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PART 3/3

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT REPORT

Accompanying the document

Proposal for a Regulation of the European Parliament and of the Council

establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU

{COM(2022) 457 final} - {SEC(2022) 322 final} - {SWD(2022) 287 final}

Subsidiarity Grid

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

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?

1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?

The proposal's general objective is to improve the functioning of the internal media market. Improving the functioning of the internal media market would foster the provision of quality media services and thus strengthen the integrity of the internal market as a whole. A regulation providing common rules, underpinned by a structured cooperation framework for media regulators within a Board composed of representatives of the relevant national independent media regulatory authorities or bodies, will achieve this objective.

The CJEU case law confirms that Article 114 TFEU is an appropriate legal basis for the creation of new structures under EU law. This is particularly relevant given the governance aspect of the initiative. The proposal would aim to foster closer cooperation between national media regulators within an EU Board, which would be empowered to promote the effective and consistent application of the new framework (including via non-binding opinions upon request by or in agreement with the Commission and assisting the Commission in drawing up guidance). The CJEU has previously held that Article 114 TFEU allows for the establishment of a Union body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate[1].

Article 114 TFEU has been used by other initiatives pertinent to the media sector, such as the proposal for the Copyright Directive[2] and the proposal for a Regulation on online transmissions and retransmissions[3]. Most recently, the Digital Services Act[4] and the proposal for a Regulation on political advertising[5] were based on Article 114 TFEU.

[1] Case C-217/04, *United Kingdom v European Parliament and Council* (ENISA), para 44.
[2] Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final.
[3] COM/2016/594 final.
[4] COM/2020/825 final – to be updated when published.
[5] COM/2021/731 final – to be updated when published.

1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?

Shared competence

*Subsidiarity does not apply for policy areas where the Union has **exclusive** competence as defined in Article 3 TFEU[6]. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU[7] sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU[8] sets out the areas for which the Unions has competence only to support the actions of the Member States.*

2. Subsidiarity Principle: Why should the EU act?

2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[9]:

- Has there been a wide consultation before proposing the act?
- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?

In line with the Better Regulation Guidelines, stakeholders were widely consulted as part of the impact assessment process. The consultation strategy for the impact assessment on the European Media Freedom Act targeted all types of stakeholders impacted by the initiative, including media outlets (including private and public television and radio broadcasters, press publishers), advertisers, online platforms and media market players, journalists associations and trade unions, regulatory authorities, NGOs, academia and citizens.

In addition to the Commission open public consultation and feedback on the call for evidence, the Commission organised meetings with key stakeholders and experts to gather additional evidence and data on the specific problems to be addressed by the initiative, the policy approach and its impact, as well as technical information about existing industry practices. It also analysed numerous position and analytical papers received in the context of the initiative's preparation of the initiative. The preparation of the impact assessment underpinning the initiative was supported by two external studies who also conducted targeted workshops with key stakeholders, case studies and surveys and individual consultations.

Both the explanatory memorandum (section 2) and the impact assessment (chapter 3) contain

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN
[7] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN
[8] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML
[9] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

respectively sections on the principle of subsidiarity, for more details see question 2.2 below.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

The objectives of the intervention cannot be achieved by Member States acting alone, as the problems are increasingly of a cross-border nature and not limited to individual Member States or to a subset of Member States. Production, distribution and consumption of media content, including news, are increasingly digital and cross-border as the internet continues to drive the transformation of traditional media business models. The provision of media services across the EU is increasingly affected by global platforms, which act as gateways to media content while being prominent online advertising providers.

A common EU approach, promoting convergence, transparency, legal certainty and a level playing field for the relevant media market players is the best way to advance the internal media market. It will reduce the burden for media service providers, who have to comply with different national legal regimes when they operate in several Member States. It will enhance legal certainty for media market players, thereby promoting fair competition and cross-border investment. It will also enable media regulators to adopt coordinated responses in matters affecting the EU's information space and in particular the protection of EU consumers' interests.

The initiative takes due account of the Protocol on the system of public broadcasting in the Member States (the Amsterdam Protocol) and Article 4(2) of the Treaty on European Union (TEU). It will not interfere with Member States' competence to provide funding to public service media so that they can fulfil their public service remit, as conferred, defined and organised at national level, nor will it interfere with national identities or regulatory traditions in the media field.

