



Research Paper on the European  
Commission's Proposal for a Regulation  
establishing a common framework for media  
services in the internal market ('European  
Media Freedom Act')

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4 April 2023

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## Executive Summary

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### Introduction

On 16 September 2022, the European Commission (hereinafter: the ‘Commission’) published the Proposal for a Regulation establishing a common framework for media services in the internal market (hereinafter: the ‘Proposal’ or ‘Proposal for the EMFA’).<sup>1</sup>

It is important that the Commission has adhered to the Better Regulation Guidelines in their Proposal for the EMFA and, therefore, avoided overregulation and administrative burdens for citizens, administrations and businesses, especially small and medium-sized enterprises.<sup>2</sup> It is also important that the principles of subsidiarity, proportionality and fundamental rights are fully respected.<sup>3</sup>

### The overarching objectives of the Proposal for the European Media Freedom Act (‘EMFA’)

The legal basis for the Proposal is Article 114 of the Treaty on the Functioning of the European Union (hereinafter: ‘TFEU’),<sup>4</sup> therefore, having as its objective the establishment and functioning of the internal market. As well as this objective, the Proposal seeks to provide increased protection to the freedom of expression across the EU,<sup>5</sup> protected by Article 11 of the Charter of Fundamental Rights of the European Union<sup>6</sup> (hereinafter: the ‘Charter’), which corresponds to Article 10 of the European Convention on Human Rights<sup>7</sup> (hereinafter: the ‘ECHR’).

The Proposal centres around the following four specific objectives:

- to foster cross-border activity and investment in media services by harmonising diverging national media pluralism frameworks;
- to increase regulatory cooperation and convergence through cross-border coordination tools and EU-level opinions and guidelines;
- to facilitate the provision of quality media services by mitigating the risk of undue public and private interference in editorial freedom; and

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<sup>1</sup> 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 (‘Proposal for the EMFA’), COM/2022/457 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457> (last accessed on 3 January 2023).

<sup>2</sup> Commission Staff Working Document, Better Regulation Guidelines (‘Better Regulation Guidelines’), Brussels, 3.11.2021, SWD(2021) 305 final, available at [https://ec.europa.eu/info/sites/default/files/swd2021\\_305\\_en.pdf](https://ec.europa.eu/info/sites/default/files/swd2021_305_en.pdf) (last accessed 10 August 2022).

<sup>3</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (‘Better Law-Making’), OJ L 123, 12.5.2016, p. 1-14, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29> (last accessed on 26 January 2023). 1-14.

<sup>4</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47 – 390, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> (last accessed 26 January 2023).

<sup>5</sup> Proposal for the EMFA, see footnote 1.

<sup>6</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391 – 407, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (last accessed 10 August 2022).

<sup>7</sup> European Convention on Human Rights and Fundamental Freedoms, Rome 4.XI. 1950, available at [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) (last accessed 10 August 2022).

- to ensure transparent and fair allocation of economic resources in the internal media market by enhancing transparency and fairness in audience measurement and allocation of state advertising.<sup>8</sup>

## The key aspects and notable provisions of the Proposal for a European Media Freedom Act ('EMFA')

The Proposal is divided into four chapters, constituting 28 Articles in total.

Chapter I concerns the General Provisions, setting out the subject matter and scope, along with the relevant definitions under Article 2, and Chapter II outlines the rights and duties of media service providers and recipients.

Chapter III is the most substantial chapter of the Proposal, providing a framework for regulatory cooperation to allow for a well-functioning internal market for media. It is divided into six sections. Sections I and II principally relate to the amendment of the Audiovisual Media Services Directive (hereinafter: the 'AVMSD'),<sup>9</sup> through increased responsibilities for national regulatory authorities (hereinafter: 'NRAs') or bodies, and through the establishment of the European Board for Media Services (hereinafter: the 'EBMS'), comprised of the national media authorities. Section III concerns regulatory cooperation and convergence, including provisions on structured cooperation between national authorities, guidance on media regulation matters, and requests for enforcement of obligations by video-sharing platforms (hereinafter: 'VSPs'). Section IV of this Chapter regulates the provision of media services in a digital environment and includes a number of weighty provisions, notably Articles 17, 18, 19 and 21. Section V concerns the requirements for well-functioning media market measures and procedures, including provisions on national measures affecting the operation of media service providers,<sup>10</sup> and the assessment of and opinion on media market concentrations.<sup>11</sup> Finally, Section VI deals with the transparent and fair allocation of economic resources, containing provisions pertaining to audience measurement<sup>12</sup> and notably the allocation of state advertising.<sup>13</sup>

The final chapter is Chapter IV, which outlines the final provisions regarding monitoring, evaluation and reporting, amendments to the AVMSD, and entry into force.

## The analysis of the Proposal for a European Media Freedom Act ('EMFA')

Some content of the Regulation may appear to result in practical complexities, in particular the definitions of 'media service' and 'media service provider' (Article 2), the erosion of the

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<sup>8</sup> See generally the Proposal for the EMFA and European Parliamentary Research Service, 'European media freedom act', 21 November 2022, available at < [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2022\)739202](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)739202)> (Last accessed 27 January 2023), p. 7.

<sup>9</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 303, 28.11.2018, p. 69-92, available at <https://eur-lex.europa.eu/eli/dir/2018/1808/oj> (last accessed on 17 March 2023).

<sup>10</sup> Proposal for the EMFA, see footnote 1, Article 20.

<sup>11</sup> Ibid, Articles 21 and 21.

<sup>12</sup> Ibid, Article 23.

<sup>13</sup> Ibid, Article 24.

country-of-origin principle (Article 14), the statement of reason and expedited appeals and self-declaration regime (Article 17), the structured dialogue (Article 18), and user controls (Article 19).

### ***Definitions of ‘media service’ and ‘media service provider’ (Article 2)***

Under Article 2, the definition of a ‘media service’ is especially vague, particularly on who would fall into this bracket beyond traditional media services. The legal uncertainty resulting from this lack of a clear criterion indicates that specific indicators may be beneficial to provide the utmost clarity as to what is classified as a ‘media service’ under the EMFA. Furthermore, it is important for both legal certainty and the effectiveness of the Proposal that providers are concretely aware of whether they are operating a media service and, therefore, need to comply with the provisions of the EMFA.

The definition of ‘media service provider’ (hereinafter also referred to as an ‘MSP’) can also be found under Article 2. The definition of an MSP, in combination with Recital 8 providing that very large online platforms (hereinafter: ‘VLOPs’) can also be MSPs, does not consider the interaction between the EMFA, e-Commerce Directive, and Digital Services Act (hereinafter: the ‘DSA’) with regard to when VLOPs could be considered to be exercising ‘editorial control’. Recital 8 also provides that VSPs can also be MSPs, again with no consideration of what is considered to constitute the exercise of ‘editorial control’. Furthermore, the editorial responsibility of VSPs is referred to as part of the AVMSD; therefore, resulting in the framework being split between these two instruments.

### ***Erosion of the country-of-origin principle (Article 14)***

There is a risk that the country-of-origin principle is not reflected as strongly in the Proposal for the EMFA as in other EU legislation, which could result in legal uncertainty. In particular, from the fact that the country-of-origin principle forms part of the e-Commerce Directive,<sup>14</sup> AVMSD,<sup>15</sup> DSA,<sup>16</sup> and Digital Markets Act<sup>17</sup> (hereinafter: ‘DMA’), yet is not mentioned as part of the EMFA. In relation to Article 14, this is of particular concern as the provision leaves open the chance for one national authority to request the enforcement of an obligation in circumstances where such enforcement is not provided for under national law. Therefore, the country-of-origin principle could be a welcome inclusion to this provision to safeguard legal certainty.

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<sup>14</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1-16, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031> (last accessed on 26 January 2023), Recital 22.

<sup>15</sup> AVMSD, see footnote 9, Recital 33.

<sup>16</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p.1-102, available at: <https://eur-lex.europa.eu/eli/reg/2022/2065/oj> (last accessed on 26 January 2023), Recital 123.

<sup>17</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, p. 1-66, available at: <https://eur-lex.europa.eu/eli/reg/2022/1925> (last accessed on 30 January 2023), Arts. 22, 23, 26, 27, ff.

### ***Statement of reason and expedited appeals and self-declaration regime (Article 17)***

Firstly, the criterion for self-declaration seems to be especially unclear in terms of what is specifically required for an MSP to self-declare and benefit from the privileges under Article 17.

The first criterion is that of ‘editorial independence from Member States and third countries’. Editorial independence is not defined in the EMFA, nor anywhere else in Union law. The lack of definition and clarity may mean that different VLOPs approach the situation differently resulting in an inconsistent application of Article 17. In light of this, it seems important that parameters are set when it comes to assessing what is considered to be a sufficient level ‘editorial independence’ when self-declaring as an MSP.

The second criterion is that MSPs must be subjected to ‘regulatory requirements for the exercise of editorial responsibility in one or more Member States’ or ‘adhere to self-regulatory or co-regulatory mechanisms that are widely recognised in one or more Member States’.<sup>18</sup> There are questions as to what could be considered ‘widely recognised and accepted’, with no elaboration provided on which regulatory requirements are considered satisfactory. It seems as though this may be left up to the NRAs, as referred to in Article 30 of the AVMSD. Nevertheless, even with the NRAs potentially applying this criterion, the Regulation is still unclear on whether and how the NRAs can decide whether or not an MSP is exercising editorial responsibility.

The lack of clarity in the abovementioned criteria for self-declaration may open up the potential for abuse where MSPs may self-declare to gain privileges from VLOPs.

