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Without Enforcement, the EMFA is Dead Letter

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Platformisation, combined with geopolitical challenges such as disinformation, ideological hybrid warfare, the COVID-19 crisis and rule of law backsliding challenged the economic viability and democratic function of the media over the past two decades. To address these challenges, the European Commission, exercising its competence to regulate the internal market for media services, adopted a [proposal for a European Media Freedom Act](#) ('Proposal') in September 2022. With the Proposal, the Commission takes a long awaited supranational action to address growing economic and fundamental rights concerns in the media sector including some Member States' capture and regulatory abuses in the control of the media. The Proposal outlines a set of new rules to promote media pluralism and independence across the EU with the aim to increase the transparency, independence and accountability of actions affecting European media markets. Besides important substantive provisions, the Proposal contains various mechanisms concerning the role of national regulatory authorities, the newly established European Board for Media Services (Board) and the Commission. However, we argue that the proposed tools fail to effectively improve the already available enforcement mechanisms in EU law. We offer three recommendations to improve enforcement of media law and policy in the EU, while remaining within the boundaries of the competences as established by the EU Treaties.

The competence puzzle

The EU lacks an explicit competence to regulate the media. In fact, media as a field of EU policy is absent from the Treaties. However, while the media is a cultural good, it also functions as an important economic sector of the single market. Hence, the regulation of media markets falls under the EU's internal market and competition law competences. Concerning the internal market, the Commission shares its competence with the Member States, while it has direct and exclusive competence with far-reaching supervisory powers in the area of competition law. At the same time, Article 2 of the Treaty lists „pluralism“ among the EU values, and Article 11 (2) of the [European Charter on the Fundamental Rights](#) requires that „[t]he freedom and pluralism of the media shall be respected.“ In fact, Articles 11(2) and 51(1) of the Charter together with Article 167(4) TFEU establish a [duty for the Commission to respect media freedom and pluralism when implementing the Union's internal market and competition policies](#). These provisions present “very little [hard' law on media pluralism](#)”. Despite repeated policy initiatives, media pluralism remained unaddressed by secondary EU law so far (for historical context, see [here](#)). Even though the gravity of the problems varies across EU Member States, with the Proposal the Commission now clearly answers previous calls from other EU

institutions to address barriers to the functioning of the internal media market and promote pluralism while safeguarding independence in the media market.

The relevance of enforcement in the internal media market

Translating the described system of competences to actual enforcement has limitations as shown by the current Proposal. The original Proposal of the Commission contains relatively weak and cautious mechanisms that aim at friendly cooperation rather than actual enforcement structured around the role and tasks of national regulatory authorities (“NRAs”, Article 7). One might even argue that all new mechanisms are likely to be ineffective in case there is a serious risk of state capture of media.

The proposal for EMFA is currently based on the assumption that each Member State has a fully independent NRA that is capable of effectively enforcing media law, including the EMFA when adopted. Independence of NRAs is key to the enforceability of media laws. Independence must ensure that interventions with the media remain [impartial and at arm’s length](#) from states and stakeholder interests. However, relevant stakeholders in media can mainly be characterized by their mutual distrust towards each other. Trust between EU institutions and certain Member States has significantly eroded over the past decade, but also media owners often hold opposing interests to those of media authorities and some media owners have overly close ties with state representatives, either through investments or politicians. Moreover, all stakeholders are wary of the European Commission, due to its supranational supervisory and sanctioning powers that can intervene with national media governance models. This complex web of mutual distrust makes enforcement and media governance a particularly challenging exercise in the EU.

Moreover, various enforcement mechanisms existed in the hands of the Commission even before the EMFA proposal. Yet, surprisingly, the Commission has so far been reluctant to make use of them. Theoretically, one could argue that it would have been possible to initiate infringement proceedings on the basis of EU law, such as competition law, the [Audiovisual Media Services Directive](#) (AVMSD) and the Charter. Moreover, interpretative guidance has been given by the Court of Justice of the European Union, who must interpret these laws in light of the Charter, and NRAs must respect the Charter when they act in the realm of EU law, for example, the AVMSD.

The 2018 revision of the AVMSD obliged Member States to designate independent regulatory authorities and Article 30 AVMSD extensively codified requirements of independence and effective functioning of regulatory authorities in Member States’ audiovisual media sectors. However, not all Member States transposed the Directive in the spirit of the Charter.

Guarantees of independence are indispensable as a way to prevent politicization of the media. However, formal safeguards prove largely ineffective due to so-called

[political parallelism](#) in the case of some countries as the appointments of decision-makers remain the prerogative of politicians in power.

Against this background, we first briefly set out the current enforcement framework proposed by EMFA and second, present a tentative governance framework that, instead of deepening mutual distrust even further among the current actors, creates a transparent enforcement mechanism based on mutual control among stakeholders, national and EU institutions, and a clear system of checks and balances. It incorporates independent expertise and accelerates decision-making by setting deadlines. Our proposed governance framework addresses the situation of systematic non-compliance by Member States and their authorities and builds linkages between NRAs, the Board, Member States, and the Commission as well as providing civil society organizations and the press ways to call these actors to account. Ultimately, the Court of Justice should decide in disputes.

Current enforcement framework proposed by EMFA

The original EMFA proposal hardly improves currently available enforcement mechanisms. By reinforcing the implementation of Article 30 of the AVMSD, EMFA adds the coercive power of a Regulation to the already existing Directive. The successor of European Regulators Group for Audiovisual Services, the Board, has several tasks, but none that would impose any obligation on its participant NRAs or Member States: its function merely involves consultation and cooperation, and its most concrete actions are the issuing of opinions. Similarly, the Commission's role is carefully framed: it can issue opinions and guidelines, organize structured dialogues and carry out a monitoring exercise annually.

