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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

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Subject: Regulation establishing the European Media Freedom Act
– Progress report

1. On 16 September 2022, the Commission presented a 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, EMFA) and amending Directive 2010/13/EU¹. The proposal was accompanied by a Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector, and an Impact Assessment.

¹ Doc. 12413/22 – COM (2022) 457 final

2. On 21 September 2022, the EMFA proposal was presented at the Committee of Permanent Representatives (Coreper).
3. The Audiovisual and Media Working Party (AVMWP) examined the text of the legislative proposal (in particular articles 1 to 24) at a number of meetings between September and November 2022².
4. In the meantime, the compulsory consultation of the European Economic and Social Committee³ and the optional consultation of the Committee of the Regions⁴ have been launched by the Council.
5. The European Parliament announced the proposal in the plenary session on 17 October 2022. The process of designation of the lead Committee, the Committees to be consulted and the Rapporteur has not yet been finalised.
6. Coreper is invited to transmit the attached Progress Report on the EMFA, as prepared by the Presidency, to the Council with a view to inform Ministers about the work accomplished and the progress made so far on this proposal.

² The AVMWP examined the Impact Assessment at its meeting on 29 September 2022

³ Art. 114 TFEU

⁴ Arts. 307 TFEU and 19(7)(h) of the Council Rules of Procedure

THE EUROPEAN MEDIA FREEDOM ACT (EMFA)

PROGRESS REPORT FROM THE PRESIDENCY

I. INTRODUCTION

1. Background

On 3 December 2020, the Commission presented the European Democracy Action Plan ('the Plan') aimed at empowering citizens and building more resilient democracies across the EU. The pillars included in the Plan focus inter alia on strengthening media freedom and pluralism as well as countering disinformation.

In the State of Union address on 15 September 2021, the President of the European Commission, Ms. Ursula von der Leyen, emphasised that Europe needs a law that safeguards media independence and indicated that the Commission would deliver a proposal for legislation in 2022 in the form of the Media Freedom Act.

A public consultation took place from 10 January 2022 to 21 March 2022. The consultation was intended to collect views on the most important issues affecting the functioning of the internal media market. It covered governance options and three main areas pertaining to media markets:

- media independence and pluralism (e.g. scrutiny of media market transactions, transparency of media ownership and audience measurement);
- conditions for their healthy functioning (e.g. exposure of the public to a plurality of views, media innovation in the EU market, regulatory cooperation);
- fair allocation of state resources (e.g. independence of public service media, transparency and fair distribution of state advertising).

On 16 September 2022, the Commission presented a 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, EMFA) and amending Directive 2010/13/EU⁵. On the same day, a complementary Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector was adopted.

2. Commission proposal and impact assessment

The EMFA aims to improve the functioning of the internal media market. The proposal revolves around four specific objectives:

- fostering cross-border activity and investment in media services
- increasing regulatory cooperation and convergence
- facilitating the provision of quality media services
- ensuring the transparent and fair allocation of economic resources

The impact assessment report on the EMFA explained the choice of the legal basis and the compliance of the proposal with the principles of subsidiarity and proportionality.

The Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector sets out a catalogue of voluntary good practices for media companies to promote editorial independence and recommendations to media companies and Member States and aims to increase media ownership transparency. The Recommendation focuses on contributing to the mitigation of the risks of undue interference in individual editorial decisions and on enhancing access to information on media ownership.

⁵ Doc. 12413/22 – COM (2022) 457 final

3. Other institutions/bodies

As regards the state of play at the European Parliament (EP), the EMFA Regulation proposal was announced in the EP plenary session on 17 October 2022. The Committee on culture and education (CULT) is to be the lead Committee and the Committee on Internal Market and Consumer Protection (IMCO) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) will be consulted. The designation process will be finalised in due course. A rapporteur has not yet been appointed to the file.

Pursuant to Article 114 TFEU, the European Economic and Social Committee (EESC) must be consulted, and therefore the consultation process has been launched.

