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Acting on Media Freedom: The Proposed European Media Freedom Act (EMFA) of the European Union

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Act-Ing On Media Freedom: The Proposed European Media Freedom Act (EMFA) of the European Union

Mark D. Cole*

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I. INTRODUCTION

A. From “European Media Law?” to “European Media Law!” in the EU

Originally, the European Union approached “media market” regulation with some caution and restraint. The regulation of media related issues by the EU has changed significantly in the past years, from a Member-State-driven domain to a very significant influence of the EU, thereby gradually creating “European media law.”¹ What started in 1989 with the so-called “Television without Frontiers-Directive,”² which subsequently evolved into the “Audiovisual Media Services Directive”³ that was last amended in 2018,⁴ will in the future potentially have a new focal point with the so-called “European Media Freedom Act.”⁵ The European Commission has proposed a Regulation with this ambitious title—an act that is not only ambitious in title,

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¹ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 7–8 (Apr. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU\(2023\)733129_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU(2023)733129_EN.pdf).

² Council Directive 89/552/EEC of 3 Oct. 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities 89/552/EEC, 1989 O.J. (L 298) 23–30; cf. Development European Commission on Ex-post REFIT Evaluation of the Audiovisual Media Services Directive, 2016 O.J. 2010/13/EU 123–26.

³ Directive 2010/13, 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), 2010 O.J. (L 95) 1–24 (corrigendum to Directive 2010/13/EU, 2010 O.J. (L 263) 15).

⁴ Directive (EU) 2018/1808, of the European Parliament and of the Council of 14 Nov. 2018 Amending Directive 2010/13 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) in View of Changing Market Realities, 2018 O.J. (L 303) 69–92; see Consolidated Version of the Audiovisual Media Services Directive, Dec. 18, 2018, 2018 O.J., <https://eur-lex.europa.eu/legal-content/>. See generally Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *Cross-Border Dissemination of Online Content – Current and Possible Future Regulation of the Online Environment with a Focus on the EU E-Commerce Directive*, at 102 et seq. (Aug. 1, 2020), <https://doi.org/10.5771/9783748906438> (for background on the AVMSD); Deloitte and SMIT, *Study on the Implementation of the New Provisions in the Revised Audiovisual Media Services Directive (AVMSD)* (2021), <https://op.europa.eu/en/publication-detail/-/publication/6d536c6f-5c68-11eb-b487-01aa75ed71a1/language-en>; Mark D. Cole & Christina Etteldorf, *Research for CULT Committee - Implementation of the Revised Audiovisual Media Services Directive - Background Analysis of the Main Aspects of the 2018 AVMSD Revision* (Nov. 22, 2022), [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2022\)733100](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)733100) (for background analysis on the implementation of the latest revisions); Mark D. Cole & Christina Etteldorf, *Research for CULT Committee - Implementation of the Revised Audiovisual Media Services Directive - Policy Recommendations* (2022), [https://www.europarl.europa.eu/thinktank/de/document/IPOL_BRI\(2022\)733099](https://www.europarl.europa.eu/thinktank/de/document/IPOL_BRI(2022)733099) (for accompanying policy recommendations based on this analysis).

⁵ *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 (2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457> [hereinafter “European Media Freedom Act”]. For more extensive explanations of these implications, see Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination – A Critical Analysis of the Current Regulatory Framework for Law Enforcement Under the EU Audiovisual Media Services Directive and the Proposal for a European Media Freedom Act* (2023), <https://doi.org/10.5771/9783748939856>.

but also in content. The Commission published at the same time a Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector,⁶ accompanying the proposal for a Regulation—both tabled on 16 September 2022.

While the Digital Single Market strategy of the current and previous European Commission already resulted in the initiation of a number of new legal acts with potential to shape the digital environment well beyond the borders of the EU,⁷ the EMFA is attempting to secure, by a piece of secondary legislation, the fundamental principles of a free, independent, and pluralistic media landscape, which reflects the requirements deriving from the fundamental right to freedom of expression and freedom of the media as interpreted by the European Court of Human Rights (ECtHR) in Strasbourg concerning Article 10 of the European Convention on Human Rights (ECHR)⁸ and the Court of Justice of the European Union (CJEU) in Luxembourg in view of Article 11 of the Charter of Fundamental Rights of the European Union (CFR).⁹ It is (at the time of writing in the summer of 2023) in the midst of the legislative procedure and being controversially discussed in the Council of the EU¹⁰, being the Member States' representation body, and the European Parliament.¹¹

Against this background, the following contribution will contextualize the parameters of what can be referred to today as “European Media Law”¹²—now with an exclamation mark instead of a question mark—and how the

⁶ Commission Recommendation (EU) 2022/1634 of 16 September 2022 on Internal Safeguards for Editorial Independence and Ownership Transparency in the Media Sector, at 56–65 (2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022H1634> (on file with the *University of the Pacific Law Review*).

⁷ Cf. Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *Updating the Rules for Online Content Dissemination – Legislative Options of the European Union and the Digital Services Act Proposal* (Aug. 1, 2021), <https://doi.org/10.5771/9783748925934> (on file with the *University of the Pacific Law Review*); Mark D. Cole, Jorg Ukrow & Christina Etteldorf, *On the Allocation of Competences Between the European Union and Its Member States In the Media Sector, An Analysis with Particular Consideration of Measures concerning Media Pluralism*, at 173 *et seq.* (2021), <https://doi.org/10.5771/9783748924975>.

⁸ European Convention on Human Rights, art. 10, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, https://www.echr.coe.int/Documents/Convention_ENG.pdf. The wording is:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

⁹ Charter of Fundamental Rights of the European Union, art. 11, 2016 O.J. (C 202) 389–405. The wording is:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected.”

¹⁰ Francisco Javier Cabrera Blázquez, *Proposal for a European Media Freedom Act, European Audiovisual Observatory*, COM (2022), <https://rm.coe.int/note-emfa/1680a9af14> (on file with the *University of the Pacific Law Review*).

¹¹ David Ramiro Troitiño, *The European Union Facing the 21st Century: The Digital Revolution*, 12 TALTECH 60–78 (2022), <https://doi.org/10.2478/bjes-2022-0003>.

¹² Cf. Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *Cross-Border Dissemination of Online Content*, at 53 *et seq.* (for an overview of the network of sectoral regulation (including AVMSD, e-Commerce Directive, Copyright in the Digital Single Market Directive, Terrorist Content Online Regulation, Digital Services Act [Regulation] and Digital Markets Act [Regulation]) which is relevant in the context of “European Media Law” but which cannot be detailed further in this contribution); Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *Updating the Rules for Online Content Dissemination*, at 81 *et seq.*, 107 *et seq.*

EMFA supplements it, before detailing on which legal basis the EU sees its authority to act in this direction. Having set the scene, the discussion will then move to present, in some detail, the most important of the proposed provisions. This will be followed by a reflection on the need to critically review and improve the current draft Act. Much of the critique presented here is centered on the extensive Background Analysis report, which was co-authored by the author of this contribution and submitted to the CULT Committee¹³ of the European Parliament in March 2023.¹⁴ In addition, the present analysis reflects concrete Policy Recommendations, which were subsequently produced as support for the Committee's work, in order to supplement the Background Analysis.¹⁵

B. The “Act-ification” of EU Law and the Proposed European Media Freedom Act (EMFA) Regulation

The EU can act in legislative regard by choosing from an enumerated list of different types of legislative texts. These are referred to in the TFEU¹⁶ (Part Six, Title I, Chapter 2, Section 1) as “legal acts”, however the different categories are Regulations, Directives and Decisions as well as non-binding Recommendations and Opinions (Art. 288). Nonetheless, in recent years the European Commission has entitled several of the key (legislative) elements of its Digital Single Market strategy as “Acts” instead of merely referring to them as Regulations with a certain topical focus. In other words, as has already been the case in the past, besides the technical description, including the number of the legal act in the title—an abbreviated, more easily referable title was added. In this abbreviated title it is no longer mentioned as a Regulation, but instead an “Act.” While, for example, the Audiovisual Media Services Directive is the abbreviated title for “Directive (EU) 2010/13 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,” the Digital Services Act is the short version of “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.”

