Council of the European Union

Brussels, 4 April 2023
(OR. en)

8089/23

Interinstitutional File:
2022/0277 (COD)

LIMITE

JUR 239
AUDIO 31
CODEC 557
DIGIT 58
MI 268
DISINFO 16
FREMP 99
COMPET 301
EDPS 4
DATAPROTECT 87
JAI 403
SERVICES 11
POLGEN 31

OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Audiovisual and Media Working Party
Subject:	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 – Legal basis

I. INTRODUCTION

1. On 16 September 2022 the Commission submitted 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) and amending Directive 2010/13/EU

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(hereinafter "the proposal") as part of the Media Freedom package.[2]

2. At its meeting of 29 September 2022, the Audiovisual and Media Working Party has requested the Council Legal Service to analyse the legal basis of the proposal. The opinion focusses on the legal basis of the proposal and should not be read as an assessment of all legal aspects of the proposal.

II. LEGAL BACKGROUND

3. The proposal establishes common rules for the supply and receipt of media services in the internal market and provides for a more extensive cooperation amongst national media regulators and at Union level. It complements an existing legislative framework regulating the internal market for media services.

4. This framework consists notably of the Audiovisual Media Services Directive (AVMS Directive).[3] The AVMS Directive regulates the provision of audiovisual media services (TV broadcasting/on-demand audiovisual media services). It coordinates a number of rules regarding the provision and content of such services. The directive contains *inter alia* rules on the banning of certain harmful content, the protection of minors, making sponsoring transparent, imposing a certain share of European works in on-demand services, designating the Member State which has jurisdiction over video-sharing platforms and establishing national regulatory authorities as well as a European Regulators Group for Audiovisual Media Services (ERGA). It obliges Member States in principle to allow the retransmission of audiovisual media services lawfully broadcast in another Member State for reasons thus coordinated (country-of-origin principle).

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[2] COM(2022) 457 final (doc. ST 12413/22). The second element is a Commission Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector.

[3] 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 (Audiovisual Media Services Directive), as amended by Directive 2018/1808, OJ L 95, 15.4.2010, p. 1.

While the AVMS Directive does not aim at comprehensively regulating the conduct of market operators in order to preserve media pluralism and editorial independence, its Articles 10(1)(a) and 11(3)(a) provide for rules to avoid that the content and scheduling of programs are influenced in such a way as to "*affect the responsibility and editorial independence of the media service provider*". Contrary to the proposal, the AVMS Directive is not applicable to non-audiovisual media services (radio/written press).

5. The existing legal framework also comprises the Digital Services Act (DSA)[4], which contains rules on the provision of intermediary services, including through very large online platforms. The proposal complements the DSA with specific measures relating to the provision of media services through very large online platforms.[5] The proposal also complements the Digital Markets Act (DMA)[6], which contains rules to regulate anticompetitive and unfair business practices by digital companies and online platforms, by providing for specific measures relating to audience measurement systems for media services.[7] The proposal further complements the Copyright Directive[8], which aims at protecting the financial stability of the press, and contains specific measures on the allocation of public funds to media service providers for state advertising.[9]

4 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, OJ L 277, 27.10.2022, p. 1–102.

5 See Articles 17 and 18 of the proposal.

6 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265, 12.10.2022, p. 1–66.

7 See Article 23 of the proposal.

8 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.

9 See Article 24 of the proposal.

6. The legal basis of the proposal is Article 114 TFEU. Article 114(1) TFEU reads:

"*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. 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.*"

7. Pursuant to Article 26 TFEU, to which Article 114 TFEU refers:

"*1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties*.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

III. CONTENT OF THE PROPOSAL

8. Pursuant to Article 1, the regulation "*lays down common rules for the proper functioning of the internal market for media services, including the establishment of the European Board for Media Services, while preserving the quality of media services*".

9. The main substantive provisions of the proposal are contained in two chapters, namely Chapters II and III. Chapter II covers rights and duties of media service providers and recipients relating to editorial independence and pluralism of media. It establishes a right of recipients of media services to a plurality of news content (Article 3) and lays down rules aimed at avoiding interference in editorial decisions (Article 4). It contains specific measures for public service media providers (Article 5) and for media service providers providing news and current affairs content (Article 6).

10. The provisions in the first three sections of Chapter III create regulatory bodies tasked with ensuring the application of the substantive provisions and of national measures implementing the AVMS Directive, regulate their cooperation with the Commission and establish governance rules in that respect. This part of the proposal also establishes the European Board for Media Services ("Board"), replacing ERGA.