Secondly, considering that Article 17 applies to ‘VLOPs’, it is important that the EMFA is aligned with the DSA to prevent any contradictions. The definition of a VLOP in Article 33 of the DSA is broad and encompasses platforms that rarely interact with media services. As such, the carrying over of this concept in Article 17 will place the same obligations on a VLOP that is directly connected to media services and on a VLOP that has limited interaction with media services. This will result in a regulatory burden on VLOPs who rarely interact with media services to make sure that they are complying with their obligations under EU law, even when they are not directly connected to media services.

### ***Structured dialogue (Article 18)***

Article 18 could provide a meaningful and proactive mechanism for stakeholders to come together to discuss experiences and best practices in the application of Article 17, to foster access to diverse offers of independent media on VLOPs, and to monitor adherence to self-regulatory initiatives aimed at protecting society from harmful content. However, the dialogue may be more meaningful and proactive if VLOPs were also to be able to initiate the dialogue. This would allow any issues experienced when applying Article 17 to be ironed out in the interest of cultivating best practices, as desired by the mechanism under Article 18.

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<sup>18</sup> Proposal for the EMFA, see footnote 1, Article 17.

### *User controls (Article 19)*

If users should have the possibility to change the default settings of a device or user interface under Article 19, it should be clarified as to what should be customised to achieve the aims of the Regulation.

Furthermore, Article 19 should be in line with Article 27 of the DSA – that there should be a specific section of the interface allowing users to select and modify their preferred recommender systems. However, as much as empowering users to decide on what content they view is a positive development, it is not clear to the manufacturers that these two provisions are interlinked in the EMFA which, therefore, may fail to result in a system that is easy to comply with and does not add unnecessary regulatory burdens.

In addition, there is a further risk of legal uncertainty with regard to the relationship between Article 19 of the EMFA and Article 7a of the AVMSD. The introduction of Article 19 of the EMFA raises some questions in terms of the consistency with the AVMSD due to the unclear relationship between national legislation regulating public value services and the users' right to customisation under the EMFA.

### **The existing EU framework and the principles of subsidiarity and proportionality**

The EMFA will need to fit into the current EU regulatory framework for media freedom and pluralism. This current regulatory framework takes the form of the DSA,<sup>19</sup> DMA,<sup>20</sup> EU Copyright Directive (hereinafter: 'EUCD'),<sup>21</sup> AVMSD,<sup>22</sup> the Platform-to-Business Regulation (hereinafter: the 'P2B Regulation'),<sup>23</sup> and the e-Commerce Directive.<sup>24</sup> The interactions between these instruments and the EMFA need to be considered in light of the Commission's Better Law-Making to ensure that overregulation and any burden on citizens, administrations and businesses, especially small and medium-sized enterprises are kept to a minimum.

The Commission's Better Regulation Guidelines indicate the importance of the overarching principle of subsidiarity.<sup>25</sup> In light of the increasingly cross-border nature of issue-at-hand resulting from the increasing role of digital technologies and the internet in EU consumers' day-to-day lives, should the legal certainty of the Proposal be strengthened, it could be said that the initiative does comply with the principle of subsidiarity.

Similar to the principle of subsidiarity, the importance of the principle of proportionality as an overarching principle of EU law is also emphasised within the Better Regulation Guidelines. In light of the fragmentation at national level, it is likely that the Proposal for the EMFA as a whole

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<sup>19</sup> DSA, see footnote 16.

<sup>20</sup> DMA, see footnote 17.

<sup>21</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92-125, available at: <https://eur-lex.europa.eu/eli/dir/2019/790/oj> (last accessed on 30 January 2023).

<sup>22</sup> AVMSD, see footnote 9.

<sup>23</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57-79, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R1150> (last accessed on 30 January 2023).

<sup>24</sup> e-Commerce Directive, see footnote 14.

<sup>25</sup> Better Regulation Guidelines, see footnote 2.

is necessary for achieving the Commission's aim of enhancing transparency and legal certainty and reducing regulatory fragmentation and market distortions.<sup>26</sup> Some provisions, in particular Articles 2, 14, 17, 18, and 19, are perhaps considered too broad and could be replaced by a finetuned solution that is lighter and less burdensome. If these provisions were replaced by a finetuned solution, it could be said that the Proposal complies with the principle of proportionality.

## Conclusion

The findings show that should the current Proposal for the EMFA become law, without any amendments to the current version, there would be a risk of overregulation in the field of media freedom and pluralism at the EU level. This would result in legal uncertainty, thus, requiring further elaboration on some provisions. There is also an overlap between the EMFA and other instruments, particularly the AVMSD, DSA, and e-Commerce Directive. Such overregulation and legal uncertainty would result in an administrative burden for media market players.

In terms of the provisions of the Regulation that may cause instances of overregulation and legal uncertainty, these are Articles 2, 14, 17, 18, and 19. These issues all bring into question some concerns with regard to the compliance of the Proposal with the principles of subsidiarity and proportionality. However, should these issues be addressed and, thus, the potential burden on media market players reduced, these principles would be in compliance with the Proposal and achieve the intended benefits, be targeted, be easy to comply with and would not add unnecessary regulatory burdens as per the EU institution's commitment to Better Law-Making.

To conclude, when moving onto the latter stages of the legislative procedure, the EU institutions should ensure that the Better Regulation Guidelines and Better Law-Making commitments are followed. It is important that the utmost coherence of the Proposal is achieved in order for it to fit effectively within the EU regulatory framework regarding media freedom and media pluralism and achieve its intended objectives when it comes to protecting media freedom and pluralism in the Union.

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<sup>26</sup> Proposal for the EMFA, see footnote 1.



## 1. Introduction

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On 16 September 2022, the Commission published the Proposal for the EMFA.<sup>27</sup> The Proposal delivers on the political commitment made by President von der Leyen in the 2021 State of the Union Address.<sup>28</sup> More specifically, as part of this Address, President von der Leyen stressed the importance of protections for journalists and the independence of media companies, highlighting that ‘media freedom means defending [...] democracy’.<sup>29</sup>

Media freedom and pluralism have long been considered pillars of democracy. At the EU level, the protection of media freedom and pluralism is included in the Charter,<sup>30</sup> the ECHR,<sup>31</sup> and the Copenhagen criteria for membership in the EU.<sup>32</sup> Free and pluralistic media allows those in power to be held to account and, therefore, allows citizens to make informed decisions based on reliable information.<sup>33</sup>

Media freedom and pluralism are already covered in multiple EU instruments. The EMFA, for instance, takes the AVMSD as its starting point when seeking to set rules to protect media pluralism and independence in the EU. As the EMFA will be joining this crowded field of legislation, it will need to be compatible with these instruments, as per the Commission’s Better Regulation Guidelines and the commitments made as part of the Institution’s agreement on Better Law-Making,<sup>34</sup> to allow for the utmost efficiency of EU policy.

The paper is a follow-up to our previous Research Paper<sup>35</sup> drafted before the publication of the Proposal for the EMFA. In this previous paper, we delved into some of the potential subjects that may be included in the Proposal, assessing the compatibility of the inclusion of these subjects with the pre-existing EU instruments in the area of media freedom and media pluralism, as well as whether these subjects would be consistent with the Commission’s Better Regulation Guidelines and the principles of subsidiarity and proportionality.

This paper aims to delve into what has been included as part of the Proposal for the EMFA, considering the compatibility of the Proposal with both the Better Regulation Guidelines, as well as considering the principles of subsidiarity and proportionality. As part of their commitments to Better Law-Making, the European Parliament, the Council of the European Union and the Commission agreed to simplify Union legislation and avoid overregulation and administrative burdens for citizens, administrations and businesses, especially small and

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<sup>27</sup> Proposal for the EMFA, see footnote 1.

<sup>28</sup> Proposal for the EMFA, see footnote 1. See also Ursula von der Leyen, State of the Union Address 2021, European Commission, available at: [https://state-of-the-union.ec.europa.eu/system/files/2022-12/soteu\\_2021\\_address\\_en.pdf](https://state-of-the-union.ec.europa.eu/system/files/2022-12/soteu_2021_address_en.pdf) (last accessed on 3 January 2022).

<sup>29</sup> State of the Union Address 2021, see Ibid.

<sup>30</sup> Charter of Fundamental Rights, see footnote 6, Article 11(2).

<sup>31</sup> ECHR, see footnote 7, Article 10. See, to affirm the importance of media pluralism in relation to Article 10, Guide on Article 10 on the European Convention on Human Rights, European Court of Human Rights, 30 April 2021, available at [https://www.echr.coe.int/documents/guide\\_art\\_10\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_10_eng.pdf) (last accessed 10 August 2022), p. 107 – 112.

<sup>32</sup> Consolidated Version of the Treaty on European Union, OJ C 326/13, 26.10.2012, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF) (last accessed on 26 January 2023), Article 49.

<sup>33</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, On the European democracy plan, COM/2020/790 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423> (last accessed on 26 January 2023).

<sup>34</sup> Better Regulation Guidelines, see footnote 2.

<sup>35</sup> Spark Legal Network, ‘Research Paper on the European Union’s initiative on ‘Safeguarding media freedom and pluralism in the internal market (Media Freedom Act)’, 8 September 2022, available at <<https://www.sparklegallnetwork.eu/research-paper-on-the-proposal-for-a-european-media-freedom-act>> (last accessed on 30 January 2023).

medium-sized enterprises.<sup>36</sup> As such, it is important that the Commission ensures that 'regulation achieves benefits, is targeted, easy to comply with and does not add unnecessary regulatory burdens'.<sup>37</sup> It is also important that the principles of subsidiarity, proportionality and fundamental rights are fully respected.<sup>38</sup>

Therefore, in order to successfully assess the compatibility of the Proposal for the EMFA with pre-existing EU instruments, we will first set the scene in Section 2 with what is contained in the Commission's Proposal for the EMFA. Following this, in Section 3, we will look at the content of the Regulation that may appear to result in practical complexities, before delving into looking at the pre-existing EU legal framework in the field of media freedom and pluralism and the principles of subsidiarity and proportionality; this is with particular regard to whether or not elements would adhere to the Commission's Better Regulation Guidelines and the commitments made as part of the Institution's agreement on Better Law-Making.

