

## The European Media Freedom Act

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The Media Freedom Act has met with objections. The EC's Regulatory Scrutiny Board in its [impact assessment](#) initially objected to the assessment of costs and benefits and has given only qualified approval. A number of national governments have raised concerns. In [Germany](#) for example, doubts were raised about whether the proposed Act meets the standards of subsidiarity and proportionality that all EU legislation must meet.

It is not possible in the time and space available to offer a full assessment of these objections, and this short document will not include the required evidence, but I will outline some arguments and offer my personal judgements. Some of the more historical and theoretical arguments are set out in my recent books<sup>1</sup>.

(I did play a minor role as an advisor to the team producing the impact assessment study but this note is a personal opinion).

The Opinion of the **Regulatory Scrutiny Board** on the impact assessment on EMFA argued that:

*(1) The report does not sufficiently exploit the existing evidence to support the problem definition, in particular the fragmentation of the single media market and its resulting negative impacts.*

*(2) The report lacks sufficient clarity on the complementarities between the different policy options and their design with regard to the problems they seek to tackle. The analysis of their effectiveness does not provide sufficient clarity as to what will make them successful.*

*(3) The analysis of single market and distributional impacts, among different media services and between Member States, is not sufficiently developed.*

These are criticisms of the report, rather than the EMFA itself, but the role of the regulatory scrutiny board is to ensure that regulation is evidence based, so it is entirely appropriate that the RSB raises these issues. Taking them in turn:

1. That the European media market is fragmented is not in itself controversial. In comparison with markets for goods, as well as more comparable markets in other information services, news and entertainment are strikingly fragmented nationally within the EU. What is controversial is the explanation for this: conventionally separate languages and democratic systems have been seen as underlying a fragmented media market in the EU, rather than regulatory fragmentation in relation to the issues raised by the EMFA, such as media merger regimes, public resources and public service governance. Evidence so far assembled is patchy, but further research is unlikely to resolve this as research is not available. It is also impossible to separate out the role of regulatory fragmentation and in any case rapid change is likely to ensure that evidence is quickly out of date. Increasing use of various forms of automation in media, including translation, is likely to change the balance between governance and other factors that explain fragmentation. There will always be a lack of

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<sup>1</sup> Media Freedom. Polity Press 2021. Regulating Big Tech (Martin Moore and Damain Tambini (eds). Oxford University Press 2021.

evidence in such a dynamic situation. It is relevant to note also that the EMFA outlines measures (such as improved audience measurement and regulatory cooperation) to improve implementation of a wide range of regulatory standards (including AVMS but also prospective future regulation) which enjoy the support of most independent NRAs in the EU and which will in time help correct the evidence gap. In short there is a lack of evidence, but in my view the report does as much as can be done, and it would not be realistic to require more evidence at this stage.

2. In my opinion the proposed policy options are complementary to one another and appropriate to the problems that they need to tackle, but it is also correct to point out that the mechanisms by which the EMFA should achieve its objective could be further clarified. The history of this policy area shows that the problem of regulatory instability and fragmentation should be understood in terms of a universal tendency of governments in a democracy to attempt to manipulate media policy in order to shape public opinion. The tools highlighted in the proposed legislation (state advertising and other resources, public service media, ownership and mergers) merely target the current playbook of some of those that seek to manipulate the media.
3. The role of the EU in media governance is a crucial one because it offers a set of standards that are isolated from many of these MS level pressures: in the years since the second world war the European Court of Human Rights has also played a role as a check on state power to control the media and on the development of what academic experts call the 'political media complex' of interwoven state and media power that ultimately threatens to undermine democratic legitimacy. In this context the EMFA is based on art 114/ single market rationales, but it the legislation is correct to address the problem of predictable chilling of media growth due to the legal uncertainty that results from such tendencies to manipulate the media.

Others including members of the German Parliament have raised issues about the subsidiarity and proportionality of the proposed measures.