While the consultation of the Committee of the Regions (CoR) is optional, the Commission suggested in its proposal to consult it. On 16 November 2022, and on the basis of Articles 307 TFEU and 19(7)(h) of the Council Rules of Procedure, the Committee of Permanent Representatives (Coreper) decided to consult the CoR.

Neither the EESC, nor the CoR have yet provided their opinions on the EMFA proposal.

II. WORK_CONDUCTED IN THE COUNCIL PREPARATORY BODIES

During the Czech Presidency, there was an initial presentation of the EMFA proposal at Coreper on 21 September 2022.

Subsequently, the Audiovisual and Media Working Party examined the Commission's proposal at a number of meetings held between September and November 2022.

On 29 September 2022, the Commission presented the EMFA proposal together with the impact assessment and the Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector to the Audiovisual and Media Working Party. Delegations then expressed their general comments on the EMFA proposal. A large number of Member States expressed their support for the general objectives of the Act and stated that further examination of specific articles is needed.

At the meetings on 13 and 25 October and on 8. and 16. November 2022, the Audiovisual and Media Working Party examined in detail all the substantive provisions of the EMFA (Articles 1-24).

A number of delegations have maintained general and specific scrutiny reservations in respect of the EMFA.

III. DELEGATIONS' MAIN REACTIONS

Delegations' main reactions on the EMFA can be grouped around the following main issues:

1. Legal basis

The legal basis proposed by the Commission for the EMFA is Article 114 of the Treaty on the Functioning of the European Union (TFEU), which provides for the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their objective the establishment and functioning of the internal market. The EMFA proposal aims to address the fragmented national regulatory approaches related to media freedom and pluralism and editorial independence affecting the functioning of the internal market.

While the question of the legal basis has not yet been specifically examined by the Audiovisual and Media Working Party, several Member States have expressed interest in understanding the use of Article 114 TFEU as the legal basis for the EMFA, especially the link between the proposal and the internal market, as well as the competence for the Union to legislate on all issues that are covered by the EMFA. A view of the Council Legal Service (CLS) was requested on these issues. The CLS is currently examining the proposed legal basis for the EMFA.

2. Scope and definitions

a) Relation to other legal instruments

Several Member States asked questions about the exact relationship between the relevant provisions of the Audiovisual and Media Services Directive (AVMSD, 2010/13) and the EMFA, particularly in the context of Article 1(2) EMFA, where the AVMSD is not mentioned among the list of legislative acts not affected by the EMFA. The EMFA does affect the AVMSD, notably by amending its Article 30b relating to the establishment, composition and tasks of the European Regulators Groups for Audiovisual Media Services (ERGA). The CLS explained that apart from amending Article 30b AVMSD, the EMFA has also an impact on other provisions of the AVMSD in relation to the responsibilities of national regulatory authorities or bodies referred to in Article 30 AVMSD (see notably Articles 7(1), 7(2), 13(1), 13(4) and 14(1) EMFA).

b) Minimum level of harmonisation

The EMFA follows a minimum harmonisation approach regarding certain aspects of the internal media services market. Member States are free to adopt more detailed rules in some fields as stipulated in Article 1(3) EMFA. In this regard, some Member States would prefer not to limit this possibility to the fields mentioned in Article 1(3), but would like Member States to be able to adopt more detailed rules in other policy areas addressed by the EMFA, e.g. state advertising. Some Member States also suggested to adding ‘stricter’ to ‘more detailed rules’, since they are of the opinion that detailed rules might not necessarily mean stricter rules.

c) Editor, editorial decision, editorial responsibility

Article 2 EMFA provides definitions for ‘editor’, ‘editorial decision’ and ‘editorial responsibility’. These three definitions are interlinked.