This proliferation of “Acts” can be seen with the DSA and Digital Markets Act (DMA), as well as the Data Governance Act, the Data Act, the Cyber Resilience Act or now with the EMFA. However, the word “Act” cannot suggest any different legal quality or relevance compared to a Regulation, as such a distinction is not foreseen by the Treaties. Nonetheless, it is evident the Commission has been using this to signal its lighthouse projects, which contribute to creating an overarching “code” of laws for a specific sector.

¹³ The Committee on Culture and Education (CULT) of the European Parliament is responsible for the cultural aspects of the Union such as the dissemination of culture, cultural heritage, and cultural and linguistic diversity, as well as for education, audiovisual policy, information and media policy, information society's cultural and educational aspects, youth, and sports.

¹⁴ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis* (Apr. 20, 2023), <https://www.europarl.europa.eu/committees/en/cult/supporting-analyses/latest-documents>.

¹⁵ Mark D. Cole & Christina Etteldorf, *Research for CULT Committee - European Media Freedom Act: Policy Recommendations* (May 2023), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/733130/IPOL_BRI\(2023\)733130_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/733130/IPOL_BRI(2023)733130_EN.pdf).

¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union, 2016 O.J. (C 202) 47–200.

Interestingly, the reform of the rules for the telecommunications sector, in which a number of pre-existing Directives were amended and integrated into one legal document, received the title of European Electronic Communications Code—using the word “code”, but in a way going in the direction of an “Act” considering its relevance in comparison to the other texts mentioned; the fact that it is still a Directive may explain the choice of a different wording. Retrospectively, the General Data Protection Regulation (GDPR) would also have deserved this denomination, considering the impact it has had beyond the borders of the EU; but it predates the development as it was passed in 2016. The “Act-ification” as such therefore does not change the way the concerned legal texts need to be analyzed, but it is a notable trend in the self-perception of the law-initiating body of the EU.¹⁷

The relevance of the media sector in connection with recent international crisis situations that impacted the EU heavily, such as the COVID-19 pandemic and the Ukraine war became very evident and gaps in the protection of an independent and resilient media landscape that can contribute to reliable and diverse information of EU citizens gained more attention. Addressing these issues puts the relevance of the proposed EMFA in a bigger context of the above-mentioned “Acts” and is a response to policy initiatives of the years before aimed at increasing the security of journalists at work, independence of the media and the oversight bodies from state influence and the positioning of media in the new communication flows which are dominated by platforms. Some of these developments had been addressed by the regularly conducted survey of the state of the media in the Member States through the Media Pluralism Monitor, the edition of 2022¹⁸ being referenced in the creation of the EMFA proposal. The European Commission started an annual Rule of Law Report exercise analyzing how this fundamental value of the EU is respected in its Member States and one pillar of the analysis considers independence of the media, for which in the report of 2022¹⁹ several areas of concern were highlighted.

Therefore, the Commission decided not only to issue a Recommendation addressed at Member States and media service providers themselves with suggestions on how to improve the overall situation, but drafted this ambitious legislative text, with which in form of a directly binding Regulation many of the concerns would be addressed in the way the Commission sees it. Besides discussing whether the analysis of the situation and the framework of the Treaties justifies the proposal of a Regulation with this content, the main elements of the EMFA will be introduced. Beyond these sections, there are a number of further important elements such as regulating the actual allocation

¹⁷ See Vagelis Papakonstantinou, *The “Act-ification” of EU Law: The (Long-Overdue) Move Towards “Eponymous” EU Legislation*, EUROPEAN L. BLOG (Jan. 26, 2021), <https://europeanlawblog.eu/2021/01/26/the-act-ification-of-eu-law-the-long-overdue-move-towards-eponymous-eu-legislation/>; see also Vagelis Papakonstantinou & Paul De Hert, *The Regulation of Digital Technologies in the EU: The Law-Making Phenomena of “Act-ification”, “GDPR Mimesis” and “EU Law Brutality”*, 2022 TECH. & REGULS. 48–60 (2022), <https://doi.org/10.26116/techreg.2022.005>.

¹⁸ Konrad Bleyer-Simon et al., *Monitoring Media Pluralism in the Digital ERA, Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the Year 2021*, CTR. FOR MEDIA PLURALISM AND MEDIA FREEDOM (2022), <https://cadmus.eui.eu/bitstream/handle/1814/74712/MPM2022-EN-N.pdf?sequence=1&isAllowed=y> (on file with the University of the Pacific Law Review).

¹⁹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2022) 500 final.

of state resources to media service providers (e.g. through advertisements on behalf of public authorities) and transparency about it, setting a framework for (transparency about) audience measurement systems also in the online environment as well as a “monitoring” of media markets in order to identify risky developments, all of which cannot be dealt with in this contribution.²⁰

II. ACT-ING FOR THE FUNCTIONING OF THE SINGLE MARKET – LIMITATIONS OF ARTICLE 114 TFEU AS LEGAL BASIS FOR EU ACTION

A. Choosing Article 114 of TFEU as the Legal Basis for the EMFA

The legal basis for the proposed EMFA is the single market clause in Article 114 of the Treaty on the Functioning of the European Union (TFEU), which formulates:

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 ... 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.²¹

The European Commission based its EMFA proposal exclusively on this provision, as is evident from the reference at the beginning of the proposed EMFA text. This is relevant when it comes to analyzing the allocation of powers between the EU and its Member States and whether this division of competences is respected by the proposal and the Commission.²² According to the single market clause, in order to achieve the objectives of Article 26, sections one and two of TFEU—establishing or ensuring the functioning of the internal market with the free movement of goods, persons, services and capital—the EU may adopt measures for the approximation (or harmonization) 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.²³ The EMFA proposal mentions risks and barriers to these fundamental freedoms (to move goods, services, etc.) and the functionality of the internal market, which supposedly results in media services

²⁰ See Francisco Javier Cabrera Blázquez, *Proposal for a European Media Freedom Act*, COM (2022), <https://rm.coe.int/note-emfa/1680a9af14> (on file with the *University of the Pacific Law Review*).

²¹ Consolidated Version of the Treaty on the European Union, 2016 O.J. (C 202) 1, 94.

²² See generally Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *On the Allocation of Competences*, at 93 *et seq.* (2021) (for an extensive explanation on this in general terms as well as specifically in view of media pluralism measures).

²³ *Id.*; see Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 14 (Apr. 20, 2023), <https://www.europarl.europa.eu/committees/en/cult/supporting-analyses/latest-documents>; Christina Etteldorf, *Why the Words “But” and “However” Determine the EMFA’s Legal Basis*, VERF BLOG (July 13, 2023), <https://dx.doi.org/10.17176/20230613-111130-0>; Marta Cantero Gamito, *Consistent Regulatory And Self-Regulatory Mechanisms For Media Freedom In The Digital Single Market: The European Media Freedom Act (EMFA) As Meta-Regulation*, EUI RSC, CTR. FOR MEDIA PLURALISM AND MEDIA FREEDOM 10 *et seq.* (2022), <https://hdl.handle.net/1814/74564> (following a broader understanding of the internal market clause). *But see* Melinda Rucz, Kristina Irion & Martin Senftleben, *Contribution to the Public Consultation on the European Media Freedom Act*, at 2 *et seq.*, (2022), <https://www.ivir.nl/position-paper-european-media-freedom-act-consultation-2/> (on file with the *University of the Pacific Law Review*).

being prevented by various external influences from being able to fully realize the free dissemination of their services.²⁴ These barriers include, according to the Explanatory Memorandum, legal and regulatory fragmentation and different state influences on media services in the Member States, as well as market operations by rogue operators and the actual developments of the media landscape itself which is continuously adapting to a more digital environment. However, these justifications for relying as a basis on the internal market clause are formulated very generally and have been criticized from the perspective of the law on competence allocation between the Member States and the EU for several reasons.

