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## NOTE

From:	General Secretariat of the Council
To:	Audiovisual and Media Working Party (Attachés) 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 - Comments from NL

Delegations will find attached the written contributions from delegations that were made during or after the Audiovisual and Media Working Party meeting on 22 May 2023 in relation to the Presidency compromise proposals set out in WK 6368/2023 INIT.

#### Amendments to (6), art 1 and 4

NL has argues for changes in article 4. More specifically on replacing the term spyware with intrusion software, narrowing restrictions on investigative measures to media service providers and their employees and on not elaborating beyond the criterium of "overriding requirement in the public interest".

<b>Text from the Swedish presidency</b>	<b>Dutch amendment proposals</b>	
Preamble	Preamble	
	(6bis) This Regulation does not apply to the activities which fall outside the scope of Union law. Member States should ensure that all measures, activities and operations performed in the context of public policies falling into the exclusive remit of Member States respect the fundamental rights, notably freedom of expression and information.	Amendment to make clear that the regulation as a whole is without prejudice to MS responsibilities for national security and defence.
Article 1	Article 1	
	2bis. This Regulation shall not apply to activities, which fall outside the scope of Union law, and in any event measures, processing activities and operations concerning national security and defence, regardless of who is carrying out those activities whether it is a public authority or a private operator acting at the request of a public authority.  (Drafting from the general approach adopted by the Council for the ePrivacy Regulation (Article 2(2)(a)).	Amendment to make clear that the regulation as a whole is without prejudice to MS responsibilities for national security and defence.
Article 4 Rights of media service providers	Article 4 Rights of media service providers	
2a. Member States shall ensure an effective protection of the sources of media service providers and their employees. Member States shall not, unless this is justified by an overriding requirement in the public interest and provided for in national law in accordance with Article 52(1) of the Charter and	2a. Member States shall ensure an effective protection of the sources of media service providers and their employees. Member States shall not, unless this is justified by an overriding requirement in the public interest and provided for in national law in accordance with Article 52(1) of the Charter and	Amendment restricts scope to msps and their employees.  Amendment uses the term intrusion software on grounds argued in the AVMWP.

<p>in compliance with other Union law [...]:</p> <p>(a) oblige media service providers or their employees to disclose information on their sources;</p> <p>(b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers or, if applicable, their family members, or their employees or their family members, or their corporate and private premises, on the ground that media service providers or their employees refuse to disclose information on their sources [...]; or</p> <p>(c) deploy spyware in any device or machine used by media service providers or, if applicable, their family members, or their employees or their family members for the purpose of obtaining information on the sources of media service providers or their employees, unless the deployment</p> <p>(i) is justified, on a case-by-case basis, on grounds of public security [...]; or</p> <p>(ii) occurs in [...] investigations of one of the [...] persons mentioned in Article 4(2)(c) for offences referred to in Article 2(2) of Council Framework Decision 2002/584/JHA and punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least three years.</p> <p>[...]</p> <p>[...]</p> <p>Member States shall not adopt a measure pursuant to point (c) of the first subparagraph where measures referred to point (b) of the first subparagraph are</p>	<p>in compliance with other Union law [...]:</p> <p>(a) oblige media service providers or their employees to disclose information on their sources;</p> <p>(b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers or, if applicable, <del>their family members</del>, or their employees <del>or their family members</del>, or their corporate and private premises, <del>on the ground that media service providers or their employees refuse to disclose information on their sources [...];</del> or</p> <p><del>(c)</del> deploy <b>intrusion software</b> <del>spyware</del> in any device or machine used by media service providers or, if applicable, <del>their family members</del>, or their employees <del>or their family members</del> for the purpose of obtaining information on the sources of media service providers or their employees., <del>unless the deployment</del></p> <p><b>(2b) Member states shall not deploy any of the investigative measures mentioned in paragraph 2a(b) nor shall detain or sanction media service providers' family members or their employees' family members on the sole ground that media service providers or their employees refuse to disclose information on their sources.</b></p> <p><del>(i) is justified, on a case-by-case basis, on grounds of public security [...]; or</del></p> <p><del>(ii) occurs in [...] investigations of one of the [...] persons mentioned in Article 4(2)(c) for offences referred to in Article 2(2) of Council Framework Decision</del></p>	<p>Amendment introduces restriction on the use of measures mentioned in art 4 par 2a(b).</p> <p>Amendment strikes referrals to Council Framework Decision and maximum punishments since the "overriding requirement" criterium suffices.</p>
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adequate and sufficient to obtain the information sought.	<p><del>2002/584/JHA and punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least three years.</del></p> <p>[...]</p> <p>[...]</p> <p>Member States shall not adopt a measure pursuant to point (c) of the first subparagraph where measures referred to point (b) of the first subparagraph are adequate and sufficient to obtain the information sought.</p>	
No changes proposed for art 4 par 3		

## Amendments to article 17

NL has argued against article 17 on the grounds that an ex ante media exemption to be applied at the level of a recipient as a whole is vulnerable to abuse and may result in counteracting the DSA. The current compromise proposal in our view aggravates this vulnerability. The possibility of a media exemption was discussed and rejected during negotiations on the DSA on similar grounds. For NL removing the article remains preferable.

