art 24 – Allocation of state advertisement

Article 24 EMFA focuses on the allocation of state advertising and aims to prevent the misuse or distorted use of such advertising to influence editorial choices and media content, thereby impeding fair competition in the internal market. It is important to note that this article does not pertain to political advertising and should not interfere with specific national or upcoming European rules regarding political advertising. The rationale behind the provision on state advertising is explained in Recital 48, emphasizing that state advertising serves as a significant revenue source for many media service providers, contributing to their economic viability. Therefore, access to state advertising should be granted in a non-discriminatory manner to any media service provider from any EU Member State that can effectively reach the relevant audience, ensuring equal opportunities within the internal market. The 2022 Media Pluralism Monitor results highlight the high risk of political influence and threats to editorial independence associated with state advertising in the majority of EU Member States, with only six countries scoring low risk in this area. While the definition of state advertising in Article 25 encompasses a broad scope, some weaknesses in the provision should be acknowledged. Firstly, the threshold of 1 million inhabitants appears high, and the rationale behind this threshold is not entirely clear, unless it is intended to qualify the measure as significant for the internal market. This is particularly noteworthy as very few local or territorial entities within the EU have a population exceeding 1 million. Additionally, the text mentions that emergency messages by public authorities necessary in situations such as natural disasters, accidents, or sudden incidents causing harm to individuals should not be included in the definition of state advertising (Recital 10). This could create a loophole wherein substantial governmental messages, often associated with events like the COVID-19 pandemic or the war in Ukraine, can be utilized to subsidize, control, or influence media outlets. Transparency regarding spending on emergency communication is justified, and there should be no justifiable reason for it to be exempt from scrutiny. Lastly, the provision does not explicitly address sources of (state) funding beyond advertising, limiting the perspective on financial transparency and non-discrimination in subsidy allocation to ensure equal opportunities in the internal market.

4.3 Concluding remarks

The proposal is a very relevant step towards the functioning of the internal market for what concerns the media services (CMPF, 2023a). It is also a concrete development of media policy at EU level (see in Section 3.2 the historical background on the debate on media pluralism in the EU), including for what concerns the EU competences in the field.

There is a clear need for a harmonised intervention in the internal media market to prevent fragmentation caused by varying domestic regulations across EU Member States. Such fragmentation not only poses risks to media companies due to a lack of legal certainty but also undermines guarantees of editorial independence, the work of journalists, and ultimately, freedom of expression and information within the Union. Additionally, the rise of digital platforms, especially social networks and search engines, has amplified the role of actors who are not traditional media providers but rather information intermediaries that shape the public's access to information and media's access to their audience. This evolving landscape necessitates a reconceptualization of media and information pluralism from both theoretical and scientific perspectives. It also presents a constitutional challenge for legislators and policymakers, as these global actors often transcend national regulations designed for traditional media and rely heavily on advertising—the economic sustenance of private media for nearly a century.

The proposal of a European Media Freedom Act prompted various reactions across the relevant stakeholders that range from the welcoming positions of the European Federation of Journalists, the European Broadcasting Union, the Association of Commercial television, and other organisations¹⁰¹ to the firm opposition of great part of the publishers¹⁰².

Considering the first amendments proposed, the Committees in charge of the proposal in the European Parliament, CULT, IMCO and LIBE, seem to have different approaches to the EMFA: so far, the CULT Committee seem more cautious and oriented to reaffirm Member States competences, avoiding publishers may be limited in their relationship with newsrooms, or question the legal basis. A broader debate surrounds the EU's authority to legislate on the media sector, as well as the benefits of harmonising rules at the European level, in particular for those countries where the media system seems to work well. Conversely the other two Committees, also given their remit, seem to highlight how the act is not interfering with national competences and it is a push towards EU cooperation among national regulators, public scrutiny of crucial information, and the establishment of additional EU-wide safety measures.

The debate regarding the EU's competence to legislate in the media sector and the advantages of harmonising rules at the European level is still open and particularly triggered by stakeholders, academics and policymakers in countries with well-functioning media systems. Supporters of the proposal emphasise, instead, that it does not infringe upon national competences but instead encourages EU cooperation among national regulators, public scrutiny of vital information, and the establishment of additional EU-wide safety measures. Based on the Media Pluralism Monitor general

¹⁰¹ For a detailed analysis of the positions, see Cabrera Blázquez, F. J. (2022).

