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COMMENT

What can a media privilege look like? Unpacking three versions in the EMFA

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ABSTRACT
The media privilege has been one of the most controversial aspects of the proposed European Media Freedom Act (EMFA). However, it is important not to assess the drawbacks of the media privilege in isolation, but in relation to the other available alternatives. In this comment, we lay out and critique how the European Parliament and Council build on the Commission's proposal for a media privilege in the EMFA. We focus on three key questions: how is media content treated differently, who qualifies as media, and who decides who qualifies as media?

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KEYWORDS EMFA; media privilege; platforms; content moderation

Introduction

The term 'media privilege' in platform governance literature is shorthand for legislative proposals that require platforms to take a more hands-off approach to moderating the content of media organisations. The main argument behind such provisions is that media companies are already subject to editorial responsibility requirements, and are expected to produce trustworthy content that fulfils an important role in the public debate. Having platforms use their gatekeeping power to remove or demote this content because it does not align with their terms of service limits media freedom, as well as users' access to quality journalism.[1]

The need to safeguard media freedom and access to quality content on platforms is fairly uncontroversial. However, using a media privilege to

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[1]Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU' COM(2022) 457 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0457> (EMFA Commission Position) recital 31–32; 'European Media Freedom Act: Protect Media to Preserve Democracy' (EBU 2023) <https://www.ebu.ch/files/live/sites/ebu/files/News/Position_Papers/open/2023/20230118-EBU-position-EMFA.pdf> accessed 9 November 2023; Charis Papaevangelou, '"The Non-Interference Principle": Debating Online Platforms' Treatment of Editorial Content in the European Union's Digital Services Act' (2023) 38 European Journal of Communication 466 <https://doi.org/10.1177/02673231231189036> accessed 9 November 2023.

attain these goals raises a host of contentious questions and potential unintended side-effects. For example, how exactly should platforms' moderation of media content be limited, and (how) can this be done without hampering platforms' efforts to fight disinformation and other harmful content? Which media organisations should be given special privileges? And which actor(s) should decide which media organisations are given special privileges?

There are no clear, unproblematic answers to these questions. Rather, the answers require normative choices between the interests of the media and users, while creating safeguards that limit the potential for media companies, platforms, or states to abuse the media privileges. The Commission, Council, and European Parliament have now put forward different concrete ways to regulate the media privilege in Article 17 of the European Media Freedom Act (EMFA), each opting for (slightly) different privileges and safeguards.[2] Below, we will compare and critique these positions, focusing on the key questions of (1) what the media privilege is, (2) which media organisations qualify for it, and (3) who determines which organisations qualify.

What differentiated treatment does the media privilege require?

Table 1. Overview of the Commission's, Council's, and European Parliament's positions on the content of the media privilege.

	Commission	Council	European Parliament
Type of moderation covered	Covers decisions to suspend platform services for media content that violates the ToS.	Covers decisions to suspend platform services for, or restrict the visibility of, media organisations' content that violates the ToS.	Covers decisions to suspend or restrict platform services for media services that violate the ToS.
Rights provided	Platforms must provide a statement of reasons prior to their decision.	Platforms must provide a statement of reasons prior to their decision, and give the media organisation an	Platforms must provide a statement of reasons prior to their decision, and give the media organisation 24 h to

(*Continued*)

[2]Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU – Mandate for negotiations with the European Parliament', 2022/0277(COD), <https://data.consilium.europa.eu/doc/document/ST-10954-2023-INIT/en/pdf> (EMFA Council Position); European Parliament, 'Amendments adopted by the European Parliament on 3 October 2023 on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU', P9_TA(2023)0336, <https://www.europarl.europa.eu/doceo/document/TA-9-2023-0336_EN.html> (EMFA Parliament Position).

Table 1. Continued.

