# The European Media Freedom Act unpacked

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**Director of publication** – Susanne Nikoltchev, Executive Director
**Editorial supervision** – Maja Cappello, Head of Department for Legal Information
European Audiovisual Observatory
**Editorial team** – Olivier Hermanns, Justine Radel-Cormann, Sophie Valais

**Authors**
Mark D. Cole, Christina Etteldorf

**Proofreading**
Anthony Mills, Aurélie Courtinat

**Translation**
Erwin Rohwer, Nathalie Sturlèse

**Editorial assistant** – Sabine Bouajaja
**Press and Public Relations** – Alison Hindhaugh, alison.hindhaugh@coe.int
European Audiovisual Observatory

**Publisher**
European Audiovisual Observatory
76, allée de la Robertsau, 67000 Strasbourg, France
Tel.: +33 (0)3 90 21 60 00
Fax: +33 (0)3 90 21 60 19
iris.obs@coe.int
www.obs.coe.int

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# The European Media Freedom Act Unpacked

**Mark D. Cole, Christina Etteldorf**

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# Foreword

If the European Audiovisual Observatory were to adopt a motto, it might well choose to reflect the famous words of Heraclitus: "There is nothing permanent except change." Since its inception in 1992, the Observatory has monitored many a media regulation, commencing with the Council of Europe's Convention on Transfrontier Television and its EU counterpart, the Television without Frontiers Directive (both adopted in 1989), and continuing with the current AVMSD and its intermediate iterations.

It is notable that all of these legal developments, which constitute significant milestones in the history of EU media regulation, occurred in ten-year increments (give or take). However, in line with the acceleration of market and technological developments in recent times, legislative production has also increased in pace. 'DSA', 'DMA', 'EMFA', are all acronyms of recent EU legislation that are drastically changing the rules of the game. In particular, the EMFA (short for the European Media Freedom Act) may be regarded as the beginning of a new era of media regulation by the EU and an important step towards safeguarding media freedom and media pluralism in the EU internal market.

This is at least the opinion of the authors of the present publication. Through its pages, Professor Mark Cole and Research scientist Christina Etteldorf, both from the Observatory's partner institution Institute of European Media Law (EMR) in Saarbrücken, unravel the intricacies of this new legislative framework in a manner that is accessible also to a broader audience.

The report addresses pivotal legal questions regarding the legal basis and the context of creation of the EMFA and introduces us to the structure of the Regulation. It looks into the role of member states in ensuring the rights and duties of media service providers and their recipients. The authors show that the EMFA compasses a comprehensive framework for regulatory cooperation and a well-functioning internal market for media services. To this end, the EMFA relies on cooperation between strong national regulatory authorities or bodies and a new independent European Board for Media Services (EBMS) to advise the European Commission on matters related to media services.

The core part of the report offers an overview of the most significant topics touched upon by the new Regulation, structured according to their respective effects on different addressees. It delves into the provisions ensuring the effective editorial freedom and independence of media service providers, the protection of journalistic sources, and the safeguards for the independent functioning of public service media providers. It explains moreover the important mechanism of "preferential treatment" laid down by the EMFA, that would benefit curated media. Finally, the report presents the rules regarding the assessment of media market concentrations and the institutional set-up for a strengthened cooperation.

The result is a fresh look at the EMFA, for which I would like to thank both authors.

Enjoy the read!

Strasbourg, December 2024

Maja Cappello
IRIS Coordinator
Head of the Department for Legal Information
European Audiovisual Observatory

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# 1. Introduction

Having passed relatively swiftly through the legislative process compared to other EU legal acts in just under 15 months after its proposal,[1] the European Media Freedom Act (EMFA)[2] entered into force on 1 May 2024.[3] The majority of its provisions will become finally applicable on 8 August 2025. The background and motivation for proposing[4] an EMFA were, in particular, four identified problems: (1) uncoordinated national rules and procedures related to media pluralism; (2) insufficient cooperation between national media regulators; (3) interference in editorial decisions of media services; and (4) opaque and unfair allocation of economic resources to media.[5] To substantiate these vulnerabilities, the European Commission relied largely on its Rule of Law Report[6] and the analysis of the Media Pluralism Monitor (MPM) 2021[7] by the Centre for Media Pluralism and Freedom (CMPF) – an EU-funded project that annually monitors developments related to media pluralism and media freedom in the EU and some candidate countries.

**Figure 1. EMFA voting results at the European Parliament**

*Source: European Parliament, Plenary Session of 13.3.2024, voting results*

[1] A provisional agreement between the European Parliament and the Council was reached in mid-December 2023 (Council of the EU, press release of 15 December 2023), while the agreement on the final text was reached at the end of March 2024 (Council of the EU, press release of 26 March 2024).

[2] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU, OJ L, 2024/1083, 17.4.2024.

[3] See for a more comprehensive overview of the legislative process with further references EPRS (2023), European Media Freedom Act – Briefing EU Legislation in Progress, 2023.

[4] COM/2022/457 final.

[5] European Commission, Impact assessment report, SWD(2022) 286 final, Part 1/3, p. 4.

[6] Communication from the Commission 2021 "Rule of Law Report", COM/2021/700 final.

[7] Bleyer-Simon K. et al., "Monitoring Media Pluralism in the Digital Era", 2021.

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In the four major areas covered by the MPM 2021, the CMPF identified (according to its own categories) an average medium risk level for fundamental protections (e.g. existence of information rights and safeguards for journalists as well as independent media authorities), political independence (e.g. extent of political control over media, especially of public service media, or existence of safeguards against manipulative practices in political advertising) and social inclusiveness (e.g. access to the media by various social and cultural groups or the state of media literacy). For the area of market plurality (e.g. transparency and concentration of media ownership), however, an average high risk was concluded, raising alarm about the economic conditions of professional journalism and the viability of the media. In this light, the EMFA proposal was based on the consideration that, on the one hand, threats to media freedom and diversity made it more difficult for the media to fulfil their essential role in democracies from a socio-political point of view. On the other hand, an uneven playing field in economic terms from the perspective of the European Commission meant that media market players could not use the internal market to its full potential.

In order to address these challenges at the crossroads between cultural and economic considerations, the EMFA's main objective is to contribute to the functioning of the internal (media) market, the essential characteristics of which are democracy and the rule of law. However, since the protection of media freedom and diversity is considered an essential supporting pillar of this, secondary objectives are also the safeguarding of media pluralism, independence, editorial freedom and the protection of journalists. This is remarkable, as previously these fundamental rights aspects were not 'regulated' directly by EU law but rather regarded as being necessary conditions to be safeguarded by member states.

In view of the multiple aims of the EMFA, the regulation instrument, being directly applicable in all member states, was chosen rather than the adoption of a directive, which would have entailed the subsequent need for national implementation. In contrast to the approach via a directive in other areas of media regulation, this change was primarily reasoned with a higher degree of binding force of the ruleset. This was likely considered useful in view of potential future infringement proceedings against member states in case of non-compliance. Further arguments were that it would lead to fewer potential deviations during the implementation process, the establishment of directly applicable rights, as well as positive impacts on institutional aspects, namely the possibility of establishing a Board to replace the current coordinating body of the national regulatory authorities, the European Regulators Group for Audiovisual Media Services (ERGA).[8] Nevertheless, the manifold rules of the EMFA, which address a wide range of areas and actors, contain a significant level of discretion for member states, which determine the actual degree of harmonisation under the new "EU media law".[9]

[8] European Commission, Impact assessment report, SWD, 286 final, Part 1/3, p. 40.

[9] On the shift towards a more extensive EU media law acquis see Cole M., "Acting On Media Freedom: The Proposed European Media Freedom Act (EMFA) of the European Union", *University of the Pacifica Law Review* 55 (2024)2.

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The aim of this publication is to provide a comprehensive and concentrated overview of the EMFA's rules[10] and their impact on the addressees – recipients, media service providers and intermediaries, but also regulatory authorities and member states. It further identifies where important adjustments to the minimum harmonisation achieved by the EMFA still need to be made at national level and shows challenges on the horizon for the upcoming months and years.

[10] See on the EMFA proposal already Cabrera Blázquez F. J., *The proposal for a European Media Freedom Act*, European Audiovisual Observatory, Strasbourg, 2022.

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# 2. Legal basis and (ongoing) controversy

## 2.1 The Single Market clause as legal basis

For the EMFA regulation, the so-called internal market clause of Art. 114 of the Treaty on the Functioning of the European Union (TFEU)[11] was chosen as a legal basis. This is a provision that has been used regularly in recent years for the regulation of the 'Digital Single Market', for example in the Digital Services Act (DSA)[12] and Digital Markets Act (DMA).[13] It grants the EU extensive (but not exclusive or unlimited)[14] legislative powers to realise the establishment and achieve the better functioning of the internal market. However, while the DSA and DMA were primarily concerned with the economic aspects of protecting consumers and competition when regulating intermediary services, the EMFA focuses on media services. It addresses such services primarily in their capacity as an economic asset in light of a functioning and free internal media market. But the EMFA's secondary objectives aim to protect pluralism, editorial freedom and independence, thereby closely linking the EMFA with the role of media as a cultural asset. Based on the principle of limited conferral of powers, the EU has no specific competence for the media or the cultural sector as such. Rather, the so-called cultural clause of Art. 167 TFEU, put simply, emphasises that the Treaties aim at leaving a large degree of cultural sovereignty to the member states which prevents the EU from harmonising and limits it to supplementing national law in a supportive manner.[15] A similar restatement of this division can be derived from the Amsterdam Protocol[16] specifically for the area of PSM with which the member states declared that the Treaties and namely the competition rules are without prejudice to the member states' competences for defining remit and funding of PSM.

> ***PROTOCOL (No 29) ON THE SYSTEM OF PUBLIC BROADCASTING IN THE MEMBER STATES*** *[…] "The provisions of the Treaties shall be* ***without prejudice to the competence of Member States*** *to provide for the* ***funding of public service broadcasting*** *and in so far as such funding is granted to broadcasting organisations for the fulfilment of the* ***public service remit as conferred, defined and organised by each Member State****, and in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be*

[11] Treaty on the Functioning of the European Union, consolidated version.
[12] Regulation (EU) 2022/2065, OJ L 277, 27.10.2022, pp. 1–102.
[13] Regulation (EU) 2022/1925, OJ L 265, 12.10.2022, pp.- 1-66.
[14] CJEU, judgment of 5 October 2000, *Germany v Parliament and Council* (Tobacco advertisement), C-376/98, paragraph 83.
[15] Extensively on this Ukrow J., Cole M. and Etteldorf C., "On the Allocation of Competences between the European Union and its Member States in the Media Sector", 2021, Chapter B; in the context of the EMFA see also Cole M. and Etteldorf C., Research for CULT Committee - European Media Freedom Act - Background Analysis, 2023, pp. 14 et seq. with further references; Brogi E. et al., "The European Media Freedom Act: media freedom, freedom of expression and pluralism", Research for LIBE Committee, 2023, pp. 38 et seq.
[16] Originally attached to the Treaty of Amsterdam this is now Protocol No. 29 on the system of public broadcasting in the Member States, OJ C 202, 7.6.2016, p. 311.

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*contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."*

In essence, the existence of different legal bases and limitation rules means that the EU is, in principle, not prevented from invoking the internal market clause when regulating the media market. This also applies if other secondary objectives are pursued that could not be based separately on Art. 114 TFEU.[17] However, if such an approach is chosen, the principle of subsidiarity enshrined in Art. 5(3) of the Treaty on European Union (TEU)[18] only allows the EU to take action if the (internal market) objectives of an envisaged legal instrument cannot be sufficiently achieved by the member states, either at central or regional or local level and there is a surplus by Union action. The competence of the EU in this field definitely reaches its limits where the actual focus of a legislative measure lies outside economic aspects or where regulation at EU level offers no actual added value, i.e. does not prove to be more efficient.[19]

**Figure 2. Cultural, single market and subsidiarity clauses**

| Cultural clause<br>Art. 167(5) TFEU | Single market clause<br>Art. 114(1) TFEU | Subsidiarity clause<br>Art. 5(3) TEU |
|---|---|---|
| *In order to contribute to the achievement of the objectives referred to in this Article:*<br>*- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt* ***incentive measures, excluding any harmonisation of the laws and regulations of the Member States****,*<br>*- the Council, on a proposal from the Commission, shall adopt* ***recommendations****.* | *[...] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the* ***approximation of*** *the* ***provisions*** *laid down by law, regulation or administrative action in Member States* ***which have as their object the establishment and functioning of the internal market****.* | *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the* ***Union shall act only if and in so far as the objectives*** *of the proposed action* ***cannot be sufficiently achieved by the Member States****, either at central level or at regional and local level,* ***but*** *can rather, by reason of the scale or effects of the proposed action,* ***be better achieved at Union level****.* |

## 2.2 The question of allocation of powers for the EU

That the plan for a media regulation in the form of the EMFA would test these limitations had become very evident already during the preparation of the proposal. Earlier drafts by

[17] See on this in general CJEU, judgment of 11 June 1991, *Commission v Council (Titanium dioxide)*, C-300/89.
[18] Treaty on European Union (consolidated version).
[19] See on this CJEU, judgment of 8 June 2010, *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, C-58/08, in particular para. 32.

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the Commission were criticised, even partly rejected, by its advisory Regulatory Scrutiny Board, not least with a view to the insufficient justifications regarding the competence basis and subsidiarity clause 'in view of the diverse cultural, historical and political traditions of the media frameworks in the Member States'.[20] Although the points raised were subsequently considered by the Commission and necessary refinements were made, criticism continued after the EMFA proposal was published.[21] While there was consensus and support for the worthy goals of the proposal and the existence of a certain level of threat to the fundamental issues of media freedom was not disputed, there was disagreement in academia as well as from industry perspectives and national legislators about which level should respond to this risk and in what way and to which extent.[22] Therefore, there was an unusually large number of reservations pertaining to the proposal issued by member states. *Inter alia*, these concerns prompted four member states (Denmark,[23] France,[24] Germany[25] and Hungary[26]) to officially address reasoned opinions to the European Commission in the subsidiarity control mechanism alleging that the proposal constituted a violation of the principle of subsidiarity. Without giving it the format of a reasoned opinion, several other member states (*inter alia* the Czech Republic, Italy, the Netherlands and Poland) likewise voiced concerns in this regard in other policy documents or at least expressed the need for further concretisation and examination.[27]

Apart from regarding the proposal as amounting to an intrusion by the EU into national cultural sovereignty in general, criticism revolved around many different aspects of legality, proportionality and necessity of the proposal in view of the rules on division of powers between EU and member states. For example, it was claimed that the regulation of local and regional media, which were also covered by the proposal, lacked a justification based on the single market clause and that the same level of threat did not exist in all member states, and that therefore EU harmonisation was not necessary. Further, the actual wording was criticised as it would not leave sufficient flexibility to adapt to the peculiarities of national media markets from a cultural policy perspective. The considerable powers and role of the Commission, in particular its potential influence on the new Board, were also viewed very critically. This concerned especially the question of introducing regulation of the press, which in many member states had traditionally not been subject to strict regulation and even less a specific form of supervision by an authority. These concerns were intensified by the choice of legal instrument, as a regulation typically does not leave much margin for the member states, in contrast to the approach chosen in the Audiovisual Media Services Directive (AVMSD).[28] Finally, it was questioned whether the proposed rules would

[20] See the summary in European Commission, Annexes to the impact assessment report accompanying the EMFA proposal, SWD(2022) 286 final, Part 2/3, pp. 3 et seq.
[21] Cole M. and Etteldorf C., EMFA Background Analysis, 2023, p. 14 et seq. with further references.
[22] See for an overview of different voices with further references Cole M. and Etteldorf C., EMFA Background Analysis, 2023, pp. 14 et seq.
[23] Danish Folketinget, J.nr.: 22-001044-1.
[24] French Sénat, no. 194 (2022-2023).
[25] German Bundesrat, Printed Papers 514/22.
[26] Hungarian National Assembly, OE-42/619-1/2022.
[27] For an overview of all the submissions from the member states see the data on COM/2022/0457.
[28] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, as amended by Directive (EU) 2018/1808 (consolidated version).