11. Section 4 of Chapter III regulates the provision of media services by very large online platforms and the customisation of audiovisual media offer. Section 5 of Chapter III contains requirements for national measures affecting the operation of media service providers (Article 20) and obligations to assess media market concentrations (Article 21). Chapter III, section 6, covers rules on audience measurement (Article 23) and the allocation of funds to media service providers for the purpose of state advertising (Article 24). Finally, Chapter IV contains measures empowering the Commission to monitor the media market (Article 25).

12. Pursuant to Article 1(3) of the proposal, the common rules contained in Chapter II and section 5 of Chapter III "*shall not affect the possibility of Member States to adopt more detailed rules […], provided that those rules comply with Union law*".

IV. LEGAL ANALYSIS

13. According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure.[10] If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.

[10] Judgment of 11 June 1991, *Commission v Council (Titanium dioxide),* C-300/89, EU:C:1991:244, paragraph 10.

Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases,[11] unless these legal bases prescribe procedures which are incompatible with each other.[12]

A. REQUIREMENTS FOR RECOURSE TO ARTICLE 114 TFEU AS LEGAL BASIS

14. Article 114 TFEU empowers the European Parliament and the Council to adopt 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 the functioning of the internal market.

15. The Court of Justice has made it clear that Article 114 TFEU does not confer upon the Union legislature a general power to regulate the internal market.[13] Therefore, legislation based on Article 114 TFEU must not merely seek to regulate the internal market in ways that are seen as desirable by the legislature.[14] In addition, the legislature may not rely on Article 114 TFEU when the measure to be adopted only incidentally harmonises market conditions within the Union.[15] According to settled case law of the Court, in order to rely upon Article 114 TFEU as a legal basis, a Union measure must "*genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market*".[16]

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11 Judgment of 8 September 2009, *Commission v Parliament and Council*, C-411/06, EU:C:2009:518, paragraphs 46 and 47.

12 See *supra* footnote 10, "*Titanium dioxide*" judgment, paragraphs 17-21.

13 See judgment of 5 October 2000, G*ermany v Parliament and Council (Tobacco advertisement)*, C-376/98, EU:C:2000:544, paragraph 83.

14 Opinion of the Council Legal Service of 11 September 2013, doc. ST 13524/13, paragraph 20.

15 See *supra* footnote 13, paragraphs 33 and 83.

16 Judgment of 8 June 2010, *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, C-58/08, EU:C:2010:321, paragraph 32.

The Court has also held that Article 114 TFEU may be "*used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market*"[17] and for measures actually contributing to the elimination of obstacles to the free movement to provide services, or to the removal of distortions of competition.[18]

16. The Union legislature may have recourse to that legal basis in particular "where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market or to cause significant distortions of competition".[19] However, the "mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of [Article 114 TFEU]".[20] Recourse to Article 114 TFEU is also possible if the aim is to prevent the emergence of obstacles to trade resulting from the divergent development of national laws but "the emergence of such obstacles must be likely and the measure in question must be designed to prevent them".[21]

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17 See judgment of 2 May 2006, *UK v Parliament and Council (ENISA)*, C-217/04, EU:C:2006:279, paragraph 42.

18 Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 60.

19 See *supra* footnote 16, "*Vodafone*" judgment, paragraph 32.

20 See *supra* footnote 16, "*Vodafone*" judgment, paragraph 32.

21 Judgment of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 35; judgment of 4 May 2016, *Poland v Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 33; see *supra* footnote 16, "*Vodafone*" judgment, paragraph 33; judgment of 14 December 2004, *Arnold André GmbH & Co. KG v Landrat des Kreises Herford,* C-434/02, EU:C:2004:800, paragraph 31; judgment of 14 December 2004, *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, C-210/03, EU:C:2004:802, paragraph 30; judgment of 12 July 2005, *Alliance for Natural Health and Others*, joined cases C-154/04 and C-155/04, EU:C:2005:449, paragraph 29; see *supra* footnote 13, "*Tobacco Advertisement*" judgment, paragraph 86.

17. It should also be noted that Article 114 TFEU constitutes a legal basis "*save where otherwise provided in the Treaties*". Hence the use of Article 114 TFEU is justified only if the Treaties do not contain a more specific provision that is capable of constituting the legal basis for the adoption of the measure in question.[22]

18. Given that Article 114 TFEU provides a legal basis for "*measures of approximation*", a specific remark needs to be made in respect of Article 1(3) of the proposal, which allows Member States to adopt "*more detailed rules*" in relation to certain provisions. It is noted that Article 1(3) does not, in addition to "*more detailed rules*", refer to "*stricter rules*", as does Article 4(1) of the AVMS Directive.[23] Therefore, the description in the explanatorymemorandum, according to which the rules in Chapter II "*are minimum harmonisation provisions*",[24] which was confirmed by the Commission during the discussions in the Audiovisual and Media Working Party,[25] does not find support in the wording of the proposal and notably of Article 1(3) thereof. The term "*more detailed rules*" is neither specified further, nor defined. The natural meaning of the wording suggests that Member States are allowed to adopt rules adding further detail within the scope of the provisions in Chapter II and Section 5 of Chapter III. It does not lend itself to an interpretation which would allow Member States to deviate from the substance of the harmonised rules.

