bitkom

Position Paper

European Media Freedom Act

Bitkom position paper: European Commission Proposal ‘establishing a common framework for media services in the internal market’

At a glance

European Media Freedom Act

Bitkom's view

Bitkom welcomes the opportunity to give feedback to the Commission's 'Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act)'. Bitkom agrees with the European Commission's view that media independence and pluralism are essential for functioning democracies and, thereby, markets as well. Bitkom furthermore supports effective harmonization of key areas of media regulation relevant for media pluralism, to the extent that harmonization is limited to areas where there is a justified and evidence-based threat to overriding public interests for which proportionate regulatory intervention is necessary, yet welcomes the Commission initiative in the area.

Core points

- **Right of customization**

  The proposed right of customization shows no direct or indirect causal link to this Draft Regulation's objectives, namely freedom and pluralism of the media. To the contrary, it represents a restriction to the freedom of expression, the freedom to provide services and the free movement of goods of service providers and manufacturers, as applicable, which is not justified.

- **Consistent application and no 'gold plating'**

  Bitkom welcomed the AVMSD as it aims to harmonize European media policy. However, Member States increasingly undermine the country-of-origin principles of the AVMSD and furthermore tend to interpret EU rules in an onerous way which leads them to go beyond their scope ("gold plating"), leading to fragmentation in the single market and undue operational burdens for (cross-border) services. This is particularly the case regarding prominence obligations for content of general interest and for European works, as well as for levies and investment obligations in local content which constitute market-entry barriers. Consistent European rules strengthen the Single Market by ensuring predictability and reliability, which are crucial for our members' business activities.

- **Application of already existing EU law**

  For the proper functioning of the Internal Market, it is essential that already existing EU regulation is being transposed, implemented and enforced. Deficiencies thereof can be observed for, inter alia, Directive 2010/13/EU (as amended). Therefore, more coordination on EU level is needed to address obstacles in the cooperation between national regulators that result from the lack of enforcement agreements between EU member states for legal action e.g. in the area of minors' protection (e.g. blocking of illegal content).

Partial minimum harmonization Article 1

Article 1 (2) of the Regulations allows “Member States to adopt more detailed rules in the fields covered by Chapter II and Section 5 of Chapter III”. Generally, this partial minimum harmonization bears the risk of (additional) divergent rules on national level, hence fragmentation and hindrances for the effective functioning of the Internal Market. While it may appear necessary in view of some areas’ specificities (i.a. Amsterdam Protocol and Commission Communication on Public Service Broadcasting; respect for diverse and pluralistic cultural landscape in MS), this may put at risk the level of harmonization needed to attain the objectives of the present proposal for a EU Regulation.

Definitions: ‘media service’, Article 2 no. 1

Bitkom would like to emphasize that a distinction must be made between "news" and "entertainment" media service providers. While it may be justified to establish a higher degree of precautionary measures with regard to editorial independence through regulation in the news/information sector, there is no comparable threat to the influence on public opinion formation for media services in the entertainment sector.

Definitions: ‘media service provider’, Article 2 no. 2

We welcome that the EMFA recognises that VLOPs (very large online platforms) curate and moderate content, but in principle do not exercise editorial responsibility over the content to which they provide access. Currently, however, the text gives rise to the confusing situation where the same VLOP/ VSP could potentially be classified as “media service provider”, too. We encourage the co-legislators to improve legal clarity regarding the services in scope and make clear distinctions to ensure both media service providers and other stakeholders (e.g. third-party services carrying media service providers) can comply with their respective EMFA obligations, and that the authorities are able to enforce the rules.

Definitions: ‘state-owned enterprises or other state-controlled entities’, Article 2 no. 15

For the definition of ‘State advertising’ in Article 2 (15), reference is made to ‘state-owned enterprises or other state-controlled entities’. However, no further definition of these notions is provided, and their meaning remains unclear. Therefore, Bitkom welcomes further definition on the matter.

'Rights of recipients of media services' Article 3

Article 3 of the Regulation poses many questions (see below) to which we deem further information and clarification are necessary.

- Does Art. 3 proclaim an individual, subjective right or is it about an objective right from which no individual legal position can be deferred which could be enforced through legal procedures (via national courts)?
- Against whom can the defined right be executed?
  (e.g. A Member State's positive obligation to establish a legal framework which enables and ensures the production of such plurality? A Member State's obligation to designate specific service providers to deliver such variety through their output? In view of each single provider individually or regarding all relevant providers in the entirety?)
- What about recipients' access to such news/content – presumably, the right is directed at sources which are "openly" accessible to the general public ("*allgemein zugängliche Quellen*", Article 5(1)1 German Federal Constitution, *Grundgesetz*)?
- Would the right not exist in case news/content items were produced in disrespect of editorial freedom?
- Does a media service provider have to have the intention of furthering "public discourse" when producing such news/content?