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even achieve the objectives pursued and effectively remedy the problems identified, and whether they might not even lead to a deterioration of functioning systems in less at-risk member states.[29]

## 2.3 Adressing controversial issues in the legislative procedure

These concerns were voiced again during the legislative process. In particular, the Council's legal service was asked to provide an opinion specifically concerning the choice of legal basis. In its (orginally unpublished) opinion, the legal service in principle confirmed the possibility of invoking Art. 114 TFEU. At the same time, however, it also saw a need for adjustments, since in some places the proposal was not clear regarding the extent to which some of the provisions genuinely aim to improve the functioning of the internal market for media services or how the divergence of national rules really obstructs or is likely to obstruct it or distort competition. In particular, Artt. 5, 21, 25 were criticised and, more generally, the aim relating to "minimum harmonisation provisions" as stated in the recitals but not reflected in the proposed wording of the according provisions of the EMFA.[30] The Commission itself justified its reliance on the internal market clause in an (unpublished) 'Non-paper on certain aspects of the Proposal for a European Media Freedom Act'. Therein, it opposed the suggestion to split the EMFA proposal into a regulation and a directive, which had been brought forward as a possibility to respond to the competence questions. The subsequent discussion in the legislative procedure on a split of the proposed provisions into two different instruments, a Regulation and a Directive, were not pursued further.[31] Although the instrument remained as a regulation, the criticism led, especially during the final trilogue procedure, to numerous adjustments of the original proposal.[32]

In addition to amendments of specific provisions, the main changes concerned in particular the downscaling of the Commission's role in the institutional setup and the sharpening of the (minimum) harmonisation approach. The latter can be seen, *inter alia* in the derogation clause of Art. 1(3) which was aligned more closely to the wording in Art. 4(2) of the AVMSD. In the final version it no longer only refers to the possibility for member states to adopt 'more detailed' rules, but instead refers to 'more detailed or stricter rules'.

**Table 1. Changes in wording of Art. 1(3) during the legislative process**

| EMFA Proposal EC | EP Mandate | Council Mandate | EMFA |
|---|---|---|---|

[29] In this light e.g. Cornils M., Statement on the Proposal for a European Media Freedom Act, presentation delivered in the CULT meeting of 6 February 2023; see for an overview also Cole M. and Etteldorf C., "EMFA Background Analysis", 2023, pp. 14 et seq.
[30] Legal Service of the Council of the EU, Opinion on the legal basis, 4.4.2023, 8089/23.
[31] Cole M. and Etteldorf C., Research for CULT Committee - European Media Freedom Act: Policy Recommendations Concomitant expertise for legislative report, 2023, p. 3.
[32] For an overview of all amendments in the negotiations process see the 4-column synopsis provided by the Council, doc. no. 15514/23.

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| | | | |
|---|---|---|---|
| Art. 1(3): This Regulation shall not affect the possibility for Member States to adopt more detailed rules in the fields covered by Chapter II and Section 5 of Chapter III, provided that those rules comply with Union law. | Art. 1(3): This Regulation shall not affect the possibility for Member States to adopt more detailed *or stricter* rules in the fields covered by Chapter II, Section 5 of Chapter III *and Article 24*, provided that those rules comply with Union law. | Art. 1(3): This Regulation shall not affect the possibility for Member States to adopt more detailed *or stricter* rules in the fields covered by Chapter II, Section 5 *and Article 24* of Chapter III, provided that those rules comply with Union law. | Art. 1(3): This Regulation *does* not affect the possibility for Member States to adopt more detailed *or stricter rules* in the fields covered by Chapter II, Chapter III, Section 5, *and Article 25*, provided that those rules *ensure a higher level of protection for media pluralism or editorial independence in accordance with this Regulation and* comply with Union law. |

In addition, numerous 'definitive' formulations of rights and obligations were replaced by a wording that better reflects the requirements for implementation at member state level ('member states shall ensure/respect'). However, these formulations make the instrument partly closer to the form of a directive, without giving the EMFA this legal nature, and are thus to some extent a compromise in view of the idea expressed by some member states to either select the instrument of a directive or introduce some substantive provisions of the EMFA in a future reform of the AVMSD.

## 2.4 The legal challenge pending before the CJEU

Whether the changes made and the arguments concerning the legal basis will be regarded as sufficient, will likely relatively soon be answered by the CJEU. Hungary had already criticised the proposal during the legislative process and has recently brought an action for annulment of the entire EMFA, or alternatively of some of its provisions, to the CJEU.[33]

The action is based on the argument that although the media services covered by the EMFA have both a cultural and an economic character, the EMFA does not in fact regulate economic aspects, but rather its main objective is to promote freedom and pluralism of the media, which is outside the scope of Art. 114 TFEU. As the structure of the action implies, because specific provisions are also challenged separately from an overall questioning of the legal act, the CJEU may answer all of the above raised questions concerning the scope of the EMFA, its essential objective and its relation to the internal market as well as respect for the principle of subsidiarity.

[33] Action brought on 10 July 2024 – *Hungary v European Parliament and Council of the European Union*, Case C-486/24.

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# 3. The EMFA in a nutshell

The EMFA is divided into four chapters,[34] containing both procedural and substantive rules, which are not strictly separated from each other but rather spread throughout the chapters and sections. What should be emphasised in this context is that for each provision it must be analysed separately whether and to what extent a direct (legal) effect already arises from the EMFA or whether it depends on the implementation by the different member states and whom this (direct) legal effect is targeting.

## 3.1 Chapters I and II on definitions, rights and obligations

| Articles | Main Recitals |
|---|---|
| *Chapter I – General provisions* | |
| *Art. 1 – Subject matter and scope* | 1-8 |
| *Art. 2 – Definitions* | 9-13 |

Chapter I contains, as is typical for EU legal acts, the declaration of the subject matter and scope of the regulation (Art. 1) as well as the relevant definitions – in this case an extensive list (Art. 2). Particularly relevant are Art. 1(2) and (3) EMFA, which specify the relationship between the EMFA and other EU legal acts and national law. In particular, the EMFA shall not affect the e-Commerce Directive,[35] the copyright-related Digital Single Market Directive,[36] the Platform-to-Business (P2B) Regulation,[37] the DSA, the DMA, the Regulation on the transparency and targeting of political advertising[38] and the General Data Protection Regulation.[39] The chosen wording 'shall not affect' – in contrast to the formulation 'without prejudice' used in many other more recent legal acts – suggests that, in principle, the EMFA rules are not considered to conflict with the rules of the aforementioned legal acts, but that, in case of ambiguity, these should take precedence.[40] As far as national law is concerned, the EMFA does not limit the possibility for member states to adopt more detailed or stricter rules. However, this possibility is restricted to certain provisions (Chapter II, Chapter III Section 5 and Art. 25), which in turn means that other provisions are to be regarded as fully harmonised by the EMFA – although to a different extent of detail – leaving no such flexibility to the national level. With regard to the definitions in the EMFA, which will be discussed in more detail below in the context of its substantive sections, it

[34] An overview of all of the articles of the chapters with the corresponding recitals can be found in the Annex of this publication.
[35] Directive 2000/31/EC, OJ L 178, 17.7.2000, pp. 1–16.
[36] Directive (EU) 2019/790, OJ L 130, 17.5.2019, pp. 92–125.
[37] Regulation (EU) 2019/1150, OJ L 186, 11.7.2019, pp. 57–79.
[38] Regulation (EU) 2024/900, OJ L, 2024/900, 20.3.2024.
[39] Regulation (EU) 2016/679, OJ L 119, 4.5.2016, pp. 1–88.
[40] See on this in detail Cole M. and Etteldorf C., EMFA Background Analysis, 2023, pp. 20 et seq.

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should be noted that some new definitions are introduced (e.g. media services or editorial responsibility), while existing definitions, e.g. as laid down in the AVMSD, are partially re-used and adapted to the broader scope of the EMFA, or simply referenced from other legal acts (e.g. audiovisual media services and video-sharing platforms from the AVMSD, online platforms from the DSA and mergers from the Merger Regulation). This will contribute to a coherent application of the legal acts that partially intersect with each other. However, not all important legal terms from the EMFA have been made subject to a concrete definition, such as the terms 'recipients', 'editorial independence' or 'media pluralism', which therefore require further interpretation.

| Articles | Main Recitals |
|---|---|
| *Chapter II – Rights and duties of media services providers and recipients of media services* | |
| *Art. 3 – Right of recipients of media services* | 8, 14, 15 |
| *Art. 4 – Rights of media services providers* | 16-26 |
| *Art. 5 – Safeguards for the independent functioning of public service media providers* | 27-31 |
| *Art. 6 – Duties of media service providers* | 32-35 |
| *Art. 29 – Entry into force and application* | - |

Chapter II contains substantive provisions relating to rights of recipients (Art. 3), rights of media service providers including especially journalists (Art. 4), duties of media service providers addressing news and current affairs content with stricter obligations (Art. 6) and safeguards for the independence of PSM (Art. 5).[41]

## 3.2 Chapter III on institutional structures and cooperation procedures as well as media market structure

| Articles | Main Recitals |
|---|---|
| *Chapter III – Framework for regulatory cooperation and a well-functioning internal market for media services* | |
| *Section 1 – Independent media authorities* | |
| *Art. 7 – National regulatory authorities or bodies* | 36 |
| *Section 2 – European Board for Media Services* | |
| *Art. 8 – European Board for Media Services* | 37 |
| *Art. 9 – Independence of the Board* | 37 |
| *Art. 10 – Structure of the Board* | 38, 39 |
| *Art. 11 – Secretariat of the Board* | 42 |
| *Art. 12 – Consultation mechanism* | 40 |

[41] See on these provisions in more detail below sections 4.1, 4.2 and 4.3.

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| | |
|---|---|
| *Art. 13 – Tasks of the Board* | 41 |
| *Section 3 – Regulatory cooperation and convergence* | |
| *Art. 14 – Structured cooperation* | 43, 44 |
| *Art. 15 – Requests for enforcement of obligations of video-sharing platform providers* | 43, 45 |
| *Art. 16 – Guidance on media regulation matters* | 46 |
| *Art. 17 – Coordination of measures concerning media services from outside the Union* | 47-49 |
| *Section 4 – Provision of access to media services in a digital environment* | |
| *Art. 18 – Content of media service providers on very large online platforms* | 50-55 |
| *Art. 19 – Structured dialogue* | 56 |
| *Art. 20 – Right to customise the media offering* | 57-59 |
| *Section 5 – Requirements for well-functioning media market measures and procedures* | |
| *Art. 21 – National measures affecting media service providers* | 60-61 |
| *Art. 22 – Assessment of media market concentrations* | 62-66, 68 |
| *Art. 23 – Opinions on media market concentrations* | 67-68 |
| *Section 6 – Transparent and fair allocation of economic resources* | |
| *Art. 24 – Audience measurement* | 69-71 |
| *Art. 25 – Allocation of public funds for state advertising and supply or service contracts* | 72, 73 |

Chapter III is the most comprehensive one and contains a framework for regulatory cooperation and rules for a well-functioning internal market for media services. It is divided into six sections. Sections 1 and 2 concern the institutional setup provided for the application of the EMFA and also affecting the AVMSD. Section 1 (Art. 7) determines the national regulatory authorities or bodies (NRAs) tasked with the application of (only) Chapter III EMFA and thereby directly links to the authorities (already) set up under the AVMSD, which will lead to consistency in the synchronised application of the EMFA and AVMSD. Section 2 (Art. 7 to 13) details the newly created European Board for Media Services (hereinafter, Board) which will replace the ERGA, and provides rules for its establishment, organisation, independence, structure and tasks.

Noteworthy is the consultation mechanism introduced in Art. 12 at a late stage of the trilogue negotiations, which concerns situations in which the (audiovisual media services) regulatory authorities within the Board deal with non-audiovisual matters and therefore have to involve other relevant sectors, such as the press.[42] Section 3 contains provisions on regulatory cooperation and convergence, in particular addressing structured cooperation between the NRAs (Art. 14) as well as guidance (Art. 16) under the AVMSD and EMFA in general, enforcement vis-à-vis video-sharing platforms under the AVMSD

[42] See on Sections 1 and 2 in more detail below section 4.6.1.

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specifically (Art. 15) and coordination of measures outside the scope of the AVMSD and EMFA as regards media services from outside the Union (Art. 17).[43]

While these sections are more about procedural aspects, Section 4 (provisions of and access to media services in a digital environment), Section 5 (requirements for well-functioning media market measures and procedures) and Section 6 (transparent and fair allocation of economic resources) contain a mixture of substantive and procedural rules addressing different aspects of ensuring media freedom and pluralism in the digital environment.

## 3.3 Chapter IV on monitoring and evaluation as well as applicability timeline

| Articles | Main Recitals |
|---|---|
| ***Chapter IV – Final provisions*** | |
| ***Art. 26 – Monitoring exercise*** | 74 |
| ***Art. 27 – Evaluation and reporting*** | 74 |
| ***Art. 28 – Amendments to Directive 2010/13/EU*** | - |
| ***Art. 29 – Entry into force and application*** | - |

Chapter IV contains final provisions *inter alia* on monitoring (Art. 26) and evaluating (Art. 27) the EMFA and its impact, which will be the task of the European Commission while the member states and the Board are required to cooperate on providing relevant information, while also establishing obligations for the Commission to involve the national representatives. Art. 29 contains rules on entry into force and applicability, following a tiered system: While the EMFA shall apply in its entirety from 8 August 2025, certain provisions apply already earlier (Art. 3 as of 8 November 2024; Art. 4(1) and (2), Art. 6(3) and Artt. 7 to 13 and 28 as of 8 February 2025; Art. 14 to 17 as of 8 May 2025) or even later after a transition period (Art. 20 concerning the right to customise media offerings as of 8 May 2027).

Of particular relevance is Art. 28 concerning amendments to the AVMSD. It only states that Art. 30b is deleted and that references to that provision on ERGA shall be construed as references to the Board as established by the EMFA after 8 February 2025. Beyond that, however, the relationship between the EMFA and the AVMSD is not explicitly clarified. In particular, the AVMSD is not included in the list of EU legal acts that are to remain unaffected – as the AVMSD actually is amended by the EMFA, albeit only concerning one provision. Rather, references to the AVMSD can be found in several places throughout the EMFA. Some of these, in particular the rules on cooperation in enforcement, can be regarded as useful additions or extensions of the AVMSD.

[43] See on Section 3 in more detail belowsection 4.6.2.

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Others, such as the Commission's powers to adopt guidelines on Art. 7a AVMSD (prominence of public value content) and Art. 5(1) AVMSD (transparency of media ownership), are aimed at intensified harmonisation (even though they will not be legally binding) of the AVMSD rules. Yet others, such as Art. 6(1) EMFA regarding information on media ownership, turn the previously optional possibility for member states to lay down such rules in national law (Art. 5(2) AVMSD) into a binding obligation for media service providers on EU level, i.e. override it without amending it.

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# 4. The scope of the EMFA in more detail

Although the EMFA consists of only 29 articles, it contains a wide range of very different rules that are all intended to safeguard media freedom and pluralism in the context of a functioning internal market while approaching the aim from different angles. To provide for a better overview, the provisions will be examined in more detail below, grouped into their respective impact on different addressees.

