

Safeguarding media independence and pluralism

POSITION PAPER ON THE EUROPEAN MEDIA FREEDOM ACT

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Introduction

Independent media and freedom of expression are key to any well-functioning democracy, which is why the Computer & Communications Industry Association (CCIA Europe) supports the main goals of the European Media Freedom Act (EMFA) proposed by the European Commission in September.¹

The Internet, and online platforms in particular, play an important role in promoting media pluralism, giving Europeans easy access to a diverse news landscape. In 2021, 89% of Europeans used the Internet to access a variety of online news sites, magazines, or newspapers.² The online world has also greatly lowered the entry barriers for new media players and independent reporting. As research by the European Parliament found, online platforms provide instant access to a global audience, drive demand for news content, create new markets, as well as diversifying the ways in which Europeans access and consume media content.³

CCIA Europe's Members – leading computer, communications, and Internet industry firms – play an important role in disseminating news content to Europeans. They are also strongly committed to promoting media pluralism and independence, and the freedom of expression.

While online platforms make it easy for users to discover media content, the Internet can also be abused by malicious actors to spread disinformation under the pretence of sharing news. In order to address this major challenge, online platforms have put in place a wide variety of initiatives and measures. The fight against the spread of disinformation is a key priority for all of them, with the EU Code of Practice on Disinformation being a tangible example of online platforms' commitment.⁴

As the European Parliament and the 27 national governments now have to define their positions on the EMFA and reach an agreement, CCIA Europe offers the following six key recommendations to ensure the EMFA preserves a fair and balanced relationship between online platforms and media:

1. Introduce extra safeguards for the special treatment granted to media
2. Provide a workable definition of "media service providers"
3. Make audience measurement fit for the digital age
4. Align right of customisation with the Digital Services Act
5. Ensure consistency with European Law
6. Provide enough time for implementation

¹ European Commission, 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, 16 September 2022, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0457>

² Eurostat, Consumption of Online News Rises in Popularity, consulted on 13 October 2022, available at:

<https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220824-1>

³ European Parliament, Policy Department for Structural and Cohesion Policies Directorate-General for Internal Policies, Research for CULT Committee - Europe's Media in the Digital Decade, 7 May 2021, available at:

[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)690873](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)690873)

⁴ European Commission, Code of Practice on Disinformation, consulted on 13 October 2022, available at:

<https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>

1. Introduce extra safeguards for the special treatment granted to media

Article 17 of the proposed EMFA introduces a de facto special treatment of media service providers' (MSPs) content on very large online platforms (VLOPs). While the intention of this provision is not to exempt (online) media content from moderation, the question how it would function in practice raises serious concerns. Discussions about restricting the ability of online platforms to moderate MSP content already took place during the legislative process of the Digital Services Act (DSA).⁵ The proposal for a so-called "media exemption" under the DSA was rejected back then as many stakeholders and institutional players objected to the introduction of a "must-carry obligation" of media content for online platforms.⁶ Věra Jourová, Vice-President of the European Commission, called a media exemption "good intentions leading to hell".⁷ While Article 17 of the EMFA sets out additional safeguards in comparison to the previously-debated media exemption, several fundamental problems still persist.

1.1 Narrow the self-declaration of MSPs

The obligation created by Article 17 should not rely on the self-declaration of MSPs alone (paragraph 1). Under the current proposal, VLOPs would have to create a form allowing MSPs to declare: whether they match the definition of an MSP as provided in the proposal, their independence from any government, and adherence to editorial independence (e.g. via respect of regulatory, co-regulatory or self-regulatory codes). Yet, these three criteria are not clear enough. And this procedure can easily be abused as a declaration via the form would automatically trigger the obligation for VLOPs to give special treatment to the content posted by MSPs. The design of the proposed self-declaration mechanism does not take into account that it could be abused. As it stands, self-declaration simply would lead to a myriad of entities registering as "media service providers" with VLOPs, creating a burdensome and disproportionate mechanism. In fact, this would also defeat the provision's purpose of protecting MSP content.

Self-declaration would also have extremely damaging implications for the information ecosystem, as rogue actors can exploit it to spread disinformation under the pretence of sharing factual news. Indeed, the current EMFA proposal does not prevent rogue actors – such as conspiracy theory websites posing as credible media – from disseminating disinformation, as they can simply use the form to declare themselves a legitimate MSP.

While the European Commission intends to issue additional guidelines, it is important that all criteria and details regarding self-declaration are included in the EMFA itself in order to ensure that this provision does not produce any undesired effects. To avoid exploitation by rogue actors, we

⁵ 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), available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R2065&qid=1666857517641>

⁶ Conspiracy Watch, DSA : un collectif d'experts alerte les parlementaires européens, L'Observatoire du conspirationnisme, 11 Novembre 2021, available at:

<https://www.conspiracywatch.info/dsa-un-collectif-dexperts-alertent-les-parlementaires-europeens.html>

⁷ EU DisinfoLab, Disinfo Update 04/11/2021, 4 November 2021, available at:

<https://www.disinfo.eu/outreach/our-newsletter/disinfo-update-04-11-2021/>

recommend either deleting Article 17 altogether, or drastically improving the self-declaration process for MSPs.

