

**European Media Freedom Act: Legally Flawed, Politically Dangerous**

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Adopted on 7 May 2024, the European legislation on media freedom, the new rules of which will begin to apply in 2025, aims to protect media pluralism and independence in the EU by enabling public and private media “to operate more easily across borders in the EU internal market, without undue pressure and adapting to the digital transformation of the media landscape.”<sup>1</sup> Presented as the guarantor of the European democratic model, this text is the first EU regulation to apply to the press and media sector, paving the way for harmonization of national legislation in this area. A legacy of the first von der Leyen Commission, and in particular of Commissioners Věra Jourová and Thierry Breton, the adoption of the European Media Freedom Act (EMFA) nevertheless raises a number of questions, not least because of the transfer of competence to the EU through the extension of the scope of the single market provisions, but also because of the serious risk of the politicization of this new legislative framework.

## I. National Competence in the EU's Sights

Pluralism and freedom of the press are not concepts explicitly addressed in the European treaties. As a result, these matters fall under the jurisdiction of Member States, which are responsible for legislating in this area. Nonetheless, Member States must ensure compliance with the EU Charter of Fundamental Rights, particularly Article 11,<sup>2</sup> which guarantees freedom of expression and information, stating:

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.*

In addition to monitoring compliance with the Charter, the EU has also developed a series of tools designed, among other things, to assess the state of press freedom and pluralism within Member States. These include the annual reports on the rule of law, which make recommendations to Member States.<sup>3</sup> The EU also relies on assessments from so-called “independent” organizations, such as the European Centre for Media and Press Freedom, which publishes an annual situation report based on contributions from civil society.<sup>4</sup> However, these tools are non-binding and lack any legal basis that would allow the EU to intervene in Member States' competences regarding media and press regulation.

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<sup>1</sup> European Commission. (2024). *European Media Freedom Act*. European Commission. Available online at [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protecting-democracy/european-media-freedom-act\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protecting-democracy/european-media-freedom-act_en).

<sup>2</sup> Official Journal of the European Union. (2012, October 26). *Charter of Fundamental Rights of the European Union, 2012/C 326/02*. EUR-lex. Available online at [https://eur-lex.europa.eu/eli/treaty/char\\_2012/oj](https://eur-lex.europa.eu/eli/treaty/char_2012/oj).

<sup>3</sup> European Commission. (2024). *2024 Rule of Law Report*. European Commission. Available online at [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2024-rule-law-report\\_en](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2024-rule-law-report_en).

<sup>4</sup> European Centre for Press & Media Freedom. (n.d.). *Monitoring – Report New Threats*. ECPMF. Available online at <https://www.ecpmf.eu/monitor/>.

Yet, it is these documents that the EU is using to interpret Article 2 of the TEU,<sup>5</sup> which guarantees respect for human dignity and democratic values:

*"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

This article is systematically invoked in arguments against Member States accused of violating the rule of law and "European values." Originally intended as a declaration of principle, the article has evolved into an open-ended receptacle for issues ranging from the defense of the rights of the LGBTQ community to biased interpretations of press freedom and the independence of the judiciary. In short, Article 2 paves the way for the endless expansion of the notion of "European values" in line with societal developments and the EU's ideological biases.

Its application is only given concrete expression by the triggering of Article 7 of the TEU, which provides that:

*"On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure."*

Article 2 is therefore primarily linked to a penalty procedure that is long and fraught with consequences. Incorporating the notions of pluralism and freedom of the press into this framework proves ineffective, as its enforcement inevitably relies on Article 7, which introduces a pronounced political dimension to what should be primarily legal considerations.

This was implicitly acknowledged by the European Commission in 2022 when it launched the idea of press and media legislation at the European level. Until that date, this domain had been left to the Member States, albeit subject to *soft governance* measures and directives. This approach ultimately meant leaving authority with the Member States, who faced either reprimands at best or legal action in the event of failure to comply with a directive. Viewing this system as ineffective, the European Commission took the plunge and pushed for the adoption of the European Media Freedom Act.

## II. A Highly Debatable Legal Basis

Without amending the Treaties, the Commission needed to identify an existing legal basis to regulate the media and press. Following consultations with various bodies, the Commission chose

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<sup>5</sup> Official Journal of the European Union. (2016, June 07). *Consolidated Version of the Treaty on European Union*. EUR-Lex. Available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M002>.