## 4.1 Rights of recipients and users

While the EMFA revolves around the concept of media services and their role in the internal market, this role includes the provision of access to a plurality of views and reliable sources of information to citizens and businesses. This also brings the recipients of the services within the ambit of the regulation, as they should ultimately benefit from a free and diverse media market. On the one hand they therefore indirectly benefit from all provisions of the EMFA that aim at this objective. On the other hand, some provisions are even directly addressed to them.

### 4.1.1 Access to plural and independent media content

Art. 3 EMFA establishes – at least this is what its title suggests – a 'right of recipients of media services'. While the EMFA proposal for this provision merely stated a right without explaining its implementation or enforcement in more detail,[44] the final version contains a mandate to the member states. These should, first of all, respect the right of recipients of media services to access a variety of editorially independent media content. In this respect, the final EMFA wording still does not create a subjective right, but rather emphasises the member states' commitment to the (existing) rights that follow from the fundamental rights of freedom of information and expression and are subject to interpretation and concretisation by constitutional courts as well as the European Court of Human Rights (ECtHR) concerning Art. 10 ECHR.[45] Despite the rather passive formulation ('respect'), no statement is made about active or passive obligations of the member states, because both defensive and proactive obligations can arise from fundamental rights, the guarantors of which are the member states.[46] Furthermore, and more actively formulated, the member states should also ensure framework conditions to protect this right for the benefit of a free and democratic discourse. In essence, this is about empowering recipients to make

[44] Cole M. and Etteldorf C., EMFA Background Analysis, 2023, p. 25.
[45] See on this in particular ECtHR, *Dink v Turkey*, App no 2668/07 and others (2010).
[46] See for Art. 10 ECHR in a media-related context ECtHR, *Informationsverein Lentia and others v Austria*, App. No. 13914/88 and others (1993), para. 38.

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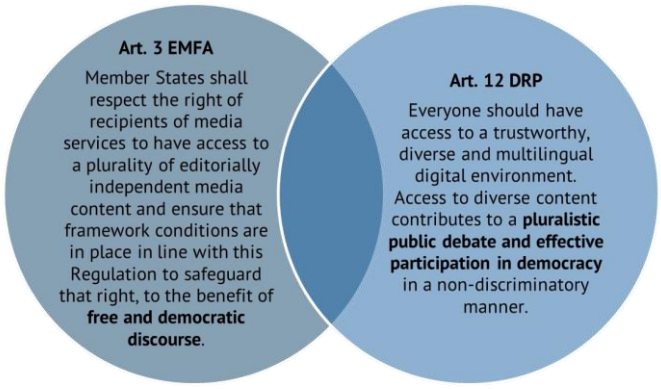
informed decisions, including about the state of their democracies and in the context of elections.

Although the term 'recipient' in the context of Art. 3 is not defined by the EMFA itself, Recital 8 sheds light on the understanding of the legislators, whodescribe them as natural persons who are nationals of member states or benefit from rights conferred upon them by Union law and legal persons established in the Union. Both this restrictive specification and the process of access being tied solely to offerings from (because of the service-based definition typically 'professional'[47]) media service providers are surprising in that they do not result from the fundamental rights mentioned, which are ultimately the basis of Art. 3 EMFA.[48] Essentially, this provision transfers the positive obligations of member states, which already follow from fundamental rights and have been shaped in particular by the ECtHR,[49] into the framework of binding EU secondary law. Comparable approaches already existed in non-binding instruments, such as Art. 12 of the European Declaration on Digital Rights and Principles for the Digital Decade,[50] which provides for a right to access a trustworthy, diverse and multilingual digital environment and diverse content.

**Figure 3. Relation between the EMFA and the European Declaration on Digital Rights and Principles for the Digital Decade**




However, important questions about how such a right to access could be guaranteed were already discussed in the context of the fundamental rights requirements relating to member states, in particular the scope of the positive obligation, the content of the right and how failure to comply with the obligation amounts to a violation of fundamental rights of individuals by the states.[51] These questions remain under Art. 3 EMFA in an even more relevant dimension as the instrument itself is a directly binding regulation. The way the

[47] See below 4.2.1.1.
[48] Cole M. and Etteldorf C., EMFA Background Analysis, 2023, p. 25.
[49] See extensively on this in light of fundamental rights Pentney K., "States' positive obligation to create a favourable environment for participation in public debate: a principle in search of a practical effect?", *Journal of Media Law*, 16(2024)1, pp. 146–177.
[50] European Declaration on Digital Rights and Principles for the Digital Decade 2023/C 23/01, OJ C 23, 23.1.2023, pp. 1–7.
[51] Pentney K., "States' positive obligation to create a favourable environment for participation in public debate", p. 160.

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provision is formulated, non-compliance with the provision would have to be seen in the form of a possible violation of the Treaty obligations by member states rather than the dimension of fundamental rights, but the regulation contains no further specifications. Recital 14 merely indicates that news and current affairs content, as well as quality journalism as a counterweight to disinformation, might be of particular relevance here. A framework guaranteeing the substance of Art. 3 EMFA can result in a wide range of potential policy actions, ranging from promoting quality journalism, introducing must-carry or must-be-found rules concerning such content or regulating algorithms. It therefore remains to be seen whether and to what extent the member states will take up this 'inspiration' by Art. 3 EMFA.

### 4.1.2 Right to customise media offerings

Furthermore, under Art. 20 EMFA, 'users' shall have a right to easily change the configuration, including default settings, of any device or user interface controlling or managing access to and the use of media services providing programmes in order to customise the media offering. However, it is not the member states that are obliged to guarantee this right, but it rather results directly from the EMFA provision and is addressed to manufacturers, developers and importers of such products. They shall not only ensure that users can freely and easily change at any time their configuration (including default settings) to their personal interests or preferences but also that the visual identity of media service providers accessed through their devices or interfaces is consistently and clearly visible to the users. This concerns for example a prioritisation on the home screen of a device, through hardware settings or software shortcuts, applications and search areas, but does not extend to individual items, such as programmes, within an on-demand service catalogue.[52] On the one hand, this is intended to empower users to make their own informed decisions about the content they consume (and thus determine how they form their opinions). On the other hand, this indirectly promotes the non-discriminatory treatment of media services and their content, which no longer depends solely on the prioritisation as now set by devices or user interfaces. In this light and with a media-specific approach, Art. 20 EMFA supplements provisions of the DSA and DMA, namely Art. 25 DSA (manipulation-free design of online interfaces) and Art. 6(3) DMA (free design of standard settings of the operating system, virtual assistants and web browsers). Importantly, Art. 20 EMFA should not affect national measures implementing Art. 7a or 7b AVMSD, a discretionary possibility which was taken up in some member states to establish rules on prominence of public value content.[53]

[52] Recital 57 EMFA.

[53] See on this Cappello M. (ed.), *Public interest content on audiovisual platforms: access and findability*, *IRIS Special*, European Audiovisual Observatory, Strasbourg, 2023; Deloitte and SMIT (2021), "Study on the implementation of the new provisions in the revised Audiovisual Media Services Directive (AVMSD)", Final report (SMART 2018/0066 – Part D).

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**Table 2. Comparison of EMFA, DMA and DSA provisions on user empowerment**

| Art. 20(1) EMFA | Art. 6(3) DMA | Art. 25(1) DSA |
|---|---|---|
| **Users** shall have a right to easily change the configuration, including **default settings, of any device or user interface** controlling or managing access to and the use of media services providing programmes in order to customise the media offering in accordance with **their interests or preferences** in compliance with Union law. | The **gatekeeper** shall allow and technically enable end users to easily un-install any software applications on the **operating system** of the gatekeeper […].<br><br>The gatekeeper shall allow and technically enable end users to easily change **default settings on the operating system, virtual assistant and web browser** of the gatekeeper that **direct or steer end users** to products or services provided by the gatekeeper. | **Providers of online platforms** shall not design, organise or operate their **online interfaces** in a way that deceives or manipulates the **recipients** of their service or in a way that otherwise materially distorts or impairs **the ability** of the recipients of their service to make **free and informed decisions**. |

## 4.2 Rules on media service providers

### 4.2.1 Rights and duties of (news) media service providers

#### 4.2.1.1 The notion of media service providers

One of the main focus points of the EMFA are media services, which the regulation defines very broadly as 'a service as defined by Articles 56 and 57 TFEU, where the principal purpose of the service or a dissociable section thereof consists in providing programmes or press publications, under the editorial responsibility of a media service provider, to the general public, by any means, in order to inform, entertain or educate' (Art. 2 no. 1 EMFA). Thus, the EMFA follows an approach that does not focus on a specific form of content or dissemination (as the AVMSD does with regard to audiovisual content disseminated by certain actors), but takes a broader approach. Still, there are obvious similarities with the definition of (audiovisual) media services in the AVMSD relying mainly on 'professional activity' and 'editorial responsibility', which is important in the context of consistency but remarkable in light of the EMFA and the AVMSD following different objectives (actively protecting media freedom in contrast to minimum harmonisation for certain areas of audiovisual content dissemination in order to accompany the country of origin principle).[54]

The term 'press publication' refers to the definition in Art. 2 point (4) of the DSM Directive[55], i.e. essentially refers to journalistic content in both traditional (printed) and online press.

[54] See extensively Seipp T., Ó Fathaigh R. and van Drunen M., "Defining the 'media' in Europe: pitfalls of the proposed European Media Freedom Act", *Journal of Media Law*, 15(2023)1, 39, 41 et seq.
[55] Directive (EU) 2019/790, OJ L 130, 17.5.2019, pp. 92–125.

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Meanwhile, the term 'programme' – although inspired by Art. 1(1)(b) AVMSD – is not identical to the AVMSD term; in particular, it includes beyond audiovisual content also audio content. Thus, the EMFA addresses television or radio broadcasts, on-demand audiovisual media services, audio podcasts, press publications, etc.[56] Although the impact any form of content might have on the formation of public opinion is reflected in the definition – which is also in line with more recent case law of the ECtHR in the context of freedom of expression and of the media –,[57] a significant limitation is made in that the offer has to be a service and therefore has to have a commercial dimension or compete with such services. This approach reflects the grounding of the regulation on the internal market legal base. Not all offerings that are potentially relevant to the formation of opinion are therefore covered. This is particularly relevant when it comes to the question of the applicability of the EMFA to user-generated content, for example by influencers on video-sharing platforms or social networks. These are only covered if their activity constitutes a professional activity normally provided for consideration, be it of a financial or other nature.[58] Due to the reference to the freedom to provide services, the extensive relevant case law of the CJEU will in future apply to this question. It will be interesting to see how the Court will deal with obligations of influencers – an issue that has already been on the EU's consumer protection agenda for a while.[59] On the other hand, this service-based approach might limit the direct applicability of rights laid down in the EMFA for individual journalists, bloggers, non-profit news websites, or NGOs.[60]

#### 4.2.1.2 Rights of media service providers

In essence, only media service providers are endowed with certain rights by the EMFA which have to be ensured or respected by the member states. Art. 4(1) of the EMFA essentially repeats the freedom to provide services for this specific type of service and enshrines it at the level of ordinary law. Although the free movement of media services across borders already follows directly from primary law (Art. 56 TFEU), the foundation in secondary law opens up further legal avenues for monitoring compliance by the member states in the form of potential infringement proceedings or preliminary reference requests by national courts in cases involving media service providers.

Similarly, Art. 4(2) EMFA enshrines another right of media service providers or, rather, an obligation of member states, which already follows from Art. 11 of the Charter of Fundamental Rights of the EU and national constitutions as well as the ECHR, but is much more specific: member states (including their NRAs) shall respect the effective editorial freedom and independence of media service providers in the exercise of their professional activities and shall not interfere in or try to influence their editorial policies (the overall

[56] Recital 9 EMFA.
[57] See e.g. *Magyar Helsinki Bizottság v Hungary*, App no 18030/11 (2016) para 168, where the court pointed to the importance of bloggers and social media influencers in light of opinion-forming. See in general, Oster J., "Beneficiaries of media freedom: who is 'the media'?" in: Oster J., Media Freedom as a Fundamental Right. Cambridge Intellectual Property and Information Law, pp. 57-68.
[58] Recital 9 EMFA.
[59] See in brief European Commission, Legal brief #3: "When is an influencer a 'trader'?", 11.10.2023.
[60] Seipp T., Ó Fathaigh R. and van Drunen M., "Defining the 'media' in Europe: pitfalls of the proposed European Media Freedom Act", pp. 39, 41 et seq.

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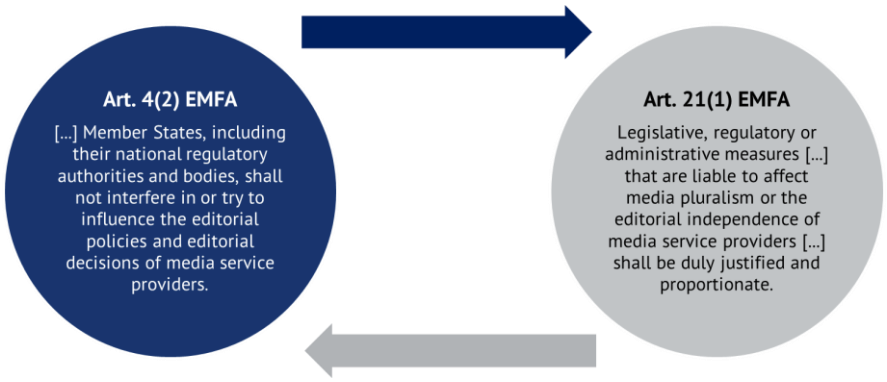
editorial line) and editorial decisions (individual decisions exercising editorial responsibility in day-to-day operations). However, since the EMFA does not provide for any means of enforcing this right at EU level, it still does not create any legal recourse for individual complaints against fundamental rights violations to the CJEU, such as those that exist at the ECtHR or national constitutional courts. In close connection with Art. 4, the stipulations of Art. 21 EMFA have to be read.

**Figure 4. Relation between Art. 4 and Art. 21 EMFA**




Although the provision is directed at the member states, it practically concerns media service providers. According to this, national measures (legislative, regulatory or administrative) that are liable to affect media pluralism or the editorial independence of media service providers shall be duly justified, proportionate, reasoned, transparent, objective, non-discriminatory and follow timeframes set out in advance. These procedural safeguards actually follow from the principles of the rule of law and proportionality, which are enshrined in fundamental rights. However, Art. 21(3) EMFA stipulates that media service providers must also be granted the right (at national level) to appeal to an independent appellate body (e.g. a court) in order to review such national measures that concern them individually and directly. This may include a wide range of state media regulation measures, as these regularly have at least the potential to impact media pluralism and editorial independence.[61] This therefore even concerns laws that implement the AVMSD and EMFA, as well as their enforcement in specific cases by NRAs (e.g. advertising rules or decisions under media concentration rules). In addition it concerns national media law that is not harmonised at EU level (e.g. broadcasting licences) or only partially harmonised (e.g. the protection of minors in the media).

#### 4.2.1.3 Duties of media service providers

On the other hand, the EMFA also contains duties of media service providers in Art. 6 EMFA. This includes – to enhance transparency for recipients[62] – information obligations for all

[61] See on these terms below section 4.5.1.

[62] Generally Cappello M. (ed.), *Transparency of media ownership*, IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2021.

