

# EPD's assessment of the European Media Freedom Act proposal



The European Partnership for Democracy welcomes the [European Media Freedom Act](#) (EMFA), proposed by the European Commission on 16 September 2022, as an important step to **strengthen the free and pluralistic media system** and a **commitment to protect journalists and editorial independence** in the European Union. Moreover, we believe the **open procedures and transparent, objective, proportionate and non-discriminatory criteria for public funds** provided to media service providers for advertising, introduced by the EMFA proposal, are crucial and will increase the transparency of a large portion of state advertising paid to the media sector. If the EMFA is drafted well, it will be a major win for **democratic societies** all over the world.

However, while the EMFA is an important step forward, there are certain areas of the proposal that would benefit from further modifications. Below, we elaborate on our main concerns regarding the initiative, including the **transparency of state advertising and media ownership, the protection of editorial and journalistic sources, the so-called “media privilege”, and the independence of the new European Board for Media Services.**

## Editorial and journalistic sources protection (Art. 4)

As currently drafted, Article 4 of the European Media Freedom Act constitutes a welcome novelty in terms of editorial and journalistic sources protection. However, the wording of the Article contains specific provisions that in their current formulation may limit or even reverse its beneficial intended purposes. Therefore, we provide the following recommendations:

- Principle of legality: Ensure the EMFA is a **piece of clear legislation** (written, accessible, and publicly available) with **guarantees of foreseeability and guarantees against arbitrary application**, including the basic principle of protection of journalistic sources (POJS) and the modalities / narrow circumstances in which an interference with journalists' sources can be justified under restrictive and cumulative conditions, with specific procedural safeguards.
- Principle of ex-ante judicial authority: Introduce a **mandatory requirement for judicial ex-ante assessment** of any use of spyware or surveillance practices targeting journalists and their professional and private networks of acquaintances (4.2.b and 4.2.c). There needs to be a decision ex-ante by a judge or another independent authority, in line with ECtHR rulings on protection of journalistic sources, including in cases of mass or bulk surveillance.
- Principle of subsidiarity: Introduce an obligation for proof, in case of the use of surveillance to prevent or prosecute serious crime, that the **recovered information is crucial** and that all other alternative legal means to disclose that information were tried before surveillance was considered.
- Principle of legitimate aim, necessity and proportionality: Ensure that **no surveillance measure is applied arbitrarily**. The use of these measures should be limited to what is demonstrably necessary to achieve the legitimate aim and considering the sensitivity of the information accessed and the

severity of the human rights infringement.

- Journalist and journalistic sources as vital actors for democracy: Provide special **safeguards against surveillance to both journalists and journalistic sources**, given the vital role of public-watch-dog of the press. Member States should prevent surveillance against media workers by new definitions, broader scope of protection, and gender approach, and promote specific tools of protection.
- Prohibit indirect surveillance: **Explicitly prohibit both direct and indirect surveillance** (Art. 4.2.b and 4.2.c). By indirect surveillance, we mean “forms of surveillance that do not target an individual journalist, rather people that belong to their network of acquaintances, which may include **colleagues, family members, friends, and other individuals** who share their physical and/or digital spaces with the journalist”. This also comprises opportunistic or unintended forms of surveillance, including mass surveillance, that can nevertheless compromise the security of the information flow which the journalist is at the centre of. Article 4 must protect journalists and their broad network of professional and private relationships, moving beyond the formula “journalists, colleagues, and their family members” contained in the original proposal. To ensure clarity, the definition of “indirect surveillance” should be included as a demonstrative list in Article 2.
- Gender approach vis-à-vis media workers: Recognise and reflect in the EMFA the high level of threats women and LGBTQ+ journalists receive online. An **equal working environment** should be promoted at the EU level, to ensure all media workers are protected from threats in online contexts such as gender-based disinformation, doxxing and other forms of privacy violation, cyber-stalking, cyber-harassment and smear campaigns.
- Positive measures to protect journalists: Include **encryption as a legitimate tool** to support professional secrecy and legal professional privilege, in direct reference to Articles 7, 8, and 11 of the Charter and according to the “Council Resolution on Encryption - Security through encryption and security despite encryption” of 24 November 2020.
- Negative obligations of non-interference journalistic work: Encourage Member States to refrain from adopting policies that undermine and interfere with encryption in a generalised or arbitrary manner.