	Commission	Council	European Parliament
		appropriate period to respond before the decision takes effect.	respond before the decision takes effect.
	Platforms must address media organisations' complaints with priority and without undue delay.	Platforms must address media organisations' complaints with priority and without undue delay.	Platforms must address media organisations' complaints with priority and within 24 h. If platforms find a violation, they may refer the case to the regulator of the editorial responsibility code the media organisation falls under.
	Platforms must engage in a dialogue if a media organisation believes their content is frequently moderated without sufficient grounds. The outcome may be reported to the European Board for Media Services ('the Board').	Platforms must engage in a dialogue if a media organisation believes its content is frequently moderated without sufficient grounds. The outcome may be reported to the Board, and the media organisation may resort to mediation under art. 12 P2B Regulation.	Platforms must engage in a consultation if a media organisation believes its content is frequently moderated without sufficient grounds in a way that undermines media freedom and pluralism. The outcome may be reported to the Board, and the media organisation may lodge a complaint under art. 21 DSA.

The Commission's initial proposal for a media privilege required very large online platforms (hereafter: platforms) to inform media organisations prior to suspending their services for content infringing the Terms of Service (ToS) through a statement of reasons, and to enter into an amicable dialogue when media organisations felt platforms had too often moderated their content without justification. This approach was criticised both for affording the media a special position, yet at the same time granting them little actual additional protection – platforms would simply be able to inform the media organisation a minute before removing their content.[3] The Council and in particular the European Parliament strengthen the protection media organisations are afforded (Table 1).

Scope of the media privilege

The major change in the foreseen relationship between platforms and media organisations concerns the time media organisations have to respond to the

[3]Natali Helberger and others, 'Expert Opinion on Draft European Media Freedom Act for Stakeholder Meeting 28 February 2023 – DSA Observatory' (29 March 2023) <https://dsa-observatory.eu/2023/03/29/expert-opinion-on-draft-european-media-freedom-act-for-stakeholder-meeting-28-february-2023/> accessed 9 November 2023.

statement of reasons. The European Parliament requires that media organisations are given the opportunity to respond to the statement of reasons 'within 24 h prior to the suspension or restriction taking effect', while the Council requires they have an 'appropriate period' to respond.[4]

Requiring that media content stays available until media organisations have been given time to respond to a moderation decision is a highly significant change. It supports both the media's societal role (as news is most relevant shortly after it is published) and financial interests (for platforms that show more recent news to more users). During the negotiations on the DSA, it was pointed out that requiring that content stays available is similarly attractive to actors that might abuse the media privilege to post disinformation or other harmful content.[5] The Commission's EMFA proposal addressed these concerns by stating Article 17 does not cover content that contributes to systemic risks (which the Commission heavily argues covers disinformation).[6]

The Council and European Parliament instead state the media privilege is without prejudice to systemic risk mitigating measures under the DSA. This may slightly expand the scope of the exception, as platforms would only have to argue the measure affecting media organisations' content is part of their efforts to mitigate systemic risks, and not that the specific content contributes to systemic risks. It should be noted, moreover, that systemic risks not only include disinformation, but cover a wide range of 'negative' effects on for example 'public security', 'civic discourse', and a host of fundamental rights. The broad scope of the systemic risks carveout may therefore give platforms an opportunity to argue many of the ToS they apply to media content aim to mitigate systemic risks, and therefore do not fall under the media privilege.

The Commission's proposal also only applied to cases in which platforms suspended their services. In contrast, the new media privilege would also apply when platforms *restrict* their services (EP) or restrict the *visibility* of content (Council). 'Suspension' and 'restriction' are terms used in the P2B Regulation which, while not explicitly defined,[7] likely cover measures such as removal and delisting (for suspension) and demotion (for restriction).

[4]EMFA European Parliament Proposal art 17(2); EMFA Council Position art. 17(2).

[5]'Policy Statement on Article 17 of the Proposed European Media Freedom Act' *EU DisinfoLab* (January 2023), <https://www.disinfo.eu/advocacy/policy-statement-on-article-17-of-the-proposed-european-media-freedom-act/> accessed 9 November 2023.

[6]European Commission Directorate-General for Communications Networks, Content and Technology, *Digital Services Act: Application of the Risk Management Framework to Russian Disinformation Campaigns* (Publications Office of the European Union 2023) <https://data.europa.eu/doi/10.2759/764631> accessed 4 November 2023; 'The Commission Sends Request for Information to X under DSA' (*European Commission*, 12 October 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4953>.