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media service providers not only on contact details but also on financial backgrounds of the media offering. This includes, in particular, information about the owners who are able (e.g. through their share in the undertaking) to influence the operation and strategic decisions of the media service, and beneficial owners, as well as about the public funds the provider has received for advertising. This information must be made easily and directly accessible to the recipients. Simple contact information requirements will not be new for most providers, as they arise from Art. 5(1) AVMSD for audiovisual media services, follow from Art. 5 of the e-Commerce directive for online media, and are regularly provided for in national law, at least as imprint requirements, for press and radio. This would be more relevant if the EMFA were to follow the market location principle, i.e. also establish such obligations for foreign providers that provide their media services in the EU or address them to EU citizens. However, this is not to be assumed, since there is no explicit such rule laid down, as it is contained in the DSA or the GDPR, for example. The EMFA rather refers to services under Art. 56 TFEU (established in a member state) and otherwise leaves the country of origin principle untouched. At EU level, information requirements regarding financial backgrounds, on the other hand, have already been laid down in non-media-specific legislation such as the Money Laundering Directive.[63] For audiovisual media services, this means that the previous possibility for member states to provide for rules on the transparency of media ownership in national law under Art. 5(2) AVMSD is now mandatory under the EMFA. For other media services, this obligation is likely to be completely new, with the exception of similar requirements existing in some member states.

The primary aim of these rules is to protect freedom of information and the opinion-forming process of recipients – they should be in a position to understand and enquire about potential conflicts of interest, including where media owners are politically exposed, as a pre-condition for their ability to assess the reliability (or potential bias) of the information they receive.[64] Future media ownership databases[65] that are to be created and maintained by regulatory authorities will likely provide a reliable source of information for regulators and academics, maybe even more so than for recipients. The collected information can be made useful in other contexts, for example in the general monitoring exercise by the Commission pursuant to Art. 26 EMFA, the monitoring of state advertising spending pursuant to Art. 25 EMFA or the monitoring of media concentration pursuant to Art. 22 EMFA at national level. Furthermore this information can serve journalists, NGOs and researchers, to independently monitor possible misconduct, conflicts of interest and abuse of power in the media sector.[66]

[63] See on this extensively in the AVMSD context Cole and Etteldorf in: Cappello M. (ed.), "Transparency of media ownership", pp. 25 et seq.
[64] Recital 32 EMFA.
[65] See e.g. the databases of the EAO Mavise or the data collected in the Media Pluralism Monitor of the CMPF. For further references Cole and Etteldorf in: Cappello M. (ed.), "Transparency of media ownership", pp. 27 et seq.
[66] Brogi E. et al., "The European Media Freedom Act: media freedom, freedom of expression and pluralism", p. 54.

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#### 4.2.1.4 Duties concerning independence of editorial decisions

Media service providers providing news and current affairs content are subject to further obligations under Art. 6(2) EMFA. They shall take measures to guarantee the independence of editorial decisions, in particular aim to guarantee that these can be taken freely within the provider and ensure that any actual or potential conflicts of interest are disclosed. In comparing the two, Art. 4 EMFA is about protecting the external freedom of the press, while Art. 6(2) is about the internal freedom of the press. The latter duty is directed at the provider, i.e. the person who bears editorial responsibility (exercise of effective control both over the selection of content and organisation). This is usually the person who determines the general editorial line of a medium, but not necessarily the person who makes the editorial decisions (exercising editorial responsibility on the day-to-day operation). These are more likely to be the editors-in-chief or editors on specific pieces of content, and in some cases even individual journalists, for example in the field of investigative reporting.

The obligation thus has to balance the freedom of the press of the provider, who is ultimately responsible for what is published and may also be held liable for the published content, with that of the internal editors. It is therefore important that Art. 6 and Recital 35 make it clear that both the protection of fundamental rights and the right to determine the general editorial policy (including to shape the composition of editorial teams) remain unaffected by the obligation. The EMFA does not specify what such protective measures to comply with Art. 6(2) EMFA should look like. However, Recommendation (EU) 2022/1634[67] provides insight into what the Commission considers possible examples. This Recommendation – although published accompanying the EMFA proposal in September 2022 – is meant to be a sperate and independent tool encouraging media service providers to put in place certain safeguards concerning editorial independence and integrity as well as media ownership transparency while providing for a catalogue of certain measures (e.g. establishing ethics or supervisory committees, information rights of staff members, internal mechanisms such as those foreseen under the Whistleblower Directive,[68] etc.). Due to its nature as a Commission Recommendation under Art. 288 TFUE it is not legally binding, but can have important political significance. However, since the EMFA does not provide for any supervision of compliance with the first section of the regulation, in particular it does not establish any enforcement or sanction mechanisms, and it does not provide for any redress mechanism, for example for editorial staff vis-à-vis the (private) media service provider, comparable to Art. 21 EMFA. The provision thereby mainly takes the form of self-regulation.

***Commission Recommendation (EU) 2022/1634: Excerpt on editorial independence***

*(8) Media service providers are encouraged to establish mechanisms enabling members of the editorial staff to protect their editorial independence against any form of undue interference. Such mechanisms could include:*

[67] Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector, OJ L 245, 22.9.2022, pp. 56–65.
[68] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, OJ L 305, 26/11/2019, pp. 17–56.

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*(a) by way of complement to the obligations laid down in national rules implementing Directive (EU) 2019/1937 of the European Parliament and of the Council, procedures to signal any pressure they might be exposed to; they could provide* ***options for anonymous or confidential signalling*** *of instances of pressure;*
*(b) a* ***right of opposition*** *enabling members of the editorial staff to refuse to sign articles or other editorial content which have been modified without their knowledge or against their will;*
*(c)* ***conscience clauses*** *protecting against disciplinary sanctions or arbitrary dismissals of the members of editorial staff who refuse assignments that they consider to be against professional standards;*
*(d) without prejudice to the rights and obligations laid down in labour law or other protective rules,* ***the right*** *for members of the editorial staff who believe that an ownership change regarding the media service provider may affect their editorial integrity and independence* ***to leave*** *that provider and retain all the benefits that apply in respect of time spent at the media outlet.*

### 4.2.2 Special protection of journalistic sources

Not least because of the increasingly dangerous working conditions for journalists worldwide,[69] better protection for journalists is a priority on the EU agenda.[70] While the SLAPP Directive[71] is intended to protect journalists (and others) from unjustified lawsuits and thus from being muted, and the Whistleblower directive protects informants also in their capacity as information sources for media reporting, Art. 4(3)-(8) EMFA addresses the protection of journalistic sources and confidential communications directly by obliging member states.

On the one hand, member states shall ensure that journalistic sources and confidential communications are effectively protected which might include respective safeguards in national law but also any other exercise of state power (regulatory, administrative, judicial, etc.). On the other hand, member states are explicitly prohibited from taking certain actions listed in Art. 4(3) EMFA which concern the respect of the right of certain actors not to disclose journalistic sources or confidential communications, not making them subject to criminal procedural measures such as searches or seizures that could disclose such information, and not deploying intrusive surveillance software. Although Art. 4 does not mention 'journalists' specifically nor is the term defined in the EMFA, Recital 19 makes it clear that the main focus is to protect journalists' ability to collect, fact-check and analyse information. However, only such journalists are protected who are staff members of or have at least a 'regular or professional relationship' with a

[69] See Reporters without borders, 2023 World Press Freedom Index.
[70] See on this Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, C/2021/6650, OJ L 331, 20.9.2021, pp. 8–20.
[71] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation'), OJ L, 2024/1069, 16.4.2024.

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media service provider.[72] The prohibitions imposed on member states[73] may already follow from fundamental rights and extensive case law of the ECtHR.[74] Accordingly, Art. 4(4) and (5) EMFA provide for possibilities for member states to deviate from the prohibition in exceptional cases and under the condition of observing the principle of proportionality following certain objectives of public interest. However, the EMFA has a further-reaching impact insofar as it limits derogation possibilities to the exceptional cases provided for therein.[75] It further requires judicial review for surveillance measures and stipulates the necessity of effective judicial protection at the national level.

[72] Critical in this light Seipp T., Ó Fathaigh R. and van Drunen M., "Defining the 'media' in Europe: pitfalls of the proposed European Media Freedom Act, 39, 41 et seq.

[73] Brogi E. et al., "The European Media Freedom Act: media freedom, freedom of expression and pluralism", Research for LIBE Committee, 2023, p. 50, point to a possible protection gap as this might not hinder states from delegating the deployment of spyware, or other illicit practices to non-state actors.

[74] See on this, and critical as regards the EMFA proposal reflecting the ECtHR case law, Voorhoof D., "The proposal of a European Media Freedom Act and the protection of journalistic sources: still some way to go".

[75] In doing so, this can be seen as a reaction to the 'Pegasus scandal', extensively on this Liger Q. and Gutheil M., "The use of Pegasus and equivalent surveillance spyware – The existing legal framework in EU Member States for the acquisition and use of Pegasus and equivalent surveillance spyware", study requested by the European Parliament's Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware, 2023.

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**Figure 5. Excerpt of a ECtHR's factsheet on protection of journalistic sources**

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Unit
Unité de la Presse

Factsheet – Protection of journalistic sources

January 2024
This Factsheet does not bind the Court and is not exhaustive

Protection of journalistic sources

**Article 10 (freedom of expression) of the European Convention on Human Rights**

The European Court of Human Rights has repeatedly emphasised that Article 10 of the European Convention on Human Rights safeguards not only the substance and contents of information and ideas, but also the means of transmitting it. The press has been accorded the broadest scope of protection in the Court's case law, including with regard to confidentiality of journalistic sources.

"Protection of journalistic sources is one of the basic conditions for press freedom. ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information be adversely affected. ... [A]n order of source disclosure ... cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest." (*Goodwin v. the United Kingdom*, judgment of 27 March 1996, § 39).

*Source: ECtHR, Press Unit, Factsheet – Protection of journalistic sources*

## 4.3 Entering the stage in EMFA: public service media

In regard to public service media (PSM), the EMFA is a real novelty. While in the past the member states even saw the need to clarify that the application of state aid rules by the European Commission should not interfere with their retained power to define the remit of – then still – public service broadcasters, the Regulation now explicitly contains a provision on Union level that deals with the special role of PSM and the corresponding remit, some aspects of their structure and financing, all of which with a special consideration of procedural aspects. The protocol that the member states had annexed to the Amsterdam Treaty in 1997 and which is protocol no. 29, since the Treaty of Lisbon is even referenced in Art. 5(1) EMFA. The provision addresses the undisputed importance that PSM have for the democratic opinion-forming of societies by providing "in an impartial manner a plurality of information and opinions to their audiences", which necessitates that they be "editorially and functionally independent". This structure of PSM is to be guaranteed by the member states in accordance with the remit for which they have the competence to define according to above-mentioned protocol.

### 4.3.1 The notion of public service media providers

The provision of Art. 5 EMFA is noteworthy for many reasons. Not only does it include PSM, whose remit is typically defined by member states in a purely internal manner addressing the national audiences, in the scope of an internal market-enhancing Regulation. It also obliges member states to set appropriate frameworks without giving any exact formula –

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which is a consequence of the lacking allocation of powers to do so on Union level – nor clarifying what the legal consequence may be in case of "non-compliance".[76] The motivation for the provision is that the Commission identified a high risk of state "capture" of PSM and the possibility of interference by (certain) member states[77] due to the fact that the organisation (and financing) of these entities gives them close proximity to state actors, which can result in undue influence irrespective of the fundamental rights standards set by the ECtHR.[78] In addition, state aid rules with which the Commission can assess whether the financing is a justified compensation for the fulfilment of the remit and which will continue to apply besides the EMFA, were regarded as insufficient to react to abuses when it comes to the lack of independence or the non-fulfilment of the remit. In the final wording of the provision, criticism of the original proposal was responded to by clarifying that the member states are expected to define the remit with the substantive elements mentioned in paragraph 1 while acknowledging that a direct obligation of the PSM providers themselves would have been problematic.[79]

Further, the definition of PSM providers in Art. 2 no. 3 EMFA as a sub-category of media service providers now makes clear that it only applies to those providers, irrespective of their form of organisation, that have been entrusted with a specific remit and receive as a counterpart the according financing, thereby using the rationale of the state aid rules.

> *'**public service media provider**' means a media service provider which is entrusted with a public service remit under national law and receives national public funding for the fulfilment of such a remit.*

The accompanying Recital 10 underlines that these are only entities that are fully devoted to public service, while private undertakings which, based on an agreement e.g. with the state authority licensing the provider, fulfil certain "tasks of general interest" and receive compensation for that are to be regarded as outside of the scope. It was argued[80] that the national rules concerning such PSM providers are so diverse that this can impact and distort the internal market for media services as well as the fundamental right of Art. 11 of the Charter of Fundamental Rights of the European Union,[81] which is why a certain form of harmonization would be needed.[82] However, this still does not lead to a provision that resembles what typically can be found in a Regulation, but rather leaves a lot of margin to the member states comparable to a Directive, as long as the basic standards are achieved.[83] Even though PSM providers are explicitly only addressed in Art. 5 EMFA, their relevance for

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[76] Cole M. and Etteldorf C., EMFA Background Analysis, 2023, pp. 32 et seq.
[77] See at the time of discussion of the EMFA the situation in Hungary and Poland, on that Kozak M., "The Media Pluralism Principle, The financing of Public Broadcasters, and EU Law", *German Law Journal* 25(2024), pp. 111, 113 et seq.
[78] See for the latter e.g. ECtHR, *Manole and others v Moldova*, App no 13936/02 (2009).
[79] Cole M. and Etteldorf C., EMFA Policy Recommendations, pp. 5 et seq.
[80] Explained in detail in Recitals 27 to 30.
[81] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, pp. 389–405.
[82] Brogi E. et al., "The European Media Freedom Act", p. 52; Recital 27 refers as source of evidence on the report / mapping by the European Audiovisual Observatory: Cabrera Blázquez F. J. et al., "Governance and independence of public service media", *IRIS Plus*, European Audiovisual Observatory, Strasbourg, 2022; see especially the national factsheets annexed to the report.
[83] The EMFA refers in Recital 31 to the standards as developed by the Council of Europe.

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the achievement of access to a plurality of editorially independent media content and the free and democratic discourse as referred to in Art. 3 EMFA[84] is obvious. And it should also be underlined that there is no restriction of PSM to broadcasters; they can be any type of PSM provider, even though previously under EU state aid rules only broadcasters were addressed.

### 4.3.2 Procedural safeguards concerning management and financing

Paragraphs 2 and 3 of Art. 5 EMFA lay down procedural safeguards in two aspects: concerning key personnel of the PSM providers and the allocation of financial resources, both with the overarching aim of ensuring independence of the PSM. The rules on appointment and dismissal are limited to either the single head of management or[85] the members of the management board, depending on how the provider is organised. In order to avoid the placing e.g. of favourable persons based on their expected loyalty to a specific government, the rules on the appointment have to be clear in advance of the procedure which then has to take place in a "transparent, open, effective and non-discriminatory" way and be based on "transparent, objective, non-discriminatory and proportionate" selection criteria. Both the length of the appointment as well as the limitation of reasons for early dismissal shall contribute to a robust protection of the independence.

**Table 3. Changes in wording of Art. 5(2) during the legislative process**

| EMFA Proposal EC | EP Mandate | Council Mandate | EMFA |
|---|---|---|---|
| Art. 5(2): The head of management and the members of the governing board of public service media providers shall be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and proportionate criteria laid down in advance by national law. […] | Art. 5(2): *Member States shall ensure, by means of national law and their actions, that the principles of independence, accountability, effectiveness, transparency and openness are respected when the management structures of public service media are appointed. In particular,* the head of management and the members of the governing board of public service media providers shall be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and | Art. 5(2): *Member States shall ensure that the procedures for the appointment and the dismissal of* the head of management *or* the members of the *management* board of public service media providers*, including the duration of their term of office, seek to guarantee the independence of the public service media providers*. The *appointment of* the head of management or the members of the *management* board of public service media providers shall *be based on* transparent, open and non- | Art. 5(2): *Member States shall ensure that the procedures for the appointment and the dismissal of* the head of management *or* the members of the *management* board of public service media providers *aim to guarantee the independence of public service media providers*. The head of management *or* the members of the *management* board of public service media providers shall be appointed *on the basis of* transparent, open, *effective* and non-discriminatory procedure*s* and |

[84] See above section 4.1.