¹⁰² European press publishers call on the European Commission not to adopt "Media Unfreedom Act" Monday, September 12, 2022, <https://www.magazinemedi.eu/press-releases/european-press-publishers-call-european-commission-not-adopt-media-unfreedom-act>.

ranking of the risks for media pluralism in EU Member States, it is interesting to note that the countries that mostly oppose the Act are those that either were assessed at the lowest or at the highest risk.¹⁰³

As it has emerged from the analysis of the study, at this point there are arguably two major foreseeable paths. On the one hand, the proposed Act could end up in a stall due to political opposition of some Member States. On the other hand, negotiations could fruitfully start over to eventually agree and adjust the limitations highlighted in this study and, strong of the legal basis and well-defined competences, the Act may pass next year representing a fundamental step for European media law and a new cornerstone of democracy in Europe. Regardless of the final outcome of the draft proposal, it is crucial to acknowledge that the Act represents a tangible result of a longstanding debate and an opportunity to foster a truly European discussion on how to ensure media pluralism and media freedom within both the EU and its Member States. The EMFA not only serves as a relevant step toward the functioning of the internal media market for media services but also signifies a significant advancement in EU media policy, as it has triggered a public discussion on the role and the future of the media. While the horizontal approach of the Digital Services Act (DSA) aims to address challenges in the digital realm, there is a risk that it may still allow major online platforms (VLOPs) to wield the power to determine what constitutes a risk for media pluralism and media freedom. Monitoring the implementation of the DSA could prove challenging, potentially leaving room for these platforms to continue to deeply influence the media landscape.

¹⁰³ See <https://cmpf.eui.eu/mpm2022-general-ranking/>.

5 POLICY RECOMMENDATIONS

If approved, the proposed regulation for a European Media Freedom Act would be a ground-breaking step towards strengthening media freedom and media pluralism in the European Union. As argued in this study, the pursuit and protection of media freedom require multidimensional policies and tools; these policies and tools need to be adapted and updated; any achievement cannot be taken for granted, but must be protected by old and new threats, due to the changing situations and evolving times. The pursuit and the protection of media pluralism and media freedom require a holistic perspective as well as a rich policy toolbox. In a globalised world and a globalised and digitised media market, national policy toolboxes risk being not effective or only partially effective, or even counterproductive. The proposed EMFA addresses this issue by introducing new tools and safeguards for media freedom at a supranational level, and by realigning the scope of the regulation with the cross-border dimension of the media systems and media markets. In so doing, it expands the EU digital strategy's complex architecture to include also the media.

The first Recommendation, consistent with the considerations exposed in the report, is:

- **Maintaining the choice of an intervention on the media systems at EU level, and the instrument of a regulation.** Art. 114 TFEU is suitable as legal basis for this intervention, and the Regulation is the most suitable instrument, as argued in Section 4.1.

The second group of Recommendations builds on the detailed analysis of the EMFA, provided in this study, and asks ameliorating some aspects of the proposed Regulation, and/or to prevent possible shortcomings in its implementation. Among all the specific measures/amendments proposed in the study, it is worth highlighting (but for more suggestions, see the analysis of the EMFA proposal in Section 4):

- **Strengthening the inclusivity of the protections and safeguards.** Definition of media service provider could clearly include new forms of professional journalism, which go beyond the roles as employee in the newsrooms, but contribute to the offer of quality public interest news by professionals with respect standards of independence and responsibility.
- **Strengthening the transparency obligations for the media service providers, adding disclosure of ownership upwards, to the public bodies.** Art. 6 imposes duties for the media service providers to disclose full information on their ownership (up to the beneficial owners) to the public. This provision is of utmost importance, to safeguard the individual rights to know the source of the news and to make informed choices. In parallel, it would be important adding a duty to provide the relevant information about the structure and changes of media ownership to the public authorities/bodies, and aiming to the creation of publicly available registers at national and – in a second step – at EU level. Disclosure of media ownership towards the public authority is indeed a precondition to monitor media systems, to apply the rules to prevent excessive market and opinion power in the media sector, to prevent conflict of interests and undue influence on the editorial independence. Therefore, we propose to include in Article 6 (1) EMFA a provision on the obligation for Member States and/or NRA's to create and maintain media ownership databases in line with Section III of Recommendation (EU)

2022/1634, following the proposals from the CULT Committee on Article 6 (European Parliament, 2023).