As regards **subsidiarity**, ensuring that rules are developed, adjudicated and enforced as close as possible to the citizen is of particular importance in relation to the media. Trust and legitimacy of democracy requires that any rules that can impact upon media and the formation of public opinion in a democracy – including rules on media freedom – are understood and trusted by citizens. If public media are to be sanctioned, or indeed protected from state sanction, or if a media merger is to be permitted or denied by public authorities, these decisions must be taken in the public interest and understood to be thus. Rules that are perceived to be imposed by remote authorities are unlikely to be trusted.

According to the Treaty on the European Union (art 5 s3-4):

*“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

*The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the*

*application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.*

The EC and member states in Europe will clearly think carefully about this sensitive set of issues. However a close look at the proposals suggests that they do meet the strict criteria of subsidiarity. Because there are clearly problems for the single market that result from the patchwork of current rules in this area, that can only be resolved by EU level guidance. Note that the standard is that the action must “*by reason of the scale or effects of the proposed action, be better achieved at Union level*”.<sup>2</sup>

On **proportionality**, it might be the case that they are not sufficient. Most objections on the basis of proportionality point out that legislative proposals do too much: “using a sledgehammer to crack a nut”. In this case the proportionality objection may be rather that the proposals do not do enough, and they need to do more or the nut will remain whole.

“The principle of proportionality is laid down in Article 5(4) of the Treaty on European Union and in the Protocol (no 2) to the Treaty. It seeks to set actions taken by European Union (EU) institutions within specified bounds.

Under this principle, EU measures: must be suitable to achieve the desired end; must be necessary to achieve the desired end; and must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved (proportionality in the narrow sense).

According to the treaty:

*“Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”*

The criteria for applying the principle are set out in the protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the treaties.”<sup>3</sup>

This can be thought of as a three-part test. EU action:

1. *must be suitable to achieve the desired end;*

It is not disputed if these approaches are suitable. Harmonisation and new rules on areas such as ownership transparency, resources, public service and the other areas identified are now widely understood by experts to be the key current ways in which media freedom is threatened. This is reflected by the opinions and evidence gathering of civil society NGOs such as Reporters Without Borders and also by the independent academic research of bodies such as the EUI Center for Media Pluralism and Media Freedom

2. *must be necessary to achieve the desired end;*

It is indisputable that EU standard setting and monitoring is required and justified in order to prevent a patchwork of new regulatory obligations emerging. The lack of reliable market and audience data creates a problem in that there is clearly a lack of market evidence but there is

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<sup>2</sup> See: <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>

<sup>3</sup> See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016E%2FPRO%2F02>

3. *must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved*

In the case of EMFA the burden on the individual takes various forms: in the impact assessment it is conceived in terms of cost of compliance calculations which are justified as proportionate. There are questions however regarding whether this policy approach will be sufficient. It is likely that the problem of the nexus between political power and media will lead to further dangers of capture and various forms of cross subsidy and ownership strategies that will continue to undermine the single market in ways that have not yet been predicted. Those that seek to control media and thereby to undermine media freedom will seek new and alternative means to do so.

So there may be an argument for adding a more general discretion to enable media regulators, working in collaboration with the European Board for Media Services to identify new ways that public authorities might work to control and influence media. This could comprise a method whereby media can raise complaints directly to the European Board in addition to national regulatory authorities, and a clearer definition of media freedom as a regulatory objective in itself, in addition to the clearer definition of media pluralism called for by the Regulatory Scrutiny Board.

## **Conclusion**

In my view the current draft of EMFA outlines an appropriate approach to some areas where EU action is necessary in order to protect media freedom in the EU. Whilst subsidiarity is particularly important in relation to media regulation, there is a strong case for the necessity of EU action in this case, and the current draft offers an appropriate approach.

Whilst more evidence might be sought in support of this approach it would not be easy to provide this evidence and I am not convinced that sufficient doubts exist about the evidence base to further delay the legislation. There are some doubts about whether the approach in the current draft is sufficient. If sufficient supports for regulatory independence can be put in place there may be an argument for enhanced procedures to enable them and the Regulatory Board to proactively monitor and identify for new threats to media freedom<sup>4</sup>.

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<sup>4</sup> In addition to the current procedures at article 14.