[85] Notably, with this formulation the EMFA clarified that the provision applies either to the one or the other, while the proposal referred to the "head of management *and* the members of the governing board".

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| | | | |
|---|---|---|---|
| | proportionate criteria laid down in advance *in* national law. […] | discriminatory procedures and transparent, objective, non-discriminatory and proportionate criteria laid down in advance *at national level*. […] | transparent, objective, non-discriminatory and proportionate criteria laid down in advance *at national level*. […] |

Similarly, the rules for the funding of the PSM have to be clear before the allocation and procedure can, as required, be based on "transparent and objective criteria". In this regard there is an additional substantive element, namely that the level of financing has to be adequate and it should allow advance planning and a sufficient ("sustainable") level in order to achieve the public service remit. The expectation is even that a development of the PSM providers beside the fulfilment of the remit shall be possible, which responds to the need of adaptability to the fast-changing conditions in the media market.

### 4.3.3 Monitoring of the PSM provision

Finally, as the provision of Art. 5 EMFA is contained in Chapter II of the Regulation which is not the object of supervision by the Board and NRAs,[86] there is a separate rule on the monitoring of compliance with paragraphs 1-3. According to Art. 5(4) EMFA, member states have to give the competence to one or several authorities or bodies – or foresee "mechanisms free from political influence by governments" – for this purpose. In some member states there is oversight by a regulatory authority that covers – for the audiovisual media sector – not only the private but also the public service broadcasters or media. In other member states the PSM are equipped with internal control mechanisms in order to avoid state or state-initiated influence. The formulation of the provision shall encompass all these possibilities as long as there is some form of control taking place. Importantly, this monitoring shall contribute to transparency as it has to be made public, and it reaches from the remit and appointment procedures to the actual financing decisions.

In the application of the EMFA it will be interesting to see whether the Commission can or will use an assumed non-fulfilment of the guarantees in Art. 5 EMFA including the lack of a mechanism of monitoring as a reason for an infringement procedure against a member state, which would certainly have a more direct impact on the structure and functioning of PSM compared to the more limited state aid control so far. Also, whether e.g. financing decisions by member states can be regarded as potentially negatively affecting media pluralism and therefore falling under the requirement of an appeals procedure as foreseen in Art. 21(3) EMFA which a PSM could turn to, will be an important additional question. The Commission will likely continue to proceed with monitoring the state of PSM as it did in the Rule of Law reports,[87] now under Art. 26 EMFA even if the PSM are not separately mentioned therein.

[86] See below section 4.6.1.
[87] See above section 1.

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## 4.4 Relationship between platforms and media

Online platforms play a key role in the online distribution of content and pose significant challenges as media content distributors to undertakings in all media sectors, in particular the smaller ones in the radio and press sectors, when it comes to competing on a level playing field.[88] The relationship between platform and media is consequently addressed by the EMFA in several ways. Besides online platforms being addressed in the rules on media concentration assessments, audience measurements, and state advertising (further discussed below), the provision on the so-called 'media privilege' is of particular relevance.

### 4.4.1 The preferential treatment of media service providers

According to Art. 18 EMFA, very large online platforms (VLOPs) – relying on the respective definition of Art. 3 lit. i) in conjunction with Art. 33 DSA – have to establish a mechanism allowing media service providers to identify themselves as such. If media service providers declare that they will meet certain criteria which essentially are about qualifying them as quality media, VLOPs must treat them preferentially when moderating content. These criteria include that they have to be independent from states, adhere to a regulatory framework providing for compliance with editorial standards and comply with information obligations under Art. 6(1) EMFA amongst others.

[88] Recital 6 EMFA.

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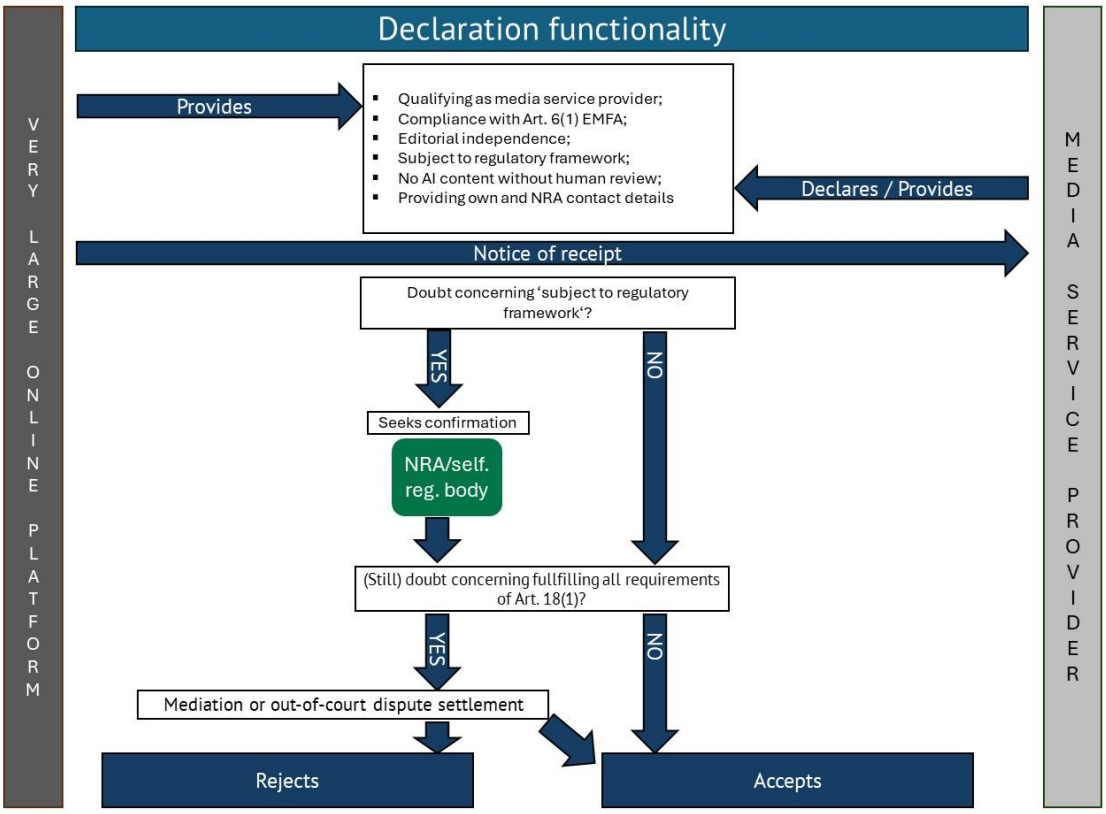
**Figure 6. Declaration functionality under Article 18(1) EMFA**




*Source: Elaboration of the authors*

The preferential treatment means that if a VLOP intends to restrict (e.g. block or delete) content by a media service provider, the concerned provider must not only be informed with a statement of reasons for the restriction, but must also be given the opportunity to submit its own opinion, during which a 24-hour standstill period applies for the content moderation by the VLOP (Art. 18(4) EMFA). This period in which the moderation decision is not allowed to take effect yet constitutes the main difference to similar requirements to give justifying reasons as well as provide for complaint mechanisms that online platforms or intermediary services have to comply with under the DSA and the P2B-Regulation. Furthermore, complaints lodged by media service providers under Art. 20 DSA or Art. 11 P2B Regulation need to be processed and decided upon with priority and without undue delay by VLOPs.

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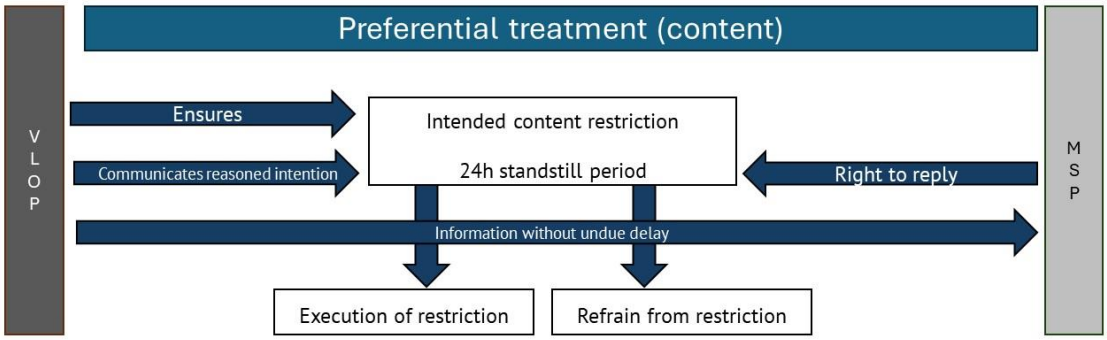
**Figure 7. Procedure regarding suspension or visibility restriction under Article 8(4) EMFA**




*Source: Elaboration of the authors*

This means that media are granted a special position acknowledging their special role in the democratic system, i.e. in their capacity as a cultural asset, which distinguishes them from other economic operators. Similar 'media privileges' are known from other areas such as in data protection or criminal procedure law.[89] The main reason for introducing such a privilege also in the EMFA is that media service providers, which already are subject to media regulation – either media legislation or self- and co-regulation – and content-related monitoring, face another layer of monitoring (by the platforms) when it comes to disseminating their content online. Moreover, this is done by a private party, partly on the basis of civil law instruments such as content policies. These platforms are at the same time competitors for the media to a certain extent. This could lead not only to a limitation of media freedom but also of users' access to quality journalism.[90]

### 4.4.2 Challenges associated with a "media privilege"

Such a privilege in content moderation was already discussed in the framework of the DSA, but ultimately was not included in the final text. One argument against the privilege was (and still is) the possibility of misuse, i.e. that actors acting in bad faith could use the preferential treatment and also the standstill period for the dissemination of e.g. disinformation under the guise of being a media service provider.[91]

In addition, it is difficult to choose the criteria under which the privilege should apply. With the requirements under the EMFA this was regarded as less problematic, because it applies (only) to media service providers that 'are subject to regulatory requirements for the exercise of editorial responsibility in one or more Member States and

[89] See on this extensively Cappello M. (ed.), *Journalism and media privilege*, IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2017.
[90] van Drunen M. et al., "What can a media privilege look like? Unpacking three versions in the EMFA", in: *Journal of Media Law* 15(2023)2, p. 152.
[91] Brogi E. et al., "The European Media Freedom Act: media freedom, freedom of expression and pluralism", *Journal of Media Law* 15(2023)2, pp. 60 et seq.

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to oversight by a competent national regulatory authority or body or that they adhere to a co-regulatory or self-regulatory mechanism governing editorial standards that is widely recognised by and accepted in the relevant media sector in one or more Member States'. While a stable EU legal framework for audiovisual media services already exists in the form of the AVMSD, this is not the case for the press, radio or online media, meaning that national regulation must be relied upon for these in order to determine whether the provider qualifies as beneficiary of the privilege. These are not based on a unified understanding of editorial standards owing to different constitutional traditions. This applies even more where self-regulation is applicable, although there are international standards which potentially could be relied upon;[92] these are, however, not enforceable even if participating providers voluntarily commit to complying with such standards.

### 4.4.3 Exemptions and potential impact

An important exemption of this privilege is laid down in Art. 18(4) EMFA: The right to reply and standstill obligations do not apply if VLOPs moderate content in order to fulfil their obligations pursuant to Art. 28, 34 and 35 DSA, Art. 28b AVMSD or other provisions relating to illegal content pursuant to Union law (e.g. terrorist content or child sexual abuse material). In light of this exemption referring to rules which themselves are subject to broad interpretation or, rather, can be differently assessed, e.g. when it comes to content being harmful to minors, containing incitement to hatred or commercial communication not respecting human dignity, even content posing 'systemic risks' under the DSA such as disinformation,[93] the preferred treatment might ultimately not be applicable in a lot of cases. Indeed, that makes the actual scope of Art. 18 potentially quite narrow and leaves room for VLOPs to not apply the mechanism in any case.

However, then at least the preferred treatment in the complaint mechanism still applies in addition to the obligation of VLOPs to engage in a meaningful and effective dialogue with the media service provider in cases of repeated restrictions without sufficient reasoning having been given. Besides that, the large scope of platforms moderating (also media) content based on their own policies remains in the scope of Art. 18(4) EMFA except if such platform policies are part of risk mitigation measures under Art. 35 DSA and subject to the Commission's supervision.

[92] Recital 53 mentions the standard of the Journalism Trust Initiative in particular.

[93] See van Drunen M. et al., "What can a media privilege look like? Unpacking three versions in the EMFA", *Journal of Media Law* 15(2023)2, p. 152, 156.

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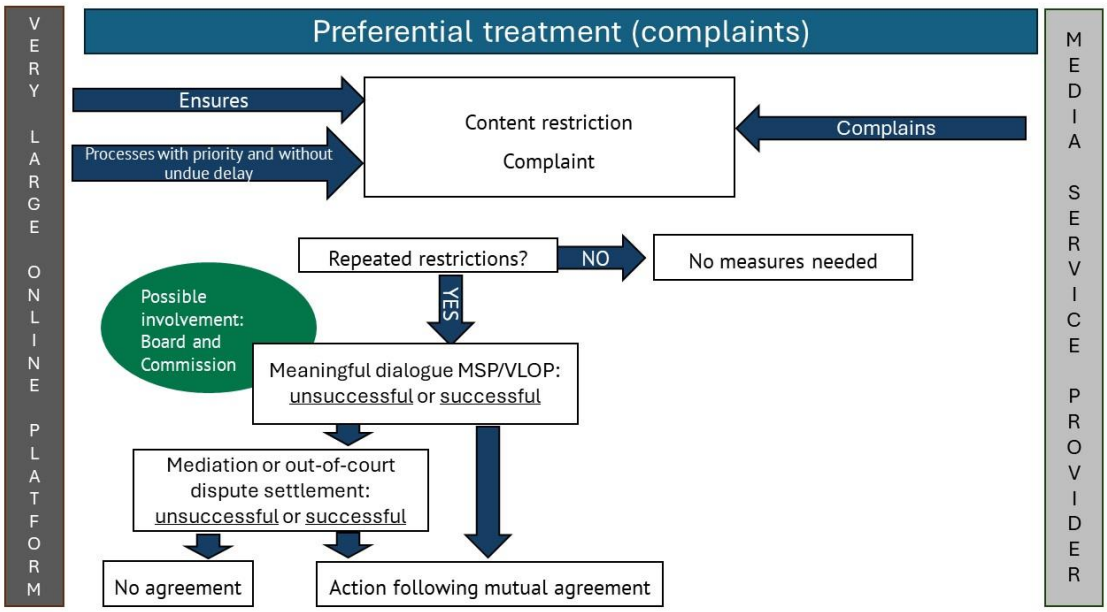
**Figure 8. Complaint-handling processes under Article 18(5)-(6) EMFA**




*Source: Elaboration of the authors*

The actual practicality of the media privilege and its positive or negative impact on diverse and free content distribution will only become clear in its application. Through the structured dialogue between the parties involved and civil society representatives under the organisation of the Board, as per Art. 19 EMFA, it should be possible to identify potential gaps in protection or undesirable developments at early stages.[94]

## 4.5 Shaping the internal media market

The loss of advertising revenues over the past decade, accelerated by the rapid rise of online distribution of content and changing consumption habits, has drained financial resources from the traditional media sector in particular through the loss of advertising revenues in the broadcasting and press sector. This affects not only the economic sustainability of providers and the market but also negatively impacts the quality and diversity of content. Seeing the need to ensure sustainable returns for independent news and quality journalism, the EMFA contributes to (re-)shaping the internal media market from different angles.