Article 114 of the TFEU as the foundation for its draft regulation, citing that “the free flow of information is essential to the functioning of an efficient and prosperous single market.”<sup>6</sup>

It is therefore the rules of the single market that now apply to the media and press, allowing the EU to adopt measures to approximate (harmonize) national regulations concerning the establishment and functioning of the internal market. The Commission justifies applying market logic to the media sector because of the “problems of market concentration and media capture which have an impact on the media sector and its business model.”<sup>7</sup>

The media and the press thus fall within the scope of an article that provides the legal basis for the European Union to adopt measures aimed at *harmonizing* the national laws and regulations of Member States that create *obstacles* to the free movement of goods, persons, services and capital within the internal market. The aim is to strengthen the integration and operation of the internal market by reducing disparities between national laws that may hinder trade and the movement of economic resources.

The adoption of this market logic poses a problem given the inherently political dimension, often described in EU law as “cultural,” that is specific to the media sector. Article 167(4) of the TFEU grants Member States significant cultural sovereignty, which restricts the EU's capacity for harmonization:

*“The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”*

In addition, the Amsterdam Protocol on public service broadcasting<sup>8</sup> reaffirmed that:

*“... provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organizations for the fulfilment of the public service remit as conferred, defined and organized by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account.”*

There is a clear tension between the provisions that uphold Member States' cultural sovereignty in media matters and the choice of Article 114 as the legal basis for the EMFA. While the media are not the only area where culture and market logic conflict, for Article 114 to take precedence

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<sup>6</sup> Ball, L. (2022, December 06). *The European Media Freedom Act: What's at Stake?*. Global Forum For Media Development. Available online at <https://gfmd.info/emfa-whats-at-stake/>.

<sup>7</sup> For more information, see footnote 6.

<sup>8</sup> Official Journal of the European Union. (1999, February 05). *Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting*. EUR-Lex. Available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A41999X0205>.

over Article 167(4), the main objective of the EMFA would need to be the proper functioning of the single market.

Although this objective is mentioned, the emphasis in the regulation is placed on pluralism and independence of the press, editorial freedom and the protection of journalists. It is hard to see any economic objectives here. While the Commission argues that the EMFA safeguards democracy, thereby enabling the single market to function optimally, this legal rationale exceeds the scope of Article 114. Indeed, such an argument appears limitless, as it would suggest that virtually any issue could fall within the remit of Article 114.

For example, one could argue that social security for journalists has an impact on their work, which in turn influences the quality of the press, and by extension, the proper functioning of the media market and the single market. Under this reasoning, health and pension systems could fall under Article 114, thus inadvertently becoming an EU competence. Article 114 could therefore potentially encompass every aspect of human activity, as all such activities have an economic dimension. If we follow the logic used to set up the EMFA, virtually anything could be justified under Article 114, ultimately undermining the principle of the division of competences.<sup>9</sup>

This shift in the Commission's legal reasoning is all the more problematic given that Article 114 is supposed to apply when obstacles to the proper functioning of the market are identified. In this case, these obstacles are anything but economic and relate to the media policies put in place by certain Member States, particularly Hungary and Poland before Donald Tusk's return to power in December 2023. While the European Commission claims to have adopted an economic rationale to find a legal basis for this new regulation, in reality, it is clear that its approach is political. The problems it has identified with Polish and Hungarian legislation cannot be considered as obstacles to the smooth operation of the European market. Indeed, it would be entirely illogical to argue that problems identified in the media market in Hungary or Poland negatively impact the functioning of the media market in another Member State. The Commission's purported legal rationale is, in fact, a political strategy.

### III. Towards a Political Use of the European Media Freedom Act?

The legal architecture put in place by the European Commission thus lacks coherence, and to get past this legal inconsistency, the defenders of this regulation often present it as being necessary to ensure the protection of the European Union's democratic values. The importance of these objectives is portrayed as outweighing any concerns for legal consistency. As a result, the European Commission is clearly politically motivated; according to its views, these regulations will make the press more transparent, ensure greater media freedom, and guarantee press pluralism. But what is the reality? What will be the real impact of these regulations, and how will the main tools designed to implement them work?

