

# The European Media Freedom Act stirs a potent cocktail of political imperatives

Blog post by Senior Associate Jack Keevill, 4 October 2022

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Poland and Hungary have given Brussels many headaches. One that has received less attention is the state of press freedom, which the European Commission believes has suffered not only under the Orbán and Kaczyński regimes, but also in Slovenia, Malta, and Greece. Its proposed remedy is the European Media Freedom Act.

In the Commission's mind, the European Media Freedom Act (EMFA) will safeguard media outlets operating in Europe. It will shield them from government interference, bring transparency to how they are run, strengthen their position vis-à-vis online platforms, ensure media market consolidation does not impact pluralism, and increase regulatory cooperation among Member States.

That may prove to be wishful thinking. The sector it is supposed to help gave the proposal a frosty reception, and it presents everyone concerned with tricky political dynamics to navigate if it is to make it into EU law.

Europe's media sector is sensitive. For one thing, there is variety: press publishers are different from public broadcasters, who differ from private broadcasters, who differ from video-on-demand services, and so on. It is also closely linked to cultural, linguistic & legal traditions. Policy is national, not European: it is an area which, according to the EU's founding treaties, the European Union can only support, coordinate or supplement member state action. It can provide incentives and recommendations but cannot attempt to harmonise legislation. Governments like to keep control over the rules that shape their respective public spheres, and media companies by and large like this status quo - an EU 'single market' for media would be an anathema.

Yet the EMFA seems to trample over both sensitivities, creating a broad category of 'media service provider' and subjecting it to the beginnings of single market logic.

Leaving aside the choice of Article 114 TFEU - on the functioning of the internal market - as its legal basis (the legal robustness of which will be for the lawyers to argue), the EMFA would require the introduction of laws to assess concentration in the media market, where member states vary greatly in their approaches. Compare the detailed regimes in France and Germany with the minimal scrutiny in Finland and Estonia, for instance. Such differences may explain why a topic long discussed in the Council of Europe and European Union has seen little tangible progress. That media companies tend to view market consolidation as an important incentive for further investment is also no small detail.

EMFA would also beef up regulatory oversight via the European Board for Media Services, which would replace ERGA. Sectors which have thus far been subject to self-regulatory codes of practice, usually to safeguard editorial freedom, are now faced with the prospect of external oversight.

It would seem the Commission has tried to sweeten the deal by strengthening the rights of media service providers vis-à-vis Big Tech. ‘Very Large Online Platforms’ - a term coined in the Digital Services Act to cover the biggest social media platforms - would have to treat complaints by media service providers about restrictions on their content as a matter of priority, reflecting the time-sensitive nature of some content - i.e. journalism. But this is arguably only an incremental improvement on the regime established by the Platform-to-Business (P2B) Regulation: P2B established the complaint mechanisms and procedures; EMFA just adds urgency.

Doing so pulls in a powerful interest group in the shape of Big Tech, for only a small gain for European media. The latter might also raise a more fundamental question: why should they be subject to more rules and oversight when online platforms are not? After all, they consider online platforms to be their major competitors and/or ‘gatekeepers’, with whom the relationship is already fractious (c.f. the litany of heated EU lobbying battles over content regulation) and, crucially, who have also begun edging into editorial activity.

This brings us back to the political cocktail: the EMFA proposal is part of the Commission’s efforts to tackle a quasi-existential issue for Europe, namely the extent to which it is a Union of values, and not just economic interests. It is tightly bound with the Rule of Law disputes with the Polish and Hungarian governments, as well as the other threats to democratic processes which the (far less controversial) proposal on political advertising is meant to tackle.

Even without considering the likely effectiveness of the EMFA measures in achieving the objectives of safeguarding media pluralism and independence, the sensitive issue of bringing internal market-related measures to the media sector is now tied to the quasi-existential threat to the EU as a community of values, while also drawing in the vexed question of how to balance European content producers and news organisations against US Big Tech.

What could go wrong?