[94] See on the impact of the dialogues foreseen in detail van Drunen M., Helberger N. and Fahy R., "The platform-media relationship in the European Media Freedom Act", VerfBlog 2023/2/13.

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### 4.5.1 Assessment of media market concentrations

One major aspect of this is the creation of media concentration rules to which Art. 22 and 23 EMFA are devoted. Already in 1992, the European Commission had envisaged a legislative initiative in its 'Green Paper on Pluralism and Media Concentration'[95] intended to harmonise the very different national rules in the (then still 12) member states regarding restrictions on media ownership. However, the initiative ultimately lost momentum mainly due to concerns of member states about the allocation of competences.[96] With the EMFA, the EU is now taking up the principle idea of a media concentration law again with similar reasoning and very similar policy proposals. The existing media concentration laws in the member states have developed in different ways and exist to a varying extent, not least due to de facto developments in the respective national media markets. The differences relate to the type of rules (e.g. limiting the accumulation of mono-media or multi-media ownership, setting maximum limits for participation in a service, restrictions regarding the person who can control the media undertaking, etc.), their ambit (e.g. mono-media or cross-media oriented) and the actors they address (e.g. print, television, multimedia, etc.), the degree of restrictions or possible legal consequences in case of a (potential) concentration (e.g. restriction of the number of licences, thresholds for regulated concentrations) and modalities of application of the restrictions (e.g. applicability only to certain distribution channels or areas).[97]

Art. 22 EMFA now harmonises this to a certain extent, reacting to problems identified in view of market plurality.[98] According to that, member states shall lay down, in national law, substantive and procedural rules which allow for an assessment of media market concentrations that could have a significant impact on media pluralism and editorial independence. 'Media market concentration' means a concentration as defined in Art. 3 of the Merger Regulation[99] (merger of two or more previously independent (parts of) undertakings or acquisitions) involving at least one media service provider or, alternatively – and this is noteworthy –, one provider of an online platform which gives access to media content. With the application of media concentration control systems to concentration steps concerning (only) online platforms, the EMFA recognises that these can have an impact on the formation of opinion already due to their providing of an 'infrastructure' for media content dissemination.[100] In this context it is then irrelevant which other undertaking is involved in the merger besides the media service provider or online platform. Obvious

[95] COM (92) 480 final.
[96] Ukrow J., Cole M. and Etteldorf C., "Allocation of competences", Chapter C.I.; Brogi E. et al., "The European Media Freedom Act", p. 20.
[97] See extensively CMPF et al., "Study on media plurality and diversity online – Final report", Publications Office of the European Union, 2022, pp. 206 et seq.
[98] See extensively Seipp T. J., "Media Concentration Law: Gaps and Promises in the Digital Age", *Media and Communication* 11((2023)2), pp. 392-405.
[99] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29/01/2004, pp. 1–22.
[100] Unlike the AVMSD, for example, which justifies the rules for VSPs by the fact that they at least have an organisational effect on media content (sorting, ranking, etc.), the definition of an online platform under the DSA and thus EMFA does not require such an element, but rather deems the mere provision of access to media content sufficient.

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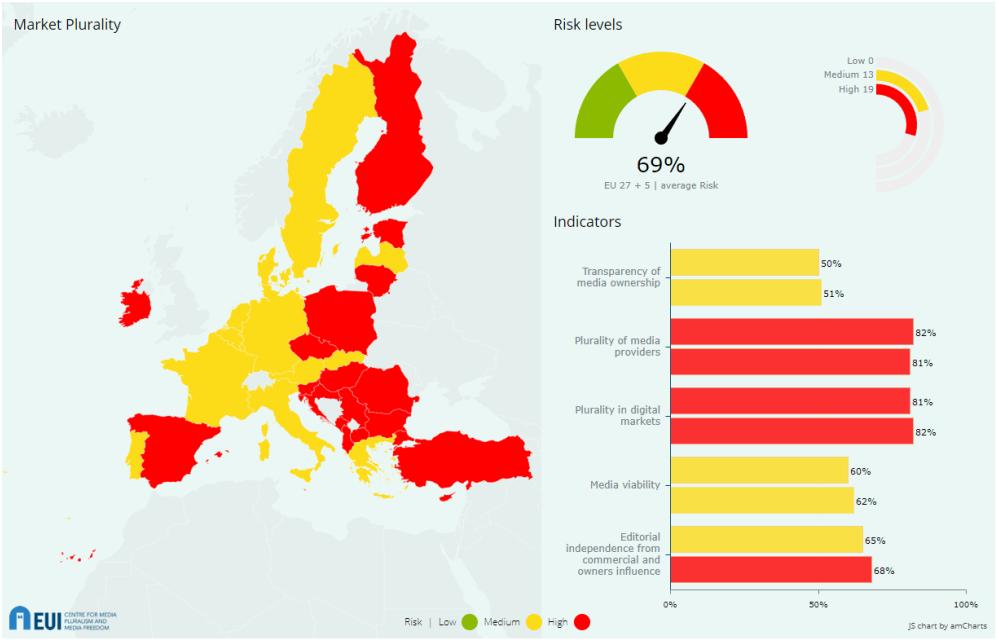
other actors could be, for example, advertising service providers, services for interpersonal communication or even state actors if these are at all able to be involved in a concentration.

**Figure 9. Illustration of the risk levels in the covered countries according to the Media Pluralism Monitor 2024**




*Source: CMPF, Media Pluralism Monitor 2024*

Not all ownership changes are within the scope of Art. 22 EMFA; it addresses only such that potentially have a significant impact on 'media pluralism' and - formulated cumulatively – 'editorial independence' in the 'media market'. Neither of these important terms are defined by the EMFA. Recital 64 explains in this light that 'media pluralism should be understood as the possibility to have access to a variety of media services and media content which reflect diverse opinions, voices and analyses', i.e. follows a risk-based approach with due regard to fundamental rights, taking into account external media pluralism through a variety of providers or internal media pluralism within providers as well as combinations thereof. In essence, the aim is to prevent a single institution from having a major influence on the formation of public opinion. Editorial independence should be understood as addressing the impact a merger has on editorial control in a particular market, in other words whether an actor in a particular market or in several markets gains decisive influence of an editorial nature in the sense of 'editorial dependency of the market' and thus of the formation of public opinion. With regard to the media market, the EMFA suggests taking an overall view of the market, which is based less on traditional media categories and more on opinion-forming power. However, the formulation of actual threshold values - concentrations that can have a 'significant impact' in the described sense – as intervention criteria is left to the member states.

Art. 22 EMFA does, however, harmonise procedural benchmarks that need to be reached by the national rules. Art. 22(1) EMFA refers in particular to the transparency and

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proportionality of procedures, the setting of deadlines and notification criteria. Although the NRAs competent under AVMSD and EMFA do not have to be designated as competent authorities for the monitoring of concentrations – this means that member states are free to refer to the procedures under their national competition law –, they have to be 'substantively involved' in any case. The substantive criteria laid down in Art. 22(2) EMFA, on the other hand, define clearly which factors should (at least) be taken into account by the authorities at the national level when conducting their assessment. These include not only the impact of a concentration on pluralism and opinion-forming, with particular consideration to be given to the online environment, but also, in the context of editorial independence, the measures taken by media service providers (e.g. under Art. 6(2) EMFA) to counter editorial influence. Economic sustainability should also be taken into consideration, i.e. whether a provider could continue to exist at all without the merger. In case a media market concentration is likely to affect the functioning of the internal market for media services, the Board shall be involved by the concerned NRA (or can act on its own initiative under Art. 23 EMFA) and deliver an opinion, which then has to be taken into 'utmost' account in the final national decision.

As for the relationship between the EMFA concentration control and the competition law system, Art. 22(1) subpara. 2 EMFA clarifies that both these assessments are to be seen separately. The intention is for competition law and media law to coexist. Concentration control for media undertakings will thus continue to be carried out by the European Commission on the basis of economic criteria (if the merger has a Union dimension) or on the basis of national competition rules (below that threshold). Consequently, if the economic and the media pluralism-related considerations lead to different results, it must be assumed that a merger can be prohibited independently of each procedure or made subject to conditions (without the EMFA itself specifying possible legal consequences). In view of national media concentration laws existing in many member states, which was already possible besides competition law due to the opening clause of Art. 21(4) Merger Regulation, Art. 22(1) subpara. 1 EMFA and Recital 66 will have to be read in such a way that the former purely optional clause of Art. 21(4) Merger Regulation will become a mandatory clause for the area of safeguarding media diversity and protecting editorial independence as legitimate interests, meaning that there is an obligation to introduce such rules. In addition, existing media concentration rules must at least meet the requirements of Art. 22 EMFA.

### 4.5.2 Audience measurement

One significant tool for both the assessment of media concentration and besides as an independent instrument, in particular in the context of market observation, is audience measurement, which is why the EMFA is giving that separate attention. 'Audience measurement' means the activity of collecting, interpreting or otherwise processing data about the number and characteristics of users of media services or users of content on online platforms for the purposes of decisions regarding advertising allocation, pricing, purchases or sales or regarding the planning or distribution of content (Art. 2 no. 16 EMFA). Audience reach is an essential factor for media, intermediaries and advertisers, but also as

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a deciding factor for regulating them. It can determine the cost of an advertisement or the number of recipients a piece of content actually reaches. In media concentration law, it is (also) a parameter for measuring the power to impact public opinion. In the DSA and DMA, a similar value – number of (active) users – is the measurement for subjecting certain undertakings to stricter obligations, either because they control markets or because they pose systemic risks due to their reach. If audience measurement is therefore non-transparent or even flawed, based on inadequate methods, this can have a considerable impact on the media sector in many respects.

Against this background, Art. 24 EMFA stipulates that providers of audience measurement systems shall ensure that such systems (including methodologies used) comply with the principles of transparency, impartiality, inclusiveness, proportionality, non-discrimination, comparability and verifiability. Respecting data protection law and trade secrets, they also have to provide media service providers and advertisers, without undue delay and free of charge, with 'accurate, detailed, comprehensive, intelligible and up-to-date information' on the methodology used for audience measuring. This reacts to the fact that, in particular, certain new players have emerged in the media ecosystem, such as online platforms, that do not abide by widely accepted industry standards but provide their proprietary measurement services without making available information on their methodologies, ultimately leading to information asymmetries among media market players and potential market distortions.[101] The DMA has already addressed this problem with transparency requirements for providers of online advertising services, which are intended to enable live access to the advertising inventory. The obligations of the EMFA, on the other hand, are broader and additionally cover how the measurement is carried out. It is nonetheless too early to say which shape the obligations will take in practice. In particular, this will require the development of codes of conduct and the organisation of 'structured dialogues' involving providers on both sides, as well as regulators, taking into account that the providers of such services may be outside of the scope of existing media regulation. This provision is another that empowers the Commission to issue guidelines for further clarification.

### 4.5.3 Allocation of state advertising

Aiming to tackle one aspect of a biased allocation of economic resources in the media sector, Art. 25 EMFA contains rules on state advertising and supply or service contracts. This term should be understood as broadly covering any placement, promotion, publication or dissemination, in any media service or online platform, of a promotional or self-promotional message or a public announcement or an information campaign by, for or on behalf of a public authority or entity. It refers to advertising activities that are normally carried out against payment and, although according to the definition itself this does not necessarily (only 'normally') require a remuneration to be involved, the substantive rules link to the necessity of some kind of public funds spending or other benefits or advantages granted. For example, information campaigns or public announcements are included, the latter,

[101] Recital 69.

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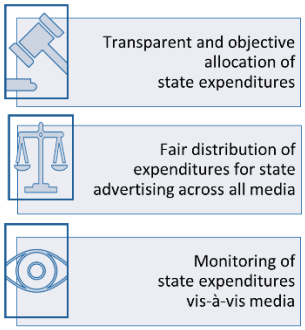
however, not covering official announcements for reasons of public interest such as emergency messages.[102] Tying such state advertising by definition to the condition that it must be initiated by the state, i.e. authorities or bodies and entities controlled by national or subnational governments, it includes private companies where the state has a decisive influence due to e.g. contracts or shares but does not include political actors per se such as political parties outside of an involvement in government structures. Noteworthy is that state advertising in this sense differs from the concept of 'political advertising' as addressed in the Regulation on the transparency and targeting of political advertising[103] according to which such advertising can be placed by, for or on behalf of a 'political actor' to fall under that definition. This can be attributed to the fact that Art. 25 EMFA not only addresses economic aspects that are important for the sustainability of media, but one of the secondary objectives of the EMFA, namely the increasing influence of the state on editorial decisions. While the rules on media ownership (transparency and concentration) can also be subject to the observation of *political* influence, the focus here is on the potential influence exerted by *state* powers and their access to resources which can then be used in a potentially distorting manner.

**Figure 10. Main rules of Art. 25 EMFA**




*Source: Elaboration of the authors*

This two-sided objective is well illustrated by the three main rules that Art. 25 EMFA contains in relation to state advertising, positioning member states ultimately both in the role of agents and subjects of transparency.[104] Firstly, state expenditure (money or other benefits) to media service providers or, which needs emphasising again here, online platforms should be approved based on transparent, objective, proportionate and non-discriminatory criteria and procedures. The same also applies to the purchase of other goods or services beyond state advertising, for example audiovisual productions, market data and consultancy or training services. The award criteria should be publicly available in advance, which is intended to reduce the risk of biased and opaque decisions. It is thus

[102] Recital 13 EMFA.
[103] Regulation (EU) 2024/900, OJ L, 2024/900, 20.3.2024.
[104] Klimkiewicz B., "Media, State and Reciprocal Transparency: Normative Expectations and Regulatory Possibilities in a Proposal of the European Media Freedom Act (EMFA)", in: *Zeszyty Prasoznawcze* 66)(2023)4), 113, 120 et seq.

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about equal access to state resources. The obligations follow directly from the EMFA without the need for implementation by the member states, although national concretisations of the procedures are likely to be offered.

Secondly, Art. 25 EMFA contains an encouragement – not a detailed obligation – for member states to distribute their expenditure for state advertising in a more diverse way, i.e. in principle more fairly across all forms of media, although the specifics of the national media market should be considered. The latter element could well lead to a situation in which an inherently 'unfair' distribution with higher expenditure in the radio sector, for example, turns out to be actually fairer than an equal distribution because, for example, the online sector, already has significantly higher revenues from private-sector advertising. This is essentially about equal allocation of resources to help media players stay competitive, which, as Recital 73 EMFA emphasises, is also related to safeguarding media pluralism.

Thirdly, again as a direct obligation addressing national public authorities or entities, these shall provide in publicly accessible annual reports information on how, to which media or online platforms and to what extent state expenditure has been allocated. This is ultimately to counter the risk of "secret subsidies" and undue political interference in the media. As the majority of member states until now have neither in place rules on transparency nor on the allocation of state advertising, Art. 25 EMFA will change this situation significantly.[105] In addition it will, possibly even more relevantly, shed light on the actual allocation of resources, in particular enabling a clear differentiation between revenues from commercial advertising, state advertising and public funding, which was not possible before, thereby potentially revealing problematic situations or developments.[106]

## 4.6 An institutional set-up for enhanced cooperation and more efficient procedures

The largest part of the EMFA is devoted to establishing an institutional framework that, in particular, addresses identified challenges[107] from a regulatory and law enforcement perspective. This concerns both the creation of an institutional set-up as well as using these structures for the introduction of several mechanisms for cooperation in general as well as for specific areas. Although the main provisions can be found in sections 1 to 3 of Chapter

[105] See on this Bianchini D. et al., "Support for preparation of an impact assessment to accompany an EU initiative on the European Media Freedom Act – VIGIE 2021-644", Final report, 2022, pp. 74 et seq.
[106] See also Mutu A., "The allocation of state advertising to private media corporations in Europe: legal and regulatory frameworks", 2023, p. 5.
[107] See the challenges described by the ERGA over the years and across the AVMSD 2018 reform, for example in ERGA report on territorial jurisdiction in a converged environment, 2016, pp. 20 et seq., 43 et seq.; ERGA Subgroup 3 – Taskforce 3 "Concrete Mechanisms of Regulation", Annex 3 to Final Report on Implementation of the revised AVMS Directive, 2020, pp. 24 et seq.; see for a detailed overview and identified gaps in enforcement also Cole M. and Etteldorf C., "Future Regulation of Cross-Border Audiovisual Content Dissemination", 2023, pp. 167 et seq., 205 et seq.