The European Parliament and the Council have called upon the Commission at several occasions to address shortcomings in the EU media market and safeguard media freedom and pluralism in that market.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

A common EU approach, promoting convergence, transparency, legal certainty and a level playing field for the relevant media market players is the best way to advance the internal media market.

The objectives of the intervention cannot be achieved by Member States acting alone, as the problems are increasingly of a cross-border nature and not limited to single Member States or to a subset of Member States. Production, distribution and consumption of media content, including news, are increasingly digital and cross-border as the internet continues to drive the

transformation of traditional media business models. Provision of media services across the EU is affected by global platforms which act as gateways to media content whilst dominating online advertising. The identified market failures in the EU media market have Union relevance as they arise across borders and affect several Member States.

The initiative will take due account of the Protocol 29 on the system of public broadcasting in the Member States. It will not interfere with Member States' competence to provide funding for public service media so that they can fulfil their public service remit, as conferred, defined and organised at national level. It would only envisage general principles to strengthen the independence of public service media and reinforce their societal role as recognised in the Protocol. This Impact Assessment discards the option of a full harmonisation of rules applicable to public service media (as regards their remits, organisation and funding conditions), to ensure that the initiative is compatible with the Protocol and Member States' competences in this area.

The initiative will not interfere with national identities or regulatory traditions in the media field, in line with Article 4(2) of the Treaty on European Union (TEU). The Impact Assessment discards the option of a full harmonisation of national media pluralism laws. It takes due account of stakeholders' views that uniform and detailed EU media pluralism rules would be undesirable and disproportionate, as such rules must be adapted to the historic and cultural background of each Member State.

Instead, the initiative would aim to strike the right balance between generally couched provisions and more specific rules that allow to reach the policy objectives (including legal certainty). Member States would have to ensure that independent media regulators are involved in the scrutiny of media transactions, guided by a set of qualitative criteria. It would include a mechanism enabling media regulators to consult each other and draw up non-binding opinions at EU level in view of promoting the proper functioning of the internal media market, in respect of Commission's powers under the Treaties. The Member States' powers on media concentration would remain with the competent authorities.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

The objectives of the intervention cannot be achieved by Member States acting alone, as the problems are increasingly of a cross-border nature and not limited to single Member States or to a subset of Member States. Production, distribution and consumption of media content, including news, are increasingly digital and cross-border as the internet continues to drive the transformation of traditional media business models. Provision of media services across the EU is affected by global platforms which act as gateways to media content whilst dominating online advertising. The identified market failures in the EU media market have Union relevance as they arise across borders and affect several Member States.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[10] or significantly damage the interests of other Member States?
In the absence of the EU level action, media will operate in a substantially weakened internal market. Member States will have no incentives to address the fragmentation of their laws and procedures related to media pluralism and such laws will continue to be misused in certain cases for protectionist reasons. Further internal market fragmentation is likely to arise given the inherent cross-border nature of digital media services and Member States' likely attempts to address media plurality challenges online (as already manifested in some Member States). This, in turn, will continue to induce costs and make it more difficult for media companies to invest and operate across borders, while an increase in the level of cross-border investment is unlikely.
(c) To what extent do Member States have the ability or possibility to enact appropriate measures?
Intervention at national level would not solve the identified problems. Action by Member States would lack scale or the necessary harmonising effect and would increase disparity and fragmentation. Furthermore, Member States might lack incentives to reform their media frameworks, e.g. changing rules meant to shield national markets or players from competition or making the allocation of state resources more transparent and fair. The potential creation of a common governance structure to ensure the implementation of the new framework also requires EU intervention. In addition, in view of the inherent cross-border nature of digital markets, any national attempt to regulate media diversity online could only partly solve the issues for recipients of media services. Finally, considering that in some cases the interference in editorial independence and operation of media comes directly from the state, it is unlikely that such a problem would be addressed voluntarily and effectively at the national level.
(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
The proposal aims to address several problems that hinder the proper functioning of the internal media market. These are: a) obstacles to cross-border activity and investment; b) insufficient regulatory cooperation and convergence; c) interference in the free provision of quality media services; and d) opaque and/or unfair allocation of economic resources. The gravity of the problems varies across the EU: Obstacles to cross-border activity and investment in the internal media market affects especially the broadcasting sector, which is traditionally regulated (at EU and/or national level), and to a lesser extent the press sector