[7]Doris Buijs, 'Article 17 Media Freedom Act & the Digital Services Act: Aligned or Alienated?' *DSA Observatory* (25 November 2022) <https://dsa-observatory.eu/2022/11/25/article-17-media-freedom-act-the-digital-services-act-aligned-or-alienated/> accessed 9 November 2023.

Including demotion is important, as it is a measure platforms commonly employ against content that they view as undesirable, but which is not so harmful that it needs to be removed.[8] This choice would therefore significantly broaden the scope of the media privilege to include measures to address lawful but harmful content. It should be noted, however, Article 17 only covers moderation decisions in relation to a media service (EP) or for content provided by a media organisation (Commission, Council). Platform measures that harm all media providers equally, such as decisions to show news less prominently or remove news from a platform altogether, are in all likelihood not covered by Article 17.[9]

How do platforms have to act on media organisations' objection to moderation?

Apart from the benefits of having content stay up until media organisations have had the time to respond, the actual benefit for media organisations of a right to respond depends on what platforms are required to do based on media organisations' reply. After all, in case platforms can put media organisations' responses aside without any effects, such a 'right to a response' would remain quite superficial and merely symbolic. So, what happens after the response?

The Council and Commission require platforms to process media organisations' complaints more quickly, but ultimately leave platforms free to decide whether to remove or demote media organisations' content. The European Parliament goes a (small) step further. It states that if a platform still wishes to remove or restrict the content after considering the media organisation's reply, it 'may' refer the 'case' to the national regulatory authority or supervisor of the self/co-regulatory editorial responsibility mechanism to which the media organisation is subject. This authority will then decide whether the platform's restriction is 'justified' in view of the specific clause in the terms and conditions, 'while taking into account fundamental freedoms'. In short, platforms are given the option to escalate the conflict to regulators.

This construction is the closest legislators can come to imposing some regulatory oversight over the content that platforms should allow on their service, while still leaving platforms free to ultimately decide what they remove. This threatens to exacerbate the issues with privatised fundamental

[8]Paddy Leerssen, 'An End to Shadow Banning? Transparency Rights in the Digital Services Act between Content Moderation and Curation' (2023) 48 Computer Law & Security Review 105790 <https://www.sciencedirect.com/science/article/pii/S0267364923000018> accessed 9 November 2023.

[9]Mike Isaac, Katie Robertson and Nico Grant, 'Silicon Valley Ditches News, Shaking an Unstable Industry' *The New York Times* (19 October 2023) <https://www.nytimes.com/2023/10/19/technology/news-social-media-traffic.html> accessed 9 November 2023.

rights governance to new levels: rather than platforms applying rules set by legislators, regulators now have to apply the rules created by platforms to cases selected by platforms.[10] This affords platforms a powerful tool to shape the agenda and decision-making practice of regulators. Platforms may, for example, only refer those cases in which the facts support a restrictive application of their terms of service. Alternatively, platforms may only invite review of those ToS they know are in compliance with freedom of expression standards. The provision thereby potentially further legitimises privatised fundamental rights governance.

Which media organisations qualify for the media privilege?

Table 2. Overview of the Commission's, Council's, and European Parliament's positions on the criteria media organisations have to comply with to qualify for the media privilege.

	Commission	Council	European Parliament
Media organisation	Media service provider.	Media service provider. Complies with the EMFA's obligations on ownership transparency.	Media service provider. Complies with the EMFA's obligations on ownership transparency. Discloses contact details of its managing director.
Independence	Independent from the state.	Independent from the state.	Independent from the state, political parties, and EU. Functionally independent from private entities that are not media.
Responsibility	Subject to editorial responsibility (self/co-) regulation.	Subject to editorial responsibility (self/co-) regulation, and discloses the contact details of the regulator.	Subject to editorial responsibility (self/co-) regulation, and discloses the contact details of the regulator. Does not provide AI-generated content without human oversight and editorial control.