Several improvements are necessary to prevent the self-declaration mechanism from being abused by illegitimate actors. A possible solution could include:

- I. Narrowing the definition of a “media service provider” in article 2;
- II. Having a third party, e.g. from civil society or national authorities, verify the declaration prior to bestowing special treatment upon a self-declared MSP;
- III. Introducing penalties for abuse of the self-declaration tool.

These improvements would also bring more balance to the provision that provides for a remedy when MSPs think that VLOPs suspend content without sufficient ground (paragraph 4). Overall, self-declaration should put the responsibility on the declarants.

1.2 Specify the involvement of VLOPs

The DSA provides for a robust horizontal approach to content moderation and its implementation has just begun. Article 34 of the DSA already asks VLOPs to 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”. Under the DSA, MSPs do have access to VLOPs’ internal complaint-handling mechanisms and out-of-court dispute settlement. For the EMFA to be aligned with the principles of the DSA, it is imperative that Article 17 provides further clarifications.

Article 17 of the EMFA builds on the DSA by using its “VLOPs” category, which raises several questions. Improvements clarifying that this provision only applies to VLOPs providing access to media services would be welcome. Not all platforms that will be designated as VLOPs have the same impact on Europe’s media landscape. It is important to avoid creating additional regulatory burdens for online platforms having little interaction with media services. To ensure the effectiveness of Article 17, the scope of VLOPs should thus be limited to those providing access to a significant amount of news information or media services.

VLOPs should not bear the responsibility of determining who or what qualifies as a “genuine” media service provider either. Recital 33 of the proposed EMFA states that VLOPs retain the possibility not to accept self-declaration where they consider that the conditions are not met. However, putting this heavy burden on platforms is not appropriate, as they are not equipped to assess this type of information. What is more, asking platforms to verify the accuracy of the information declared could contradict the EU’s ban on general monitoring, which is enshrined in the DSA.

2. Provide a workable definition of “media service providers”

Article 2 of the EMFA introduces a new category of services coined as “media services” – going beyond the scope of services already regulated under EU law, in order to include media publications. Typically, publications by media outlets are subject to self-regulation at Member State level. The EMFA marks the first time that press publications will be subjected to EU-level regulation and the authority of a statutory regulator. This is a very significant step for the EU, so all possible impacts

should be carefully considered, particularly given the diversity of obligations the EMFA introduces. This new EU framework could also become a global model, potentially inspiring undemocratic third countries to use similar tools to actually undermine independent reporting.

Europe should strive for an EMFA with clear definitions, which are key to reaching its objectives. As the EMFA is a Single Market tool, it should aim to avoid fragmentation and enable harmonised implementation and enforcement. Specifically, the definition of “media service providers” (MSPs) is still very broad in the current draft, and could capture non-intended organisations. Recital 8 also states that VLOPs could fall under the definition of MSPs, as they might have “editorial control” over their services or parts thereof.

Indeed, the EMFA’s current definition of MSPs relies on the exercise of “editorial responsibility” – as later defined in the text. Besides the semantic divergence between editorial “control” and “responsibility,” the exact meaning of editorial responsibility in the context of VLOPs remains unclear. The VLOP category can include a variety of different platforms with business models that also differ. That is why it would be a serious misconception to design this legislation on the assumption that all VLOPs share the same characteristics. The proposal does exclude content organisation, including through automated means or algorithms, from the conception of editorial control but otherwise fails to provide more detailed guidance.

The EMFA needs to contain crystal clear definitions to ensure that all actors in scope can effectively comply with their respective obligations, and that authorities can also properly enforce the new rules. As it stands now, the EMFA makes it possible for a VLOP to be both an MSP as well as a “device or user interface controlling or managing access to and use of audiovisual media services”⁸ at the same time. This confusing overlap in definitions would undermine the EMFA’s implementation, and could even be contradictory. If a VLOP is also considered to be an MSP with editorial independence, Article 17 would not be applicable, for instance.

3. Make audience measurement fit for the digital age

Article 23 of the EMFA outlines the need for transparent, impartial, inclusive, proportionate, non-discriminatory, and verifiable audience measurement systems and methodologies. Most online platforms offering access to media content already have tools in place that allow media publishers to get to know their audience better, and reach new audiences, through analytical tools – i.e. in the same spirit as the above-mentioned principles.