Although Article 114 of TFEU has become a standard legal basis applied in harmonization efforts in the past years, it is necessary to remind that Article 114 is *lex generalis* as legal basis which can only be invoked if the Treaties do not provide for a more specific (*lex specialis*) legal basis that would be relevant for a planned measure.²⁵ One may imagine such a reference point to be media freedom, of which editorial independence is an essential part, as well as media pluralism. Both are constitutive elements of the values on which the EU is founded and as they are referred to in Article 2 of TEU,²⁶ as well as in the fundamental rights as enshrined in the CFR, namely Article 11, subsections one and two of CFR. However, these references cannot provide a basis for competences of the EU. In particular, they do not change the principle of limited conferral of powers according to which competences that have not been granted to the EU by the Member States remain with them.²⁷ Concerning fundamental rights specifically, Article 6 of TFEU, as well as Article 51, section two of CFR, which underline, in explicit language, that the powers of the EU are neither extended nor is the division of competences modified by the existence of fundamental rights or the creation of the CFR.

Moreover, although the regulatory framework for the media touches upon media in both its cultural and economic dimension, a clear division between the two is not always possible. Therefore, regulating the market aspect of media services can, in principle, be based on the single market clause, even though there may be overlaps with the cultural aspects. However, an approach with which any economic dimension is regarded to suffice as justification to rely (only) on Article 114 of TFEU for a legal act, could effectively disregard the principle of enumerated powers because in such an interpretation any legislation addressing undertakings as market actors could also cover a wide range of other related aspects, even if those are the actual focus of regulation and for which no separate competence of the EU can be identified.²⁸ Besides having to determine the actual focus of a legal act in order to establish the appropriate legal basis, the question of appropriateness of the legal basis needs

²⁴ See Marta Cantero Gamito, *The European Media Freedom Act (EMFA) as Meta-Regulation* (European Union Inst., Working Paper No. 42, 2022), 10 *et seq.*

²⁵ Cf. Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *Cross-Border Dissemination of Online Content*, at 83 *et seq.*; Mark D. Cole, Jorg Ukrow & Christina Etteldorf, *On the Allocation of Competences*, at 87 *et seq.*, (2021) (on the relevance of the values of the EU as laid down in the Treaties and the CFR in the context of regulating the media environment even without these being a sufficient legal basis for action).

²⁶ Consolidated Version of the Treaty on the European Union, 2016 O.J. (C 202) 1, 46.

²⁷ Mark D. Cole, Jorg Ukrow & Christina Etteldorf, *On the Allocation of Competences* (2021) (on the question of powers).

²⁸ Christina Etteldorf, *Why the Words “But” and “However” Determine the EMFA’s Legal Basis*, VERFBLOG (June 13, 2023), <https://dx.doi.org/10.17176/20230613-111130-0> (on file with the University of the Pacific Law Review).

to be affirmed for all elements of a legislative intervention by the EU in a specific act. Especially in overlap cases, it needs to be scrutinized whether the (economic driven) regulation of Article 114 of TFEU still adequately takes into account the cultural competence of the Member States.²⁹

B. Limitations of the Single Market Clause in This Context

As delineated in section 1, in the digital era, the EU acts mostly based on the single market clause. While broad in its conception and application, it does in the context of the EMFA present certain limitations. Firstly, the rules on the allocation of powers as well as the limitations for EU action need to be considered not only for the legal basis, but also for the type of legislative instrument chosen for the specific action,³⁰ whether e.g. a directly and equally applicable Regulation that is binding for all Member States was unavoidable or whether a Directive for which there is a transposition obligation for the Member States but would have left more leeway in how the prescribed aim is to be reached in national law would have been sufficient. In that context, coherence with other legal instruments and a re-evaluation of the legal nature of some elements of EMFA's provisions are important to raise. For example, as will be shown further below, the proposed rules on media market concentrations are not entirely clear in their relation to existing provisions in competition law.

In using the instrument of a Regulation, there is a certain expectation that the EU must achieve a higher level of harmonization to reach the measure's aims, in contrast to the choice of a Directive. However, the EMFA is limited to a basic standard or minimum harmonization level of certain aspects retaining diversity in the Member States. In other aspects, the Member States' margin of maneuver is conversely restricted, although those provisions have a clear cultural policy dimension. In order to better address this tension between harmonization and Member States' diversity, the AVMSD, for example, is construed as a Directive to leave a sufficient margin to the Member States. Where the Member States are limited in the way they will have to implement the EMFA rules, these should be carefully reconsidered with regard to their compatibility with Article 167(4) of TFEU (see also below).

Therefore, it may be worth exploring whether there are alternative regulatory frameworks which may fit the EMFA's objectives. For instance, some of the provisions could be either limited in scope or re moved from the Proposal for a Regulation. An alternative way to proceed would be to identify those provisions that are critical in this regard and anyway are only aiming to set a basic standard to be filled by the Member States. These could accordingly be extracted to a Directive by splitting the original Proposal into a Regulation, retaining the majority of the provisions closely linked to the economic dimension of the single market, and a Directive with the other provisions for which there is the same binding effect except that they require a transposition into national law by the Member States thereby enabling an alignment with their national media laws.³¹ Moreover, in this context it is important to consider

²⁹ Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *On the Allocation of Competences*, at 103 *et seq.* (2021).

³⁰ *Id.*

³¹ Mark D. Cole & Christina Etteldorf, *EMFA Policy Recommendations*, at 2 *et seq.* (2023).

the relevance of the so-called “Amsterdam Protocol” which was attached as an interpretative explanation by the Member States to the Treaties.³² It requires that the rules and limitations on the allocation of powers need to be considered in the context of the application of competition law to the systems of financing public service broadcasters in the Member States. In consequence, for the legal basis and the type of legislative instrument chosen for the EMFA, which impacts remaining margins of maneuver for the national level, it also needs to be respected.³³

In a similar direction the limitations for EU action resulting from the provision of Article 167 of TFEU, which deals with cultural policy. The EMFA proposal refers to the aspect of ensuring media Article 167 of TFEU could be used as a legal basis, as it is after all the only provision in the TFEU that mentions (audiovisual) media. However, the culture provision underlines the cultural sovereignty of the EU’s Member States by limiting action of the EU to supportive and supplementary measures while explicitly excluding any harmonization of national laws and rules in this regard (Art. 167 (5) TFEU). In addition, the EU acknowledges, in its action to contribute to the development of the cultures of the Member States, that these are nationally and regionally diverse and exist in a plurality of forms. This effect of the culture clause limits EU action, as it has to consider the possible impact of each of its actions on the diversity of the Member States cultures (Art. 167(4) TFEU).³⁴

Besides the requirement of an appropriate legal basis, other requirements stemming from EU Treaty law exist. In particular, the principle of subsidiarity has to be respected in areas over which the EU does not have exclusive competence. Thus, the EU shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States themselves. This can concern Member State approaches either at central level or at regional and local levels. The argument for EU action being that by reason of the scale or effects of the proposed action, the aim is better achieved at Union level (Art. 5(3) TEU). Although this is one of the fundamental principles and it was reinforced in a procedural sense with the Treaty revision of Lisbon of 2009, its practical relevance in disputes between the EU and its Member States has been limited in the past. Nonetheless, it is worth briefly highlighting in connection with the EMFA proposal because even if the principle may not in itself question Article 114 of TFEU as the legal basis, it can challenge the assumption of an improved regulatory solution on EU level for some of the elements contained in the EMFA. According to the necessity or negative criterion of the subsidiarity principle, it must be demonstrated for the EMFA proposal that there is a regulatory deficit which cannot be satisfactorily remedied by the Member States themselves.³⁵

³² Protocol No. 29 on the System of Public Broadcasting in the Member States, 2016 O.J. (C 202) 311 (originally attached to the Treaty of Amsterdam).

³³ See Melinda Rucz, Kristina Irion & Martin Senfleben, *Contribution to the Public Consultation on the EMFA*, at 7 (2022) (for a EU-wide approach on economic aspects and additional policy approaches).

³⁴ See Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *On the Allocation of Competences*, at 93 *et seq.* (2021).

³⁵ Cf. Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 18 *et seq.* (on the relevance of the subsidiarity principle); Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *On the Allocation of Competences*, at 117 *et seq.* (2021).

In its Impact Assessment, the Commission addresses such regulatory deficits for the affected areas covered by the EMFA.³⁶ While no detailed analysis is possible here, it is striking that the main regulatory deficit used as justification for harmonizing efforts is the fragmentation of the legal situation in the different Member States. In that context, the assessment is limited to exemplifying critically the situation in some Member States without conducting a comprehensive and comparative analysis for each of the elements of the EMFA. In that sense, the assessment relates to rules with which pluralism is safeguarded actively, without discussing their effectiveness or potentially positive effects on the national media market, but instead referring only to the potentially negative impact for the single market, because the rules differ between the Member States.