Granting the media special rights forces legislators to confront the highly sensitive question of which organisations deserve such rights.[11] The EMFA as a whole faced criticism for its focus on media service providers, which

[10]Max van Drunen, Natali Helberger and Ronan Fahy, 'The Platform-Media Relationship in the European Media Freedom Act' *Verfassungsblog* (13 February 2023) <https://verfassungsblog.de/emfa-platforms/> accessed 9 November 2023.

[11]This of course is not an issue that is exclusive to the media privilege. Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Hart Publishing 2020); Damian Tambini, *Media Freedom* (John Wiley & Sons 2021); Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) <https://ebooks.cambridge.org/ref/id/CBO9781316162736> accessed 21 May 2019.

arguably only includes professional media organisations, rather than freelance journalists.[12] The European Parliament responded to this criticism by amending the definition of 'media service provider' to include 'standard and non-standard form[s] of employment'. In the recitals, the European Parliament clarifies this also includes, for instance, bloggers.[13] This change in turn widens the scope of the media privilege, and may extend it to individual journalist accounts and other media actors, which is consistent with human rights standards.[14]

However, the Commission already clarified that simply being a media service provider was not enough; organisations must also be responsible and independent from the state. The Council and particularly the European Parliament expand these requirements. This raises two issues. First, it further narrows the type of media organisations that 'deserve' the media privilege, and second, it makes it increasingly difficult to assess whether media organisations comply with these new, undefined criteria (Table 2).

From whom do media organisations have to be independent?

While the Commission and Council's positions mention media services needing to be 'editorially independent' from 'Member States and third countries', the European Parliament's position adds that media need to be independent from any EU institutions or agencies, 'political parties', and are 'functionally independent' from 'private entities' whose corporate purpose is not related to 'creation or dissemination of media services'.[15] This further narrows the type of media that can benefit from Article 17 EMFA. It also requires platforms to make even more difficult and complicated assessments of media organisations' independence. Including a criterion requiring media to be 'editorially independent' from the EU would raise questions over news outlets that receive EU funding, and notably, YouTube prominently labels Euronews's channel as 'funded in whole or in part by the European Union'.[16] Relying on this assessment to disqualify Euronews from the media privilege would be incompatible with human rights standards, however. The ECtHR has emphasised that even where a broadcaster is 'largely dependent on public resources for the financing of

[12]Theresa Seipp, Ronan Ó Fathaigh and Max van Drunen, 'Defining the "Media" in Europe: Pitfalls of the Proposed European Media Freedom Act' (2023) 15 Journal of Media Law 39 <https://doi.org/10.1080/17577632.2023.2240998> accessed 9 November 2023; Joan Barata, 'Protecting Media Content on Social Media Platforms: The European Media Freedom Act's Biased Approach' *Verfassungsblog* (25 November 2022) <https://verfassungsblog.de/emfa-dsa/> accessed 9 November 2023.
[13]EMFA European Parliament Position recital 16, art 2(2).
[14]Seipp, Ó Fathaigh and van Drunen (n 12).
[15]EMFA Commission position art 17(1); EMFA European Parliament position art 17(1).
[16]Euronews English Live (*Euronews*, 2023) <https://www.youtube.com/watch?v=pykpO5kQJ98> accessed 9 November 2023.

its activities', this is 'not considered to be a decisive criterion' for independence.[17]

Further, the idea that because a media outlet is not independent of a political party it should lose its Article 17 media status would also be quite controversial as a matter of principle. EU member states diverge significantly on this question.[18] Some member states allow political parties to have broadcasting licences, or run newspapers, while in other member states, there is an explicit prohibition on political parties owning a television station. For example, in Malta, the two main political parties have their own television stations; while in Germany, some political parties are shareholders of newspapers, but prohibited from holding broadcast licences.[19]