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<sup>36</sup> Better Law-Making, see footnote 3.

<sup>37</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Better regulation: Joining forces to make better laws, COM/2021/219 final, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52021DC0219> (last accessed on 26 January 2023).

<sup>38</sup> Better Law-Making, see footnote 3.

## 2. The European Commission's Proposal for a European Media Freedom Act

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### 2.1. Introduction

The Proposal for the EMFA was published by the European Commission on 16 September 2022. Underpinned by the fact that free media is 'a key pillar of every democracy'<sup>39</sup> in the EU, the Proposal focuses on the independence and stable funding of public service media, as well as the transparency of media ownership and the allocation of state advertising. The Proposal includes, *inter alia*, measures safeguarding against political interference in editorial decisions and against surveillance, and measures to protect the independence of editors and disclose conflicts of interest. The Proposal undoubtedly represents a significant step in EU legislative initiatives regarding free media, forming the most recent addition to a rather crowded EU regulatory landscape regarding media freedom and pluralism. This section of the paper will discuss the key steps leading up to the Proposal, the overarching objectives of the Proposal, along with the key aspects and notable provisions included within. Finally, this section will briefly outline the next steps in the legislative process, following the publication of the Proposal.

### 2.2. Recap: Lead up to the EMFA Proposal

As discussed in our previous paper,<sup>40</sup> the EMFA represents the most recent step in a collection of targeted actions by the EU to regulate media freedom and pluralism. There are several key pre-existing legislative and policy initiatives which touch upon media pluralism and freedom in some respects. These include, *inter alia*, the EUCD, the AVMSD, the P2B Regulation, the Code of Practice on Disinformation, the DSA, and the DMA.

The publication of the Proposal succeeds these legislative initiatives, reflective of the increased priority placed by the Commission on media freedom and pluralism in recent years. Following the 2021 speech by Commissioner Breton<sup>41</sup> and the 2021 State of the Union Address by President von der Leyen,<sup>42</sup> the 2022 Commission Work Programme listed a specific priority to table an EU Media Freedom Act by Q3 of 2022. The Commission highlighted an objective to 'improve transparency, accountability and independence around actions affecting media freedom and pluralism'.<sup>43</sup> Furthermore, Commissioner Jourová stated an overarching goal of harmonising media pluralism regulation at EU level by stating that 'the Commission will propose

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<sup>39</sup> European Commission press release, European Media Freedom Act, 16 September 2022, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan/european-media-freedom-act\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan/european-media-freedom-act_en)

<sup>40</sup> Research Paper on the European Union's initiative on 'Safeguarding media freedom and pluralism in the internal market (Media Freedom Act)', 8 September 2022, see footnote 35.

<sup>41</sup> It was in speech where the European Media Freedom Act (EMFA) was first announced. See further, European Commission, For a 'European Media Freedom Act', 19 April 2021, [For a « European Media Freedom Act » | European Commission \(europa.eu\)](https://ec.europa.eu/communication/en/for-a-european-media-freedom-act) (last accessed 26 January 2023).

<sup>42</sup> 2021 State of the Union Address by President von der Leyen, see footnote 28.

<sup>43</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2022: Making Europe Stronger Together, COM/2021/645 final, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:645:FIN&pk\\_campaign=Communication%20&pk\\_source=EURLEX&pk\\_medium=TW&pk\\_keyword=Work%20programme](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:645:FIN&pk_campaign=Communication%20&pk_source=EURLEX&pk_medium=TW&pk_keyword=Work%20programme) (last accessed 15 August 2022).

common rules and safeguards to protect the independence and the pluralism of the media.’<sup>44</sup> This goal of tabling the act was followed by a Call to Evidence for an Impact Assessment published in December 2021,<sup>45</sup> the Feedback Period for the Call to Evidence and for the Consultation period, both of which took place from January to March 2022.

As discussed in our previous paper,<sup>46</sup> the Impact Assessment outlined three potential options for the safeguarding of media freedom and pluralism in the media market: 1) the Commission does nothing; 2) a Recommendation addressed to the Member States; and 3) a legislative instrument. Each of these options is outlined below:

**Figure 1 - The policy actions proposed by the Commission in the Impact Assessment**

Option 1: No action	Option 2: Recommendation	Option 3: Legislative instrument
<ul style="list-style-type: none"> <li>• No changes to the current legislative framework.</li> <li>• Continuing the monitoring of the national developments via the Rule of Law Reports.</li> <li>• The AVMSD would continue to be the only instrument of EU media law.</li> <li>• No possibility for the EU to intervene in media market transactions.</li> <li>• Independent media regulators within ERGA would continue to play a role in ensuring the enforcement of existing EU media law, but without structured cooperation channels.</li> </ul>	<ul style="list-style-type: none"> <li>• A recommendation to encourage Member States to implement actions in relation to, amongst others:               <ul style="list-style-type: none"> <li>▪ national scrutiny procedures over media market operations;</li> <li>▪ restrictions to market entry and operation;</li> <li>▪ media ownership transparency;</li> <li>▪ protection of editorial independence and media diversity; and</li> <li>▪ transparent allocation of resources.</li> </ul> </li> <li>• Monitoring mechanism for the Commission to encourage its application by Member States.</li> </ul>	<ul style="list-style-type: none"> <li>• EU legislation establishing:               <ul style="list-style-type: none"> <li>○ common principles for national scrutiny procedures of media market transactions and other restrictions to market entry and operation of the media;</li> <li>○ measures to enhance transparency of media markets;</li> <li>○ principles for the protection of editorial independence of the media and the transparent allocation of state resources in the media sector;</li> <li>○ consistent regulatory and self-regulatory standards relevant for media pluralism, offline and online;</li> <li>○ a framework for media companies to foster innovation and cooperation across borders.</li> </ul> </li> <li>• An effective and independent monitoring mechanism and a structured cooperation framework for media regulator.</li> </ul>

Evidently, the option chosen by the Commission was Option 3, thereby leading to the Proposal for a Regulation establishing a common framework for media services in the internal market, otherwise known as the Proposal for the EMFA.

<sup>44</sup> European Commission Press Release, ‘European Media Freedom Act: Commission launches public consultation’, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_85](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_85) (last accessed 18 August 2022).

<sup>45</sup> Call for Evidence for an Impact Assessment, Safeguarding media freedom and pluralism in the internal market (Media Freedom Act), Ares(2021)7899801 – 21/12/2021, available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules_en) (last accessed 15 August 2022).

<sup>46</sup> Research Paper on the European Union’s initiative on ‘Safeguarding media freedom and pluralism in the internal market (Media Freedom Act)’, 8 September 2022, see footnote 35.

## 2.3 The Proposal: Overarching objectives and key aspects

### 2.3.1. Overview and Objectives

As the title suggests, the Proposal would seek to establish a common regulatory framework at the Member State level for media services in order to address the fragmented approaches which currently exist at national level. In this regard, a Regulation is the favoured type of instrument by the Commission, as a common set of rules would be directly applicable in each Member State. As anticipated in our previous paper, the legal basis for the Proposal is Article 114 TFEU.<sup>47</sup> This Article refers to the approximation of the provisions laid down in law, regulation, or administrative action in Member States, having as its objective the establishment and functioning of the internal market. The Proposal is also underpinned by the EU's objective to protect fundamental rights that are common to the EU and the Member States. Specifically, the Proposal seeks to provide increased protection for the freedom of expression across the EU, protected by Article 11 of the Charter, which corresponds to Article 10 of the ECHR. The proposed Regulation would have a considerably broad reach, as provisions are proposed which would impact media providers and online platforms, media services, governments and media regulators.<sup>48</sup> Importantly, the Proposal would also amend the AVMSD, under Articles 7 to 12, as well as Article 27.

As outlined in the explanatory memorandum, the Proposal focuses on tackling several key issues, which are centred around the following four specific objectives:

- to foster cross-border activity and investment in media services by harmonising diverging national media pluralism frameworks;
- to increase regulatory cooperation and convergence through cross-border coordination tools and EU-level opinions and guidelines;
- to facilitate the provision of quality media services by mitigating the risk of undue public and private interference in editorial freedom; and
- to ensure transparent and fair allocation of economic resources in the internal media market by enhancing transparency and fairness in audience measurement and allocation of state advertising.<sup>49</sup>

### 2.3.2. Key aspects and notable provisions

The Proposal is divided into four chapters, constituting 28 Articles in total. Each chapter, along with any notable provisions will be discussed below.

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<sup>47</sup> TFEU, see footnote 4.

<sup>48</sup> See footnote 8, the Explanatory Memorandum of the Proposal for the EMFA and EPRS Study, p. 6.

<sup>49</sup> Ibid, p. 7.

## *Chapter I – General Provisions*

Chapter I of the Proposal comprises General Provisions and sets out the subject matter and scope, along with the relevant definitions under Article 2. The definitions provided under Article 2 include, amongst others, ‘media service’, ‘media service provider’, ‘editorial responsibility’, ‘provider of a very large online platform’, ‘video-sharing platform service’, and ‘media market concentration’.<sup>50</sup> As per Article 2, a ‘media service’ is a service as defined by Articles 56 and 57 TFEU,<sup>51</sup> ‘where the principal purpose of the service of a dissociable section thereof consists in 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’.<sup>52</sup> Furthermore, a ‘media service provider’ is defined as ‘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.’ VLOPs may fall into the definition of a ‘media service provider’ if they exercise ‘editorial control’ as indicated by Recital 8.<sup>53</sup> This raises questions on the roles and responsibilities of the entities caught in both definitions (see Section 3.1 below for further information on this point).