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22 Judgment of 29 April 2004, *Commission v Council*, C-338/01, EU:C:2004:253, paragraph 60 and judgment of 6 September 2012, *Parliament v Council*, C-490/10, EU:C:2012:525, paragraph 44.

23 Article 4(1) of the AVMS Directive reads: *"Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive, provided that such rules are in compliance with Union law.*"

24 Explanatory memorandum, p. 13.

25 See in this regard the progress report of the Presidency (doc. ST 14440/22), p. 8. There is a general understanding between the representatives of the Commission and of the Member States that Member States are and should be allowed to adopt not only more detailed rules, but also stricter rules.

19. Minimum harmonisation would imply that the relevant rules set the 'floor' for protecting media pluralism and editorial independence that must be respected by all Member States, but that it is open to Member States, subject to compliance with the Treaties, to choose to raise the 'ceiling' by adopting rules that are stricter than those prescribed in the relevant parts of the proposal in order to ensure a higher level of protection of media pluralism or editorial independence.

20. The case law interprets "*measures of approximation*" as conferring discretion on the legislator as to the method of approximation and does not exclude the introduction of a minimum harmonisation clause in acts based on Article 114 TFEU, where the intention is to introduce a step-by-step harmonisation and where the free movement of products or services is ensured, giving the act its full effect in relation to its object of improving the functioning of the internal market.[26]

21. Accordingly, should this intention of minimum harmonisation be confirmed by the legislature, Article 1(3) of the proposal would need to be reworded to allow Member States to adopt "*more detailed or stricter rules*" and the understanding be reflected that the free movement of media services which comply with the harmonised rules is not thereby restricted and that these stricter rules comply with Union law.

22. The analysis below will verify whether the three conditions[27] are fulfilled for recourse to Article 114 TFEU:

– The existence or likely emergence of disparities between national laws which are such as to obstruct fundamental freedoms and thus have a direct effect on the functioning of the internal market or to cause significant distortions of competition;

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[26] CLS opinion of 18 November 2014, doc. ST 15712/14. See notably judgment of 4 May 2016, *Philip Morris*, C-547/14, EU:C:2016:325, paragraph 63 and *supra* footnote 13, "*Tobacco Advertisement*" judgment, paragraph 74.

[27] The Council Legal Service has commented on these conditions in numerous opinions, including those of 18 February 2009 in document ST 6623/09; of 11 September 2013 in document ST 13524/13; of 27 June 2014 in document ST 11395/14; of 12 May 2015 in document ST 8592/15; of 7 July 2021 in document ST 10626/21.

– The purpose of the measure is to improve the conditions for the establishment and functioning of the internal market; and

– No other legal basis is appropriate.

B. COMPLIANCE OF THE PROPOSAL WITH THE REQUIREMENTS FOR RECOURSE TO ARTICLE 114 TFEU

23. Given the subject matter of the proposal, a preliminary remark is worth making regarding the implications of Article 167 TFEU for the application of Article 114 TFEU.

24. Where the above three conditions are met, the legislator is not prevented from having recourse to Article 114 TFEU in the field of media services. Neither the wording of Article 114 TFEU nor any contextual element of the Treaty exclude the application of this provision to media services. Nothing different follows, in particular, from Article 167(5) TFEU, which excludes harmonisation from the Union competence to carry out actions to support, coordinate or supplement the actions of the Member States on culture. While some media services are indeed cultural in nature, the exclusion of certain measures from the actions which can be taken under Article 167 TFEU does not affect the scope of Union competence under Article 114 TFEU.

25. However, under Article 167(4) TFEU the Union is obliged to "*take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures*". In its case law the Court has clarified that "*respect for […] the strengthening of cultural and linguistic diversity, as values and objectives of the European Union, must be taken into account in EU actions*".[28] Hence the legislator is obliged to take these aspects into account, including when assessing the need for harmonising measures.

[28] Judgment of 24 September 2019, *Romania v Commission*, T-391/17, EU:T:2019:672, paragraph 53.