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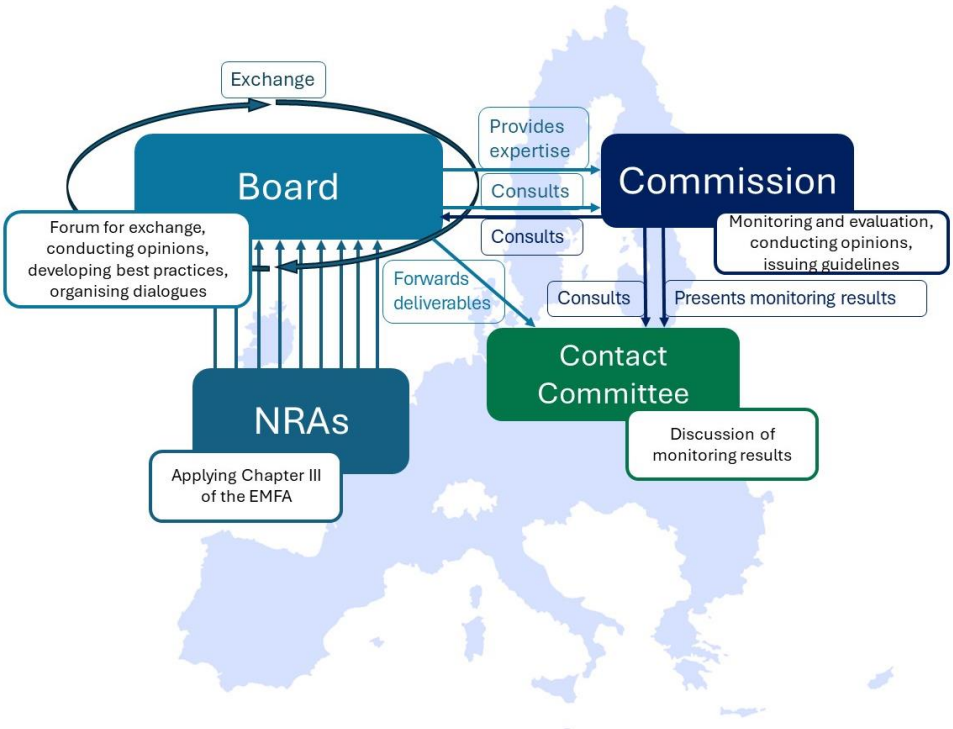
III, relevant institutional provisions are additionally scattered throughout the EMFA's substantive provisions.

### 4.6.1 Institutional set-up and the role of the new Board

The institutional framework established by the EMFA essentially consists of two main actors, one of which in a dual role: the national regulatory authorities (NRAs) are central to the system and are charged with the application of certain EMFA provisions. They are grouped together within the European Board for Media Services as an additional layer of powers which they jointly apply, and which serves as a forum for exchange. In addition, the European Commission is part of the institutional set-up by virtue of various responsibilities and mechanisms for participation, without having any direct supervisory powers within the EMFA.[108]

**Figure 11. Institutional set-up according to the EMFA**




*Source: Elaboration of the authors*

[108] See on this and the following extensively Cole M. and Etteldorf C, "Future Regulation of Cross-Border Audiovisual Content Dissemination", pp. 167 et seq., 205 et seq.

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#### 4.6.1.1 NRAs as central element of the institutional set-up

Art. 7 EMFA tasks the NRAs with the application of (only) Chapter III EMFA. Since the definition of NRAs (Art. 2 no. 13 EMFA) is directly linked to their establishment under the AVMSD, the AVMSD and EMFA are aligned, as the media regulatory authorities responsible under the AVMSD automatically are entrusted with the responsibility under the EMFA. This means that member states may not assign two different authorities with the application of the AVMSD and the EMFA. However, the option under the AVMSD to set up regulators having oversight over different sectors[109] and to establish more than one NRA, for example, in federal systems, remains unaffected. Thus, the guarantee of the independence of the NRAs follows from Art. 30 AVMSD, while the member states' duty to provide (additional) resources for the new tasks under the EMFA follows from Art. 7(3) EMFA covering not only financial and human but also technical resources.

The audiovisual regulatory authorities were considered the most suitable for performing this task because they already have relevant experience in regulating media services and in supranational cooperation, which is at the heart of the EMFA and should therefore benefit from such experience.[110] However, the EMFA's scope of application is broader than that of the AVMSD. While many of the NRAs are – independently of the AVMSD – already entrusted with responsibilities, and therefore have corresponding experience, of supervising radio and different kinds of online media at the national level, this is not the case when it comes to traditional press media. For the press, self-regulatory systems have regularly been set up at national level, with voluntary supervision by self-regulatory bodies that have no real or very limited enforcement or sanctioning powers. Since the press has not been subject to an EU-wide framework for harmonisation to date and supranational cooperation has hardly taken place independently of such a framework, there would have been no suitable candidate comparable to the NRAs that could have taken on the tasks under the EMFA. Therefore, as a general procedure a consultation mechanism was introduced in Art. 12 EMFA, which stipulates that if the Board deals with matters outside the audiovisual sector, it shall consult with representatives of those sectors, such as press councils, journalistic associations, trade unions and business associations.[111] Art. 7(1) EMFA further stipulates that in ensuring compliance with Chapter III of the EMFA, the NRAs shall coordinate not only with other competent authorities, but also with self-regulatory bodies. Such coordination will be challenging, especially at supranational level, because self-regulatory bodies are not organised in a comparable way to audiovisual NRAs. At the same time it is necessary to underline that the significant doubts and concerns that were raised on the part of the press (and its representation organisations) that the EMFA will lead to their being subjected, in a completely new or in an increased way, to supervision[112] should be responded to by showing the very limited impact that supervisory mechanisms under the EMFA will have. In fact, actual tasks that are assigned to the NRAs and the Board in Chapter III mainly revolve around enforcement aspects of the AVMSD, which does not cover the press.

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[109] Art. 30(1) sentence 3 AVMSD.
[110] Recital 36 EMFA.
[111] These examples being mentioned in Recital 40 EMFA.
[112] See on this issue Cole M. and Etteldorf C., EMFA Background Analysis, 2023, p. 29.

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#### 4.6.1.2 Powers and tasks of NRAs

An actual comprehensive catalogue of tasks is not included in a specific provision of the EMFA, although from a regulation one might have expected it in Art. 7 EMFA. This possibly results from the fact that the provision concerning the authorities was placed in the AVMSD, a Directive leaving leeway to the member states when applying their reserved powers for the organisation of the administrative implementation of the Directive. The tasks derive from the different provisions of Chapter III, which the NRAs are called upon to 'apply'. Art. 8 et seq. EMFA contain the obligation to participate effectively in the Board, Art. 16 EMFA encourages the exchange of best practices, Art. 14 et seq. contain detailed obligations on how to collaborate with other NRAs,[113] Art. 22 to participate in media concentration assessments and Art. 24 EMFA to promote the development of codes of conduct in the context of audience measurement systems. Differently from this, it is only optional to task the NRAs in the context of Art. 18 EMFA on the 'media privilege' and Art. 25 EMFA with the monitoring of state advertising expenditure, as it can also be organised in another way at national level.

Outside of Chapter III, in particular with regard to Artt. 3 to 6 EMFA, no tasks or responsibilities are assigned to the NRAs, with the exception of maintaining media ownership databases, but in that regard, again, member states are free to designate other authorities to be in charge. The EMFA only provides for investigative powers in a few places such as in Art. 7(4) EMFA with reference to a general right to information, which is to be ensured by the member states, and does not foresee a specific list of measures for imposing sanctions. Therefore, in the future it will depend to a large extent on whether and how the member states develop the institutional structure in more detail.

#### 4.6.1.3 The Board as central point for cross-border regulatory cooperation

As one of the key changes in the institutional dimension, Art. 8 EMFA establishes the new Board which will replace the existing ERGA that had been established in the framework of the AVMSD. Accordingly, the provision of Art. 30b AVMSD will be repealed by the EMFA (see Art. 28), and the new Board will not only take over responsibilities of ERGA but will have additional tasks and be based on more formalised procedures. Art. 10 EMFA on the structure of the Board continues the composition of ERGA by being composed of one representative from each NRA, each of whom has one vote[114] with which they can contribute to decision-making by a two-thirds majority within the Board. The Board is supposed to issue rules of procedure that contain provisions for the avoidance and management of conflicts of interest among its members (Art. 10(8) EMFA), details on the procedure for structured cooperation (Art. 14( 7) EMFA), on deadlines for enforcement requests (Art. 15 para. 2 EMFA) and for comments on media concentration assessments (Art. 22(5) EMFA). In this respect, the ERGA rules of procedure[115] will likely be used as a basis, although some of the rules laid

[113] See on this next chapter, especially with regard to the relevance for non-audiovisual media.
[114] For member states with more than one competent authority, mainly in federal states, Art. 10(4) EMFA requires previous coordination on who represents the authorities on the Board.
[115] ERGA Rules of Procedure as modified on 9 November 2017.

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down therein have now been integrated in the legislative provisions of the EMFA, for example on the chair but not on the procedure for the appointment to this role.

An important aspect concerning the introduction of the Board which was a topic of intensive debate in the legislative procedure is its Secretariat. Art. 11 EMFA details that this is to be provided and adequately resourced by the Commission. The ERGA already had secretariat support provided by the Commission, but according to Art. 6 in conjunction with Art. 18 of the ERGA rules of procedure, this was limited to purely administrative tasks. The new secretariat is to support the Board overall, which, in addition to administrative and organisational support, also includes substantive contributions (e.g. research activities or information-gathering, as mentioned in Recital 42) in connection with AVMSD and EMFA rules. Likewise significant is Art. 9 EMFA: while Art. 30 AVMSD ensures the independence of the members of the Board, as it addresses the position of NRAs, the provision in the EMFA ensures the independence of the Board "when performing its tasks or exercising its powers" separately. In particular, it shall neither seek nor take instructions from governments, institutions, persons or bodies. This wording is very similar to Art. 69 GDPR on the independence of the European Data Protection Board (EDPB), although the tasks of these bodies are based on different fundamental rights (protection of privacy and protection of media freedom). One important difference is that the EDPB is established as a Union body with legal personality while for the Board in the EMFA a corresponding proposal by the European Parliament[116] was not taken up. The guarantee nonetheless seeks to ensure 'full' independence, free from any political or economic influence, whether from national, supranational or international actors, or from public or private persons.

#### 4.6.1.4 Powers and tasks of the Board

Art. 13 EMFA contains a catalogue of tasks to be performed by the Board, which are mainly providing assistance and advice to the Commission regarding media services and promoting the consistent and effective application of Chapter III of the EMFA as well as the implementation of the AVMSD. The specific powers reflecting the task description in Art. 13(1) can be found in the relevant provisions of Chapter III. Art. 13(1)(a) to (c) and (o) EMFA transfer the existing tasks of the ERGA from the repealed Art. 30b(2) AVMSD and expand them to include the EMFA provisions. Importantly, concerning media literacy there will be an enhanced exchange of information with the aim of a strengthened promotion of media literacy, which initially was (and still is) included in Art. 33a AVMSD only as a duty of the member states and associated with a reporting obligation to the Commission.

The role of the Board can be categorised into three types of tasks: supporting the Commission in developing guidelines in specific areas, acting as a coordination and cooperation forum, and drawing up opinions. The latter accounts for the majority of the tasks and there is variance in terms of who can initiate them. Opinions on requests for cooperation and mutual assistance, national measures against foreign actors and assessments of mergers that affect the internal market (Artt. 14, 15, 17 and 22 EMFA) are

[116] Amendments adopted by the European Parliament on 3 October 2023 on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, Art. 8(1).

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dependent on requests, measures or initiatives by NRAs. In these cases, opinions are also prepared in consultation with the Commission. Opinions on the results of a dialogue between media service providers and VLOPs (Art. 18 EMFA) are only issued at the request of a media service provider. On its own initiative or at the request of the Commission, opinions can be issued on mergers that could pose a threat to the internal market (Art. 23 EMFA) and on regulatory or administrative measures that could have a negative impact on media (Art. 21 EMFA), the latter also on the basis of a duly justified and reasoned request from a directly affected media service provider. The extent to which such opinions shall be binding also varies. In the context of requests for cooperation under Art. 14 EMFA, coordination under Art. 17 EMFA and concentration assessments under Art. 22(5) EMFA, an explicit qualified duty of consideration of the opinion by the competent authorities when taking decisions is laid down, which means that the NRAs should either implement the Board's opinions or provide a detailed statement of reasons for deviations. The final decision-making authority remains, however, with the independent NRAs as reiterated in the Recitals for the procedures in Artt. 15, 21 and 23 EMFA.[117]

The Board is not assigned with general investigative powers in the EMFA; such powers are only found in Art. 21(5) EMFA with regard to the request for information from national authorities that have taken a regulatory or administrative measure relevant for the internal market. It also needs to be recalled that the Board also has no role to play in the substantive rules under Chapter II, so at most there may be an information exchange on the rights and obligations mentioned therein. There can therefore be no question of the Board exercising any real supervision. For non-audiovisual media and the consultation mechanism, a referral to the Board is therefore only likely to be relevant, for example, in the case of media concentration assessments of press publishers or in the measurement of audience reach in the online sector.

#### 4.6.1.5 The role of the European Commission

Besides the NRAs and the Board, the European Commission has its own 'tasks' assigned to it under the EMFA. Of particular interest is Art. 16 EMFA which refers to the power of the Commission to issue guidelines and opinions related to the application of the EMFA or the implementation of the AVMSD detailed in certain provisions of those two acts. Namely, with respect to the media privilege mechanism, the media concentration criteria and methods for audience measurement (Artt. 18(9), 22(3) and 24(4) EMFA), the Commission has the competence to issue guidelines, while it has the possibility to issue opinions e.g. concerning national measures that significantly affect the operation of a media service in the internal market (Art. 21(4) EMFA) or concerning media market mergers (Art. 22(2) EMFA). It should be noted that these are non-binding acts under Art. 288 TFEU and although they do not have a binding legal effect via concretising legislation, they will certainly have a steering effect.

In addition, the Commission has an obligation to extensively monitor, evaluate and report under Artt. 26 and 27 EMFA concerning the state of the internal market for media

[117] Recital 41.

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services and the effect of the EMFA Regulation.[118] Similarly, it has an important involvement regarding the organisation and activities of the Board. It appoints a representative to the Board who participates in the deliberations but without voting rights. The Board's rules of procedure have to be drafted in consultation with the Commission. The Board can invite experts to participate in its meetings on its own initiative, but permanent observers can only be included in agreement with the Commission. Many tasks of the Board are carried out in consultation with the Commission. Together with the Commission providing the secretariat for the Board, the prominent role of the Commission, especially in the way it was originally proposed, triggered a lot of criticism[119] regarding the independence of the Board and the supervision of media. These concerns were responded to in the legislative process to the extent that the previous rules requiring agreement for actions of the Board were almost entirely replaced by reducing them to the obligation of the Board to consult with the Commission, and the secretariat is now more closely tied to instructions from the Board rather than giving an active role to the Commission through it.