Finally, seeking to ensure media outlets are functionally independent from 'private entities' is a laudable goal in terms of trying to insulate editorial freedom from interference by powerful private actors. However, making it a requirement on media outlets to demonstrate functional independence from private entities arguably goes a lot further than current media regulation. Media regulation generally imposes rules relating to private entities under transparency of media ownership frameworks, or media concentration frameworks. However, with the exception of public service media, it does not require media organisations to be independent from private entities to be considered media. And apart from this principle-based point, assessing media organisations' compliance with this criterion could prove problematic in practice, especially when applied to not just broadcast media, but online and print media. For example, is a media organisation 'structurally independent' from organisations that are not media if it receives funding from private philanthropic entities, or relies on a platform for most of its traffic? These assessments are hard to make in practice, and carry important normative implications. By adding, but not defining, broad criteria with which media organisations have to comply to qualify for Article 17, legislators create a danger that the media privilege is applied in ways that are arbitrary, discriminatory, or not in line with freedom of expression standards.

[17] *Croatian Radio-Television v Croatia* [2023] ECtHR 52132/19.

[18] 'Media Pluralism in the Member States of the European Union' (Commission 2007) <https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf> accessed 9 November 2023.

[19] Francisco R Cádima, Carla Baptista, Marisa Torres Da Silva and Patrícia Abreu, *Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia & Turkey in the Year 2021: Country Report: Germany* (European University Institute 2022) <https://data.europa.eu/doi/10.2870/765008> accessed 9 November 2023; Louiselle Vassallo, *Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, Republic of North Macedonia, Serbia & Turkey in the Year 2022: Country Report: Malta* (European University Institute 2022) <https://data.europa.eu/doi/10.2870/32312> accessed 9 November 2023.

Artificial intelligence

The European Parliament additionally proposed that media organisations must declare 'that they do not provide content generated by an artificial intelligence system without subjecting such content to human oversight and editorial control'.[20] Likely (the recitals offer no further explanation) this criterion is intended to ensure platforms are not prevented from acting against a barrage of low quality, auto-generated content. For this, at least, the AI criterion may be effective. If a small organisation published ten articles a second, it cannot reasonably be said to exercise oversight or control. It is questionable, however, how effective it will be for cases that are not this clear-cut. There is no reliable way to detect artificially generated text. Moreover, as with all criteria in Article 17, it is very difficult for platforms to assess whether media companies exercise human oversight and editorial control over artificially generated content, especially because the European Parliament has not specified what 'human oversight and editorial control' mean in this context.

More fundamentally, the AI criterion also further narrows which media are 'good' enough to qualify for special privileges in response to current controversies regarding the use of AI in media. Recall that Article 17 already only applies to independent and responsible media organisations. To have any added value, the AI criterion would therefore have to capture media organisations that are editorially responsible and independent, but still should not qualify for the media privilege. This is an important shift. It moves decisions about how news should be produced away from editorial responsibility and (self-)regulation, and to the EMFA itself. Article 17 thereby pre-empts an important discussion currently taking place in newsrooms, journalistic ethics bodies, and media regulators about the oversight media organisations should exercise over AI.[21] That problem is exacerbated by the fact media companies cannot simply choose not to upload AI-generated content to platforms; under the current phrasing, the AI criterion does not distinguish between media organisations' behaviour on- or off-platform, and simply requires them to make a blanket declaration they do not use AI without human oversight. This expansion of Article 17's scope to lawful media conduct off-platform is a worrying restriction on media organisations' freedom to determine what technology they use (Table 3).[22]

[20]EMFA European Parliament Position art 17(1).

[21]Hannes Cools, 'Towards Guidelines for Guidelines on the Use of Generative AI in Newsrooms' *Medium* (10 July 2023) <https://generative-ai-newsroom.com/towards-guidelines-for-guidelines-on-the-use-of-generative-ai-in-newsrooms-55b0c2c1d960> accessed 11 August 2023.

[22]Natali Helberger and others, 'A Freedom of Expression Perspective on AI in the Media' (2020) 11 European Journal of Law and Technology <https://ejlt.org/index.php/ejlt/article/view/752> accessed 23 February 2021.

Who decides which media organisations qualify for the media privilege?

Table 3. Overview of the Commission's, Council's, and European Parliament's positions on which actors decide which media organisations qualify for the media privilege.