These proposed tools do not have the potential of making the already existing enforcement tools of EU law either more effective, credible, or more deterrent. In case of systemic non-compliance by NRAs or Member States, the proposed measures are unlikely to make a much-needed difference concerning media. For these reasons, we propose an enforcement structure that would enable effective enforcement of EMFA.

Recommendations for stronger enforcement EMFA

In the following we outline how a strengthened enforcement of the EMFA could take shape, at the intersection of the opposing principles: limitations imposed by the current competence framework, the principle of subsidiarity and addressing the concerns about certain Member States. It remains fully within the boundaries of the powers of the Board as proposed by EMFA, and of the Commission, respecting the competences of NRAs and builds on a dialogue with the Member States while respecting the principle of proportionality. At the core of our proposal are three elements: a) all decisions of the Board and Commission should be supported by a wider consensus of experts and stakeholders; b) post-merger assessment of media concentrations c) the Board's opinion can ultimately trigger an extraordinary market

investigation by the Commission which may lead to an infringement procedure within a specific deadline after a defined process of dialogue.

Including Experts and Stakeholders

To address current mistrust across the stakeholders and create wider consensus and a more legitimate enforcement of EMFA, external independent experts and a range of stakeholders should be involved in the decision-making.

A high-level group of experts following the example of Article 40 of the [Digital Markets Act](#) could be established. The high-level group of experts should be composed of a diversity of experts and be fully independent. The expertise of a permanent and organized advisory body could assist both the Board and the Commission.

To include a diverse set of perspectives, civil society organizations, the Media Pluralism Monitor, and the existing Rule of Law Reports should be consulted by the Board and the Commission when they draft opinions, guidelines, and other forms of decisions.

Advancing Post-Merger Assessments of Media Concentration

Member States are divided over the question whether supranational governance can create a better balance vis-à-vis the power of a nation state. Media markets in the various Member States are also vastly different and opinions may diverge on the appropriate direction of measures.

When a media regulator is captured by its government even if it complies with the detailed requirements on independence laid down in Article 30 AVMSD, it may still adopt arbitrary decisions. An illustrative case is Hungary, which was referred by the [European Commission to the European Court of Justice over the Hungarian Media Council's 2021 decisions](#) to reject broadcaster Klubrádió's application for a broadcasting license, thereby violating of the Electronic Communications Code.

To hedge this risk, the responsibility between NRAs and competent competition authorities should be shared. National competition authorities should be given a more prominent role by making use of the opinion of national media authorities on the impact of media mergers on media pluralism. Moreover, [post-merger assessment](#) of media mergers could serve as a tool to assess whether the decisions in question were correct, and if they were found to be erroneous, to understand why, with a view to improving future merger analysis or decision-making processes.

End-game in cases of systematic non-compliance

Lastly, we propose that the Board, which comprises and coordinates all NRAs, assumes a more active role in enforcing EMFA, without intervening with competences of the Member States. Retaining its primarily consultative role, the Board could give important signals to the Commission, who would be obliged to act upon these. In cases when Member States systematically fail to act in compliance with the Regulation and systematically enact measures or take decisions that

seriously impact media freedom and pluralism or editorial independence, or any other principles underlying the current Regulation or Article 11 of the Charter of Fundamental Rights, the Board could issue *recommendations* besides its opinions. When the Board decides by voting on such an opinion and recommendation, the Board representatives of Member States who are, or had been subject to such a decision, should not exercise their voting rights.

The opinion of the Board should be made public. However, the recommendations do not have to be public. Still, both should be communicated to the Commission, as well as the report of the Member State on the measures it has taken in response to the Board's opinion and recommendation. The Board will take a vote on the report of the Member State. In case of a negative decision, the Commission will start an exceptional monitoring as described below, to collect information and evidence about the effects of media concentration in the Member States on media freedom and pluralism. The Board will also have the right to call on NCAs or NRAs to carry out a post-concentration evaluation as explained above.

In cases when the Board finds systematic non-compliance of a Member State with the current Regulation, the Commission should start an extraordinary (exceptional) monitoring mechanism. Besides the regular monitoring mechanism as laid down in current Article 25, such exceptional monitoring has the advantage to focus directly on the problematic area, in particular the measures of the Member State or its NRA. Importantly, at this stage, an unsuccessful dialogue has already taken place between the Board and the Member State. Therefore, if the Commission establishes non-compliance, there is no reason to re-open the dialogue (which should be opened in case the regular monitoring finds a serious non-compliance with the Regulation or the Charter). In case the exceptional monitoring has confirmed the non-compliance with the EMFA, the Commission should start an infringement proceeding within a given deadline. The Commission should also start an infringement proceeding if, after the regular monitoring found non-compliance with EMFA, the dialogue with the Member State has ended without delivering satisfactory results. When taking these decisions, the Commission should take account of the opinions of the High-Level Expert Group, of the Media Pluralism Monitoring and other relevant bodies.

Summary

The mechanism that we suggest would increase NRAs' powers as the Board's decision would create an obligation for the Commission to act. Disagreement between NRAs should be discussed within the Board, and only if no agreement is reached, the case could be forwarded to the Commission. These steps with specifically allocated deadlines lead to a final decision within a reasonable time span. The final decision remains in the hands of the Commission, which, however, must rely on a diverse range of competent experts. While the Commission can start an infringement procedure anytime, the EMFA would concretize specific cases when an infringement procedure is due without lingering in long political dialogues and contribute to a timely, transparent, and objective enforcement of the law. Something, which is dearly missed in European media markets.