## **Safeguards for the independent functioning of public media service providers (Art. 5)**

We welcome the **vital safeguards for the independent functioning of public service media** (PSM) included in the proposal for a European Media Freedom Act, specifically the obligation for governments to provide adequate financial resources for the fulfilment of the PSM’s mission and transparent and non-discriminatory appointment of members of PSM’s governing Boards. To provide a basis for truly independent public service media, we call for:

- Clarification: Further detail and clarifications are provided so that **Member States cannot circumvent their obligations**.
- Management bodies: The scope of paragraph 2 is broadened to **include all forms of management bodies of PSMs**, and is not just limited to Boards.
- Composition: Provide obligations for governing Boards and other management bodies of PSMs to be **composed in a manner that ensures pluralism**.

## European Board for Media Services (Art. 10, 12, 13 and 18)

The EMFA envisions **the European Board for Media Services (the Board)** as the **key institution in the implementation** of its provisions. It is supposed to be fully independent of governments and any other public or private entities so that it can effectively and impartially uphold freedom of expression across the EU.

In order to ensure the Board delivers on the goals of the EMFA, we propose the following to **guarantee independence, the efficiency of its enforcement mechanisms and professionalism**:

- Independence: Ensure the Board is **independent from the European Commission** (Commission). Where the EMFA says the Board acts “in agreement with the Commission” or anything to the effect of “on request of the Commission”, the text should be replaced with “in consultation with the Board”. Media regulators need to be independent on the national level. The Board should adhere to the same standards, especially where it decides on sensitive political issues.
- Opinions of the Board: Elaborate on the **implementation of the Board’s opinions**. The opinions must be enforceable, for example by legal action of the Commission, in order for them to have any real legal power.
- Structured dialogue: Strengthen the provisions regarding **structured dialogue**, included in Articles 13 and 18. This would **ensure that civil society, professional organisations and academics are included** and invited as experts where relevant. Additionally, a potential conflict can be found between Article 18 and Recital 33. The lack of clarity must be addressed regarding who will be in charge of the structured dialogue and who can participate.
- Media plurality test: Ensure that the **Board, not the Commission, sets up guidelines for the media plurality test** for assessing the impact of media market concentrations for maximum impartiality.

## Media in the digital environment (Art. 17)

While we acknowledge the importance of increasing transparency measures regarding Very Large Online Platforms (VLOPs) and the potential restrictions and suspensions of media and journalist content and accounts, we are concerned with the fact that the **so-called “media privilege”** has found its way back into the proposed legislation.

The EMFA proposal suggests that media service providers should be identified based on **self-declaration** (Article 17(1)). The system of proposed ex-ante notification to self-declared media establishes de facto fast-track, non-transparent procedures to certain privileged actors that will have a **major negative impact on the right to freedom of expression and information**, even opening the door to rogue actors intent on distorting democratic public discourse. This mechanism would allow any self-proclaimed media, whether they truly are compliant with requirements under Article 17(1) or not, to **be able to spread disinformation, misinformation and propaganda** with more ease and less oversight.

We understand that the proposed mechanism under Article 17 aims to give media service providers better footing in the fight over the **overt removal of content by VLOPs**. However, no evidence supporting this claim has been put forward, whether in the [EMFA impact assessment](#) or anywhere else. If this problem does present itself, it can be solved by thorough enforcement of safeguards and rules provided by the [Digital Services Act](#) (DSA).

Regarding the DSA, if the EMFA is adopted as proposed, **the system established under the DSA**, including content moderation rules and a complaint mechanism, would be **fragmented** and more difficult to enforce. It is also worth mentioning that this mechanism was already **rejected by both the European Parliament and the Council of the EU** during the negotiations on the DSA and the repeated proposition risks affecting the public's trust in the legal process.

Therefore we propose to [reject Article 17 altogether](#). No media should receive preferential treatment.