	Commission	Council	European Parliament
Who decides who is media	Platforms.	Platforms. However, platforms may seek the advice of national authorities and must engage in voluntary mediation if they reject an application. Civil society and national authorities could also review applications.	Platforms initially, national authorities if platforms ask for their advice or media organisations appeal.
Transparency	Platforms must annually publish how often they restricted or suspended media content, and the grounds for such restrictions.	Platforms must annually publish how often they restricted or suspended media content, and the grounds for such restrictions. Platforms must annually publish the number of dialogues media companies initiated due to frequent moderation of their content.	Platforms must annually publish how often they restricted or suspended media content, and the grounds for such restrictions. Platforms must ensure all information in submitted declarations is publicly accessible, except for the media director's contact details. They must annually publish how often and on which grounds they refused to accept a media provider.

The Commission, Council, and European Parliament all propose to require platforms to establish 'a functionality on their online interface' that allows media organisations to declare they meet the requirements for the media privilege.[23] The Commission's initial proposal stopped there, leaving platforms considerable discretion to evaluate a declaration. The Council largely retains this flexibility, though it does state the Commission can lay down guidelines on the involvement of civil society and national regulatory authorities in reviewing these declarations.[24] It also shares the European Parliament's position that platforms should ask self- or co-regulatory bodies that oversee editorial responsibility mechanisms to advise platforms in cases of 'reasonable doubt' about a media organisation's compliance with the editorial responsibility mechanism.

[23]EMFA Commission, Council, European Parliament Position art 17(1).
[24]EMFA Council Position rec. 33, art 17(6).

The European Parliament significantly expands the procedure that will determine which organisations qualify for the media privilege (Table 3). The procedure (which the Commission can concretise through guidelines issued 'in consultation with the Board'[25]) would look as follows:

- Step 1: platforms provide an online interface for media organisations.[26]
- Step 2: media start submitting self-declaration requests to platforms.
- Step 3: platforms have to issue an immediate acknowledgment of a request.[27]
- Step 4: if platforms accept a request, the media organisation is considered a 'recognised media service provider'.[28] If platforms:

  ○ have reasonable doubts about whether the media organisation is subject to or complies with an editorial responsibility mechanism, they may request the regulatory authority to confirm or invalidate the declaration;[29]

  ○ invalidate the request, a media organisation can seek clarification from the competent regulatory authority.[30] If platforms still reject the declaration, the media organisation can appeal the decision with the competent regulatory authority, after which the Board makes a recommendation and the authority makes a swift and final decision regarding the media organisation's status.
- Step 5: if platforms frequently suspend or restrict a media organisation's content for violating the ToS, they can 'invalidate' the declaration of that media organisation.[31] The media organisation may seek recourse through relevant regulatory bodies, returning to 'Step 4'.

Additionally, the European Parliament's version is more explicit regarding the role standardisation bodies can play in providing machine-readable standards[32] on which platforms can rely to assess whether media organisations comply with the conditions for Article 17. The Council and the Commission both referred to the possibility that platforms rely on the standards of the Journalism Trust Initiative (JTI), developed by Reporters sans Frontières under the aegis of the European Committee for Standardisation (CEN).[33] The European Parliament now more explicitly notes that 'Certification to ISO standards for professional and ethical journalism, such as

[25]EMFA European Parliament Position art 17(6).
[26]EMFA European Parliament Position art 17(1).
[27]EMFA European Parliament Position art. 17(1b).
[28]EMFA European Parliament Position art 17(1b).
[29]EMFA European Parliament Position art 17(1c); EMFA Council Position art 17(1c).
[30]EMFA European Parliament Position art 17(1d).
[31]EMFA European Parliament Position art 17(1e).
[32]EMFA European Parliament Position rec 33.
[33]'CEN Workshop Agreement Journalism Trust Initiative' (European Committee for Standardisation 2019) CWA 17493 <https://www.cencenelec.eu/media/CEN-CENELEC/CWAs/ICT/cwa17493.pdf> accessed 9 November 2023.