## *Chapter II – Rights and duties of recipients of media service providers and recipients*

Chapter II outlines the rights and duties of media service providers and recipients, including four Articles to this effect. Article 3 provides a general right for recipients of media services to receive ‘a plurality of news and current affairs content, produced with respect for editorial freedom of media service providers, to the benefit of the public discourse’, while Articles 4-6 outline the rights, duties and safeguards pertaining to public service media providers and their functioning. Specifically, Article 4 provides the rights of media service providers and includes aspects such as the right to exercise economic activities and to be respected regarding editorial freedom; Article 5 provides safeguards for the independent functioning of public service media providers; and Article 6 provides the duties of media service providers providing news and current affairs content specifically.

## *Chapter III – Framework for regulatory cooperation and a well-functioning internal market for media services*

Chapter III is the most substantial chapter of the Proposal, providing a framework for regulation cooperation and a well-functioning internal market for media services. It is divided into six sections:

- Section I – Independent media authorities;
- Section II – European Board for Media Services;
- Section III – Regulatory cooperation and convergence;
- Section IV – Provision of media services in a digital environment;

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<sup>50</sup> See further, Proposal for the EMFA, see footnote 1, Article 2.

<sup>51</sup> Article 56 and 57 TFEU define a ‘service’ as ‘[...]provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. ‘Services’ shall in particular include: (a) activities of an industrial character; (b) a commercial character; (c) activities of craftsmen, (d) activities of the professions’. TFEU, see footnote 4.

<sup>52</sup> Proposal for the EMFA, see footnote 1, Article 2(1).

<sup>53</sup> Ibid, Recital 8.

- Section V – Requirements for well-functioning media market measures and procedures;
- Section VI – Transparent and fair allocation of economic resources.

Sections I and II principally relate to the amendment of the AVMSD,<sup>54</sup> through increased responsibilities for NRAs or bodies, and through the establishment of the EBMS, comprised of the national media authorities. Notably, the Board will replace and succeed the European Regulators Group for Audiovisual Media Services (hereinafter: ‘ERGA’), which was established as part of the AVMSD.<sup>55</sup> The Board would have full independence<sup>56</sup> and the overall purpose of ‘promot[ing] the effective and consistent application of this Regulation’.<sup>57</sup> In order to achieve this objective, the Board will have a number of tasks within its remit, such as: 1) promoting cooperation and the effective exchange of information between national authorities;<sup>58</sup> 2) drawing up opinions assessing the impact on media pluralism and editorial independence of a notifiable media market concentration where such concentration may affect the functioning of the internal market<sup>59</sup> in accordance with Article 21(5); and 3) organising a structured dialogue between providers of VLOPs, representatives of MSPs and of civil society in accordance with Article 18, with the results reported to the Commission.<sup>60</sup>

Section III concerns regulatory cooperation and convergence, including provisions on structured cooperation between national authorities,<sup>61</sup> guidance on media regulation matters,<sup>62</sup> and requests for enforcement of obligations by VSPs. Article 14, in particular, is quite notable; this is because it provides a mechanism for an NRA to request another NRA to ‘take necessary and proportionate actions for the effective enforcement of the obligations imposed on video-sharing platforms’,<sup>63</sup> in accordance with Article 28b of the AVMSD. Article 28b of the AVMSD outlines a series of provisions pertaining to VSPs, which include requirements for Member States to ensure that that VSPs protect both minors from harmful content and the general public from incitement to violence or hatred and child sexual exploitation and abuse, terrorist material and any other content which constitutes an activity that is a criminal offence under Union law.

Section IV of this Chapter regulates the provision of media services in a digital environment, and includes a number of weighty provisions, notably Articles 17, 18, 19, and 21. Article 17 stipulates that VLOPs shall provide a functionality allowing media providers to self-declare that they are an MSP according to the definition provided under Article 2(2), as outlined above. Under such self-declaration, MSPs must also declare that they are editorially independent of Member States and third countries and that they are subject to regulatory requirements for the exercise of editorial responsibility in one or more Member States or adhere to a co-

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<sup>54</sup> Ibid, Article 30.

<sup>55</sup> Ibid, Article 8.

<sup>56</sup> Ibid, Article 9.

<sup>57</sup> Ibid, Article 12.

<sup>58</sup> Ibid, Article 12(b).

<sup>59</sup> Ibid, Article 12(g).

<sup>60</sup> Ibid, Article 12(l).

<sup>61</sup> Ibid, Article 13.

<sup>62</sup> Ibid, Article 15.

<sup>63</sup> Ibid, Article 14(1).

regulatory or self-regulatory mechanism governing editorial standards. The Proposal does not provide any further guidance on this self-declaration mechanism aside from the above.

Article 18 provides for structured dialogue, namely between the Board and providers of VLOPs, representatives of MSPs and representatives of civil society. The purpose of this dialogue, the results of which would be shared with the Commission,<sup>64</sup> is three-fold: 1) to discuss experience and best practices in the application of Article 17 of this Regulation; 2) to foster access to diverse offers of independent media on VLOPs; and 3) to monitor adherence to self-regulatory initiatives aimed at protecting society from harmful content, including disinformation and foreign information manipulation and interference.<sup>65</sup>

Article 19 provides for the right of customisation of audiovisual media offer. The provision requires that manufacturers of devices or providers of user interfaces which control or manage the access to, and use of audiovisual media services, should allow service recipients to have the possibility to change the default settings of a device or user interface.

Section V concerns requirements for well-functioning media market measures and procedures, including provisions on national measures affecting the operation of media service providers,<sup>66</sup> and the assessment of and opinion on media market concentrations.<sup>67</sup> In particular, Article 21 is interesting to consider. This Article provides for the assessment of media market concentrations. Notably, the Article provides that competition authorities consider the impact of any media market concentrations, not only for the traditional reasons of assessing the impact on the market, but also any concentration that could have a significant impact on media pluralism and editorial independence.

Section VI deals with the transparent and fair allocation of economic resources, containing provisions pertaining to audience measurement<sup>68</sup> and notably the allocation of state advertising.<sup>69</sup>

#### *Chapter IV – Final provisions*

Finally, Chapter IV outlines the final provisions regarding monitoring,<sup>70</sup> evaluation and reporting,<sup>71</sup> amendments to the AVMSD,<sup>72</sup> and entry into force.<sup>73</sup>

#### **2.3.3. Next Steps: Legislative Process**

Following the publication of the Proposal in September 2022, the Proposal was announced in the European Parliament plenary session on 17 October 2022. The Committee on culture and

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<sup>64</sup> Ibid, Article 18(2).

<sup>65</sup> Ibid, Article 18(1).

<sup>66</sup> Ibid, Article 20.

<sup>67</sup> Ibid, Articles 21 and 21.

<sup>68</sup> Ibid, Article 23.

<sup>69</sup> Ibid, Article 24.

<sup>70</sup> Ibid, Article 25.

<sup>71</sup> Ibid, Article 26.

<sup>72</sup> Ibid, Article 27.

<sup>73</sup> Ibid, Article 28.



education (CULT) is the lead Committee and the Committee on Internal Market and Consumer Protection (IMCO) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) will be consulted. Sabine Verheyen, a German Member of European Parliament, was appointed as rapporteur on 9 February 2023. Pursuant to Article 114 TFEU, the European Economic and Social Committee (EESC) were consulted and published its opinion on the Proposal.<sup>74</sup> The European Data Protection Supervisor adopted its opinion on 11 November 2022.<sup>75</sup> As of 29 March 2023, the legal services of the European Parliament and the Council have concluded that the legal basis of the Proposal for the EMFA is appropriate.

The European Council has commenced discussions regarding the Proposal; in November 2022, a progress report was presented and discussed within the Audiovisual and Media Working Party.<sup>76</sup> These discussions are still ongoing, as April 2023. The Proposal has caused a variety of reactions from the Member States, with several issues raised regarding aspects such as the legal basis, the scope and definitions under Chapter 1, and the oversight regarding the proposed EBMS.

The Proposal is currently awaiting committee decision following the first reading by the European Parliament. It is anticipated that the Proposal will also garner considerable reaction from stakeholders during the legislative process, owing to the significance that the proposed Regulation could have on media freedom across the Union and the number of stakeholders impacted by such a Regulation.

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<sup>74</sup> See further, EESC, 'European Media Freedom Act', 14 December 2022, SOC/742-EESC-2022, available at <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/european-media-freedom-act> (last accessed 30 January 2023).

<sup>75</sup> Opinion of the European Data Protection Supervisor on 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 2022/C 487/07, 11 November 2022, available at [https://edps.europa.eu/data-protection/our-work/publications/opinions/2022-11-11-opinion-european-media-freedom-act\\_en](https://edps.europa.eu/data-protection/our-work/publications/opinions/2022-11-11-opinion-european-media-freedom-act_en) (last accessed 27 January 2023).

<sup>76</sup> See further, General Secretariat of the Council, 'Regulation establishing the European Media Freedom Act – Progress report', 2022/0277(COD), available at <https://data.consilium.europa.eu/doc/document/ST-14440-2022-INIT/en/pdf> (last accessed 27 January 2023).

## 3. An analysis of the Proposal for the EMFA

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### 3.1. Introduction

The following section will delve into the content of the Regulation that may appear to result in practical complexities. The main focus when exploring such complexities is whether or not elements would adhere to the Commission's Better Regulation Guidelines<sup>77</sup> and the commitments made as part of the Institution's agreement on Better Law-Making.<sup>78</sup> Following the review of the content of the Proposal for the EMFA, there will be some further elaboration on the existing EU legal framework on media freedom and pluralism and the principles of subsidiarity and proportionality; this will also focus on whether these are adhered to as per the Commission's Better Regulation Guidelines.