## Transparency of ownership requirements for a well-functioning media market

For a healthy, well-functioning and pluralistic media sector there should be **full transparency regarding who owns and exercises influence over media**. This requires transparency of the whole chain of ownership and beneficial ownership of media and of all financial relations between media and governments and public bodies. Only full transparency of media ownership can enable investigative journalists and human rights organisations to continue shedding light on relationships that might be affecting the way media report. **Only full transparency can help democracy flourish.**

**Media owners must be transparent and accountable** so the public can freely access information on who owns and exercises influence over a media company and its editorial policies. The EMFA currently endorses transparency in principle but does not deliver in practice. To achieve transparency of media ownership, the EU must, according to the [2022 edition of the Media Pluralism Monitor](#), harmonise the type of information that should be disclosed by all the media actors (traditional and online) in the form of an essential/basic list that is applicable across EU Member States.

EPD recommends that such list of information should be included in the EMFA and, additionally, the proposal should be strengthened in the following ways:

- Enforceability: Provide a **binding obligation** for media to be transparent about their owners. Including these provisions only in the [Commission Recommendation](#) threatens to result in a guideline that nobody follows.
- Media ownership database: Establish an **EU-wide registry of media ownership** data that will be fully and freely accessible to citizens through an online interface. The database should enable analysis of cross-media ownership, cross border media ownership, of audience measurements and media concentration levels.
- Common methodology: Give the European Board for Media Services (the Board) the authority to establish a **common methodology for consistent monitoring and reporting** on media ownership across the EU.
- National regulatory bodies: Grant powers to **gather information related to media ownership to national regulatory bodies** responsible for media ownership monitoring. These powers must not infringe on the right to privacy. National regulatory bodies should receive appropriate financial resources to ensure media owners do not withhold or provide erroneous information.
- Annual report: Oblige the Board to **publish an annual report on media ownership** that accompanies the database with a review of its main findings and conclusions.
- Annual review mechanism: Establish an **annual review mechanism**, possibly as part of the expanded structured dialogue outlined in Article 18, with media stakeholders, academia and civil society to improve the methodology and its implementation.

## Allocation of state advertising (Art. 24)

We welcome Article 24 of the EMFA proposal as strong **protection against the abuse of state advertising by governments** seeking to reward media friendly to their ideologies, reported among others by the [2022 edition of the Media Pluralism Monitor](#). However, the proposal must be strengthened to ensure no loopholes are left in the text through which media loyal to regimes can continue to receive money while independent media suffer. We recommend that the proposal is expanded to include local government expenditure, and public media subsidies and to close down back-door government support for media. This includes the following:

- All resources: Introduce rules governing the **allocation of all resources by the state to media service providers**, whether financial or not, not just advertising or purchase of goods and services. A comprehensive set of fair rules applicable to all resources would help ensure that the obligations within the EMFA are effective in protecting media pluralism and freedom and that state funding is transparent.
- The ‘1 million inhabitants’ threshold: **Removal of the exemption for local authorities with less than 1 million inhabitants to ensure that there are no loopholes through which public authorities can covertly fund and put undue pressure on media service providers via local governments.** Lowering the threshold would at least help to shrink the loophole. This is [supported](#) by several EU Member States within the Council of the EU.
- Public subsidies: Ensure the criteria for distribution and transparency are applied to all **government subsidies for media**. This is supported by the Council of Europe, which [encourages](#) Member States to ensure that subsidies and any other type of financial support are administered on the basis of objective and impartial criteria.
- Procedures and safeguards: Introduce a list of **concrete procedures and safeguards** for awarding media service providers with funding. A list of specific procedures to be followed would enable public authorities to follow the letter of the law with less effort.
- Regular reporting: Determine **regular mandatory reporting** obligations applicable to the parties involved in the allocation of state funding to media service providers.
- Exchange of goods and services: Ensure public authorities **publicly disclose information regarding exchanges of goods and services** with media service providers. If Article 24 (4), which includes goods and services, applied to the obligation for public authorities to make publicly available information on the funds paid out to media service providers (Article 24 (2)), it would help increase transparency and make covert funding more difficult.
- EU-wide database of state funding: Establish an EU-wide database of state funding provided to media service providers. This database should include all data that public authorities are obligated to make available.
- Shorter frequency of data publication: Shorten the frequency with which public authorities must **publish data** on resources allocated to media service providers to at least **once in three months**.
- Electronic publication: Include the obligation for public authorities to make data available in a **user-friendly manner over an online interface**.

The submitted assessment can be found [here](#).