In order to find a compromise position, NL proposes for consideration a different approach that is more suitable as a sectoral complement to the DSA's horizontal framework. It replaces self-declaration by recipients with a standard of reasonable expectation to be applied by VLOPs. This should make the proposal less vulnerable to abuse.

Uncomfortable as it may seem, VLOPs are responsible for making sure that their Terms and Conditions and enforcement thereof respect media freedom and pluralism (see Article 14 paragraph 4 DSA).

Compromise text	Amendment	
<p><b>Article 17 (WK 2273/2023)</b></p> <p>Content of media service providers on very large online platforms</p>	<p><b>Article 17 (WK 2273/2023)</b></p> <p>Content of media service providers on very large online platforms</p>	
<p>1. Providers of very large online platforms shall provide a functionality allowing recipients of their services to:</p> <p>(a) declare that it is a media service provider within the meaning of Article 2(2);</p> <p>(b) declare that it is editorially independent from Member States and third countries;</p> <p>(c) declare that it is subject to regulatory requirements or adheres to a co-regulatory or self-regulatory mechanism widely recognised and accepted in the relevant media sector in one or more Member States for the exercise of editorial responsibility and editorial standards.</p> <p>(d) provide the contact details of the relevant national regulatory authorities or bodies or representatives of the co- or self-regulatory mechanisms referred to in point (c).</p>	<p><b><i>1. Providers of very large online platforms shall have due regard to the freedom and pluralism of the media in their terms of service and in the application and enforcement thereof. To this end they shall take into account whether content that they intend to restrict or remove was, according to their reasonable expectation, created by a media service provider within the meaning of Article 2(2) that is editorially independent from Member States and third countries and that is subject to regulatory requirements or adheres to a co-regulatory or self-regulatory mechanism widely recognised and accepted in the relevant media sector in one or more Member States for the exercise of editorial responsibility and editorial standards.</i></b></p>	<p>The amendment replaces self-declaration by recipients with a standard of reasonable expectation to be applied by VLOPs. This should make the proposal less vulnerable to abuse. Consideration by VLOPs should regard restrictions and suspensions.</p>

<p>In case of reasonable doubts concerning the media service provider's compliance with point (c), the provider of a very large online platform shall seek confirmation on the matter from the relevant national regulatory authority or body or the relevant co- or self-regulatory body.</p>		
<p>2. Where a provider of a very large online platform decides to restrict or suspend the provision of its online intermediation services in relation to content provided by a media service provider that submitted a declaration and contact details pursuant to paragraph 1 of this Article, on the grounds that such content is incompatible with the terms and conditions of the online intermediation services, without that content contributing to a systemic risk referred to in Article 34 of the Regulation (EU) 2022/2065, it shall take all possible measures, to the extent consistent with their obligations under Union law to communicate to the media service provider concerned the statement of reasons accompanying that decision, as required by Article 4(1) of Regulation (EU) 2019/1150, and to provide the media service provider with an opportunity to reply to the statement of reasons within an appropriate period prior to the restriction or suspension taking effect. If following, or in the absence of, such a reply, the provider of a very large online platform still intends to restrict or suspend the provision of its online intermediation services, it shall inform the media service provider concerned.</p>	<p>2. Where a provider of a very large online platform decides to <del>restrict or</del> suspend the provision of its online intermediation services in relation to content provided by a media service provider <b><i>that can reasonably be expected to meet the requirements pursuant to paragraph 1 of this Article</i></b> <del>that submitted a declaration and contact details pursuant to paragraph 1 of this Article,</del> on the grounds that such content is incompatible with the terms and conditions of the online intermediation services, without that content contributing to a systemic risk referred to in Article 34 of the Regulation (EU) 2022/2065, it shall take all possible measures, to the extent consistent with their obligations under Union law to communicate to the media service provider concerned the statement of reasons accompanying that decision, as required by Article 4(1) of Regulation (EU) 2019/1150, and to provide the media service provider with an opportunity to reply to the statement of reasons within an appropriate period prior to <del>the restriction or</del> suspension taking effect. If following, or in the absence of, such a reply, the provider of a very large online platform still intends to restrict or suspend the provision of its online intermediation services, it shall inform the media service provider concerned.</p>	<p>Follows the amendment to par 1.</p> <p>Follows IRE and NGO's in a narrow range of decisions (suspensions only) for safety reasons. Any grave abuse can be restricted if needed.</p> <p>Follows the compromise text in allowing extra provisions in the procedure.</p>