First condition – existence or likely emergence of disparities between national laws which are such as to obstruct fundamental freedoms and thus have a direct effect on the functioning of the internal market or to cause significant distortions of competition

26. For the proposal to fulfil the first condition for recourse to Article 114 TFEU, it must be shown that disparities between national laws exist or are likely to emerge which are such as to obstruct the fundamental freedoms or to distort competition. At the outset, it needs to be clarified that in its case law on Article 114 TFEU, the Court refers to obstacles to the fundamental freedoms of the internal market, as referred to in Article 26(2) TFEU, rather than to obstacles to fundamental rights which are protected under the Charter, such as media pluralism.[29] While the Union can act to protect fundamental values such as media freedom and pluralism, as further explained in paragraphs 54 and 55 below, it needs to do so within the limits of the competences that have been conferred on the Union by the Treaties.[30]

27. The disparities between national laws and their effect are addressed in several recitals of the proposal. Recital 4 indicates that "*different national rules and approaches related to media pluralism and editorial independence […] make it difficult for media market players to operate and expand across borders and lead to an uneven level playing field across the Union.*" Recital 5 provides that "*in response to challenges to media pluralism and media freedom online, some Member States have taken regulatory measures and other Member States are likely to do so, with a risk of furthering the divergence in national approaches*". Pursuant to recital 15, "*Member States have taken different approaches to the protection of editorial independence*" and "*as a result of such interference and fragmentation of regulation and approaches, the conditions for the exercise of economic activities by media service providers and, ultimately, the quality of media services received by citizens and businesses are negatively affected in the internal market.*"

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29 Article 11 of the Charter provides that "*the freedom and pluralism of the media shall be respected*".

30 Judgment of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 127; Pursuant to Article 6(1) TEU and Article 51(2) of the Charter, the provisions of the Charter do not extend the competences of the Union.

Recital 17 indicates that "*the protection of journalistic sources is currently regulated heterogeneously in the Member States*" which leads to fragmentation and to the result that "*journalists, who work increasingly on cross-border projects and provide their services to cross-border audiences, and by extension providers of media services, are likely to face barriers, legal uncertainty and uneven conditions of competition*."

28. Existing or likely sources of regulatory fragmentation amongst Member States are further addressed in the impact assessment report. It maps the different national approaches[31] and indicates that interference in editorial independence affects the capacity of European media "*to independently produce and freely distribute their content across borders, thus hindering the exercise of their economic activities*" and that "*uncoordinated national rules and discriminatory practices make it difficult for media market players to operate and expand across borders*".[32] This is testified by developments in certain Member States where the investment environment has become increasingly hostile vis-à-vis foreign companies.[33]

29. It is reasonable to expect the Court to consider the above justification to be sufficient for provisions relating to harmonising measures on the provision of cross-border media services.

30. However, for certain provisions in the proposal, the existence or likely emergence of an obstruction of the free movement of media services or of a significant distortion of competition is less apparent. This applies for Articles 5 and 21 and for the inclusion of non-audiovisual media services.

Article 5

31. Article 5 sets safeguards for the independent functioning of public service media providers. Paragraph 1 obliges them to "*provide in an impartial manner a plurality of information and opinions to their audiences in accordance with their public service mission*". Paragraph 2 contains rules on transparency and non-discrimination with regard to management appointments in public service media providers.

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31 Impact assessment report, Annex 7.
32 Impact assessment report, p. 2 and 14.
33 *Ibid.*

Paragraph 3 obliges Member States to ensure that public service media providers "*have adequate and stable financial resources for the fulfilment of their public service mission*" to avoid that public media service providers are 'under-funded'.[34]

32. A preliminary question to be assessed with regard to Article 5(3) of the proposal is whether measures relating to the funding of public media service providers can be considered, in the light of Protocol N° 29 to the TFEU on the System of Public Broadcasting in the Member States ("Amsterdam Protocol"), to fall within the competence of the Union. Considering that "*the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism"*, the Amsterdam Protocol stipulates that "*the provisions of the Treaties shall be without prejudice to the competence of the 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 contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*".

33. A broad interpretation would suggest that the Amsterdam Protocol is to be understood as recognising that Member States are competent to regulate all aspects related to the funding of public service broadcasting. That interpretation would preclude the use of Article 114 TFEU for Union measures imposing obligations on Member States to avoid underfunding of the providers of these services. The literal reading, by contrast, suggests that the Amsterdam Protocol is concerned with the 'provision for the funding', i.e., the making available of funding by the Member States to public service broadcasting. Under that interpretation, the Amsterdam Protocol essentially affirms the possibility for Member States to fund their public service broadcasting, except where there is 'over-funding' beyond the public service remit. This interpretation would not exclude the Union taking measures, where it has a legal basis for doing so, to avoid under-funding of public service media providers.

[34] Recital 18 refers to the necessity to guarantee that *"public service media providers benefit from sufficient and stable funding"*.

