



28.04.2023

## Joint Position Paper on the European Media Freedom Act

We welcome the objectives of the European Media Freedom Act (EMFA) Regulation to protect media freedom and pluralism, as well as to provide safeguards against governments' unjustified decisions which affect media's capacity to freely express opinions. However, it is essential that the measures proposed by the draft Regulation do not create adverse effects on legitimate cultural policy measures aiming at promoting European works and the diversity of cultural expressions.

While the legal basis of the proposal for a Regulation is Article 114 of the Treaty on the Functioning of the European Union (TFEU) <sup>1</sup> which aims to establish or ensure the functioning of the internal market, it is of the utmost importance that the proposal also refers to Article 167 TFEU, which commands that the Union contribute to the flowering of the cultures of the Member States (para 1) and 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 (para 4).

This reference would help mitigate possible conflicting approaches. Indeed, the proposal for Regulation will be directly applicable while having a substantial overlap with the Audiovisual Media Services (AVMS) Directive <sup>2</sup> which has been transposed by Member States into national laws in different manners: the Directive allows Member States to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by the Directive. Where such overlap will occur, Member States are likely to face strong legal uncertainty regarding their ability to set cultural policies in a manner which respects their national specificities.

In this regard, we would like to draw your attention to several aspects of the proposed Regulation that need to be amended to reflect the cultural dimension of the media market.

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<sup>1</sup> Treaty on the Functioning of the European Union.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

<sup>2</sup> 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.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010L0013&from=EN>

Directive (EU) 2018/1808 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 in view of changing market realities.

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>

### ***Subject matter and scope (Article 1)***

The European Commission's proposal for a Regulation lays down rules for the proper functioning of the internal market for media services, while preserving the quality of media services. It should be added that the Regulation shall also respect and promote cultural diversity.

We welcome that the Regulation shall not affect rules laid down by Directive 2019/790/EU on Copyright and related rights in the Digital Single Market, and suggest adding other directives to this list:

- Directive 2019/789/EU on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes;
- Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society;
- Directive 2010/13/EU and Directive (EU) 2018/1808, with the exception of the amendments made by Article 27 of this Regulation.

### ***A concerning provision that would weaken national cultural policies (Article 20)***

The possible conflicting approaches between the EMFA proposal and the AVMS Directive are particularly apparent in the proposed Article 20 of the EMFA regarding national measures affecting the operation of media service providers. The article, in its current wording, would significantly limit the Member States in their ability to set cultural policy measures applicable to media service providers, by requiring new criteria that such measures be duly "justified and proportionate [... as well as] transparent, objective and non-discriminatory". In addition, Article 20 would force the Member States to take into consideration the operation of media services provider in the internal market, and not solely in their national territories.

Consequently, the Members States would have to reach these thresholds set by the EMFA in order to pursue national cultural policies under the AVMS Directive and face the risk to have their decisions being appealed by media services providers, effectively introducing a supervision of their direct competence. Besides, the appellate body provided for in Article 20 lacks clarification regarding its composition, scope and powers.

The very vague scope of this article may concern any national measure impacting the activity of the media service providers in the internal market, potentially including measures and obligations supporting creation. We are thus convinced that this article bears the great risk of offering powerful operators, more often extra-European ones, new opportunities to destabilise important and ambitious regulations set in favour of creation.

As an example, Article 13.2 of the AVMS Directive allows Member States to request media service providers to contribute financially to the production of European works, including via direct investment in content and contribution to national funds. To this day, a majority of Member States impose financial obligations on media services providers with a variety of types and percentage levels that respond to their respective cultural landscape and the situation is continuously evolving. While media services providers may argue that these obligations affect their ability to operate in the internal market, the latter are legitimate under the AVMS Directive which also allows the Member States to require media service providers targeting audiences in their territories, but established in other Member States to make such financial contributions. The AVMS Directive provides its own criteria of proportionality and non-discrimination. National measures implemented in the context of the AVMS Directive should therefore be exclusively assessed in the context of the AVMS Directive and not through an EMFA new procedure.

Article 20 would also affect other provisions of the AVMS Directive, such as the implementation of Article 13.1 concerning quotas of European works, including potential sub-quotas or higher quotas developed by Member States, as well as any national cultural policy favouring cultural matters over internal market aspects. The will to maintain a strong democratic ideal in Europe should not call into question cultural policies in the audiovisual sector: flourishing local creation and culture are also an essential aspect of well-functioning democracies.

To that effect, and to ensure that the EMFA reaches its objective of protecting media freedom and pluralism, we would like to recommend better recognition of the AVMS Directive in the EMFA in Article 1, as well as that the scope of Article 20 be limited to news and current affairs, a limitation already used in Directive 2019/789/EU<sup>3</sup>, or to measures likely to affect fundamental rights to reinforce the primary objective of the proposed regulation. In any case, Article 20 shall not apply to measures governed by State aids rules and measures implementing Directives 2010/13/EU and 2018/1808.

More than ever, creation in Europe is a force that brings us together, that unites us and that expresses the diversity of European societies. It deserves to benefit from protection and support that are specific and adapted. For all these reasons, we would like to call on you to take into account the impact the EMFA would have on the development of national cultural policies in the audiovisual sector during the negotiations.

Yours sincerely,

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Juliette Prissard, General Delegate of [EUROCINEMA, association of film and audiovisual producers](#)

Carole Tongue, Chair of the [European Coalitions for Cultural Diversity](#)

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<sup>3</sup> Directive (EU) 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes and amending Council Directive 93/83/EEF.  
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0789&from=FR>