The content of the general objectives is part of a broader desire to reshape the press according to with the values of the European Union and, above all, to establish mechanisms for monitoring

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<sup>9</sup> Etteldorf, C. (2023, June 13). *Why the Words "But" and "However" Determine the EMFA's Legal Basis*. Verfassungsblog. Available online at <https://verfassungsblog.de/why-the-words-but-and-however-determine-the-emfas-legal-basis/>.

the application of these regulations, which extend beyond the competence of the Member States. The new legislation seeks to<sup>10</sup>:

- Protect editorial independence;
- Protect journalistic sources, including against the use of spyware;
- Ensure the independent functioning of public service media;
- Enhance transparency of media ownership;
- Safeguard media against unjustified online content removal by the very large online platforms;
- Introduce a right of customization of the media offer on devices and interfaces;
- Guarantee transparency in state advertising for media service providers and online platforms;
- Ensure Member States provide an assessment of the impact of key media market concentrations on media pluralism and editorial independence;
- Boost transparency in audience measurement for media service providers and advertisers.

In addition, the EU will now aim to support media freedom by:

- Having press and media councils that strengthen the position of press and media councils in a converged media environment (Budget: €0.9 million);
- Implementing a Media Ownership Monitoring System to provide a country-based database containing information on media ownership (Budget: €0.5 million);
- Providing grants to support innovation of local and regional media and boost pluralism (Budget: €2 million);
- Having a rapid response mechanism to provide practical help to protect journalists under threat (Budget: €3.1 million);
- Implementing a Media Pluralism Monitor to identify potential risks to media pluralism (Budget: €1.1 million);
- Supporting regranting for media sectors of special relevance to democracy (such as local and investigative journalism, public interest and community media) as part of Creative Europe's Journalism Partnerships (Budget: €5 million);
- Establishing a Media Freedom Hub to support existing and established independent Russian and Belarusian media working in the EU (Budget: €2.9 million);
- Organizing a European Festival of Journalism and Media Information Literacy (Budget: €0.8 million).

This shift to EU competence is all the more problematic, given that the Commission will play a central role in introducing and monitoring the tools established by this European media legislation. The independent Media Committee being set up will be directly assisted by a

Commission secretariat. Set to begin operations in February 2025, the committee will consist of authorities and bodies from the Member States, with the stated goal of coordinating the work of these national authorities. However, it is likely that the Commission will have the final say on decisions made by this committee.

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<sup>10</sup> For more information, see footnote 1.

It is feared that national media traditions and cultures will be totally sidelined in favor of standards that will be laid down by the European Commission. The new committee will replace a more flexible structure under a previous media directive, transitioning to a much more vertical governance model. Given that this committee has not yet begun its work, it is not yet possible to say what political direction its decisions might take. However, since one of the committee's functions will be to protect the editorial line of European media, we can expect that the European Commission may interfere with the editorial stance of certain media outlets, especially ones that disagree with its positions.

This situation presents an interesting paradox: the committee is designed to make decisions that would combat political interference within the editorial offices of the European media, but some European media, particularly the conservative ones, are more likely to have to deal with interference by the European Commission in their own editorial lines. Of course, at this stage, this remains speculative. The same uncertainty applies to the idea of coordinating measures to combat interference by spyware. The European Commission is clearly aligned with certain geopolitical interests, and it is highly likely that investigations will focus on software from states deemed hostile by the Commission, often with good reason. At the same time, software used by other countries, such as the United States, which employ similar technologies, may escape scrutiny by the so-called “independent committee.” The Commission's geopolitical alignment in the context of this media legislation is also evident in its plans to allocate budget envelopes to fund so-called independent Russian and Belarusian media outlets.

The legislation also proposes to introduce a tool to combat media concentration. In this case, the amount allocated for this purpose is approximately half a million euros, which seems a negligible sum for combating the economic influence and financial resources of major Western European press groups. Once again, attention is likely to be focused on smaller, so-called “resistant” Member States, like Hungary, where issues of concentration may exist but are less entrenched than in larger countries like France – a country characterized by a highly concentrated press landscape.<sup>11</sup>

Continuing along the subject of cultural differences and national specificities when it comes to the press and media, there are different approaches to public funding of the press within the European Union: In France, for example, there is a system of public subsidies for the media, but this seems unaffected by the transparency efforts that this new legislation aims to implement. In contrast, the text does mention funding through state advertising, a system that exists in Hungary, for example, which does not directly fund the press through subsidies. This means that the legislation will primarily target the Hungarian press market, rather than the French system. However, the French subsidy system has been widely criticized for being biased and unfair, as it almost exclusively financially supports media with non-refractory political positions – even keeping outlets alive that would otherwise have disappeared in a situation of real competition.

As part of this new legislation, there are also plans to establish subsidy envelopes for local and regional media, particularly to support their digital transformation and innovation projects. Here again, it is impossible to say what these grants will actually be for, as they have not yet begun to be paid out, but there may be some doubts about the criteria that will be used to allocate them.