III. THE EMFA IN A NUTSHELL

A. Structural Overview and Main Elements of the Law

The EMFA is a relatively short, but quite a diverse legal act which covers several areas related to the protection of media freedom. Notable, in its substantive provisions there is an explicit reference to media as a public good and the outlining of what the Commission regards as an internal media market. In explaining both notions in the Explanatory Memorandum, the Commission more broadly connects fundamental principles of EU law such as market freedoms and the rule of law to the specific fundamental right of media freedom in Europe. This is indicative of the substantive content of the Act as much of the rights and responsibilities contained within it seek to place obligations on Member States and, by extension, media service providers within said Member States to ensure the protection of what is referred to as effective editorial freedom. As such, by its aim and scope, the Act seeks to guarantee the protection of editorial freedom as a cornerstone of an independent media landscape.

As described, the Act is proposed as a direct response to the current trends in the global media landscape, as well as specific situations that occurred in some of the Member States in the past years, which the Commission saw a need to respond to in light of threats to media freedom³⁷ —from spyware uses in surveillance of journalists³⁸ to the proliferation of disinformation by external

³⁶ 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, SWD (2022) 286 (2022), [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2022\)286&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2022)286&lang=en).

³⁷ Cf. Konrad Bleyer-Simon et al., *Monitoring Media Pluralism in the Digital ERA, Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the Year 2021*, <https://cadmus.eui.eu/bitstream/handle/1814/74712/MPM2022-EN-N.pdf?sequence=1&isAllowed=y> (on recent studies and reports pointing to obstacles for a free and pluralistic media landscape); *Global Press Freedom Index*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/index>; *Study on Media Plurality and Diversity Online*, CTR. FOR MEDIA PLURALISM AND MEDIA ET AL., <https://op.europa.eu/en/publication-detail/-/publication/475bacb6-34a2-11ed-8b77-01aa75ed71a1/language-en/format-PDF/> (on file with the *University of the Pacific Law Review*).

³⁸ See Quentin Liger & Mirja Gutheil, *The Use of Pegasus and Equivalent Surveillance Spyware – The Existing Legal Framework in EU Member States for the Acquisition and Use of Pegasus and Equivalent Surveillance Spyware* (May 12, 2022), [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2022\)740151](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)740151).

actors,³⁹ the EMFA attempts to address a varied set of legal issues. The proposed Act consists of several components, besides the accompanying Recommendation further background and context can be derived from the Explanatory Memorandum and the Recitals.⁴⁰ The twenty-eight substantive articles reference the core rights and responsibilities attached to the functionality and scope of the EMFA. The formal structure divides the provisions into four chapters: the general provisions including several legislative definitions for terms included in the substantive content, followed by the second chapter containing the core legal rights and duties which is subdivided into categories of addressees, mainly media service providers and the Member States. That chapter relates to transparency of ownership of media entities, the protection of journalistic sources and regulates—mainly limits—the use of spyware more closely. Noteworthy, there is also an explicit provision detailing the framework under which public service media should operate.

Additionally, the duality of obligation and legislative scope is present, as Member States must ensure a regulatory environment that promotes cooperation between national authorities in combatting the issues arising from the cross-border regulation of video-sharing platforms, which arose after the inclusion of obligations for these providers in the revised Audiovisual Media Services Directive (AVMSD) in 2018.⁴¹ The third chapter therefore includes provisions for regulatory cooperation and a well-functioning internal market for media services. This concerns the creation of a proposed European Board for Media Services (EBMS; in the text referred to as “the Board”) which is intended to replace the European Regulatory Group for Audiovisual Media Services (ERGA).⁴² This aspect of the EMFA has attracted a certain amount of criticism as it would foresee a much more prominent role of the Commission in the coordination of the Member States’ independent regulatory authorities or bodies in charge of the (audiovisual) media services. This is somewhat surprising given that otherwise independence of the media from state interference and an independent supervisory mechanism is emphasized

³⁹ Mark D. Cole, Christina Etteldorf & Carsten Ullrich, *Cross-Border Dissemination of Online Content*, at 162; see *Disinformation and Russia's War of Aggression Against Ukraine: Threats and Governance Responses*, <https://www.oecd-ilibrary.org/docserver/37186bde-en.pdf> (specifically in light of the threats posed by Russian channels); Francisco Javier Cabrera Blázquez, *The Implementation of EU Sanctions Against RT and Sputnik*, EUROPEAN AUDIOVISUAL OBSERVATORY (2022), <https://rm.coe.int/note-rt-sputnik/1680a5dd5d> (on file with the *University of the Pacific Law Review*) (on the sanctions imposed by the EU on certain channels).

⁴⁰ See Francisco Javier Cabrera Blázquez, *The Proposal For A European Media Freedom Act*, EUROPEAN AUDIOVISUAL OBSERVATORY, <https://rm.coe.int/note-emfa/1680a9af14>; Damian Tambini, D., *The Democratic Fightback Has Begun: The European Commission's New European Media Freedom Act*, LSE (2022), <https://blogs.lse.ac.uk/euoppblog/2022/09/16/the-democratic-fightback-has-begun-the-european-commissions-new-european-media-freedom-act/> (on file with the *University of the Pacific Law Review*).

⁴¹ Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 124 *et seq.* (2023), <https://doi.org/10.5771/9783748939856>; Mark D. Cole & Christina Etteldorf, *AVMSD Background Analysis*, at 23 *et seq.* See generally Paolo Cavaliere, *Who's sovereign? The AVMSD's Country of Origin Principle and Video-Sharing Platforms*, 2(3) J. DIGITAL MEDIA & POL'Y 407–23.

(2021), <https://dx.doi.org/10.2139/ssrn.3986101>. Kukliš, *Video-Sharing Platforms in AVMSD: A New Kind of Content Regulation*, in RESEARCH HANDBOOK ON EU MEDIA LAW AND POLICY 303–325 (Parcu/Brogi ed., 2021); Kinga Sorban, *The Video-Sharing Platform Paradox - Applicability of the New European Rules in the Intersection of Globalization and Distinct Member State Implementation*, 26 COMMUNIS L. 89–100 (2020).

⁴² Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 167 *et seq.*, 252 *et seq.* (2023), <https://doi.org/10.5771/9783748939856>.

throughout the proposal.⁴³ The final fourth chapter of the EMFA relates to general monitoring and reporting of the progression and efficacy of the Act by the Commission.

B. Definitions and Key Notions

The definitions of the EMFA are a key element of the proposed Regulation as they finally decide on which actors are addressed by the rules, but the EMFA only refers for some definitions to existing ones from other legal acts. One of the central definitions is “media service provider” as most of the duties and rights of the EMFA are connected to this category. According to Article 2, number 3, this is a natural or legal person whose professional activity is to provide a media service and who has editorial responsibility for the choice of the content of the media service and determines the manner in which it is organized. Essentially, there are four conditions to be met. First, professional activity requires a certain degree of professionalism and permanence of the service. Recital 7 in that context requires that the service is normally provided for financial or other consideration, which means that user-generated content can, but does not necessarily and often will not meet this criterion. Second, a “media service”, according to Article 2, number 2, is a service as defined by Article 56 and 57 of TFEU, where the principal purpose of the service as a whole or a dissociable section thereof consists in providing programmes or press publications to the general public, by any means, in order to inform, entertain or educate, under the editorial responsibility of a media service provider.⁴⁴ In contrast to the AVMSD which concentrates on different types of audiovisual content providers, the EMFA definition addresses a convergent media concept, i.e., covering different types and formats of media. The content of these services comes either in form of programmes, i.e., “a set of moving images or sounds constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider”⁴⁵ or press publications which are collections of mainly journalistic works as periodical or regularly updated publication (such as a newspaper or magazine) which has the purpose of providing the general public with information related to news or other topics and is published on the initiative, editorial responsibility and control of a specific service provider.⁴⁶

It is notable that Article 2 does not provide definitions of all key concepts. For example, terms such as editorial independence or news and current affairs form substantive elements of certain rights and obligations, yet there is no explicit reference to their scope or meaning in a legislative sense which will open room for interpretation in potential future application cases.