- **Independence of the Board:** a point of convergence from among the MEPs, is that of strengthening the independence of the future European Board for Media Services from the European Commission. The independence from the Commission entails two aspects, the first being related to the composition of the Board, the second referred to the involvement of the Commission in several procedural aspects. In both aspects, it seems that the role of the Commission could be reduced to some extent, and that an agreement of the Commission wouldn't be necessary in all the cases provided for (e.g., the agreement of the Commission when it comes to the invitation of experts and observers, or the adoption of the Board's rules of procedure). In the context of the EC's role, an agency-based secretariat would also be preferable compared to an EC-based one. At the same time, the Proposal could be also strengthened to ensure that the framework in question is supported by independent NRAs, that will de facto compose the new body. A further role of the civil society organisations could be also conceived when it comes to consultations.
- **Monitoring implementation of Art. 17:** it is important to address the relationship between media service providers and very large online platforms and very large online engines. Building on the rationale of Art. 17 EMFA and on the obligations for risk assessments and risk mitigation by VLOPs and VLOSEs under Artt. 34 and 35 DSA it could be envisaged an independent monitoring over how platforms decide on what falls under a systemic risk, as defined in the DSA. In particular, interesting are the categories of systemic risks concerning the actual or foreseeable negative effects on freedom of expression, media pluralism, democratic processes, civic discourse and electoral processes, as well as public security; but also risks relating to the design, functioning or use, including through manipulation, of very large online platforms and of very large online search engines.
- **Issuing transparent and objective guidelines to assess media market concentrations to implement Art. 21 EMFA.** The guidelines should specify the objective, non-discriminatory and proportionate criteria based for assessing the impact of media market concentration on media pluralism and editorial independence ("media pluralism test"). They should clarify how to interpret the elements listed in Art. 21(2), in particular: a) avoiding that their wideness and vagueness leaves room to arbitrary decisions; b) guaranteeing that the final goal of maintaining of creating a plurality of independent diverse voices is pursued; c) specifying that obligations of internal pluralism should be issued when a concentration is admitted ex Art. 21(2)(c); d) in this regard, a more favourable framework for pure media providers (companies that do not have businesses in other non-media sectors) could help; e) developing indicators of concentration which take into account the online and mixed consumption of information, with transparent and standardised audience measurement.
- **Including the stakeholders as well as the civil society organisations** in the procedure of assessment of media market concentrations.
- **Monitoring media market concentration,** on a regular basis and with a peer review procedure at EU level. The mechanism envisaged by Art. 21 (the media pluralism test) applies just in the case of mergers and acquisitions, but it does not provide any tools to prevent or to reduce a situation of high concentration in the market deriving from pre-existing factors, or caused by the growth of a company and the reduction/shutdown of the other ones.
- **Avoiding that the threshold set for allocation of state advertising** (more than 1 million inhabitants) becomes a loophole to avoid the respect of the new criteria, and/or maintain an area of potential political pressure on local media