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<sup>11</sup> Free Press Fund. (2024, April 25). *Press freedom in France is threatened by crisis, concentration, and a lack of independence*. Heinrich Böll Stiftung. Available online at <https://fr.boell.org/fr/2024/04/25/liberte-des-medias-en-france-peril-sur-linformation-entre-crise-concentration-et-dependance>.



The European Union has a tradition of mainly funding media that align with the political agenda of the European Commission and the European Parliament.<sup>12</sup> Thus, the first envelopes allocated under this provision will likely reveal a great deal about the direction and intent of this new European media legislation.

Lastly, it is worth acknowledging the concerns raised by press publishers, who throughout the negotiation process,<sup>13</sup> – which led to the adoption of the EMFA on 7 May 2024 – criticized a series of provisions that they felt could jeopardize their business due to their "intrusive" nature. In France, these publishers "question the insufficient consideration given to national legislation such as the French law of 1881, which protects the freedom of publication. The risk of transferring criminal liability from publication directors to journalists threatens their independence. What's more, the light-handed approach to moderation taken by online platforms could give rise to unjustified censorship."<sup>14</sup> There are thus many signs that the legislation could have the opposite effect to that stated: while its aim is to make the press freer, it could inadvertently become a tool for censorship.

#### IV. Conclusions

- The media and the press are not part of the European Union's areas of competence. However, there is a tendency to address these issues from the point of view of Article 2 and the values of the European Union. In response, the Commission sought a different legal basis for the adoption of this new legislation on the media and the press, finding it in Article 114, which concerns the internal market. This acknowledges that the press and media were not specifically mentioned in the Treaties as areas of EU competence.
- The choice of Article 114 is problematic for several reasons. First, the objectives of the media legislation are not directly economic, but rather cultural, and should therefore be dealt with under Article 167(4) of the TFEU, which grants broad cultural sovereignty to the Member States. Furthermore, Article 114 is applicable only when there are obstacles to the proper functioning of the internal market. In this case, the Commission identifies issues with national media laws of certain Member States, but these do not impact the proper functioning of the internal market.
- It is thanks to a problematic extension of the scope of Article 114 that the Commission has been able to introduce this legislation, which means that the architecture of this text is highly shaky from a legal point of view. There is also a risk of an infinite extension of the scope of Article 114, which could be used to draw other areas into the Union's remit, thereby completely undermining the principle of the division of competences. This European legislation on the media is thus proving to be a dangerous precedent that could pave the way for a series of "legal putsches" designed to unravel the sovereignty of Member States without changing the Treaties.

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<sup>12</sup> Observatoire de Journalisme. (2022, March 11). *Hungary: Telex, or woke journalism that cries dictatorship*. Observatoire de Journalisme. Available online at <https://www.ojim.fr/telex-hu-hongrie/>.

<sup>13</sup> Alliance. (2023, June 23). *European Media Freedom Act: Press publishers express their concerns*. Alliance de la Presse d'Information Générale. Available online at <https://www.alliancepresse.fr/actualite/european-media-freedom-act-les-editeurs-de-presse-expriment-leurs-inquietudes/>.

<sup>14</sup> For more information, see footnote 13.



- This totally flawed legal logic takes a back seat to the importance attached by the European Commission and the advocates of this text in the promotion of a system of values – in other words, a cultural and political positioning – as set out in Article 2 of the TEU. The "nobility" of the values needing defending would be more important than the solidity of the legislation's legal foundation.
- The harmonization of the press and media through a strong presence in the decision-making processes of the European Commission raises fears of politicization and intrusion into the editorial lines of European media, particularly those critical of the EU. In its desire to defend a system of values that takes precedence over the need to find an adequate and solid legal basis, the European Commission runs the risk of provoking effects that run counter to its objectives. By seeking to smooth out national cultures and specificities with regard to the media and the press, as recognized in particular by the Amsterdam Protocol, the European Commission is laying the foundations for a new area in which double standards could also become apparent.
- Ultimately, much more than Article 114, the real legal basis for this new legislation is Article 2 and its values, which are becoming protean, with no clear limits, and evolving according to changes in society and the political directions taken by the European Commission. It is the flexibility and undefined nature of this article that has been used as a weapon of financial blackmail by the European Commission to withhold European funds from Poland and Hungary. Rather than harmonization, the Commission is in danger of creating further divisions within the European Union by extending the possibilities for political pressure and financial blackmail on Member States.