34. A comparison of the different language versions supports the latter reading, i.e., that the Amsterdam Protocol recognizes the competence of the Member States with regard to 'making available funding'.[35] This is confirmed by a teleological interpretation of the text of the Amsterdam Protocol. The wording in the Amsterdam Protocol "*in so far as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*" and its nature as an interpretative provision support the reading that the Amsterdam Protocol cannot be understood as excluding the funding of public service media operators from the Union internal market rules. The Amsterdam Protocol therefore does not preclude a potential Union competence based on Article 114 TFEU for the adoption of the measures relating to funding of public media service providers proposed under Article 5(3) of the proposal.

35. It remains to be assessed if the provisions of Article 5 of the proposal are supported by an internal market rationale.

36. Recital 18 explains that "*public service media can be particularly exposed to the risk of interference, given their institutional proximity to the State and the public funding they receive. This risk may be exacerbated by uneven safeguards related to the independent governance and balanced coverage by public service media across the Union. This situation may lead to biased or partial media coverage, distort competition in the internal market and negatively affect access to independent and impartial media services.*"

37. The recital refers extensively to the risk of editorial interference. The only internal market related logic for Article 5 is the mention in the last sentence of recital 18 according to which "*this situation may […] distort competition in the internal market*"

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[35] See in this regard the French language version "*pourvoir au financement du service public de radiodiffusion*", the Dutch language version "*voorzien in de financiering van de openbare omroep*", the German language version "*den öffentlich rechtlichen Rundfunk zu finanzieren*", the Italian language version "*a provvedere al finanziamento del servizio pubblico di radiodiffusione*", the Spanish language version "*de financiar el servicio público de radiodifusión* ", the Polish language version "*zapewnienia finansowania publicznego nadawania*" and the Swedish language version "*att svara för finansiering av radio och TV i allmänhetens tjänst*".

However, it is not apparent from the explanatory memorandum that the disparities of the national laws on public media service providers obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market or cause significant distortions of competition, which the measures in Article 5 would address.

38. The impact assessment report mentions fragmentation across the EU of the safeguards for the independence and balanced coverage by public service media providers and biased reporting by public service media, enjoying public funding but not fulfilling the public remit, which "*distorts competition with private media (often coming from abroad) that compete for the same advertising revenues"* and that "*private media service providers can be deterred from entering such markets*".[36] However, the distortion of competition which is identified results from advantages which public service media operators have over private providers due to their public funding (without fulfilling their public remit). The rules proposed in Article 5(3), by contrast, aim at avoiding underfunding of public service media providers, and hence do not address the distortion of competition described in the impact assessment.

39. With regard to the appointment of management of public service media providers, as addressed in Article 5(2), the impact assessment report indicates that there is a divergence of rules in the Union,[37] but it does not suggest that this leads to obstacles to the functioning of the internal market for media services or to any distortion of competition.

40. The overall advantages described in the impact assessment report of the proposal regarding public service media providers, do not relate to internal market considerations: "*[a]s a result, significant improvement in rule of law and democratic standards can be expected, especially in the Member States where issues have been identified. Another likely social benefit is greater EU-wide social cohesion, as citizens of different Member States will gain more equal access to independent, inclusive and diverse public service media content.*"[38]

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36 Impact assessment report, p. 16 and 20.
37 Impact assessment report, p. 20.
38 Impact assessment report, p. 57.

41. The most recent Rule of Law Report of the Commission, which is frequently referred to in the impact assessment report, contains a chapter on safeguarding the independence of public service media, but does not conclude that the divergence of national rules governing public service media providers distorts competition.[39]

42. The elements above do not provide a basis for concluding that the first condition for the use of Article 114 TFEU is fulfilled for Article 5 of the proposal.

43. Therefore, in respect of Article 5, the effect of disparities which the relevant national laws have on the functioning of the internal market for public media services should be further substantiated, based on additional sources showing that the measures proposed address existing or likely obstacles to trade or distortions of competition, while taking cultural aspects into account, in particular in order to respect and to promote cultural and linguistic diversity under Article 167(4) TFEU and the role of public broadcasting in the Member States as recognised by the Amsterdam Protocol.

Article 21

44. Article 21 contains an obligation for Member States to provide substantive and procedural rules in order to notify and assess media market concentrations "*that could have a significant impact on media pluralism and editorial independence*".[40]

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39 2022 Rule of Law Report, COM(2022) 500 final, p. 19.

40 This assessment is distinct from the assessments under competition law and merger control and only focuses on the impact which media market concentrations may have on media pluralism and editorial independence. In this regard it is worth noting that Article 21(4) of the Merger Control Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22) considers media plurality a legitimate interest that may be taken into account by Member States when assessing mergers of undertakings.