⁴³ See generally Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 176 *et seq.* (2023), <https://doi.org/10.5771/9783748939856>.

⁴⁴ This is in alignment with the approach (for audiovisual media services) as under the AVMSD but put in more general terms by including in the output any “programmes” or “press publications” and using for the first notion of “programmes” a broader understanding than in the AVMSD, therefore encompassing purely audio services such as radio.

⁴⁵ *European Media Freedom Act*, *supra* note 5, art. 2.

⁴⁶ *Id.*, arts. 2(4) & (5). For the specific category of an audiovisual media service the EMFA definition (Art. 2 No. (6)) refers to the definition of the AVMSD, for press publications (Art. 2 No. (5)) to that of the DSM Copyright Directive (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 Apr. 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92–125, Art. 2 no. (4)).

C. Selected Elements

1. Rights and Duties

As presented in the overview of the EMFA, there is a division of rights and obligations into three distinct categories. There are rights for recipients of media services, rights and obligations for media service providers and rights of journalists vis-à-vis “their” service providers. There is also the underlying idea of media as a “common good”. Addressing recipients of media services is done by Article 3 in the following way:

Recipients of media services in the Union shall have the right to receive a plurality of news and current affairs content, produced with respect for editorial freedom of media service providers, to the benefit of the public discourse.⁴⁷

As it stands, the legislative formulation points to a rather open concept. The broad nature of the wording seems to create a ‘right’ of the recipient to a plurality of media content, specifically news and public affairs. Whilst the objective of such a right in principled terms is well-intentioned, certain substantive legal questions arise, the most obvious being what the enforceability of such a right would be like in practice. For instance, if a claim based on this right were the basis of a constitutional national or via a preliminary reference even European legal dispute before the CJEU, the obvious balancing of the right of the recipient and the media service provider’s right to freedom of expression (and more specifically the use of its media freedom) would prove difficult, especially concerning media service providers that do not have a specific remit imposed on them. To understand more closely the scope of application of the article, Recitals 11 and 12 provide some insights. There is a direct reference to the CFR stating that the content of proposed Article 3 should not contradict the guarantees included within the broader European framework for freedom of expression,⁴⁸ as well as stating that the right “does not entail any correspondent obligation on any given media service provider to adhere to standards not set out explicitly by law”, which can be understood as meaning that no legally enforceable right is envisaged by Article 3.⁴⁹ The formulation *de facto* reduces the provision to an aspirational aim or rather a goal that Member States should contribute to achieving by guaranteeing the existence of a plurality and reliability in the media landscape.⁵⁰

Several elements that are obviously regarded by the European Commission as conditions for ensuring that recipients have the benefit of the type of news and current affairs content, as addressed by Article 3, are detailed in further provisions of the EMFA, such as Articles 4 and 6, which deal with editorial independence. Therefore, Article 3 could be regarded as being only a substantiation of the objectives or a justification for proposing the EMFA from

⁴⁷ *European Media Freedom Act*, *supra* note 5, art. 2.

⁴⁸ CFR art. 11; ECHR art. 10.

⁴⁹ *European Media Freedom Act*, *supra* note 5, at 17.

⁵⁰ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 25 *et seq.*; Mark D. Cole & Christina Etteldorf, *EMFA Policy Recommendations*, at 5 *et seq.* (2023).

the outset and certain of its provisions, but this general description of the aim is already contained in Article 1 or would rather be expected in Recitals accompanying the relevant provisions. In this sense, the reminder in Recital 12 that the ECHR has interpreted Article 10 of the ECHR as including a positive obligation for “public powers” to create a framework which guarantees effective pluralism can be seen as an explanation for Article 3 of the EMFA, which would be a statement that this legislative act is an element of such a framework. Nonetheless, this would still leave Article 3—entitled as a “right”—empty when it comes to concrete obligations. These obligations already flow from fundamental rights, which are binding on the Member States, namely Article 10 of the ECHR. A provision only alluding to this without having a concrete consequence seems somewhat oddly placed in a Regulation which otherwise lays down very specific rights and obligations.⁵¹

The second category of rights are not addressed directly to the recipients of media services—the idea is rather that they also benefit from the effect of the rights—but concern the position of media service providers in defending their position against Member State actions. Most importantly, under Article 4, section 2, a number of such rights leading to limitations of possible actions by Member States are formulated as follows:

Member States shall respect effective editorial freedom of media service providers. Member States, including their national regulatory authorities and bodies, shall not:

- (a) interfere in or try to influence in any way, directly or indirectly, editorial policies and decisions by media service providers;
- (b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect 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, in accordance with Article 52(1) of the Charter and in compliance with other Union law⁵²

In contrast with Article 3, Article 4, section 2 contains much more concrete provisions aimed at ensuring that Member States respect editorial freedom of media service providers. In that regard, certain actions by Member States, including by their national regulatory authorities and bodies, are prohibited: they shall not interfere in or try to influence in any way, directly or indirectly, editorial policies, and decisions by media service providers. An ‘editorial decision’ is defined in Article 2, number 9 as a decision taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of a media service provider. This open, and therefore far-reaching, formulation aims to prevent any type of state interference in editorial freedom. It serves as a fundamental rights-based comprehensive protection of journalistic activity in view of the role of media

⁵¹ *Id.*

⁵² *European Media Freedom Act, supra* note 5, art. 4.

as public watchdog in democratic societies. While the provision itself addresses interferences by the State in general—clarifying that this includes actions by the national regulatory authorities in charge of supervising the media—the accompanying Recital 15 is broader. It mentions “other actors, including public authorities, elected officials, government officials and politicians” and thereby points to a wide understanding of the source of intrusion. Both principal decisions concerning the editorial policy as well as individual decisions, the latter of which is defined in Article 2, number 8, referring to decisions taken on a regular basis and linked to the day-to-day operation of a given provider in connection with its editorial responsibility, are covered by Article 4, number 2. The exact meaning is not clear, however, if compared to the use of the same term of “editorial decisions” in Article 6 where it relates to the internal relationship between media service provider and responsible editor (-in-chief), but not the provider itself as in Article 4. In addition, the prohibition of such actions, as described, already flows from the protection of media freedom as a fundamental right; thus, it is not certain whether there is added value in including a broad formulation which, by referring to any type of indirect interference or influence, makes it difficult to determine the scope of the prohibition and thereby ultimately questions its practical enforceability.⁵³

It is noteworthy that although Article 4 and the accompanying Recitals address the protection of journalistic work as an element of freedom of expression and the media, the aspect of privacy and protection of personal data in connection with protection of sources is not touched upon. Measures, such as seizures of documents or the installation of spying software, not only interfere with freedom of expression and freedom of the media, but also with the latter rights of both journalists and third parties who are subject of communication content. This reinforces the need for a particularly limited use of such measures and the requirement of very precisely developed provisions.⁵⁴ This finding is all the more relevant for supervision since, for data protection matters, there is even a procedural fundamental rights guarantee in the Charter (Art. 8(3) CFR) with far-reaching requirements concerning the independence of the supervisory authority as further developed by the CJEU. Even though the main goal of the additional protection system under Article 4, Section 3 is not oriented to the protection of personal data, there may be questions about the set-up of such a body compared to the strict independence criteria for the data protection authorities.⁵⁵

The third and final category of rights is what might be considered a special catalogue of rights aimed at securing journalistic and public media services’ freedoms more generally. In this respect it is important to consider Article six, section two:

⁵³ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 26 *et seq.*; Mark D. Cole & Christina Etteldorf, *EMFA Policy Recommendations*, at 5 *et seq.* (2023).

⁵⁴ Dirk Voorhoof, *European Media Freedom Act and the Protection of Journalistic Sources: Still Some Way to Go*, INFORM’S BLOG 2 (Nov. 18, 2022), <https://inform.org/2022/11/18/european-media-freedom-act-and-the-protection-of-journalistic-sources-still-some-way-to-go-dirk-voorhoof/> (on file with the *University of the Pacific Law Review*), p. 2.