'Safeguard for the independent functioning of public service media providers' Article 5

Safeguards for Public Service Media providers are essential and needed because if the independence is not safeguarded, their role and remit as described i.a. in the Amsterdam Protocol cannot be fulfilled. In this case, also the requirements stemming from the individual State Aid decisions and/or the Commission Communication will not be met.

Art. 5 (1), mentions 'impartial manner'. The notion however is not clear. Does impartial include "objective"? Is "neutral" regarded the same as "impartial"? Would Art. 5 para. 1 require that "opinions" (provided they are easily recognizable and duly marked as such and kept quite distinct from factual information) also have to fulfil the "impartial" criterion?

There is also a need to secure independence, expertise, accountability and transparent election of supervisory bodies' members, criteria for these issues have to be pre-established by law etc. Otherwise, not only appointment and/or dismissal decisions regarding the PSM management may be unduly affected by certain interests, but the PSM governing bodies/persons execution of their tasks could also be at risk. EU State aid law requires that both the fulfilment of the remit content-wise and the adherence to the financial management obligations (spending) are subject to effective control.

Furthermore, with regards to Article 5 (4), this regulation must establish clear criteria in accordance with which Member States law must regulate the main aspects of such authorities/boards.

'Structured cooperation' Article 13

While we are generally supportive of increased alignment and better cooperation between national media authorities, the proposed coordination measures should not put in question the substantial rules on the applicable law for media services, following from the general country-of-origin principle, as laid out in both Directive 2000/31/EC and Directive 2010/13/EU for the protection of a single internal market for media services. The cooperation of the national media authorities within ERGA has not resulted in a more effective, consistent and/or uniform application of EU legislation in the media sector. The issue is not the lack of cooperation between national regulators but a lack of interstate agreements to mutually enforce another Member States' legal acts. National media regulators should cooperate closely to ensure strict compliance with the country-of-origin principle.

'Requests for enforcement of obligations by video-sharing platforms' Article 14

With the DSA, DMA and the revision of the AVMSD recently adopted, it is essential that the regulatory framework and enforcement set out in these respective texts are not undermined or confused by the new EMFA. This is particularly important with respect to the Country of Origin principle, which is a foundational principle of the internal market. With the European Board for Media Services (EBMS) replacing ERGA, care needs to be taken that this new body is not granted new powers that risks cutting across the Country of Origin principle or muddying enforcement responsibilities. In this way, legislators can safeguard necessary legal certainty for businesses operating cross-border.

'Guidance on media regulation matters' Article 15

We generally welcome the exchange among national regulatory authorities or bodies in order to achieve more harmonization between the different practices.

With regard to Art. 15 (2)(a) – appropriate prominence of audiovisual media services of general interest (as mentioned in Article 7a of the revised AVMSD (2018)), any such Commission guidelines must foremost ensure that Union law requirements, inter alia on the clarity and predictability of rules as well as on proportionality of measures are duly respected. This could be done by implementing safeguards as foreseen by Art. 114

EECC ("must-carry" obligation) together with the direction given in the respective jurisprudence of the CJEU.

Preferably, however, this should be implemented through an amendment of Art. 7a of the Directive 2010/13/EU as amended (AVMSD), which should address the deficiencies related to the inclusion of such "programmatic" norm, providing in practice no harmonizing effect to any Member State measure in this regard, and offering no sufficient safeguards against disproportionate obligations.

'Content of media service providers on very large online platforms Article 17

While we welcome the Commission's proposal on Article 17 that avoids a 'must-carry' regime, we believe that the criteria for media service providers to self-declare to benefit from Article 17 could benefit from clarification. In particular, it is unclear what constitutes "editorial independence from Member States and third countries" as well as what would constitute "a co-regulatory or self-regulatory mechanism governing editorial standards, widely recognised and accepted in the relevant media sector in one or more Member States."

The underlying objectives of the EMFA is to protect media independence and safeguard media pluralism. Who qualifies for media service provider (MSP) status is therefore a critical first step, requiring greater clarity to ensure that the advantages bestowed on MSP are not abused in any way, or potentially lead to proliferation of mis or disinformation online. We encourage lawmakers to improve legal certainty through a tighter definition of media services.

Furthermore, we would like to see some further clarification on the scope of Article 17. As it currently stands, this obligation would apply to all VLOPs, regardless if they allow the sharing of media content. This seems to be overly broad, and could cover travel booking, e-commerce, transportation and other platforms, which would complicate the implementation of the obligation.

'Right of customization of audiovisual media offer' Article 19

The proposed right of customization shows no direct or indirect causal link to this Draft Regulation's objectives, namely freedom and pluralism of the media. To the contrary, it represents a restriction to the freedom of expression, the freedom to provide services and the free movement of goods of service providers and manufacturers, as applicable, which is not justified. Given that presentation and ordering of media services accessible via devices/user interfaces represents editorial decisions, it represents a restriction of the rights of the providers as enshrined in Art. 11 of the Charter and Art. 10 of the European Convention on Human Rights. For this restriction, the preservation of a pluralistic media order cannot serve as a justification.