45. Recital 40 stipulates that "*media play a decisive role in shaping public opinion and helping citizens participate in democratic processes*" and therefore "*Member States should provide for rules and procedures in their legal systems to ensure assessment of media market concentrations that could have a significant impact on media pluralism or editorial independence*", but does not indicate that there are obstacles caused by differences between national laws in this regard, or that such obstacles are likely to emerge, which are such as to obstruct the free movement of media services or cause a significant distortion of competition. The impact assessment report mentions that "*concentrations in the media market or even a potential concentration in a market that naturally evolves towards oligopoly or monopoly has been seen as the greatest risk to the democratic debate*".[41] It contains evidence of distortions of competition that are caused by different scrutiny procedures of media concentrations applied in the Member States, as illustrated by the assessment of the Vivendi case.[42]

46. The justification that the measures in Article 21 address obstacles to the free movement of media services or any significant distortion of competition that is provoked by the divergence of national rules on media concentrations should be further elaborated in the preamble of the proposal. It is therefore advised to redraft or supplement recital 40 so as to refer to the obstacles or distortions of competition (or risk thereof) caused by the different national rules on media market scrutiny of concentrations and the resulting need for a basic framework ensuring a level playing field.

Non-audiovisual media services

47. Contrary to the AVMS Directive, the proposal covers all media, including audiovisual, radio and the press, independently of whether they are available online.

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41 Impact assessment report, footnote 22, p. 4.

42 Impact assessment report, p. 6-8. For the Vivendi case, see judgment of 3 September 2020, *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni*, C-719/18, EU:C:2020:627.

48. The preamble, the explanatory memorandum and the impact assessment report focus primarily on disparities between national laws and regulatory frameworks that have a direct effect on the functioning of the internal market for audiovisual media services. With regard to the obstacles to the cross-border supply and receipt of media services and any distortion of competition, the impact assessment report notes that these obstacles "*affect especially the broadcasting sector […], and to a lesser extent the press sector*".[43] In relation to cooperation amongst national media regulators, the impact assessment report states that the current obstacles "*affect mainly providers regulated at EU level, i.e. providers of audiovisual media services and video-sharing platforms*".[44] With regard to the allocation of economic resources in the internal media market, the impact assessment report indicates that the obstacles appear "*in particular in the audiovisual sector*".[45]

49. The proposal therefore should be further substantiated on the obstacles to the functioning of the internal market or the distortion of competition resulting from the divergence of national rules on non-audiovisual media services. It may, notably, be possible to argue that the dividing line between audiovisual and non-audiovisual media services is increasingly more difficult to draw, due to the continuously growing accessibility of these services on the internet and the development of online content. In this regard reference is made to recital 1, which indicates that "*media services are increasingly available online and across borders*" and recital 2, which provides that the media market "*has substantially changed since the beginning of the new century, becoming increasingly digital and international*". It is suggested to consider providing a more detailed and evidence-based justification for the choice of the wider scope in the preamble.

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43 Impact assessment report, p. 5.
44 *Idem*, p. 9.
45 *Idem*, p. 21.

Second condition – the purpose of the measure is to improve the conditions for the establishment and functioning of the internal market

50. In order to meet the second condition for recourse to Article 114 TFEU that has been identified in the case law, the Court requires that it be "*actually and objectively apparent that the purpose [of the measure] is to improve the conditions for the establishment and functioning of the internal market*".[46]

51. Article 1 indicates that the proposal lays down common rules for "the proper functioning of the internal market for media services […] while preserving the quality of media services".

52. The preamble contains several recitals which are relevant for identifying the objectives pursued by the proposal. Recital 2 notes that "*[t]he Union should help the media sector seize [the] opportunities within the internal market, while at the same time protecting the values, such as the protection of the fundamental rights.*" Recital 3 reads "*[a]s media services are knowledge- and capital-intensive, they require scale to remain competitive and to thrive in the internal market. To that effect, the possibility to offer services across borders and obtain investment including from or in other Member States is particularly important.*" Pursuant to recital 6 "*[r]ecipients of media services in the Union […] should be able to effectively enjoy the freedom to receive free and pluralistic media services in the internal market. In fostering the cross-border flow of media services, a minimum level of protection of service recipients should be ensured in the internal market.*" Recital 14 indicates that "*[t]he protection of editorial independence is a precondition for exercising the activity of media service providers and their professional integrity.*" Recital 20 sets out that "*[t]he objective to shield editors from undue interference in their decisions taken on specific pieces of content as part of their everyday work contributes to ensuring a level playing field in the internal market for media services and the quality of such services.*" Recital 52 refers to "*the objectives of this Regulation, namely ensuring the proper functioning of the internal market for media services*".

[46] See *supra* footnote 17, "*ENISA*" judgment, paragraph 42.