- **Extending the provisions for a fair and transparent allocation of state advertising to the public subsidies (direct and indirect) to the media.** The underlying rationale behind the provisions on state advertising in the EMFA, which aims to ensure equal opportunities in the internal market by granting non-discriminatory access to public resources, should also guide the harmonization of principles governing public subsidies in the media sector. Media providers have increasingly advocated for these subsidies, and there has been a significant temporary increase in their allocation during the COVID-19 crisis. It is important to recognize that both direct and indirect public subsidies carry the risk of political capture. To mitigate and minimize these risks, it would be beneficial to include public subsidies within the scope of the EMFA regulation. The same criteria of transparency, proportionality, monitoring, and disclosure that are outlined in Article 24 for state advertising should be applied to public subsidies as well.
- **Exposure diversity.** Exposure to diverse content is a fundamental principle of media pluralism that could be pursued more proactively with both legislative and non-legislative measures. In the case of legislative measures, Art. 19 EMFA could, in theory, extend customization also to recommender systems, complementing Art. 29 DSA. This could represent a unique opportunity to clarify what options users could employ in social media's personalization. Affordances to be exposed to diverse viewpoints and trustworthy and public-interest content could be developed. Such a policy goal is in line with Article 3 EMFA, which affirms the right of recipients of media services to receive a plurality of news and current affairs content, as well as Art. 10 ECHR, which is the right to receive information. In the case of non-legislative measures, initiatives could be promoted aimed at improving the ability and strategies to cultivate media pluralism in digital environments. For example, tools and dashboards that nudge users to discover new and diverse information (i.e., serendipity) could be developed. Similarly, there could be incentives for the development of diversity-aware and democratically-aligned recommendation systems. A notable example in this respect is the PEACH project of the European Broadcasting Union, which has developed an open-source recommender system to be offered to its members able to calculate the degree of diversity of recommendations with the goal "to recommend content which will broaden a user's horizon (i.e., to educate them)" (PEACH, 2023). Fundamental to this policy goal is also ensuring a research approach that is genuinely inter- and multidisciplinary, thereby allowing computer and social sciences to fruitfully converge with human-computer interaction studies. To do this, it is fundamental to provide sufficient financial resources to attract human talents from the industry, specially for the growth of the newly founded European Center for Algorithmic Transparency.

The third group of Recommendations aims to address issues that are not covered by the proposed regulation, but which impact at a relevant extent the media systems, and the pursue of media freedom and media pluralism. The possibility to include these proposals in the scope of the EMFA, or in other acts and policies by the EU institutions, would allow to address the huge challenges and to catch the new opportunities that the digital age opened for media freedom and media pluralism, and would strengthen the proposed Act. They build on the results of the 10 years of implementation of the Media Pluralism Monitor, and on the research conducted by the CMPF with this and other projects.

- **Strengthening the political independence of the media.** The proposed Act envisages among its objectives the independence of the media from political pressure and undue commercial influence, as does the Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector. Nonetheless, in both the acts there is no specific **rules on conflict of interests**, between the ownership of media outlets and high-ranking political roles. The proposal could expand to some additional rules, **to make government offices incompatible with media ownership** (direct and indirect, including beneficial ownership). Rules of this kind could be justified in the internal market

perspective, as the ownership and influence of a (member of the) government upon a media outlet could undermine the very rationale of a regulation to protect the media freedom, and in addition could impact the well-functioning of the internal market.

- **Creating a new environment for more balanced and transparent relationships between media content providers and digital intermediaries.** The digitalization of the media environment brought to complex and unbalanced relationships between publishers and platforms and, more generally, between the content providers (the old ones and the new ones) and the digital players which intermediate the access to the news, and dominate the online advertising market as well as the data market. The proposed Regulation considers this dimension in several provisions, namely in the section of provision of media services in a digital environment (designing a sort of special regime for the media when it comes to the decisions of suspension of content by very large online platforms); in the requirements for well-functioning media market measures and procedures (asking to consider the online environment in the assessment of media market concentrations); and finally in the provision on audience measurement. These novelties are welcome but are not sufficient to restore an even playing field in the digital environment of the media. Other Union policies address the same issue, with a horizontal intervention, such as the DSA and DMA, and the forthcoming regulation on Data and Artificial Intelligence, or with a specific intervention on the media, such as the EU directive on Copyright and related content. The design and implementation of the complex framework of the new rules should consider the specificity of the media sector and carefully evaluate the impact on a sector whose well-functioning is vital for democracy and public participation. **A call from transparency emerges**, in the decisions of the very large platforms that impact the media environment, and in the relationships between media and platforms. Transparency requires monitoring implementation of Art. 17 (see above Section 4.2.4.1); but also monitoring and reporting on the economic negotiations between platforms and publishers, in the process of implementation of the EU directive on Copyright. In this regard, transparency and disclosure of the agreements would also help to foster the inclusion of diverse and pluralistic voices in the same process.
- **Financing the journalism as public good.** Economic sustainability is a key factor for guaranteeing editorial independence and the existence of a pluralistic media market. The proposed Act does not intervene directly providing financial support, as this is in the scope of other Union policies. Some actions geared to support news media are increasingly financed by the Commission, in particular after the adoption of the Media and audiovisual action plan in 2020. Since then, the news media sector has been a dedicated focus of the Creative Europe programme. Although limited in amount, this stream of financing set a principle; the acknowledgement of the media sector as “part of the cultural and creative industries ecosystem” open the path for initiatives for a stronger public support at EU level. This kind of support could follow several not-alternative routes:

 - Increase the amount of the funds in the Creative Europe programme dedicated to the news media, designing the programs to incentivize innovation in the newsrooms, new journalistic cooperative initiatives, investigative journalism, and local and community media.
 - Design a new remit for PSM, more consistent with the developments of the information and algorithmic society. PSM should be funded, also by the revenues of a “digital tax” (see below), in order to develop a media offer that is not ad-reliant, ensures the transparency and explainability of algorithmic recommender systems, uses measures to enhance exposure diversity, such as offering alternative forms of personalisation compatible with the public interest that are not reliant on the use of personal data.

- Create a **European Fund for Journalism**. This Fund should aim to promote media pluralism, supporting the sector of news media in its transition in the digital environment. Following the digital disruption and the economic crisis, the media industry more and more turns to the governments for financial help; in many cases, this could exacerbate the risks of political pressure and the threats to editorial independence. The creation of a Fund at supranational level might help in reducing the risk of political capture, on one hand; on the other hand, it might incentivize transnational and globalised initiatives, more likely to become self-sustainable in the medium term. Finally, the financing of this Fund could benefit by the parallel process for a fair reform of international taxation, in a process aimed to re-distribute the “tech dividend” to the benefit of society and democracy. In parallel with the disruption of the traditional media business model, the digital innovation brought successful new models at a very large scale, in a market dominated by the very large online platforms and search engines, in particular the ones relying for their financing on programmatic advertising. Together with the challenges to the old competition and regulation framework, the “digital dominance” also raised the issue of the fair taxation, addressed in the framework of the OECD reforming process and the international agreement on a minimum tax. With the proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union, the EU institutions aim to implement the international agreement on a minimum tax. This tax is not specifically designed for the digital companies (as it was the case of the previous EC proposal for a digital services tax), but it will raise the tax burden (also) on the tech giants which make considerable profits in the EU. The details and implementation of the minimum tax are still to be discussed, approved and implemented. But it would be interesting considering a mechanism to use part of the revenues from the taxation of the digital companies' profits to support media production and media pluralism. In this way, the digital platforms would partially contribute to restore the economic sustainability of a sector disrupted by the digital innovation; such an obligation would derive by objective rules, not out of a voluntary donation – as it is already the case of various programmes to support news initiatives. It should be stressed that this should not be meant as an automatic mechanism to compensate the same actors damaged by the digital innovation (the legacy media industry), but it should be designed in a way to sustain models that can be self-sustainable in the medium term, and open to diversity and plurality of content.
- **Establish an ad hoc independent monitoring system as regards the implementation of Art 34 and 35 of the DSA**, as regards risks assessment and mitigation or risks stemming from the design or functioning of very large online platforms and very large online search engines to media freedom and media pluralism. This would entail specific transparency provisions and access to platforms data to vetted researchers to help understanding more in detail how online platforms deal with media content, including how recommender systems work, systems to select advertisements, data related practices.
- **Research on media pluralism and media freedom under DSA's systemic risks**. To conclude, as there is a fundamental need for a more evidence-based, theory-laden and empirically-oriented research to re-conceptualize media pluralism and eventually improve the ability and the strategies to cultivate media diversity as well as media freedom in digital environments, it is fundamental to assure that future research on media pluralism and media freedom will be consistently considered as research that assesses a systemic risk that has 'actual or foreseeable

impact on the exercise of fundamental rights, democratic processes, civic discourse and electoral processes' following Art. 40 of the DSA on data access for research purposes.

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This study analyses the European Media Freedom Act proposal. It provides a political and historical overview of EU policies in the field of media and on information society at large, also taking into account the debate regarding EU competences on media pluralism and media freedom. The study reasons on the legal basis of the proposed Act, and then analyses the provisions of it under each of the Chapters of the Act, basing on relevant academic literature, policy documents, and empirical data. It concludes with policy recommendations.

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