The second sentence of the first paragraph makes a reference to Article 7a of Directive 2010/13/EU. This exemption seems to indicate that prominence rules for specific public value content, as we know them for example in Germany in Sect. 84 par. 3-5 of the Interstate Treaty on the Media (*Medienstaatsvertrag*, MStV), could even withstand / override the active decision of a user for another order for the presentation of the media offer on the interface of his/her choice. While we understand the general approach to allow national regulations for prominence of specific content (although within clear limits), such proactive attempts to steer the free media choice of the end user have to end, when the user actively decides not to want this by individually changing the appearance / order of media services on the user interface. Any rule that would prohibit the user from such changes and force the user to continuously be exposed to certain media offerings, although she/he decided not to be interested in them, would be a too paternalistic approach and incompatible with the user's media freedom. This is the same approach that the German regulation, as one of the very few Member States that have used the opportunity to introduce regulation based on Art. 7a of Directive 2010/13/EU as amended in 2018, took, when it clearly stated in Sect. 84 par. 6 that – notwithstanding the prior rules on public value prominence – any pre-installed order of media services needs to be amendable for the end user according to his/her choice. This clearly includes any positive discrimination of specific media offerings by regulation, which the user must be able to actively override. To this end, the reference in sentence 2 of par. 1 should be deleted.

It should be clearly borne in mind that prominence rules for existing AVMS services always present a hindrance to new market-entrants or new offers of existing service providers which contrasts the public policy objective of a pluralistic and diverse media offering available to the users.

With regards to Article 19 (2) the principle of proportionality is not met because it does not take into account (i) whether the device/user interface is technically apt to offer such functionality and (ii) whether such functionality's implementation would be disproportional to the economic and operational capabilities of the provider. Furthermore, (iii) it lacks an indication of an appropriate timespan for implementation, taking into account the necessary delays in developing, producing/having produced, and bringing to the market of related equipment/software

In addition to this, it is of importance to clarify the difference between paragraph 1 and 2, especially in terms of implementation timelines. Article 28 of the proposal concerns the entry into force and application. Paragraph 1 of Article 19 would apply 3 months after entry into force, while paragraph 2 would apply 48 months after entry into force. Given the very similar rights being granted to users, and the accompanying obligations on manufacturers and service providers, it would be better if both paragraphs had the longer implementation timeframe.

Moreover, reading Article 19 in conjunction with recital 37, a further question arises: are recommendations for customers no longer possible, if that results in the preferential treatment of certain content? Further clarification is also needed with regard to the timelines of implementation, especially the difference between paragraph 1 and 2.

'Assessment of media market concentration' Article 21

Article 21 requires member states to implement a special review of media market concentrations without providing a minimum of guidance on thresholds and substantive criteria for the assessment. This will result in additional layers of regulatory review for transactions in the internal market without evidence that the current media concentration review is insufficient. The proposed guidance by the Board will not be sufficient to avoid a diverse and even contradictory set of member state review proceedings based on undefined vague criteria such as pluralism and editorial independence. The unpredictability of the outcome will likely discourage cross border transactions in the internal market.

'Allocation of state advertising' Article 24

Undertakings following economic purposes and having the State/authorities among its shareholders (e.g. minority shares, no specific voting rights or other forms of dominating influence) are dependent, as any other market participant, on the media to convey promotional messages. Such messages will, in the majority of cases, have as their objective to inform consumers about products and services of these enterprises. Partly, such messages could not focus on particular products/services but inform on general issues, such as in the field of economic, social governance (ESG).

It must therefore be ensured that such advertorial activities are not covered *per se* by Article 24(2). This provision aims at preventing that advertising spend is used to further political goals, i.e. to foster or expand the political power, by using public financial means that political actors which are not part of the ruling government do not (currently) dispose of. The German Federal Constitutional Court (*Bundesverfassungsgericht*) has clarified such concept of undue levels of political influence in its 2014 judgement on the Inter-State Treaty on *Zweites Deutsches Fernsehen* (the second and nation-wide public service TV broadcaster), when it came to delineating the "State sphere" whose members may principally be represented in the governing bodies of public service media, but the number of which must not exceed a threshold of one-third in its bodies and/or committees (BVerfG, judgement of 25 March 2014, cases 1 BvF 1/11 and 1 BvF 4/11, paras 41 et seq., 57 et seq. [59]). In this respect, the *Bundesverfassungsgericht* characterised such persons attributable to the **State sphere** by inter alia referring to their exercise of state-political decision-making powers and their specific perspective of competing for office and mandate. If such criteria are not present in view of the undertakings advertising activities, those should not be covered by Art. 24(2) draft EMFA.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.

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