53. Based on these elements, it can be concluded that the proposal improves the conditions for the functioning of the internal market for media services, while emphasising the need to ensure media pluralism and editorial independence of media service providers.[47]

54. In this regard it should be noted, first, that ensuring the quality of media services or protecting media freedom does not as such exclude the use of Article 114 TFEU. Provided that the conditions for Article 114 TFEU are met, including the genuine pursuit of the aim to improve the functioning of the internal market, the legislator is not prevented from taking into account the need to ensure editorial independence and media pluralism. Even though Article 114(3) TFEU does not mention the freedom and pluralism of media – unlike for example a high level of health protection, environmental protection or consumer protection – it is inherent in the harmonisation under Article 114 TFEU that national rules are harmonised which are taken in the pursuit of specific policies. It is therefore inherent in the logic of Article 114 TFEU that the Union rules harmonising these national rules will relate to these policies. Protecting the freedom of the media and the quality of media services can thus be an essential public interest objective in a legislative act based on Article 114 TFEU if the conditions set out therein are fulfilled.[48]

55. Secondly, pluralism is recognised as an essential attribute of society in Article 2 TEU, which sets out the values on which the Union is founded. The Court has ruled on 16 February 2022 on the rule of law conditionality regulation that "*the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties*".[49] This case law indicates that that the Union legislature is empowered to ensure the protection of the values mentioned in Article 2 TEU and of other fundamental rights where it has an appropriate legal basis for taking legislative action.

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47 It is noted that the references to *"the integrity of the internal market"* leave room for interpretation whether they relate to the exercise of the right to free movement of media services in the internal market or to the level of quality of media services in the Union. It is advised to clarify this term in the final version of the act.

48 See in this regard judgment of 3 December 2020, *Czech Republic v Parliament and Council* (*Firearms*), C-482/17, EU:C:2019:1035, paragraphs 38-40, 47-48 and 56-57. See also opinion of the Council Legal Service in document ST 12302/22, paragraph 20.

49 See *supra* footnote 30, paragraph 127.

It is considered that the Union legislature is also empowered to ensure respect for pluralism when taking such action. The legislature therefore does not infringe the principle of conferral of powers by pursuing actions aimed at protecting the values and essential attributes of society of the Union where these actions comply with the conditions defined in a Treaty legal basis.

56. While it is therefore clear that the references to the need of improving media pluralism and independence do not as such question the genuine pursuit of an internal market objective, the internal market objective must underpin also those provisions which relate to media pluralism and independence. The genuine purpose must be to foster the cross-border flow and free movement of media services, to ensure competition on an equal footing and to improve the conditions for the functioning of the internal market for media services.

57. However, for several of the provisions of the proposal, their effect on improving the functioning of the internal market for media services is not apparent, and the corresponding recitals refer instead extensively to the need to protect media independence and plurality as such. This applies, in varying degrees, to Articles 5, 21 and 25. In order to provide a solid basis for including these provisions in the proposal without putting in question the appropriateness of Article 114 TFEU as a legal basis for the proposal, it is advised to substantiate the relevant recitals as described below.

58. Regarding Article 5, which contains provisions on the mission, the appointment of management and the funding of public service media providers, recital 18 explains that "*public service media can be particularly exposed to the risk of interference, given their institutional proximity to the State and the public funding they receive […] This situation may lead to biased or partial media coverage, distort competition in the internal media market and negatively affect access to independent and impartial media services."* While recital 18 invokes a distortion of competition in the internal market, it extensively refers to the risk of political interference affecting the impartiality of the coverage. On the basis of this explanation in recital 18, it cannot be concluded that the purpose of the measures in Article 5 is to improve the functioning of the internal market for media services.

It rather seems to suggest that Article 5 aims to improve the independence and impartiality of public service media providers. A more concrete justification is therefore needed to conclude that the measures in Article 5 relating to public service media providers have indeed as their purpose the improvement of the functioning of the internal market for media services.

59. Recital 40 justifies the measures in Article 21, which approximate rules on the assessments of media market concentrations, by explaining that "*media play a decisive role in shaping public opinion and helping citizens participate in democratic processes*", mentioning *inter alia* that national measures on media market scrutiny *"can have an impact on the freedom to provide media services in the internal market"*. It is advised to better reflect in recital 40 the need to create a level playing field regarding scrutiny of media market concentrations.

60. Under Article 25(1) the Commission "shall ensure an independent monitoring of the internal market for media services, including risks to and progress in its functioning and resilience". Pursuant to Article 25(3)(a) and (b), the monitoring exercise shall "include a detailed analysis of the resilience of media markets of all Member States" and the "resilience of the internal market for media services as a whole". While the monitoring of the functioning of the internal market for media services clearly pursues an internal market related objective, the notion of "resilience" is unclear and should be deleted.