⁵⁵ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 28, 46 *et seq.*; Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 190 *et seq.*, 248 *et seq.* (2023), <https://doi.org/10.5771/9783748939856> (on file with the *University of the Pacific Law Review*).

Without prejudice to national constitutional laws consistent with the Charter, media service providers providing news and current affairs content shall take measures that they deem appropriate with a view to guaranteeing the independence of individual editorial decisions.

(a) guarantee that editors are free to take individual editorial decisions in the exercise of their professional activity; and ...⁵⁶

Because of their relevance and the importance of trust in what is more generally addressed as “news media” in Recital 19, the EMFA proposal imposes certain duties on them. There is no specific definition given for this category of providers, although the term news and current affairs content is also included in Article 3. Recital 19 explains why it is crucial for the recipients to know who owns and stands behind news media with the ability to identify and understand potential conflicts of interest, which in turn is a prerequisite for the recipients to form well-informed opinions in the context of democratic choices. The relevance of media content for the democratic decision-making process of the population is well known as reason for the significance of its protection under fundamental rights.⁵⁷

However, in that context the protection is not limited to the narrow framework of news and current affairs. Rather, it is recognized in that jurisprudence that even purely entertainment and other similar formats—although they might be subject to a lesser level of protection when balancing with other interests—have relevance to opinion formation, not only in form of the content transmitted, but also by the selection of content formats for the programme or publication.⁵⁸ Therefore, designating a special status “only” for news and current affairs content may not be adequate for reaching the goal of the provision to support transparency of public opinion forming. At the same time, it seems that the reach of Article 6 was supposed to be somehow limited, as it imposes additional duties on service providers.⁵⁹

2. *Safeguarding Editorial Independence*

As previously discussed, several elements of the EMFA are aimed at contributing to a minimum level of protection when it comes to “editorial independence.” Besides above-mentioned Article 6, Section 2, it’s worth noting the general idea of independent media providing trustworthy and reliable information.⁶⁰ As mentioned above, the Recommendation (EU) 2022/1634 on internal safeguards for editorial independence and ownership transparency in the media sector, which was published by the Commission with a connex to the EMFA proposal, is relevant in this regard. As follows from Recital 6 and paragraph one of the Recommendation, it is meant to be a

⁵⁶ *European Media Freedom Act*, *supra* note 5, art. 6.

⁵⁷ See generally *Guide on Article 10 of the European Convention on Human Rights*, at 20 *et seq.* (2022), https://www.echr.coe.int/documents/d/echr/guide_art_10_eng (on file with the *University of the Pacific Law Review*).

⁵⁸ *Hannover v. Germany*, Judgement, 2004 ap. 59320/00 (June 24).

⁵⁹ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 28 *et seq.*

⁶⁰ Cf. Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 224 *et seq.* (2023), <https://doi.org/10.5771/9783748939856> (on file with the *University of the Pacific Law Review*) (on the approach under UK broadcasting law).

tool with immediate effect that is to be seen separate from the latter (planned) entry into force and applicability of the EMFA itself. Therefore, it leaves the provisions of the EMFA unaffected and, in case of overlap, it is explicitly explained in paragraph twenty-five that the Recommendation will be revised or replaced, if necessary. Due to its nature as a Commission Recommendation under Article 288 of the AEUV, it is not legally binding but can have important political significance. It supports self-regulatory initiatives by the media sector and thereby follows the roadmap prepared by the European Democracy Action Plan (Recital 7) as an element of the European Commission in bringing forward the media sector.⁶¹

Consequently, the Recommendation is mainly directed at media service providers—albeit without defining them—rather than to the Member States. It “encourages” them to put in place certain safeguards concerning editorial independence and integrity, as well as media ownership transparency, while providing for a catalogue of possible measures that are to be regarded appropriate and could be used for orientation. It reflects—and thereby in a way pre-empts—the conditions laid down in Article 6, section two, concerning obligations of media service providers (including Commission powers to issue Guidelines on this) about ownership structures; however, it is also much more specific on what providers should reasonably achieve.⁶²

3. Addressing (Member States’) Public Service Media

Article 5 of the proposal addresses public service media providers (PSM) which is in itself remarkable given the previous restraint of EU regulatory approaches for this category of media. Background to this restraint is the close connection of PSM to the respective Member States even if they can also be received cross-border. There is a clear attachment of defining both remit and financing of such providers to the reserved sphere of competence of the Member States.⁶³ This was underlined by the Member States with the so-called Amsterdam Protocol,⁶⁴ attached to the EU Treaties in 1997, as an interpretative guideline, limiting the possibilities of the European Commission in applying the rules of EU competition law in view of public service media providers.⁶⁵ Nonetheless, one now finds in Article 5 a number of “safeguards” to ensure that PSM function the way they are supposed to: independently. Partially, the provision seems to suggest a framework within which the Member States can define the remit of their PSM, such as the proposed paragraph 1 which (in the draft) even addresses the PSM providers directly:

(1) Public service media providers shall provide in an impartial manner a plurality of information and opinions to their audiences, in accordance with their public service mission.⁶⁶

⁶¹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2020) 790 final.

⁶² Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 22 *et seq.*

⁶³ See Mark D. Cole, Jorg Ukrow & Christina Etteldorf, *On the Allocation of Competences* (2021).

⁶⁴ See Christina Etteldorf, *Why the Words “But” and “However” Determine the EMFA’s Legal Basis*, VERFBLOG (June 13, 2023), <https://dx.doi.org/10.17176/20230613-111130-0>.

⁶⁵ See Mark D. Cole, Jorg Ukrow & Christina Etteldorf, *On the Allocation of Competences*, at 112 *et seq.* (2021).

⁶⁶ *European Media Freedom Act*, *supra* note 5, art. 5(1).

Procedural safeguards to ensure independence can be found in the following paragraphs:

(2) The head of management and the members of the governing board of public service media providers shall be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and proportionate criteria laid down in advance by national law.

The duration of their term of office shall be established by national law, and be adequate and sufficient to ensure effective independence of the public media service provider. They may be dismissed before the end of their term of office only exceptionally where they no longer fulfil the legally predefined conditions required for the performance of their duties laid down in advance by national law or for specific reasons of illegal conduct or serious misconduct as defined in advance by national law.

Dismissal decisions shall be duly justified, subject to prior notification to the person concerned, and include the possibility for judicial review. The grounds for dismissal shall be made available to the public.⁶⁷

This is supplemented by the requirement of stable and reliable financing of PSM providers to make sure they can fulfil the remit imposed on them:

(3) Member States shall ensure that public service media providers have adequate and stable financial resources for the fulfilment of their public service mission. Those resources shall be such that editorial independence is safeguarded.⁶⁸

Prior to assessing the substance of proposed Article 5, one needs to point to Recital 18, which follows the idea that, although PSM are established by Member States, according to their own decision and rules, they play a particular role in “the internal media market” by ensuring citizens and businesses have access to quality information and impartial media coverage as part of their mission. This assumption is valid insofar as PSM are constituted by the Member States precisely for the purpose of ensuring a supply of a specific type of media to reach potentially all of their citizens. However, the extent to which this role has a significance for the “internal media market” (meaning the market of the EU overall, not for the respective national media market) needs to be questioned against the background that the mission (or remit) of these providers is determined by the Member States typically targeting the national market and is oriented to cultural peculiarities as well as market conditions in that State.⁶⁹

⁶⁷ *Id.*, art. 5(2).

⁶⁸ *Id.*, art. 5(3).

⁶⁹ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 32 *et seq.*; Mark D. Cole & Christina Etteldorf, *EMFA Policy Recommendations*, at 2 *et seq.* (2023); see Francisco Javier Cabrera Blázquez et al., *Governance And Independence Of Public Service Media*, EUROPEAN AUDIOVISUAL OBSERVATORY (2022), <https://rm.coe.int/iris-plus-2022en1-governance-and-independence-of-public-service-media/1680a59a76> (on file with the *University of the Pacific Law Review*) (explaining differences in national systems for PSM).