Several Member States asked for clarification about who is covered by the definition of ‘editor’ and whether it concerns only editors-in-chief or also other editors. In the proposal the definition of ‘editorial responsibility’ refers to the ‘exercise of effective control both over the selection of the programmes or press publications and over their organisation for the purposes of the provision of a media service’.

d) Serious crime

Article 2 (17) EMFA provides a list of criminal offences covered by the notion of “serious crime” for the purposes of the proposal. It refers to some of the criminal offences as listed in Article 2(2) of the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States. Whereas some Member States asked about the selection of criminal offences listed in the definition and considered that it could be expanded, several other Member States have raised the issue of subsidiarity given the interaction with national criminal procedure.

3. Rights of media service providers

Article 4 (2) EMFA states that Member States must respect effective editorial freedom of media service providers. It also provides for a prohibition on detaining, sanctioning, intercepting, subjecting to surveillance or search and seizure, or inspecting ‘media service providers or, if applicable, their family members, their employees or their family members, or their corporate and private premises, on the ground that they refuse to disclose information on their sources, unless this is justified by an overriding requirement in the public interest’. It also introduces restrictions on deploying ‘spyware in any device or machine used by media service providers or, if applicable, their family members, or their employees or their family members, unless the deployment is justified on a number of grounds’, which are listed exhaustively in Article 4.

Some Member States have raised questions about the potential conflict between Article 4(2)(c) EMFA and their respective national criminal law, therefore indicating the need for further internal examination at national level.

Several Member States have emphasised that it is necessary to further clarify the scope of ‘employees’ and ‘family members’ in Article 4(2)(b) and (c) and 4(3) EFMA, because not all of these people are involved in activities related to media content.

4. Duties of media service providers providing news and current affairs content

Articles 6 EMFA imposes a duty on media service providers providing news and current affairs content to make information on their ownership easily and directly accessible to the recipients of their services as well as to take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions. Several Member States mentioned the fact that only those media service providers, who provide news and current affairs, are covered in particular by Article 6 EMFA, and also sought clarification about which entities qualify as media service providers providing news and current affairs.

In Article 6(3) EMFA Member States considered the pros and cons of having an exemption for micro enterprises within the meaning of Article 3 of Directive 2013/34/EU. On the one hand, such an exemption can reduce the administrative burden for micro enterprises but, on the other hand, not having an exemption for micro enterprises would raise the level of transparency regarding the ownership, as well as the level of editorial independence, of all media service providers providing news and current affairs content.

5. European Board for Media Services

Article 8 EMFA establishes the European Board for Media Services ('the Board'), which replaces the European Regulators Group for Audiovisual Media Services (ERGA) established by the AVMSD. Pursuant to Article 9 EMFA the Board must act in full independence when performing its tasks or exercising its powers. Several Member States raised questions about the independence of the Board, in particular in relation to the Commission, in the light of the proposed level of involvement of the Commission in certain cases, including where the decision/ or opinion of the Board will be taken 'in agreement with the Commission'.

As regards Article 12 EMFA, several Member States suggested that the text should explicitly state that the Board can act on its own initiative.

6. Coordination of measures concerning media service providers established outside the Union

Article 16 EMFA states that the Board must coordinate measures of national regulatory authorities or bodies in cases where the dissemination of or access to media services are provided by those media service providers, which are established outside of the Union, where those media services ‘prejudice or present a serious and grave risk of prejudice to public security and defence’.

In this regard, Member States discussed the practicalities of the coordinated actions among national regulatory authorities and the relationship between Article 16 EMFA and the recent media sanctions which have been imposed by the Council under a different legal basis. Some Member States requested further clarifications on the coordinating procedures and the scope of the measures that can be taken. The term ‘risk of public security and defence’ also raised questions and requests for clarifications from some Member States.

7. Allocation of state advertising

Article 24(2) states that ‘public authorities, including national, federal or regional governments, regulatory authorities or bodies as well as state-owned enterprises or other state-controlled entities at national or regional level or local governments of territorial entities of more than 1 million inhabitants’ must among other things make information about their advertising expenditure allocated to media service providers publicly available. A discussion was held about the administrative burden resulting from this threshold. Several Member States expressed the opinion that, for the sake of increased transparency, the threshold of 1 million inhabitants should be removed altogether or lowered.