[10] https://europa.eu/european-union/about-eu/eu-in-brief_en

(where covered by the national rules); Insufficient regulatory cooperation and convergence, on its side, affects national regulatory authorities in all MS and mainly providers regulated at EU level, i.e. providers of audiovisual media services and video-sharing platforms, and ultimately also impacts consumers and other media market players, such as media content distributors; Interference in free provision of quality media services in the internal market has resulted in an increasingly hostile investment environment vis-à-vis foreign companies in several Member States and the resulting exodus of foreign media owners from certain national markets driven by both regulatory and political pressure reasons has not been counterbalanced by new media services entering the markets. With regard to the opaque and/or unfair allocation of economic resources in the internal media market, the opacity of and biases inherent to proprietary systems of audience measurement skew advertising revenue flows, affecting negatively media companies across the EU, while the non-transparent and/or unfair allocation of state advertising is an issue, to a larger or lesser extent, in most Member States.
(e) Is the problem widespread across the EU or limited to a few Member States?
The identified problems affect the Union as a whole.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
Due to the inherent cross-border nature of digital markets, any national attempt to regulate media diversity online could only partly solve the issues for recipients of media services. Action by Member States would lack scale or the necessary harmonising effect and would increase disparity and fragmentation.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
The option of a balanced legislative intervention is supported by most stakeholders, including the national media regulators and the European Regulators Group for Audiovisual Media Services (ERGA). Only publishers would prefer a recommendation, although they do support measures on audience measurement, state advertising and protection of journalistic sources. As regards governance, there is wide support for an oversight structure based on ERGA. Regulators and the media freedom community in particular are in favour of strengthening ERGA, while companies and business associations would rather keep it in its current form.
2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

(a) Are there clear benefits from EU level action?
Yes, EU level action could reduce the burden for market players to comply with different national legal regimes when they operate in several Member States. It would increase predictability and enhance legal certainty for media market players, thereby promoting fair competition and cross-border investment. It could also allow for a coordinated response of media regulators in matters affecting the EU's information space.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
The initiative, by establishing a common EU framework fostering cross-border activity, strengthening cooperation between regulators, promoting free provision of quality media content, and addressing practices that distort competition, would create conditions more favourable for the development of media services across borders and increase consumer choice by better access to quality media content. This will strengthen the internal media market whilst promoting media freedom and pluralism, protected under the Charter of Fundamental Rights.
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
A better functioning internal media market will lead to increased investment, scaling up and competition, thus improving the viability of media companies and providing consumers with access to a more diverse range of quality media content. The annual net economic benefits, in terms of increased revenues of media companies, are estimated at EUR 2.9 billion. The expected societal benefits include growing accountability and trust in the media and improving media freedom and pluralism, thus strengthening the rule of law and democratic standards.
(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?
The initiative will not interfere with national identities or regulatory traditions in the media field. The legislative proposal will provide common rules for the internal market for media services, and will assign important tasks to the Board, as the collective body of independent media regulators, including tasks to provide expert advice on regulatory, technical or practical aspects of media regulation, to issue opinions on market concentrations likely to affect the functioning of the internal market and to coordinate actions with regard to media service providers (including from third countries) not following EU media standards. The

recommendation will encourage media companies and Member States to foster media independence and transparency. Such a multi-layered and flexible approach will bring the desired benefits while optimising the costs for media market players and public authorities.

(e) Will there be improved legal clarity for those having to implement the legislation?

The proposed Regulation will promote convergence, transparency and legal certainty for the relevant media market players. It will reduce the burden for media service providers, who have to comply with different national legal regimes when they operate in several Member States. It will enhance legal certainty for media market players, thereby promoting fair competition and cross-border investment. It will also enable media regulators to adopt coordinated responses in matters affecting the EU's information space and in particular the protection of EU consumers' interests.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The initiative builds on existing legal frameworks and will only focus on areas where additional EU action appears necessary for the proper functioning of the internal media market, including to ensure a level playing field and independent operation of media market players across the EU. It is limited to issues on which Member States cannot achieve satisfactory solutions on their own, and provides for a well-calibrated harmonisation that does not go beyond what is necessary to achieve the objective of establishing a common framework for the proper functioning of the internal market for media services, while guaranteeing the quality of such services. The fact that several of the proposed rules are principle-based also contributes to ensuring the proposals' proportionality.