### 3.1. A deeper look at the Proposal for the EMFA

This section will consist of a deeper look at the content of the Proposal for the EMFA. It will specifically consider the commitments made by the Commission as part of their Better Law-Making, particularly the aim to avoid overregulation and administrative burdens for citizens,<sup>79</sup> and ensuring that the Regulation achieves benefits, is targeted, easy to comply with and does not add unnecessary regulatory burdens.<sup>80</sup>

The following points will be considered in this section: 1) the definitions of 'media service' and 'media service provider' under Article 2; 2) the erosion of the country-of-origin principle under Article 14; 3) the statement of reason and expedited appeals, as well as the self-declaration regime under Article 17; 4) the structured dialogue under Article 18; and 5) the user controls under Article 19.

#### *Definitions of 'media service' and 'media service providers' (Article 2)*

Article 2 sets out the definitions that shall apply for the purposes of the Regulation.<sup>81</sup> The definitions provided in the Regulation should be as clear as possible so that the Regulation can achieve its intentions when it comes to ensuring that both MSPs and other stakeholders (e.g. third-party services carrying MSPs) can comply with their respective obligations under the EMFA and that the authorities are able to enforce the rules.

The first definition provided in the EMFA is that of a 'media service'. A 'media service' is a service as defined by Articles 56 and 57 TFEU,<sup>82</sup> 'where the principal purpose of the service of a dissociable section thereof consists in providing programmes or press publications to the general public, by any means in order to inform, entertain or educate, under the editorial

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<sup>77</sup> Better-Law Making, see footnote 3.

<sup>78</sup> Better Regulation Guidelines, see footnote 2.

<sup>79</sup> Better Law-Making, see footnote 3.

<sup>80</sup> Ibid.

<sup>81</sup> Proposal for the EMFA, see footnote 1, Article 2.

<sup>82</sup> Article 56 and 57 TFEU define a 'service' as '[...]provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include: (a) activities of an industrial character; (b) a commercial character; (c) activities of craftsmen, (d) activities of the professions'. TFEU, see footnote 4.

responsibility of a media service provider'.<sup>83</sup> Recital 7 provides some exclusions to this definition – 'user-generated content uploaded onto a platform unless it constitutes a professional activity provided for consideration', private correspondence, services without the principal purpose of providing audiovisual or audio programmes or press publications, and corporate communication and distribution of informational or promotional materials for public or private entities'.<sup>84</sup> However, a clear criterion and specific indicators may be beneficial to provide the utmost clarity as to what is classified as a 'media service' under the EMFA. This is because at the present time, it is unclear as to who specifically would fall into this bracket beyond traditional media services.<sup>85</sup> It is important regarding both legal certainty and the effectiveness of the Proposal that providers are concretely aware of whether they are operating a media service and, therefore, need to comply with the provisions of the EMFA.

The definition of most interest is that of a 'media service provider'. This is defined as '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 which it is organised'.<sup>86</sup> Recital 8 calls into question the clarity of this provision – considering that as long as VLOPs play a key role in the content organisation, including by automated means or algorithms, they can be an MSP – even if they do not exercise editorial responsibility – if they have started to exercise editorial control.<sup>87</sup> It is unclear as to what the distinction is between 'editorial responsibility' and 'editorial control'. 'Editorial responsibility' is defined in Article 2 as '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'.<sup>88</sup> It can be derived from the wording of the Recital that 'editorial control' is the beginning of the process of gaining 'editorial responsibility', but the lack of definition leaves it to the imagination as to how much editorial control needs to be exerted in order for a media service to be provided.

Furthermore, the concept of 'editorial control' in this respect is contrary to the provisions of the e-Commerce Directive and the DSA. The e-Commerce Directive provides a clear liability exemption for service providers for removing or disabling access to illegal content online for services that play a neutral, merely technical, and passive role towards hosted content'. In such cases, it is implied that 'the information society provider has neither knowledge of nor control over the information which is transmitted or stored'.<sup>89</sup> This aligns with the approach taken in the DSA. In the DSA, it is stated that 'the fact that the provider automatically indexes information uploaded to its service, that it has a search function or that it recommends information on the basis of the profiles or preferences of the recipients of the service is not a sufficient ground for considering that provider to have 'specific' knowledge of illegal activities carried out on that platform or of illegal content stored on it'.<sup>90</sup> This lack of 'specific knowledge' brought about by algorithms seems to bring into question whether 'editorial control' as

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<sup>83</sup> Proposal for the EMFA, see footnote 1, Article 2(1).

<sup>84</sup> Ibid, Recital 7.

<sup>85</sup> 'Traditional media services' includes newspapers, magazines, radio, television, and billboards.

<sup>86</sup> Proposal for the EMFA, see footnote 1, Article 2(2).

<sup>87</sup> Ibid, Recital 8.

<sup>88</sup> Ibid, Article 2(9).

<sup>89</sup> e-Commerce Directive, see footnote 14, Recital 42.

<sup>90</sup> DSA, see footnote 16, Recital 22.

provided under the EMFA is possible in light of pre-existing EU legislation. The e-Commerce Directive and DSA provide that no control can be had where there is no specific knowledge brought about by algorithms, which contradicts the EMFA, where it is acknowledged that control can be determined by knowledge brought about by algorithms. This contradiction seems potentially starker considering that Article 1(2) of the Proposal stipulates that the Regulation shall not affect the rules laid down by the DSA.<sup>91</sup>

The editorial responsibility of VSPs is referred to as part of the AVMSD, yet no reference is made to this in the Proposal for the EMFA. Specifically, in the AVMSD, it is provided that VSPs are not under editorial responsibility; however, those providers determine the organisation of the content, including by automatic means or algorithms.<sup>92</sup> This function means that under the AVMSD, VSPs are required to take appropriate measures to protect both children from harmful content and the general public from content that incites to violence or hatred.<sup>93</sup> In the EMFA, it is explicitly stated that VSPs could constitute MSPs should they exercise ‘editorial control’ – in such case, they would then be subject to the requirements under the EMFA.<sup>94</sup> The same issues as above are duplicated in the sense that it is uncertain as to what specifically constitutes ‘editorial control’ in the context of VSPs. Therefore, the uncertainty and fragmentation of EU law in this circumstance may conflict with the Commission’s Better-Law Making by resulting in overregulation and administrative burdens for citizens, administrations, and businesses, due to the rules for VSPs being spread beyond the AVMSD with citizens, administrations, and businesses now having to consider the EMFA and determine whether their VSP also exercises ‘editorial control’ and constitutes an MSP as well as a VSP. The avoidance of such overregulation and administrative burden could be achieved by delineating between VLOPs and VSPs, with VLOPs tackled in the EMFA and VSPs in the AVMSD.

### *Erosion of the country-of-origin principle (Article 14)*

The country-of-origin principle was established as part of the e-Commerce Directive. This provides that when providing a service, providers are subject to the jurisdiction of their country of establishment.<sup>95</sup> This is a foundational principle of the internal market.<sup>96</sup>

Despite being established as part of the e-Commerce Directive, the country-of-origin principle is reiterated in the AVMSD, DSA, and DMA. In the AVMSD, it is explicitly stated that ‘[t]he country-of-origin principle shall be regarded as the core of this Directive’ and ‘should be applied to all audiovisual media services in order to ensure legal certainty for media service providers’.<sup>97</sup> Similarly, the DSA states that ‘the powers to supervise and enforce the obligations under this Regulation should be conferred to the competent authority in the Member State where the

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<sup>91</sup> Proposal for the EMFA, see footnote 1, Article 1(2).

<sup>92</sup> AVMSD, see footnote 9, Recital 47.

<sup>93</sup> AVMSD, see footnote 9, Article 28b.

<sup>94</sup> Proposal for the EMFA, see footnote 1, Recital 8.

<sup>95</sup> e-Commerce Directive, see footnote 14, Recital 22.

<sup>96</sup> The country-of-origin principle has been used in many different areas EU law, including financial services, insurance, broadcasting, electronic commerce and transport. As such, as well as the e-Commerce Directive, AVMSD, DSA, and DMA, the country-of-origin principle can be found, *inter alia*, in Directive 2013/36/EU (Credit Institutions), Directive 2004/39/EC on markets in financial interests, and Directive 2009/138/EC (Solvency II).

<sup>97</sup> AVMSD, see footnote 9, Recital 33.

main establishment of the provider of the intermediary services is located’.<sup>98</sup> Furthermore, in the DMA, the principle is adhered to with rules focusing on the national competent authority of the Member State enforcing rules.<sup>99</sup> This consistency throughout the legislation regulating the EU’s media law framework shows how this principle is inherent when it comes to facilitating the free movement of MSPs and, thus, encouraging cross-border competition.

In light of the above, it is important that the country-of-origin principle is still respected in the EMFA to ensure that the DSA, DMA and AVMSD are not undermined or confused. In particular, with replacing the ERGA with the EBMS, it should be brought to attention that the EBMS should not be granted new powers that risk undermining the country-of-origin principle in order to safeguard legal certainty for cross-border businesses. Some concern that this principle may be undermined stems from Article 14 of the EMFA<sup>100</sup> which introduces requests for the enforcement of obligations for VSPs between national authorities.<sup>101</sup> This provision leaves open the chance for one national authority to request the enforcement of an obligation in circumstances where such enforcement is not provided for under its national law. Therefore, a reminder of the country-of-origin principle could be a welcome inclusion to this provision to safeguard legal certainty. This would make it clear that despite such a request from another Member State, the competent national authorities in the Member State where the services are located will remain responsible and the MSPs will continue operating under the rules of that competent authority, despite any requests for enforcement from other national authorities.