The approach to audience measurement, as set out in the Commission proposal, intends to differentiate “proprietary audience measurement” from “industry-standard audience measurement”. However, these two types of audience measurement are not separately defined in Article 2 of the draft EMFA and clarity is needed as to what is being proposed for each.

Article 23 is part of the chapter dedicated to the allocation of economic resources in the internal media market, which aims to address perceived opacity in the market and to introduce transparency on advertising, as well as the potential use of advertising by governments and other actors to

⁸ European Commission, EMFA, op. cit., Article 19

influence MSPs. The EMFA should only regulate in areas where that is justified. Generally speaking, the case for intervention in the advertising market is not clear. Industry-standard mechanisms for audience measurement, for example, already have rigorous checks and balances in place, but cannot require media owners to supply data in order to develop transparent and comparable data sets. Besides, extending transparency obligations to audience measurement outside of advertising would not correspond to the logic of Article 23.

There already is a range of different mechanisms for audience measurement, and competition between providers of these services, in the EU market. It is important to recognise that some parts of the market are in transition. In broadcasting, for example, mechanisms to measure analogue services are being adapted to measure digital media consumption. It is important that the EMFA safeguards the innovation that this competition brings about and does not disrupt technological adaptation, for example by imposing standards on the market or prescribing certain technologies.

Equally important is the need to clarify that Article 23 of the EMFA is not intended to contradict other legislative frameworks that already regulate the relationships between actors in this value chain under EU law, in areas such as competition and data protection.

4. Align right of customisation with the Digital Services Act

Allowing users to have greater choice in how they wish to view audiovisual media services is important. Article 19 introduces a right of customisation, enabling users to “change the default settings of any device or user interface controlling or managing access to and use of audiovisual media services.” However, further clarification is needed on how this provision would interact with the DSA, which pursues similar goals. Because Article 27 of the DSA already introduced the capability for users to select and modify their recommender system options. Although the scope of the DSA and EMFA provisions seems to apply to different categories, devices, and recommender systems, mentioning that Article 19 of the EMFA does not apply whenever the DSA already applies would help clarify and articulate the differences between the two texts. Otherwise, two similar yet different regimes would apply, leading to legal uncertainty for businesses and having a detrimental effect on improving consumer choice.

5. Ensure consistency with European Law

The EMFA needs to fit into the current European regulatory framework, instead of creating a patchwork of conflicting rules. In addition to the DSA, the EMFA will also have to be aligned with the Digital Markets Act (DMA)⁹ and the Audiovisual Media Services Directive (AVMSD)¹⁰, both of which were adopted recently. The AVMSD, DSA, and DMA together make up a framework that reaffirms the “country of origin” principle, which is key to the well-functioning of the EU Single Market.

⁹ 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 (Digital Markets Act), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>

¹⁰ 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 (Audiovisual Media Services Directive) in view of changing market realities, available at: <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

As the European Board for Media Services is set to replace the current European Regulators Group for Audiovisual Media Services, it is important to ensure that its functioning and power do not undermine the country of origin principle. This will also allow for clear enforcement and provide legal certainty to businesses operating in the EU. Article 14 of the EMFA, which introduces requests for enforcement of obligations for video-sharing platforms between national authorities, would benefit from this in particular. While increased coordination between national authorities is useful of course, the provision should be aligned with the AVMSD and the country of origin principle.

6. Provide enough time for implementation

The EMFA would introduce a variety of new obligations for numerous actors involved in bringing news to citizens, while also revising the European media governance framework. Given the novelty and scope of these obligations the six-month period provided for implementation of the EMFA, as currently proposed in Article 28, is simply too short. Other recent EU legislative initiatives mentioned earlier in this paper – e.g. the DSA and DMA – all provided more lead time. At the very least, the final EMFA should start to apply 18 months after its official publication.

Conclusion

The European Media Freedom Act has the potential to become an important tool to safeguard the independence and pluralism of media across Europe. However, in order to foster a healthy and balanced information ecosystem, the current proposal should be reworked to: clarify how self-declaration of media service providers would work in practice (and abuse by rogue actors will be prevented), provide a workable definition of “media service providers,” and make audience measurement fit for the digital age.

Members of the European Parliament and the Council should strive for the final EMFA to better reflect the actual functioning of the Internet; including the diversity of Europe’s online ecosystem and the highly varied nature of online platforms that would be grouped together as “VLOPs”. Provided that the necessary clarifications are made, and strikes a more balanced approach to the relationship between online platforms and media, the EMFA can equip journalists, media outlets, and platforms with the right tools to improve the quality of information available to Europeans.

About CCIA Europe

- The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and Internet industry firms.
 - As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009.
 - CCIA’s Brussels-based team seeks to improve understanding of our industry and share the tech sector’s collective expertise, with a view to fostering balanced and well-informed policy making in Europe.
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