Thus, the actual design of the PSM and their remit is very diverse in the Member States. For instance, in States with a diverse and sustainable media landscape, the mandate of PSM may be less pronounced or even limited in order to strengthen the competitive situation of commercial providers, whereas in states where PSM are the main or one of few sources of information, the mission may have to be defined much more broadly. The mandate imposed on the providers may also be diverse in terms of what type of content is offered—e.g., education, news, entertainment—as well as in which format—e.g., television, radio, online media, etc. Equally (and related to the remit) the diversity extends to the scope and limitation of state funding for PSM as well as structural elements. As is underlined by the Amsterdam Protocol, the Member States have a wide margin of discretion in deciding about “their” PSM. The definition of EMFA in Article 2, number three determines that such providers have either been entrusted with a public service mission under national law or qualify as such because they receive some form of “national public funding”, the criteria being non-cumulative.

Article 5 lays down legal safeguards the EMFA aims to establish in response to risks for PSM. The provision starts, however, with what could be described as an “expectation” what should be in the mission of a PSM provider and how it should be fulfilled: according to Article 5, Section 1, they shall provide in an “impartial manner” a “plurality of information and opinions”.⁷⁰ This shall be in accordance with their public service mission, which as mentioned in the definition, clearly stems from the Member States. Although the provision of a pluralistic range of information and opinions is indeed likely to be the core part of the PSM remit defined at national level, it is questionable what consequence would derive from Article 5, Section 1 in case a Member State would not (explicitly) include these aspects. Clearly, the Amsterdam Protocol—although Recital 18 only relates to it concerning the Member States’ discretion to decide about the *funding* of public service media—does not allow a reading of the EMFA provision according to which in such a case the “minimum definition” of Article 5, Section 1 would override the Member State mandate, because it states that the financing is connected to the definition of the remit which is assigned as a responsibility to the Member States. In that regard, Article 5, Section 1 may have to be read as rather aspirational in reminding that the underlying reason for the exceptional state funding of such providers is in the special role that the PSM are tasked with.⁷¹

Additionally, Article 5, Section 2 has a structural and organizational dimension by including rules on the independence of governing bodies within PSM which is to be safeguarded through specific procedural guarantees in the appointment and potential dismissal of relevant persons within the providers. In that sense, the leading positions of a PSM provider shall be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and proportionate criteria laid down in advance by national law. Referring to the “head of management and the members of the governing board” seems to have a specific governance model in mind and might not be reflected in the existing and varied structures

⁷⁰ European Media Freedom Act, art. 5.

⁷¹ Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 33 (Apr. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU\(2023\)733129_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU(2023)733129_EN.pdf).

for PSM in the Member States.⁷² There is no mention in the Recitals either in which way these references are to be understood, but in view of the very concrete consequences attached to the norm, a clearer formulation of what categories of bodies are meant would be needed. This could be done by referring, for example, to the functions relating to programme decisions or a supervisory role or having editorial responsibility or being in charge of personnel when determining which bodies are meant. In light of the objective of enabling PSM to fulfil their democratic mandate independently, a descriptive rather than conceptually fixed rule would be more expedient, since the EMFA itself cannot make specifications about the structural set-up of national PSM providers.

4. *Supervision Structures and Cross-Border Enforcement Procedures*

In its Chapter III, the EMFA proposal provides for a framework for regulatory cooperation between competent supervisory authorities and bodies. The institutional and cooperation structures, included in Sections 1 through 3 of the chapter, are fundamentally based on procedures developed in the AVMSD or based on that Directive. As a consequence, the insertion of the procedural provisions in the EMFA would lead to an amendment of the AVMSD, namely by deleting the provision of Article 30(b) on the cooperation mechanism through ERGA.⁷³ This would be replaced by expanded EMFA provisions dealing with cooperation. Not only would it lead to a replacement of ERGA as a body by the EBMS, but the aforementioned sections would also introduce significant innovations, in particular concerning more formalized cooperation procedures. Further, new mechanisms in the oversight of providers and the division of tasks between the national regulatory authorities and the European Commission would be created.⁷⁴

Generally, the foreseen role of the Commission and its impact on the regulatory cooperation between national authorities is worth a closer look. Besides being tasked with the regular evaluation of the EMFA per se⁷⁵—a standard procedure in many EU legal acts with which a continued relevance of legislation shall be ensured—the Commission is in charge of monitoring the internal market for media services, including analyzing risks that exist and the state of resilience of the market overall.⁷⁶ additional harmonization powers are assigned to the Commission, in the form of a competence to issue opinions on

⁷² See Francisco Javier Cabrera Blázquez et al., *Governance and Independence of Public Service Media*, EUROPEAN AUDIOVISUAL OBSERVATORY (2022), <https://rm.coe.int/iris-plus-2022en1-governance-and-independence-of-public-service-media/1680a59a76> (on file with the *University of the Pacific Law Review*) (for an in-depth look at the various aspects of governance of public service media and its role in safeguarding the independence of PSM).

⁷³ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 Amending Directive 2010/13/EU 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) In View Of Changing Market Realities, 2018 O.J. (L 303) 69, 91.

⁷⁴ Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 167 *et seq.* (2023), <https://doi.org/10.5771/9783748939856> (on file with the *University of the Pacific Law Review*).

⁷⁵ European Media Freedom Act, *supra* note 5, art. 26.

⁷⁶ *Id.*, *supra* note 5, art. 25.

media market concentrations⁷⁷ or on national measures affecting the operation of media service providers.⁷⁸ systems,⁷⁹ on the factors to be taken into account when assessing the impact of media market concentrations on media pluralism and editorial independence by the national regulatory authorities or bodies,⁸⁰ and on the form and details of declarations to be provided by so-called Very Large Online Platforms (VLOPs according to the DSA),⁸¹ all of which are far-reaching specification possibilities of the EMFA provisions.⁸²

Also in the context of the procedural functionality of the Board it is important to note the direct interplay of the Board with the Commission. Although the powers of the EBMS, especially as regards opinions, are significantly expanded compared to ERGA, these powers are, as a rule, dependent on either a request by the Commission or an agreement with it. The only case where the EBMS can issue opinions without involvement of the Commission is on draft national opinions or decisions for which the EBMS can assess the impact on media pluralism and editorial independence of a notifiable media market concentration in those case in which such a concentration may affect the functioning of the internal market. When it comes to issuing Guidelines, the EBMS is tasked only with assisting the Commission as the latter issues the Guidelines.⁸³

Regarding the composition of the proposed EBMS, Article 8 in section 1 establishes its existence and in section 2 declares that it should replace ERGA, while Art. 10 confirms that the Board shall continue to be composed of representatives of the national regulatory authorities or bodies. Recital 22 describes this Board as an independent advisory body at Union level gathering national regulatory authorities or bodies and coordinating their actions. While the independence of ERGA derives from its composition of independent national regulatory authorities, Article 9 of the EMFA separately provides for a rule that is intended to guarantee the independence of the EBMS in its work and not only by its composition.⁸⁴ Accordingly, the EBMS shall act in full independence when performing its tasks or exercising its powers. In particular, it shall neither seek nor take instructions from any government, institution, person or body. This provision is apparently modelled closely on the similar provision of Article 69 GDPR on the independence of the European Data Protection Board (EDPB). This comparability is due to the independence of the supervisory authority being anchored in both areas in fundamental rights. In contrast to the explicit guarantee of supervisory independence in Article 8, Section 3 of the CFR for the area of data protection, combined with a

⁷⁷ *Id.*, arts. 22(2) & 21(6).

⁷⁸ *Id.*, art. 20(4).

⁷⁹ *Id.*, art. 23(4).

⁸⁰ *Id.*, art. 21(3).

⁸¹ European Media Freedom Act, *supra* note 5, Art. 17(6).

⁸² Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 176 *et seq.*, 252 *et seq.* (2023), <https://doi.org/10.5771/9783748939856>; Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 44 (Apr. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU\(2023\)733129_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU(2023)733129_EN.pdf).

⁸³ Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 176 *et seq.*, 252 *et seq.* (2023), <https://doi.org/10.5771/9783748939856>; Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 46 *et seq.* (Apr. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU\(2023\)733129_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU(2023)733129_EN.pdf).