#### *Statement of reason and expedited appeals and self-declaration regime (Article 17)*

According to Article 17, VLOPs shall provide a functionality allowing media providers to self-declare that they are an MSP according to the definition under Article 2(2).<sup>102</sup> They must also provide that they are editorially independent of Member States and third countries and that they are subject to regulatory requirements for the exercise of editorial responsibility in one or more Member States or adheres to a co-regulatory or self-regulatory mechanism governing editorial standards.<sup>103</sup>

Following such self-declaration, MSPs gain four privileges:

1. When a VLOP decides to suspend an MSP on the grounds that its published content is incompatible with the VLOP’s terms and conditions, it must provide a ‘statement of reasons’ prior to the suspension taking effect.
2. Expedited appeals after content removal, whereby any complaints by MSPs should be processed and decided upon with priority and without undue delay.

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<sup>98</sup> DSA, see footnote 16, Recital 123.

<sup>99</sup> DMA, see footnote 17, Arts. 22, 23, 26, 27, ff.

<sup>100</sup> Proposal for the EMFA, see footnote 1, Article 14.

<sup>101</sup> See, for instance, from the Computer & Communication Industry Association, Safeguarding media independence and pluralism: Position paper on the European Media Freedom Act, December 2022, available at: <https://ccianet.org/wp-content/uploads/2022/12/CCIA-position-paper-European-Media-Freedom-Act.pdf> (last accessed on 23 January 2023), p. 5-6.

<sup>102</sup> Proposal for the EMFA, see footnote 1, Article 17. Please also see above for a commentary of the issues regarding the definition of ‘media service provider’ under Article 2(2) of the Proposal for the EMFA.

<sup>103</sup> Proposal for the EMFA, see footnote 1, Article 17.

3. All content management around MSP content needs to be published via a transparency report; and
4. When an MSP considers that a VLOP frequently restricts or suspends the provision of its services without sufficient grounds, the VLOP has to engage in meaningful and effective dialogue with the MSP with a view to finding a solution for ending unjustified restrictions or suspensions and avoiding them in future.<sup>104</sup>

The two principal concerns when it comes to Article 17 are: 1) the criterion for self-declaration is uncertain and open to abuse, and 2) the conflicting relationship between the EMFA and DSA.

### **The criteria for self-declaration is uncertain and open to abuse**

The criteria for self-declaration seems to be especially unclear in terms of what is specifically required for an MSP to self-declare.

The first criterion for self-declaration is that of *'editorial independence from Member States and third countries'*. Editorial independence is not defined in the EMFA, nor anywhere else in Union law. In the basic sense, editorial independence is the freedom of editors to make decisions without interference. The EMFA only refers to editorial independence from Member States and third countries but provides nothing on the extent of independence required.<sup>105</sup> Editorial independence has many factors; it does not just involve legal and political factors, but also issues concerning financial support, business, and revenue models and vertical or horizontal integration.<sup>106</sup> An example of perhaps a more complex instance could be where a person with a clear, but not officially declared, political bias is providing significant financial support to an MSP which may indirectly influence the editorial decisions made. In such a scenario, questions may be raised as to whether this could be considered editorially independent. Furthermore, different VLOPs may approach the situation differently resulting in an inconsistent application of Article 17. In light of this, it seems important that more parameters need to be set when it comes to assessing what is considered to be a sufficient level of *'editorial independence'* when self-declaring as an MSP. If such parameters are set, it could perhaps be helpful to have an independent vetting mechanism to ensure the consistent application of Article 17. This would help improve the legal certainty of this provision to bring it in line with the common commitment and objective of *'legal certainty'* as provided in the Interinstitutional Agreement for Better Law-Making.<sup>107</sup>

The second criterion for MSPs to benefit from the privileges under Article 17 is that they must be subjected to *'regulatory requirements for the exercise of editorial responsibility in one or more Member States'* or *'adhere to self-regulatory or co-regulatory mechanisms that are widely recognised in one or more Member States'*.<sup>108</sup> This criterion does bring some questions as to what could be considered as *'widely recognised'* and deduced to be conducive to editorial

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<sup>104</sup> Ibid, Article 17.

<sup>105</sup> Ibid, Article 17.

<sup>106</sup> See Recommendation CM/Rec(2022)11 of the Committee of Ministers to Member States on principles for media and communication governance (Adopted by the Committee of Ministers on 6 April 2022 at the 1431<sup>st</sup> meeting of the Ministers' Deputies), Council of Europe, April 2022, available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a61712](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712) (last accessed on 24 January 2023).

<sup>107</sup> Better Law-Making, see footnote 3, p. 2.

<sup>108</sup> Proposal for the EMFA, see footnote 1, Article 17.

responsibility. In 2022, the Media Pluralism Monitor generally ranked countries for media pluralism with only seven Member States found to pose a low risk to the erosion of media pluralism.<sup>109</sup> Therefore, it could be brought into question whether MSPs subjected to widely recognised regulatory requirements in so-called high-risk countries<sup>110</sup> could be exercising ‘editorial responsibility’ in line with the aims of the EMFA. Furthermore, should the low-risk countries be distinguished as those Member States that are ‘widely recognised and accepted’, this could become a politically sensitive topic.

However, under Article 7 of the EMFA, it is provided that the NRAs, as referred to in Article 30 of the AVMSD, shall be responsible for the application of Chapter III (Articles 7 – 24) of the Regulation. In light of this, it may be the intention for NRAs to consider what constitutes a ‘widely recognised’ co-regulatory or self-regulatory mechanism and, thus, deduced to be conducive to editorial responsibility. The way in which this will be executed is still up for question with no concrete method provided by the Regulation assisting NRAs with deducing what constitutes a ‘widely recognised’ co-regulatory or self-regulatory mechanism. Therefore, it would be beneficial for the Commission to improve the legal certainty of this provision by making it clearer whether and how the NRAs can decide whether or not an MSP is exercising editorial responsibility.

Furthermore, the lack of clarity in the abovementioned criteria for self-declaration may open up the potential for abuse where MSPs self-declare in order to gain privileges from VLOPs as a result of their declaration. This potential for abuse may undermine the effectiveness of the EMFA. For instance, there is nothing in place to prevent potential conspiracy theorist websites from self-declaring as an MSP and, thus, being granted the privileges attached to Article 17. This may result in disinformation being spread more broadly online with such websites posing as credible media through their declaration, which would go against the aim of the EMFA to reduce disinformation on VLOPs.<sup>111</sup> An increase in the clarity of the provision itself is important to avoid such exploitation and, thus, ensure that the provision does not go against the aims of the EMFA, especially in light of the fact that legal certainty is a general principle of EU law.<sup>112</sup> As above, it could perhaps be helpful to have an independent vetting mechanism in order to ensure that Article 17 cannot be abused by ‘MSPs’ self-declaring to gain privileges from VLOPs.

### **The relationship between the EMFA and DSA**

The DSA introduced the concept of a VLOP. In Article 34 of the DSA, VLOPs must take into account systemic risks of content moderation with a potential impact on the ‘freedom of expression and of information, including media freedom and pluralism’.<sup>113</sup> Under the DSA, MSPs have access to VLOPs’ internal complaint-handling mechanisms and out-of-court dispute settlement.<sup>114</sup> Therefore, considering the fact that Article 17 applies to ‘VLOPs’, it is important

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<sup>109</sup> Monitoring media pluralism in the Digital Era 2022, EUI Centre for Media Pluralism and Media Freedom, available at: <https://cadmus.eui.eu/bitstream/handle/1814/74712/MPM2022-EN-N.pdf?sequence=1&isAllowed=y> (last accessed on 30 January 2023), p. 121.

<sup>110</sup> Ibid.

<sup>111</sup> See, for instance, Proposal for the EMFA, see footnote 1, Recital 3.

<sup>112</sup> Better-Law Making, see footnote 3, p. 2.

<sup>113</sup> DSA, see footnote 16, Article 34.

<sup>114</sup> Ibid.

that the EMFA is aligned with the DSA to prevent any contradictions and, thus, fragmentation of EU law that would be contrary to the Commission’s Better Regulation Guidelines.<sup>115</sup>

Under Article 17, VLOPs have the responsibility to determine what qualifies as a genuine MSP.<sup>116</sup> Recital 33 of the EMFA states that VLOPs retain the possibility not to accept self-declaration where they consider that the conditions are not met. However, these platforms are not the best fit to assess this type of information, especially in light of the vagueness of the necessary criteria as explained above; thus, creating a burden on VLOPs who may not correctly apply the criteria required under Article 17.

Furthermore, the definition of a VLOP in Article 33 of the DSA is broad and encompasses platforms that rarely interact with media services. This Article provides that the term VLOP covers ‘online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million’.<sup>117</sup> As such, the carrying over of this concept in Article 17 will place the same obligations on a VLOP that is directly connected to media services and on a VLOP that has limited interaction with media services. This will result in a regulatory burden on VLOPs who rarely interact with media services to make sure that they are complying with their obligations under EU law, even when they are not directly connected to media services. As above, this can be considered to create an unnecessary burden on some VLOPs to ensure that they are complying with this Article, despite not posing a particular risk to the wider EU media landscape.

### *Structured dialogue (Article 18)*

Article 18 requires the EBMS to organise a dialogue between platforms, MSPs, and civil society to discuss best practices for applying Article 17, fostering access to diverse offers of independent media on VLOPs, and adherence to self-regulatory initiatives aimed at protecting society from harmful content.<sup>118</sup>

If executed properly, Article 18 could provide a meaningful and proactive mechanism for stakeholders to come together to discuss these aspects. However, for the time being, Article 18 could perhaps go further in terms of allowing other stakeholders to organise the dialogue, rather than solely the EBMS. Considering that it is VLOPs who shall provide a functionality allowing media providers to self-declare that they are an MSPs under Article 17, it may facilitate more meaningful and proactive discussion by allowing VLOPs to also be able to initiate the dialogue. This is specifically in regard to any issues experienced when applying Article 17 which should be ironed out in the interest of cultivating best practices.