<p>3. Providers of very large online platforms shall take all the necessary technical and organisational measures to ensure that complaints under Article 11 of Regulation (EU) 2019/1150 by media service providers that submitted a declaration pursuant to paragraph 1 of this Article are processed and decided upon with priority and without undue delay.</p>	<p>3. Providers of very large online platforms shall take all the necessary technical and organisational measures to ensure that complaints under Article 11 of Regulation (EU) 2019/1150 by media service providers <b>that can reasonably be expected to meet the requirements pursuant to paragraph 1 of this Article</b> that submitted a declaration pursuant to paragraph 1 of this Article are processed and decided upon with priority and without undue delay.</p>	<p>Follows amendment to par 1.</p>
<p>4. Where a media service provider that submitted a declaration pursuant to paragraph 1 considers that a provider of very large online platform frequently restricts or suspends the provision of its services in relation to content provided by the media service provider without sufficient grounds, the provider of very large online platform shall engage in a meaningful and effective dialogue with the media service provider, upon its request, in good faith with a view to finding an amicable solution for terminating unjustified restrictions or suspensions and avoiding them in the future. The media service provider may notify the outcome of such exchanges to the Board.</p>	<p>4. Where a media service provider <del>that submitted a declaration pursuant to paragraph 1</del> <b>that can reasonably be expected to meet the requirements pursuant to paragraph 1 of this Article</b> considers that a provider of very large online platform frequently restricts or suspends the provision of its services in relation to content provided by the media service provider without sufficient grounds, the provider of a very large online platform shall engage in meaningful and effective dialogue with the media service provider, upon their request, in good faith with a view to finding an amicable solution for terminating unjustified restrictions or suspensions and avoiding them in the future. The media service provider may notify the outcome of such exchanges to the Board.</p>	<p>Allows media service providers to engage in dialogue with VLOPs about contested restrictions and suspensions.</p> <p>Also creates possibility for media service providers to hold VLOPs to account on their assessments pursuant to par 1. These case-by-case dialogues should be less vulnerable to abuse than self-declaration. The criteria in par 1 commit VLOPs to a consistent framework for deciding</p>
<p>5. Providers of very large online platforms shall make publicly available on an annual basis detailed information on:</p> <p>(a) the number of instances where they imposed any restriction or suspension on the grounds that the content provided by a media service</p>	<p>5. Providers of very large online platforms shall make publicly available on an annual basis detailed information on:</p> <p>(a) the number of instances where they imposed any restriction or suspension on the grounds that the content provided by a media service</p>	<p>Follows amendment to par 1.</p>

<p>provider that submitted a declaration in accordance with paragraph 1 is incompatible with their terms and conditions; and</p> <p>(b)the grounds for imposing such restrictions or suspensions.</p>	<p>provider that <del>submitted a declaration in accordance with</del> <b>can reasonably be expected to meet the requirements pursuant to</b> paragraph 1 is incompatible with their terms and conditions; and</p> <p>(b)the grounds for imposing such restrictions or suspensions.</p>	
<p>6.With a view to facilitating the consistent and effective implementation of this Article, the Commission shall issue guidelines to facilitate the effective implementation of the functionality referred to in paragraph 1.</p>	<p><del>6.With a view to facilitating the consistent and effective implementation of this Article, the Commission shall issue guidelines to facilitate the effective implementation of the functionality referred to in paragraph 1.</del></p>	<p>Par removed following amendment to par 1.</p>

## Proposal on constitutional provisions in relation to media market concentrations

Presidency compromise text	Proposal by The Netherlands	Explanation
	<p><b>41a (new)</b>  <b>The assessment of media market concentrations shall be carried out without prejudice to constitutional provisions protecting editorial independence in Member States.</b></p>	<p>Constitutional protection in the Netherlands, as may be the case in other Member States, does not allow for an assessment of the content produced or the editorial policies of a media service provider. This could be a risk by assessing 'diversity of opinion'.</p> <p>Different constitutional traditions in Member States could have similar protections for media freedom and refraining from interfering in editorial policies than international law. Therefore, this article on media market concentrations should be followed without prejudice to <u>constitutional</u> provisions protecting editorial independence.</p>