### 4.6.2 Strengthened cooperation

Section 3 of Chapter III EMFA deals with different cooperation and regulatory procedures which aim at a (more) harmonised and effective enforcement of the AVMSD and EMFA as well as basic rules for cooperation outside these instruments.[120]

Based on the experience of a lack of effective procedures for information exchange between ERGA members under the AVMSD, which does not detail any such procedural elements, the ERGA members had agreed on a Memorandum of Understanding (MoU)[121] to facilitate their work and address identified challenges in cross-border enforcement. In essence, this MoU will remain in place now under the EMFA, except that it has been upgraded to a legislative level thereby 'codifying' it.[122] The MoU will likely also be used as a source to further flesh out the cooperation in the Board's rules of procedure.

**Table 4. Strenghtened cooperation**

| Provision | Aim | Substantive basis | Regulatory tools concerned | Bodies involved | Potential addressees of regulatory measures |
|---|---|---|---|---|---|

[118] See on this Cole M., "Acting On Media Freedom", pp. 289, 307 et seq.
[119] See with further references Cole M. and Etteldorf C., EMFA Background Analysis, 2023, pp. 44 et seq., 48 et seq.
[120] See on this and the following extensively Cole M. and Etteldorf C., "Future Regulation of Cross-Border Audiovisual Content Dissemination", pp. 180 et seq.
[121] ERGA Memorandum of Understanding dated 3 December 2020.
[122] With more explanation Cole M. and Etteldorf C., "Future Regulation of Cross-Border Audiovisual Content Dissemination", pp. 152 et seq., 176 et seq.

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| | | | | | |
|---|---|---|---|---|---|
| **Art. 14** | Ensuring structured cooperation | EMFA and AVMSD | Cooperation, including information exchange and mutual assistance | NRAs; possibly: Board and Commission | EU media service providers |
| **Art. 15** | Ensuring effective enforcement | AVMSD | Enforcement | NRAs; possibly: Board and Commission | Video-sharing platform providers |
| **Art. 16** | More harmonised application | EMFA and AVMSD | Non-binding guidance, best practices, guidelines and opinions | Board and Commission | EU media service providers and online platform providers |
| **Art. 17** | Improving structured measures | National law | Coordination | NRAs, Board and Commission | Non-EU media service providers |

#### 4.6.2.1 Exchange of best practices

The most general formulation of the Board's role in contributing to consistency and effectiveness of application is laid down in Art. 16 EMFA. The Board shall foster the exchange of best practices among NRAs, consulting stakeholders where appropriate, on regulatory, technical or practical aspects relevant to the consistent and effective application both of Chapter III EMFA and the implementation of the AVMSD.

Besides this general basis in paragraph 1, the two following paragraphs address specific contributions in cases where the Commission issues guidelines (e.g. on transparency of media ownership or promotion of public interest content) or gives opinions concerning AVMSD or EMFA issues.

#### 4.6.2.2 Structured cooperation

Art. 14 EMFA contains a rule on a new form of "structured cooperation" between NRAs both when applying Chapter III of the EMFA or implementing the AVMSD, which shall include information exchange and requests for mutual assistance. If a NRA issues an information enquiry it has to provide certain details such as the purpose and reasons for it. On the part of the requested NRA there is a duty to collaborate, which is, however, restricted in two respects: Firstly, requests can be refused for three reasons, namely if the requested NRA is not competent, the execution of the request would violate national or EU law or the request is not sufficiently justified or is disproportionate. In this regard, it needs to be recalled that the country-of-origin principle of the AVMSD and e-Commerce Directive remain untouched by the EMFA.[123] Secondly, the requested NRA is merely obliged to do its 'utmost' to comply with the request. Since neither the EMFA nor the AVMSD harmonise investigative and enforcement powers, the scope for taking action as provided under national law is relevant

[123] Cole M. and Etteldorf C., EMFA Background Analysis, 2023, pp. 50, 51.

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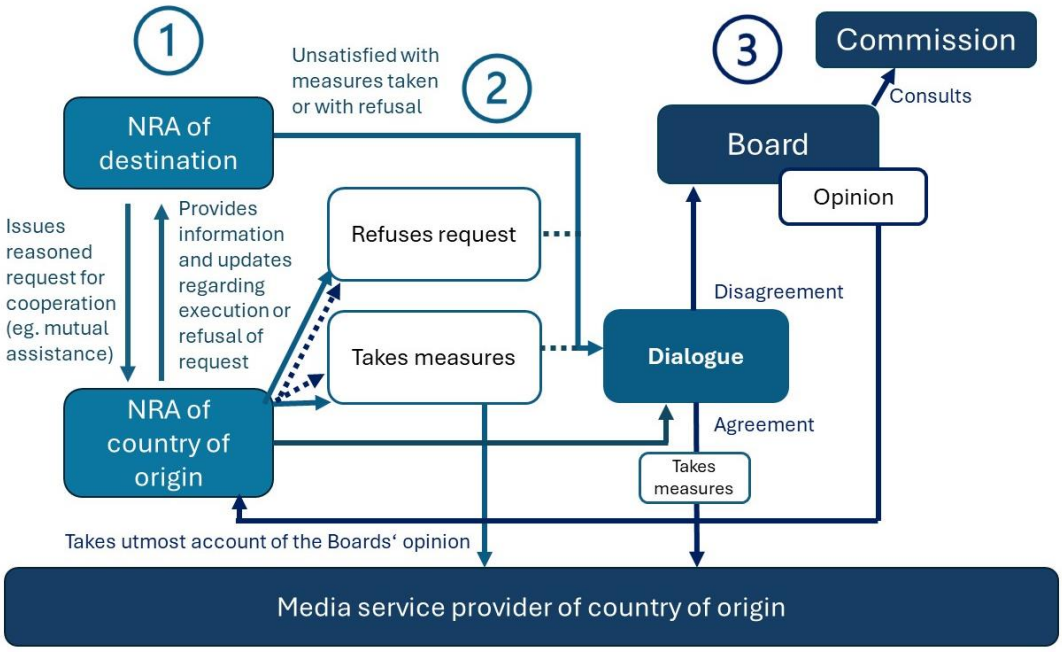
here, although in any case the member states must ensure that sufficient enforcement powers are in place (Art. 30(4) AVMSD).[124]

At any rate, the requested authority shall respond 'without undue delay' and either report on progress in implementing the request or give reasons for its refusal. For 'emergencies' (serious and grave risk to the freedom to provide media services), an accelerated procedure is provided for, requiring a response from the requested authority within 14 days. If the request is not or not sufficiently fulfilled, there should initially be an exchange between the requesting and requested authority and, if no agreement is reached, the Board should be involved. The Board should, in consultation with the Commission, issue an opinion that should then again be taken 'utmost' into account by the NRAs involved. The final decision-making authority, however, remains with the competent NRA. In particular, the Board does not have final decision-making authority as is the case, for example, within the comparable mechanisms in the GDPR. The Board may set deadlines for taking action within its rules of procedure, but it cannot ultimately enforce them or even sanction non-compliance.

**Figure 12. 'Structured cooperation' mechanism under Article 14 EMFA**




*Source: Elaboration of the authors*

[124] Since Art. 7 and Art. 2 no. 13 EMFA refer to and link to Art. 30 AVMSD in its entirety, it can be assumed that this call to the member states also applies to the relevant rules of the EMFA.

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#### 4.6.2.3 Enforcing VSP obligations

Besides the general cooperation request of Art. 14 EMFA, there is a specific procedure in Art. 15 EMFA concerning the enforcement of obligations of video-sharing platforms (VSPs) as they are laid down in Art. 28b (1)-(3) AVMSD. Any NRA should be able to address a sufficiently justified request asking for enforcement action to the NRA competent vis-à-vis a given VSP due to its establishment in that member state or because of other jurisdiction criteria. The NRA to which the request is addressed must respond without 'undue delay' with information on measures taken or planned or a justification for not taking action. Unlike in Art. 14 EMFA, however, there are no reasons for refusal laid down by the EMFA – due to the correlation with Art. 28b AVMSD. In case of disagreement on the measures to be taken, there shall be a mediation assisted by the Board and, if this fails, the Board shall issue an opinion proposing specific measures.

Following receipt of this opinion, the requested NRA shall, without undue delay and within timelines to be established by the Board in its rules of procedure, inform the Board, the Commission and the requesting NRA of the actions taken or planned in relation to the opinion. Due to the country-of-origin principle also applicable under the procedure of Art. 15 EMFA the competent NRA for the VSP provider is dependent on enforcement powers granted at national level and the law of the member state of establishment applies to the VSP concerned. In the case of Art. 28b AVMSD, which only contains a list of possible appropriate measures to be taken by VSP providers that can be foreseen in the respective national laws, the rules in the country of establishment have a decisive role to play. These may take different forms, for example, may contain elements of self- and co-regulation or provide for certain mechanisms (e.g. parental control systems or age verification) on a mandatory and others on a non-mandatory basis.[125] For the large platforms, due to their place of establishment in Europe, the Irish implementation of the AVMSD and the *Coimisiún na Meán* will remain key.[126]

#### 4.6.2.4 Responses to interference by foreign service providers

Art. 17 EMFA concerns a very different situation and has to be seen as a reaction to difficulties observed when trying to achieve a common reaction to the risks created by dissemination of Russian media or content channels in the EU after the war it started against Ukraine. The new cooperation mechanisms when taking action against media services from outside the Union are aimed at allowing for other ways to react to such dangers stemming from such external influence than only via the possibility of issuing economic sanctions ("restrictive measures") as was the case for the Russian channels in

[125] Deloitte and SMIT, "Study on the implementation of the new provisions in the revised AVMSD", pp. 25 et seq.; EAO, "Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online – 2022 update", 2022; EAO, The protection of minors on VSPs: age verification and parental control, 2023; EAO, "Mapping report on the rules applicable to video-sharing platforms – Focus on commercial communications", 2022.

[126] See for the national rules EAO, revised AVMSD tracking table (last updated 4.10.2024), especially the recently published final Online Safety Code by the Coimisiún na Meán; see on an assessment of the situation Cole M. and Etteldorf C., "Research for CULT Committee - Implementation of the revised Audiovisual Media Services Directive - Background Analysis of the main aspects of the 2018 AVMSD revision" 2022, pp. 23 et seq.

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2022 and the following years.[127] Art. 17 EMFA states that where a media service from outside the Union or provided by media service providers established outside the Union prejudices or presents a serious and grave risk to public security, the Board shall, upon request of NRAs concerned, coordinate relevant measures of the NRAs.

The Board, in consultation with the Commission, in particular may issue opinions in concrete cases and shall develop a set of criteria for exercising regulatory powers in such cases, concerning both of which the competent NRAs 'shall do their utmost' to take those into account. This 'utmost' is very important, because, unlike with Artt. 14 and 15 EMFA, this provision is not about the exercise of comparable regulatory powers, as the substantive points of reference are not harmonised provisions in the AVMSD and EMFA but rather national law as it concerns services coming from outside the Union. The country-of-origin principle is therefore typically not relevant in the context of Art. 17 EMFA. The question of the enforceability of national measures instead depends, firstly, on whether a national law (in substantive terms) declares a particular service/content to be unlawful and, secondly, whether (in procedural terms) the law also provides for enforcement powers of authorities that can be exercised not only against domestic, but also foreign providers.[128] In other words, depending on the content of a Board's opinion, the NRA(s) can only comply with it if the law of the respective member state(s) allows it(them) to take action.

These powers are designed very differently at national level and are not necessarily granted to the NRAs as addressed by the AVMSD and EMFA but rather other authorities such as the ones competent for the electronic communications sector or law enforcement authorities. The EMFA does not set out substantive or procedural rules itself, but only stipulates that member states shall ensure that the NRAs 'are not precluded' from taking into account an opinion of the Board which, however, does not oblige them to lay down corresponding powers in national law. The effectiveness of this mechanism will therefore in the future be determined by legal bases that lie outside the scope of the AVMSD and the EMFA.

[127] Cole M. and Etteldorf C., EMFA Background Analysis, 2023, pp. 51 et seq.
[128] Cole M. and Etteldorf C., EMFA Background Analysis, 2023, pp. 51 et seq.; extensively Cole M. and Etteldorf C., "Future Regulation of Cross-Border Audiovisual Content Dissemination", pp. 135 et seq., 255.

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# 5. Conclusion: a new EU(ropean) media law?

Irrespective of the doubts and criticism that the initial proposal for the EMFA was met with especially in view of the question of adequate allocation of powers under the single market harmonisation competence to regulate media services in such a broad way, the final text can certainly be regarded as the beginning of a new era of (media) regulation by the EU. The EMFA is a courageous and also in its political message important step towards safeguarding media freedom and media pluralism in the EU internal market. As manifold as the individual rules and their respective points of reference are – from editorial freedom to state influence and media concentration – as different might their effects be, either directly or through subsequent incorporation into national law. This is a relevant question, because a Regulation as a directly binding legal act in all member states should be more than the incorporation of important and laudable policy goals in a regulatory framework; it should have an enforceable effect.

In this regard, the EMFA always refers to the 'application' of the EMFA (as a Regulation) in contrast to the 'implementation' of the AVMSD (as a Directive). Nonetheless, many rules are formulated with wide margins for manoeuvre for the member states (such as e.g. the right of recipients under Art. 3 EMFA) or are limited in how they can directly impact national law (e.g. coordination measures against services from outside the Union under Art. 17 EMFA). Other provisions contain clear binding obligations that follow directly from the EMFA, but still depend on further specification by the respective addressees, such as safeguarding internal editorial independence under Art. 6 EMFA or the possibility to customise media offerings under Art. 20 EMFA. In these areas, the Recommendations, Guidelines or other guidance from the Commission and the Board will be highly relevant, as will be the development of industry standards.

Supervisory and law enforcement instruments are only provided for by the EMFA to a very limited extent, in this sense considering that the member states reserved powers for the administrative design of enforcement also under the AVMSD. Instead of detailed provisions concerning the national authorities or bodies, the EMFA emphasises cooperation, monitoring, evaluation, exchange and coordination in various areas, which aim to contribute to a better understanding of existing and emerging problems in the media sector in the future. This approach is particularly suitable for the regulation of a sensitive sector, which should benefit from the greatest possible freedom and limited interference by state or other authorities' power. However, if further threats arise or existing harmonisation proves insufficient, the envisaged non-legally binding development of Guidelines could be used to refine measures taken by the EMFA's addressees. Alternatively, a future revision of the Regulation could be an answer and the monitoring and evaluation provisions of the EMFA are quite detailed on this. Meanwhile, it should not be forgotten that the EMFA proposal was accompanied by a Recommendation on internal safeguards for editorial

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independence and ownership transparency in the media sector,[129] the practical effect of which should also be considered in the context of evaluating the EMFA as required in those provisions. And because the Council of Europe plays an important role in the definition of standards for media regulation in the form of Recommendations – see notably in recent times the overarching Recommendation on principles for media and communication governance[130] – and by the ECtHR's interpretation of Art. 10 ECHR, it is worth looking at the interplay of those standards and the EMFA.

The focus will be on the relationship between the EU and its member states when it comes to regulating the media, possibly in contrast to online services such as intermediaries which have seen a much more detailed harmonisation taking place on EU level. Most importantly, the question of whether the EMFA gives the European Commission a new or improved tool to respond to fundamentally problematic developments in member states in the future will only be answered when the Commission applies the EMFA for the first time. Finally, now that there is a Regulation outlining a number of media sector-oriented issues, the role of the CJEU in this regard will increase: firstly, when it has to decide about the (rare) challenge of the validity of a legal act of the EU in giving a judgment on the pending annulment action, subsequently if and when interpreting the notions and provisions of the EMFA.

[129] Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector, OJ L 245, 22.9.2022, pp. 56–65.
[130] Council of Europe, Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance.

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