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<sup>115</sup> Better Regulation Guidelines, see footnote 2.

<sup>116</sup> Proposal for the EMFA, see footnote 1, Article 17.

<sup>117</sup> DSA, see footnote 16, Article 33.

<sup>118</sup> Proposal for the EMFA, see footnote 1, Article 18.



### *User controls (Article 19)*

Article 19 stipulates that manufacturers of devices or providers of user interfaces controlling or managing access to and use of audiovisual media services should allow service recipients to have the possibility to change the default settings of a device or user interface.<sup>119</sup>

Generally speaking, in its current form, Article 19 is especially ambiguous. This is because the Regulation does not explain why the proposed right for the user to customise the default settings of a device or user interface is linked to media freedom and pluralism. It also does not provide any further clarity in terms of what specifically should be customised to improve the right of EU citizens to a diverse media offering. Should it be clarified as to what should be customised to achieve the aims of the Regulation, the legal certainty of the provision would overall be strengthened. As part of this clarification, the provisions of both the DSA and AVMSD should also be considered.

The obligation under Article 19 relates to the existing obligation provided in Article 27 of the DSA. Article 27(3) of the DSA provides an obligation for providers of online platforms to make available a functionality that allows users to select and modify their preferred recommender systems.<sup>120</sup> The functionality should be directly and easily accessible from the specific section of the online platform's online interface. As such, the parameters of Article 19 could be unclear in terms of how they relate to this provision. This is because if users should have the possibility to change the default settings of a device or user interface, this would be expected to be in line with what is provided in the DSA – that there should be a specific section of the interface allowing users to select and modify their preferred recommender systems. However, as much as empowering users to make the decision on what content they view is a positive development, it is not clear that these two provisions are interlinked in the EMFA which, therefore, may fail to result in a system that is easy to comply with and adds unnecessary regulatory burdens, as laid out in the Commission's Better Regulation Guidelines.<sup>121</sup>

In addition, there is a further risk to cause legal uncertainty with regard to the relationship between Article 19 of the EMFA and Article 7a of the AVMSD. Article 7a of the AVMSD provides that 'Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest'. This general interest involves objectives such as media pluralism, freedom of speech and cultural diversity.<sup>122</sup> These objectives should be proportionate in the interest of legitimate public policy considerations.<sup>123</sup> There is no reference nor indication made concerning the relationship between both Article 19 of the EMFA and Article 7a of the AVMSD. Therefore, the introduction of Article 19 of the Proposal for the EMFA raises some questions in terms of the consistency with the AVMSD due to the unclear relationship between national legislation regulating public value services and the users' right to customisation under the EMFA. A further point of consideration is the relatively recent

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<sup>119</sup> Ibid, Article 19.

<sup>120</sup> DSA, see footnote 16, Article 27.

<sup>121</sup> Better Regulation Guidelines, see footnote 2.

<sup>122</sup> AVMSD, see footnote 9, Recital 25.

<sup>123</sup> Ibid.

transposition of Article 7a into national law (the deadline of which was 19 September 2020), which will need to be re-adjusted to fit Article 19 of the EMFA.

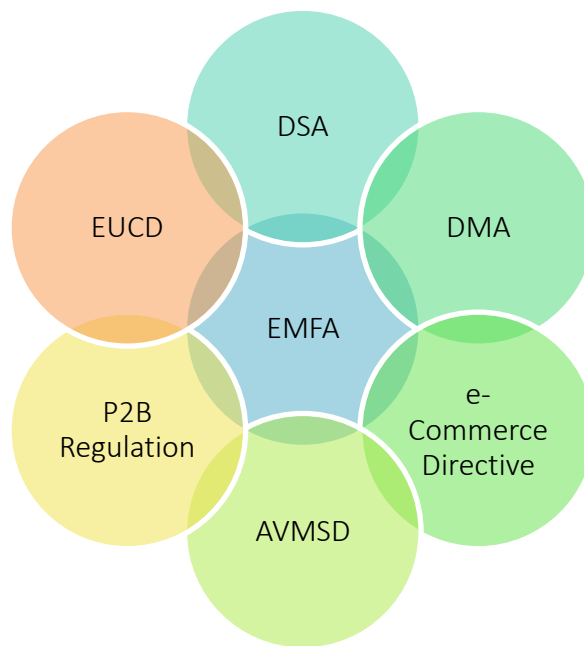
### 3.2. The existing EU legal framework on media freedom and pluralism and the principles of subsidiarity and proportionality

Avoiding overregulation and the principles of subsidiarity and proportionality are all commitments made by the European Parliament, the Council of the European Union and the Commission as part of their ‘Better Law-Making’ agreement.<sup>124</sup> Therefore, the following section will look at the existing EU legal framework on media freedom and pluralism, as well as the compliance of the EMFA with the principles of subsidiarity and proportionality.

#### 3.2.1. The existing EU legal framework on media freedom and pluralism

The EMFA will need to fit into the current EU regulatory framework for media freedom and pluralism. This current regulatory framework takes the form of the DSA,<sup>125</sup> DMA,<sup>126</sup> EUCD,<sup>127</sup> AVMSD,<sup>128</sup> P2B Regulation,<sup>129</sup> and e-Commerce Directive.<sup>130</sup> The figure below shows the existing EU regulatory framework on media freedom and pluralism.

**Figure 1 - The EU Regulatory Framework on Media Freedom and Pluralism**



With so many pre-existing instruments, already interacting with one-another, there could potentially be concerns about overregulation in this field. Any overregulation could result in an

<sup>124</sup> Better Law-Making, see footnote 3.

<sup>125</sup> DSA, see footnote 16.

<sup>126</sup> DMA, see footnote 17.

<sup>127</sup> EUCD, see footnote 21.

<sup>128</sup> AVMSD, see footnote 9.

<sup>129</sup> P2B Regulation, see footnote 23.

<sup>130</sup> e-Commerce Directive, see footnote 14.

administrative burden on citizens, administrations and businesses, especially small and medium-sized enterprises, as acknowledged in the EU Institutions' commitment to Better Law-Making.<sup>131</sup> This is something that should be borne in mind when finetuning the Proposal for the EMFA to ensure that overregulation and any burden is kept to a minimum. The above Section 3.1 indicates some points of concern when it comes to the relationship between the EMFA and other existing EU instruments.

### 3.2.2. Subsidiarity

The Commission's Better Regulation Guidelines indicate the importance of the overarching principle of subsidiarity.<sup>132</sup> The Interinstitutional Better Law-Making Agreement also highlights the importance of this principle, highlighting that as part of an impact assessment, the Commission should explain how the measures are in line with the principle.<sup>133</sup>

As part of their assessment of subsidiarity, the Commission provides that the objective of the intervention cannot be achieved by the Member States acting alone, due to the increasingly cross-border nature of the issue at hand.<sup>134</sup> The other recent developments in the EU regulatory framework in the field of media freedom and pluralism show that this is indeed the case, such as the DSA and DMA.<sup>135</sup> The increasing role of digital technologies and the internet in EU consumers' day-to-day lives further confirm as such.<sup>136</sup>

However, as part of their assessment, the Commission also stipulates that a common EU approach promoting, inter alia, legal certainty is the best way to advance the internal market by promoting fair competition and cross-border investment for media market players.<sup>137</sup> It very much seems that there are elements of the Proposal for the EMFA that do not enhance legal certainty and may rather fragment the EU legal framework by not clarifying concepts in sufficient depth nor referring to the interaction between the EMFA and other instruments forming the EU's legal framework (for more information, see Section 3.1 above).

In light of the increasingly cross-border nature of the issue-at-hand resulting from the increasing role of digital technologies and the internet in EU consumers' day-to-day lives, should the legal certainty of the Proposal be strengthened, it could be said that the initiative does comply with the principle of subsidiarity. This is important in ensuring that the objectives of the Proposal can indeed be better achieved at the Union level. Thus, as per the Better Regulation Guidelines, they should be easy for the Member States to comply with and not result in regulatory burdens for media market players.<sup>138</sup>

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<sup>131</sup> Better Law-Making, see footnote 3.

<sup>132</sup> Better Regulation Guidelines, see footnote 2.

<sup>133</sup> Better Law-Making, see footnote 3.

<sup>134</sup> Proposal for the EMFA, see footnote 1.

<sup>135</sup> For the DSA, see footnote 16. For the DMA, see footnote 17.

<sup>136</sup> For illustration, see the UN, The Impact of Digital Technologies, available at: <https://www.un.org/en/un75/impact-digital-technologies> (last accessed on 30 January 2023).

<sup>137</sup> Proposal for the EMFA, see footnote 1.

<sup>138</sup> Better Regulation Guidelines, see footnote 2.

### 3.2.3. Proportionality

Similar to the principle of subsidiarity, the importance of the principle of proportionality as an overarching principle of EU law is also emphasised within the Better Regulation Guidelines. The Interinstitutional Better Law-Making Agreements highlights the importance of this principle in the same way – i.e., by providing that the Commission should explain how the proposed measures are in line with the principle as part of their impact assessment.