the Journalism Trust Initiative could serve as a benchmark' for compliance with professional and ethical standards.[34]

Platforms or (self-)regulatory authorities

The European Parliament's proposal puts in place more safeguards regarding platform power than the other two versions by trying to strike a balance between self- and co-regulation (e.g. a platform has to go through a process when rejecting a declaration). The extent to which these safeguards solve the issues with the media privilege is inherently limited. There are concerns that the media privilege exacerbates the media's dependence on platforms. This leads, then, to the need of assessing which media are sufficiently independent and responsible to qualify for the privilege. Yet, we reckon that these concerns are rooted in the decision on whether to regulate a media privilege at all.[35]

The more narrow problem addressed by the safeguards the European Parliament proposes is that platforms lack the legitimacy and knowledge to determine who is, and is not, media. It does so by empowering standardisation bodies to provide standards on which platforms rely to assess media organisations (JTI), allowing platforms to refer a decision to editorial responsibility regulators when they have reasonable doubts, and allowing media authorities to make the final call when a media organisation disagrees with a platform's decision. These are the actors that have traditionally overseen the media; in that sense, it is logical for them to also fulfil this role under Article 17. Reliance on relevant competent self-regulatory bodies is also in line with journalism's tradition of self-regulation. This could be, then, a positive step towards achieving a more just distribution of responsible governance.

However, delegating the power to determine which organisations qualify for the media privilege to (self-)regulatory authorities also makes them prime capture subjects for Member States and other stakeholders seeking to influence the way Article 17 is implemented.[36] It is telling, and positive in that regard, that the European Parliament emphasised the need for such regulators' independence, and included assessing the 'independence of the national regulatory authorities or bodies' in the Commission's monitoring exercise.[37] Enforcement of these general requirements is a key condition for the functioning of Article 17. Otherwise, regulators may use Article 17

[34]EMFA European Parliament Position rec 33.
[35]These also get to broader questions about whether the media should have special rights in the first place.
[36]Anna Wójcik, 'EMFA and Its Uphill Battle for Media Freedom and Democracy in the EU' *Verfassungsblog* (14 June 2023) <https://verfassungsblog.de/emfa-and-its-uphill-battle-for-media-freedom-and-democracy-in-the-eu/> accessed 9 November 2023.
[37]EMFA European Parliament Position art 7(2a), 25(3cd).

to undermine media freedom by selectively granting its protections to certain media organisations over others. Additionally, these requirements should arguably be extended to self-regulatory or standardisation bodies such as the JTI which (depending on how much platforms rely on their work) may in practice play a powerful role in determining which organisations easily qualify for the media privilege. It is regrettable in that context that the EMFA proposal does not offer guidelines on the JTI's integration in the self-declaration process nor how its role should be scrutinised.

Paradoxically, platforms may play an important role in mitigating the danger posed by captured (self-)regulatory authorities. The procedure the European Parliament proposes only allows regulators to get involved if the platform rejects the application or has reasonable doubts regarding a media service provider's independence. This reaffirms platforms as custodians of our information ecosystem, despite the misalignment of their values with those of the public interest. Additionally, by not establishing a possibility for actors to contest platforms' acceptance of a media organisation's declaration, the European Parliament creates a structural advantage for media organisations to qualify for the media privilege.

The role of civil society and transparency

The Council foresees that the Commission can issue guidelines on Article 17 which include 'modalities of involvement of civil society organisations and, where relevant, national regulatory authorities or bodies in the review of the declarations'.[38] The Commission and European Parliament merely refer to the possibility that civil society is involved in the review of declarations in Recital 33, though the European Parliament does additionally propose that an expert group, including media experts, journalists, academics, and representatives from civil society, could be constituted to advise and consult the Board on the implementation of the EMFA.[39]

The integration of civil society into the implementation and monitoring of the EMFA brings both potential advantages and pitfalls. Benefits such as enhanced pluralism, representation of public interest, and cooperative responsibility can be realised through this multi-stakeholder approach in favour of the public interest. However, these advantages could be undermined by various risks. For example, as in most cases, under-resourced civil society organisations may lack the capacity to effectively participate in the processes outlined in the proposals, creating a false sense of legitimacy. Moreover, there is a potential for regulatory capture by better-equipped organisations or those with existing ties to media and platforms, thereby