⁸⁴ EMFA

pronounced case law on the independence criterion of the CJEU, there is no comparable explicit case law by the CJEU or ECHR on independent supervision with regard to media freedom or a further detailing of what this independence entails.⁸⁵ However, some further indicators can be found in different legal texts such as Recital 54 of AVMSD or the Council of Europe's Recommendation (2000)23⁸⁶ as well as in some national legal systems.⁸⁷

IV. ACT-ING TO GUARANTEE MEDIA FREEDOM AND THE FUNDAMENTAL RIGHTS CONTEXT

A. Flaws of the Proposal and Areas for Improvement

For the moment, the EMFA is only a proposal by the Commission and will likely change its shape or some of its provisions during the legislative procedure and discussion in the European Parliament and Council of the EU. As demonstrated above, there are a number of issues with the current proposal that should be addressed in order to improve the proposal.⁸⁸ Some aspects raise fundamental concerns such as the question of its legal basis and the rationale for proposing the act in the form of a Regulation, while other aspects can be rectified by some further sharpening of the formulations, such as the definitions, or taking care of the overall coherence with the already applicable regulatory framework for media.

The analysis presented has shown that invoking the single market harmonization clause of Article 114 of TFEU as sole legal basis leads to consequences for the text. As Article 114 of TFEU is an unspecific harmonization provision—in contrast e.g., to the services-specific provision used for the AVMSD which limits the choice of instrument to Directives—it is important to clearly demonstrate the need for harmonization in form of a Regulation. Therefore, the aim of the Proposal needs to be the removal of obstacles to the single market resulting from diverging national frameworks and not the removal of the diverging rules as a means in itself. As the Proposal does not only address the economic aspects of providing media services, but also the cultural dimension to a significant extent, each of the sections of the EMFA needs to be reconsidered in light of the need to have a single market relevance overall.

The aforementioned lack of precision in the EMFA should already be addressed within the definitions, as they are key elements in deciding on the

⁸⁵ Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 248 *et seq.* (2023), <https://doi.org/10.5771/9783748939856>; cf. additionally *INDIREG: Indicators for Independence and Efficient Functioning of Audiovisual Media Services Regulatory Bodies for the Purpose of Enforcing the Rules in the AVMS Directive*, <https://digital-strategy.ec.europa.eu/en/library/study-indicators-independence-and-efficient-functioning-audiovisual-media-services-regulatory> (on file with the *University of the Pacific Law Review*).

⁸⁶ *Recommendation Rec(2000)23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, Adopted by the Committee of Ministers on 20 December 2000 at the 735th Meeting of the Ministers' Deputies*, <https://rm.coe.int/16804e0322> (on file with the *University of the Pacific Law Review*).

⁸⁷ Mark D. Cole & Christina Etteldorf, *Future Regulation of Cross-Border Audiovisual Content Dissemination*, at 249 (2023), <https://doi.org/10.5771/9783748939856> (on file with the *University of the Pacific Law Review*).

⁸⁸ See Mark D. Cole & Christina Etteldorf, *EMFA Policy Recommendations* (2023) (explaining further elements).

scope and impact of the rules. The Proposal includes an important list of definitions, partly new and partly referring to existing definitions in other legal acts. However, the list of definitions, as well as their formulations, should be reviewed to ensure there is either a unified use—where this is intended—without ambiguity—or, if a divergence is intended, an explicit mention of a narrower, broader, or different understanding compared to the already existing definitions and uses elsewhere. The basic definitions have a significant impact on the scope and impact of the substantive rules of the EMFA and should therefore allow for a clear application oriented towards a clear objective. There are examples for key terms that are not defined in the catalogue of Article 2, such as “recipients of media services” or “editorial independence”.⁸⁹ Other terms are used that are defined elsewhere without an explicit reference being made to the other legislative act, such as “online intermediation service”.⁹⁰ Also, the notion of “news and current affairs”, due to its relevance in the context of some core provisions of the EMFA, could be either included with a definition or with some further explanation what such type of content entails and whether it can only be content coming from certain categories of providers of editorial content.

The need for clarification of the Proposal also concerns the interplay between the EMFA and other legal acts, considering the twofold nature of media as a cultural and economic asset. The EMFA is one of many initiatives created in the context of the EU’s European Democracy Action Plan, but it is embedded in an already complex legislative network as it touches on areas of consumer protection, competition, antitrust, data protection, platform, and (audiovisual) media law. Consequently, the EMFA clarifies that several other legal acts shall remain unaffected by the EMFA once it is enacted. However, the mere “without prejudice”-rule—EMFA being without prejudice for those legal acts—as it is currently formulated, needs to be supplemented by clear priority rules for those sections of the Proposal for which tensions with existing EU rules, or beyond that even on national level, are foreseeable. One of these examples is the open question of how Article 21 of the EMFA, regarding media concentration assessments, relates to instruments in national competition law that have been enacted to safeguard media pluralism as an aspect separate from market power assessment. Such rules could be created by the Member States due to an authorization in Article 21, Section 4 of the Merger Regulation⁹¹ even for concentrations that have an internal market dimension and are therefore dealt with on EU level. It seems unclear, in the current setup, which rules would apply to which type of (media) mergers in the future.⁹² Because the EMFA also refers to platforms in its scope of application, in particular Article 17, the relationship to the Digital Services Act (DSA)⁹³, which itself will only become fully applicable after February 2024 and is also partly dependent on national implementing rules, is an essential question not fully answered.

⁸⁹ European Media Freedom Act, *supra* note 5, art. 2.

⁹⁰ *Id.*, art. 17.

⁹¹ Council Regulation 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation), 2004 O.J. (L 24), 1–22.

⁹² Mark D. Cole & Christina Etteldorf, *EMFA Background Analysis*, at 35 *et seq.* (Apr. 2023), [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU\(2023\)733129_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/733129/IPOL_STU(2023)733129_EN.pdf).

⁹³ Regulation 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, 2022 O.J. (L 277) 1–102.

V. CONCLUDING CONSIDERATIONS

In conclusion, this contribution has raised not only certain questions about the way the European Commission is perceiving to act on creating a stronger media freedom by an Act. The question of “to act or not to act” and potentially how to act, is especially important as the objective and several provisions of the actual instrument are expressions or consequences of a fundamental right. It would be counter-productive if an Act such as EMFA would be in competition with the fundamental rights framework and the stronghold that Article 10 ECHR and Article 11 CFR have become in the interpretation by the ECtHR and CJEU. Where the EMFA only repeats protections already deriving from this fundamental rights framework it may not be necessary, where it reinforces them it does, however, support the utmost relevance that a functioning media sector has for democratic societies. This has to happen in an already complex regulatory setup and respecting Member States diversity and reserved powers for the creation of media law, none of which is unproblematic in view of the concrete proposal. Another issue in relation to a future oversight of the potentially enacted EMFA is to what extent it could actually have an impact on the media sector as a number of supervisory actions still depend on the behavior of the Member States regulatory authorities, which, for good reasons, are independent. Undoubtedly, the proposal for an EMFA addresses one of the most important elements that constitute modern democratic societies, and it needs to be positively noted that there are several innovative suggestions on how to respond to the sector’s undisputed problems. Nonetheless, there is still need for further improvement and it will be interesting to see, how other parts of the world will perceive the attempt to act by Act on stabilizing an independent and meaningful media market, especially in states such as the U.S. where any type of regulation of media is prone to be seen as violation of the First Amendment.

Concerning the actual draft, as mentioned above, the Council of the EU agreed on a common approach with which it has declared its “wish list” for amendments to the Commission proposal.⁹⁴ The Parliament followed with its position in September of 2023,⁹⁵ after which a so-called trilogue negotiation period will follow, in which these two institutions moderated by the European Commission will work on finding a joint compromise text. The ambition is to finalize this by spring of this year.⁹⁶

⁹⁴ *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 (2023) ST 10954 (June 21, 2023), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_10954_2023_INIT (on file with the *University of the Pacific Law Review*).

⁹⁵ *See 2022/0277(COD): European Media Freedom Act*, [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2022/0277\(OLP\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2022/0277(OLP)) (on file with the *University of the Pacific Law Review*) (noting that the plenary first reading was September 9, 2023).

⁹⁶ *EU Legislation in Progress: European Media Freedom Act* (Feb. 6, 2023), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739202/EPRS_BRI\(2022\)739202_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739202/EPRS_BRI(2022)739202_EN.pdf).