As part of their assessment of the principle of proportionality, the Commission maintains that the initiative is suitable and necessary for the proper functioning of the internal media market and does not go beyond what is necessary to maintain such an objective.<sup>139</sup> Some focus is placed on the fact that the Proposal for the EMFA enhances transparency and legal certainty and reduces regulatory fragmentation and market distortions. As much as it may be true that the Proposal for the EMFA reduces regulatory fragmentation at the national level, it cannot be said that the Proposal reduces regulatory fragmentation at the EU level, especially in light of the crowded existing framework as laid out in Section 3.2.1 above (see also Section 3.1 above for further elaboration on some of the points where overlap between the current instruments seems to be of concern and may contradict the Commission’s Better Regulation Guidelines).

The commitments made by the Commission as part of the Better Law-Making Agreement are also brought into question when it comes to the arguments made in favour of compliance with the principle of proportionality. In particular, the stipulation that the Proposal will ‘increase investors’ confidence and make cross-border media market transactions less burdensome’.<sup>140</sup> The contradictions between the Proposal for the EMFA and the existing EU regulatory framework may work against this aim to increase confidence and make transactions more burdensome, as it will require media market players to pay attention to a variety of instruments, which at times contradict each other when implementing the Regulation. This, therefore, raises questions about whether the burden imposed upon the individual is indeed excessive to the objective sought to be achieved. However, it cannot be denied that there is regulatory fragmentation at the national level with some Member States, such as Germany and France,<sup>141</sup> having clear legal frameworks regulating media freedom and pluralism, and other Member States, such as Finland and Sweden,<sup>142</sup> completely lacking legal frameworks in this area.

In conclusion, in light of the fragmentation at national level, it is likely that the Proposal for the EMFA as a whole is necessary for achieving the Commission’s aim of enhancing transparency

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<sup>139</sup> Proposal for the EMFA, see footnote 1.

<sup>140</sup> Ibid.

<sup>141</sup> Country report: Germany, Monitoring media pluralism in the Digital Era 2022, EUI Centre for Media Pluralism and Media Freedom, available at: <https://cadmus.eui.eu/bitstream/handle/1814/74690/MPM2022-Germany-EN.pdf?sequence=1&isAllowed=y> (last accessed on 30 January 2023). Country report: France, Monitoring media pluralism in the Digital Era 2022, EUI Centre for Media Pluralism and Media Freedom, available at: <https://cadmus.eui.eu/bitstream/handle/1814/74689/MPM2022-France-EN.pdf?sequence=1&isAllowed=y> (last accessed on 30 January 2023).

<sup>142</sup> Country report: Finland, Monitoring media pluralism in the Digital Era 2022, EUI Centre for Media Pluralism and Media Freedom, available at: <https://cadmus.eui.eu/bitstream/handle/1814/74688/MPM2022-Finland-EN.pdf?sequence=1&isAllowed=y> (last accessed on 30 January 2023). Country report: Sweden, Monitoring media pluralism in the Digital Era 2022, EUI Centre for Media Pluralism and Media Freedom, available at: <https://cadmus.eui.eu/bitstream/handle/1814/74707/MPM2022-Sweden-EN.pdf?sequence=1&isAllowed=y> (last accessed on 30 January 2023).

and legal certainty and reduces regulatory fragmentation and market distortions.<sup>143</sup> The above Section 3.1 shows that there are some provisions, in particular Articles 2, 14, 17, 18, and 19, included in the Proposal that are perhaps considered too broad. These may be replaced by a better finetuned solution, addressing the issues identified in Section 3.1, which will achieve the intended aim of the Regulation with less burden placed on its addressees. Should these provisions be finetuned and replaced with a lighter, less burdensome solution, it could be said that the Proposal would comply with the principle of proportionality.

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<sup>143</sup> Proposal for the EMFA, see footnote 1.

## 4. Conclusion

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The purpose of this paper was to consider the compatibility of the Proposal for the EMFA with the Better Regulation Guidelines and the commitments to Better Law-Making. To recap, under the Better Regulation Guidelines, the Commission places importance on the principles of legal certainty, subsidiarity, and proportionality.<sup>144</sup> Whilst, under the Better Law-Making from the European Parliament, the Council of the European Union, and the Commission, it was agreed that Union legislation should avoid overregulation and administrative burdens for citizens.<sup>145</sup> The Regulation should achieve benefits, be targeted, be easy to comply with and not add unnecessary regulatory burdens.<sup>146</sup>

The findings show that were the current Proposal for the EMFA to become law, without any amendments to the current version, there would be a risk of overregulation in the field of media freedom and pluralism at the EU level. This would result in legal uncertainty, thus requiring further elaboration in some provisions. There is also the overlap between the EMFA and other instruments, particularly the AVMSD, DSA, and e-Commerce Directive. Such overregulation and legal uncertainty would result in an administrative burden for media market players.

In terms of the provisions of the Regulation that may cause instances of overregulation and legal uncertainty, these are Articles 2, 14, 17, 18, and 19.

Firstly, there are potential concerns of overregulation and legal uncertainty under Article 2. This is with particular regard to the definition of an MSP and media service in Article 2. The definition of an MSP, in combination with Recital 8 providing that VLOPs can also be MSPs, does not consider the interaction between the EMFA, e-Commerce Directive, and DSA with regard to when VLOPs could be considered to be exercising ‘editorial control’. Recital 8 also provides that VSPs can also be MSPs, again with no consideration of what is considered to constitute the exercise ‘editorial control’. Furthermore, the editorial responsibility of VSPs is referred to as part of the AVMSD; therefore, resulting in the framework being split between these two instruments. In addition, there are also concerns with the definition of a ‘media service’ where there is no clear criteria for determining whether a service could indeed fall into this definition, thus, resulting in legal uncertainty and an unnecessary burden.

Subsequently, with regard to Article 14, there is a risk that the country-of-origin principle is not reflected as strongly in the EMFA as in other EU legislation which could result in legal uncertainty. In particular, the fact that the country-of-origin principle forms part of the e-Commerce Directive, AVMSD, DSA, and DMA, yet is not mentioned as part of this provision, brings into question whether or not this principle applies to this provision of the EMFA.

Then, there are some issues of legal uncertainty and overregulation identified with regard to Article 17. In particular, there is some legal uncertainty as to the criteria required for self-declaration and what is necessary in order to fulfil these. This leads to concerns that there is a potential for the abuse of such provision if these criteria are not clear. The issue under this Article could in part be resolved by the finetuning of the definition of an MSP under Article 2.

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<sup>144</sup> Better Regulation Guidelines, see footnote 2.

<sup>145</sup> Better Law-Making, see footnote 3.

<sup>146</sup> Joining forces to make better laws, see footnote 37.

Furthermore, there are issues caused by overregulation with regards to the definition of VLOPs provided in the DSA, which may result in an unnecessary burden for VLOPs that are not directly involved in the provision of media services.

Subsequently, Article 18 could provide a meaningful and proactive mechanism for stakeholders to come together to discuss experiences and best practices in the application of Article 17, to foster access to diverse offers of independent media on VLOPs, and to monitor adherence to self-regulatory initiatives aimed at protecting society from harmful content. However, the legal certainty of Article 17 could be improved by allowing other stakeholders, in particular VLOPs, to organise the dialogue, rather than solely the EBMS. Allowing such dialogue would help iron out any issues under Article 17 in the interest of cultivating best practices.

Finally, there are also concerns with regards to Article 19. If users should have the possibility to change the default settings of a device or user interface under Article 19, it should be clarified as to what should be customised in order to achieve the aims of the Regulation. Furthermore, clarification is necessary with regard to the interaction between this provision and both the AVMSD and the DSA. There is no reference nor indication made concerning the relationship between both Article 19 of the EMFA and Article 7a of the AVMSD; thus, raising questions due to the unclear relationship between national legislation regulating public value services and the users' right to customisation under the EMFA. Similarly, in terms of the DSA, both the EMFA and DSA provide provisions on device interfaces, yet no reference is made in the EMFA to the DSA and how these provisions would work together in practice.

As well as assessing the issue of overregulation and legal uncertainty when looking at the compatibility of the Better Regulation Guidelines and Better Law-Making commitments with the Proposal for the EMFA, the paper intended to assess the compatibility of the Proposal for the EMFA with principles of subsidiarity and proportionality. The abovementioned issues all bring into question some concerns with regards to the compliance of the Proposal with these principles. This is mainly on the basis of the concerns about legal certainty and overregulation in the field. However, should these issues be addressed and, thus, the potential burden on media market players reduced, these principles would be in compliance as the Proposal would then achieve the intended benefits, be targeted, be easy to comply with and not add unnecessary regulatory burdens as per the EU institutions' commitment to Better Law-Making.

To conclude, when moving onto the latter stages of the legislative procedure, the EU institutions should ensure that the Better Regulation Guidelines and Better Law-Making commitments are followed. This is with specific regard to the concern of overregulation and legal uncertainty which result in the Proposal in its current form not achieving its intended benefits, being targeted and easily complied with, and resulting in unnecessary regulatory burdens.<sup>147</sup> The issues provided are all connected and, therefore, if addressed, the principles of subsidiarity and proportionality would also be complied with. More specifically, for the principle of subsidiarity, it is important that Articles 2, 14, 17, 18 and 19 are all strengthened in terms of certainty to ensure that the Proposal is targeted and does not result in unnecessary

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<sup>147</sup> Joining forces to make better laws, see footnote 37.

burden on citizens, administrations, and businesses.<sup>148</sup> Subsequently, for the principle of proportionality, it is important that these provisions are all finetuned and replaced with lighter, less burdensome solutions, again, taking care not to result in unnecessary burden on citizens, administrations, and businesses.<sup>149</sup> Thus, it is important that the utmost coherence of the Proposal is achieved in order for it to fit effectively within the EU regulatory framework regarding media freedom and media pluralism and achieve its intended objectives when it comes to protecting media freedom and pluralism in the Union.

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<sup>148</sup> Better Law-Making, see footnote 3.

<sup>149</sup> *Ibid.*





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