[38]EMFA Council Position art 17(6).
[39]EMFA European Parliament Position rec 22–23, art 11.

monopolising the civil society space in these decision-making processes. Also, the elevated role of civil society in platform regulation could make these organisations targets for further silencing attacks (i.e. SLAPPs) by private entities and, even, member-states.[40]

Beyond directly involving civil society in the review of media organisations' declarations, transparency and clearer guidelines are key conditions for public scrutiny of who decides which organisations (fail to) qualify for the media privilege, who makes these decisions, and why. Such transparency is especially important because, as we argue above, the concrete shape of the media privilege is highly dependent on how open norms such as media companies' independence or use of human oversight over AI are operationalised.

The European Parliament and Council both take important steps in this context by increasing the transparency of the implementation of the media privilege. The European Parliament focuses on making (platforms' decisions on) media organisations' initial declaration more transparent, while the Council requires platforms to be more transparent about the dialogues media organisations initiate after platforms repeatedly moderate their content. Both elements are important to ensure the implementation of the media privilege is open to scrutiny. However, many actors and decisions remain opaque. These include, for example, when platforms ask for the advice of self-regulatory authorities (and what advice they provide), or how often platforms relied on standards provided by the JTI.

Conclusion

The European Parliament and Council imbue Article 17 with actual power. Whereas the Commission gave media organisations the right to be informed a second before their content was taken down, the European Parliament and Council require that platforms not remove or restrict the visibility of content until media organisations have had time (24 h for the European Parliament, or an 'appropriate period' for the Council) to object. This raises the stakes considerably. It increases the power of qualifying media organisations (whose responsible or potentially harmful content will stay up for a longer period of time), and by extension, the power of the actors that decide which media organisations qualify.

These two questions (which media organisations quality, and which actors decide which organisations qualify) are intertwined. The Commission, Council, and especially European Parliament versions show legislators' desire to require media organisations' independence and responsibility.

[40] Justin Borg-Barthet, Benedetta Lobina and Magdalena Zabrocka, 'The Use of SLAPPs to Silence Journalists, NGOs and Civil Society' (European Parliament 2021) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)694782>.

However, much remains unclear about what these criteria should mean in practice. This ambiguity can be reduced. For example, the Council of Europe and the ECtHR have laid out extensive, widely accepted standards on editorial independence. Referring to these standards would allow the EU to indicate how the broad criteria it lays out should be concretised in line with existing freedom of expression standards.

Nevertheless, the extent to which the criteria for qualifying media organisations can be specified within the EMFA itself is limited. Given the many normative choices that will still have to be made in the operationalisation of the media privilege, it is key that the process through which media organisations' applications are reviewed is regulated clearly. Though the European Parliament lays out the most extensive procedure, all versions of the EMFA are somewhat vague on this point. In particular, the role of organisations that play a supporting role, such as civil society that reviews applications or standardisation bodies such as the JTI that may provide information to platforms, remains unclear. In practice, however, such organisations may have considerable influence if platforms rely heavily on their input in order to save themselves the expense and controversies of deciding directly which media organisations qualify. In short, it is key that the role of all actors that operationalise the media privilege is clearly defined, given the important normative decisions that still need to be made in this process.

In addition, transparency is required for the public to be able to scrutinise the operationalisation of the media privilege. This is all the more important because of the conceptual ambiguity of many of the criteria of the media privilege. Here the European Parliament focuses on the beginning of the process (by making the declarations and platforms decisions on them transparent), while the Council focuses on the end (by requiring platforms to publish how often media companies initiate a dialogue with platforms that too often moderate their content). Both are important; what remains lacking is clear standards on the specificity of the information that is provided, as well as transparency on the role of (self-)regulatory authorities and standardisation bodies. Such transparency is necessary to ensure the privilege and the actors operationalising it are fully subject to public oversight.

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