61. Article 25(3)(c) provides that the Commission shall ensure an independent monitoring of the internal market for media services, which shall include an overview of measures taken by media service providers "*with a view to guaranteeing the independence of individual editorial decisions*". Recital 50 explains that this monitoring "*should provide an overview of measures taken by media service providers with a view to guaranteeing the independence of individual editorial decisions*". This provision seems to be a reporting obligation of the measures under Article 6. The reporting obligation should aim at improving the functioning of the internal market for media services instead of referring only to the aim of guaranteeing the independence of individual editorial decisions. Therefore, in respect of Article 25(3)(c), the proposal should be redrafted to link the editorial independence aim with the improvement of the functioning of the internal market for media services.

Third condition – no other legal basis is appropriate

62. In accordance with the opening words of Article 114 TFEU ("*Save where otherwise provided in the Treaties*"), the use of Article 114 TFEU is justified only if no more specific provision in the Treaties is capable of constituting the legal basis for the adoption of the measure in question.[50]

63. Given the stated aim and content of the proposal as well as its potential link with Article 53(1) TFEU in combination with Article 62 TFEU, it is appropriate to consider whether Article 114 TFEU can constitute the valid legal basis for the proposal.

64. Articles 53(1) and 62 TFEU provide a legal basis for the adoption of directives for the coordination of the provisions laid down by Member States concerning the taking-up and pursuit of an activity throughout the Union and the freedom to provide services.

65. These articles serve as legal bases for the AVMS Directive. This directive contains provisions on the establishment of audiovisual media service providers in the internal market, on the regulation of content of audiovisual media services and the cross-border provision of these services based on the country-of-origin principle. It essentially makes sure that retransmissions of audiovisual media services from other Member States are not unduly restricted.

66. The proposal by contrast is overall aimed at setting general and harmonised rules that need to be complied with in respect of all media services, regardless of whether they are provided or consumed in one Member State or in several Member States, in order to improve the functioning of the internal market for media services. Some of its provisions are not addressed to Member States alone but apply directly to economic operators. Hence, the proposal aims at regulating the activity of providing media services within the internal market generally.

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50 Opinion of the Council Legal Service of 17 May 2016, doc. ST 9007/16, paragraph 6.

67. The Court has also confirmed that Article 114 TFEU can constitute the appropriate legal basis in relation to financial services when "*the harmonisation of the rules governing such [financial service] transactions is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States*."[51] In another case relating to services the Court confirmed that Article 114 TFEU can be used "*to improve the conditions for the establishment and functioning of the internal market*" and to contribute to "*the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition*."[52]

68. Therefore Article 53(1) and 62 TFEU do not prevent the legislature from adopting the proposal on the basis of Article 114 TFEU.

V. CONCLUSION

69. The Council Legal Service is of the opinion that the proposal, as it stands, can be based on Article 114 TFEU, but that it is insufficiently apparent in the text as it stands in respect of some provisions either that they genuinely aim to improve the functioning of the internal market for media services or that the divergence of national rules obstructs or is likely to obstruct the functioning of the internal market for media services or to distort competition.

70. It is therefore recommended:

– In respect of the measures on public service media providers contained in Article 5, to identify the existence or likely emergence of disparities which obstruct fundamental freedoms and thus have a direct effect on the functioning of the internal market for media services or cause significant distortions of competition in this regard. Where such obstructions or distortions can be identified, it is advised to better reflect the genuine aim to improve the functioning of the internal market for media services in respect of this provision in the preamble.

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51 Judgment of 22 January 2014, *United Kingdom v Parliament and Council* (*short-selling*), C-270/12, EU:C:2014:18, paragraph 114.

52 See *supra* footnote 18, paragraph 60.

– In respect of measures on media concentrations in Article 21, to better explain in the preamble that the actual or potential divergence of national laws in the Union has a direct effect on the functioning of the internal market for media services or causes significant distortions of competition, and that its genuine aim is to improve the functioning of the internal market for media services.

– In respect of non-audiovisual media services, to further substantiate in the preamble the obstacles to the functioning of the internal market for media services or the distortion of competition resulting from the divergences of national rules.

– In respect of Article 25, to delete the references in paragraphs 1 and 3 to the *"resilience"* of the internal market and to redraft the proposal in respect of paragraph 3(c) so as to link the monitoring by the Commission of the media market to risks for the functioning of the internal market for media services.

– Provided that it is confirmed that Chapter II and section 5 of Chapter III are intended to contain minimum harmonisation rules, to adjust the wording of Article 1(3) and the preamble by allowing Member States to adopt "*more detailed or stricter rules*", reflecting the understanding that the free movement of media services which comply with the harmonised rules is not thereby restricted and that these stricter rules comply with Union law.