The proposal gives rise to limited compliance and enforcement costs that will likely be offset by significant benefits for media market players and citizens. By enhancing transparency and reducing regulatory fragmentation in the market, the proposal will enhance legal certainty and fair competition while reducing market distortions. This will increase investors' confidence and make cross-border media market transactions less burdensome, creating a positive environment for investments and free provision of media services across the EU. Citizens and businesses will also benefit from a more diverse and plural media offer, increased transparency and improved access to information.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

Yes, as mentioned in the Impact Assessment and the Explanatory Memorandum, the preferred option will establish some core principles/rules for the media market, and empower the Board, the collective body of independent media regulators, to come up with expert views, opinions and collective action, hence preserving national regulatory discretion in the media sector. The principles/rules could be relied upon in front of national courts and the Commission could launch infringements proceedings in particular in case of systemic issues. Moreover, national media authorities could be granted targeted enforcement powers in certain areas of the new legislation, such as the rules on audience measurement. The non-binding element of the option - the recommendation - will guide the regulatory effort on the more sensitive issues (media independence safeguards) or matters where significant progress has been achieved as a result of other EU legal instruments (media ownership transparency). Such a multi-layered and flexible approach will bring the desired benefits while optimising the costs for media market players and public authorities, especially taking into account the lower cost of the Commission secretariat compared to the EU office.
(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?
The requirements in the EU initiative would not go beyond what is needed to achieve the general and specific objectives and would not impose disproportionate costs. This option will meet the general objective of the intervention - to improve the functioning of the internal media market - in an efficient, coherent, proportionate and largely effective way.
(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?
The preferred option consists of a legislative instrument and a recommendation to media companies and Member States to foster media independence, underpinned by a governance structure consisting of the Board assisted by a Commission secretariat. This option will meet the general objective of the intervention - to improve the functioning of the internal media market - in an efficient, coherent, proportionate and largely effective way. The financial modelling estimates the net economic benefits, in terms of increased revenues, at EUR 2 885 million for the first year and EUR 2 898.1 million for the following years, above the expected benefits from other options. The legislative instrument will establish some core principles/rules for the media market, and empower the Board, the collective body of independent media regulators, to come up with expert views, opinions and collective action, hence preserving national regulatory discretion in the media sector. The principles/rules could be relied upon in front of national courts and the Commission could launch infringements proceedings in particular in case of systemic issues. Moreover, national media authorities could be granted targeted enforcement powers in certain areas of the new legislation, such as the rules on audience measurement. The non-

binding element of the option - the recommendation - will guide the regulatory effort on the more sensitive issues (media independence safeguards) or matters where significant progress has been achieved as a result of other EU legal instruments (media ownership transparency). Such a multi-layered and flexible approach will bring the desired benefits while optimising the costs for media market players and public authorities, especially taking into account the lower cost of the Commission secretariat compared to the EU office.
(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument or approach?)
The initiative builds on existing legal frameworks and will only focus on areas where additional EU action appears necessary for the proper functioning of the internal media market, including to ensure a level playing field and independent operation of media market players across the EU. It is limited to issues on which Member States cannot achieve satisfactory solutions on their own, and provides for a well-calibrated harmonisation that does not go beyond what is necessary to achieve the objective of establishing a common framework for the proper functioning of the internal market for media services, while guaranteeing the quality of such services. The fact that several of the proposed rules are principle-based also contributes to ensuring the proposals' proportionality.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
The proposal gives rise to limited compliance and enforcement costs that will likely be offset by significant benefits for media market players and citizens. By enhancing transparency and reducing regulatory fragmentation in the market, the proposal will enhance legal certainty and fair competition while reducing market distortions. This will increase investors' confidence and make cross-border media market transactions less burdensome, creating a positive environment for investments and free provision of media services across the EU. Citizens and businesses will also benefit from a more diverse and plural media offer, increased transparency and improved access to information.
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
The gravity of the problems identified varies across the EU and some issues are more serious for certain Member States. This has been assessed and made clear in the Impact Assessment when describing the problems and underlying drivers and taken into account for selecting the preferred option (see above).