

[DE] State media authorities publish opinion on proposed European Media Freedom Act

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On 13 December 2022, the German *Landesmedienanstalten* (state media authorities) published a joint position paper on the European Commission's proposal for a Regulation establishing the European Media Freedom Act (EMFA). They welcomed the proposal and its general aim to take into account the fundamental values of the European Union in the media sector and protect media freedom and independence. Nevertheless, the media authorities had serious concerns about the lack of independence and freedom to make decisions for the proposed European Board for Media Services and the low level of differentiation between providers from member and non-member states.

The state media authorities believe that the choice of the EU's internal market competence, as the legal basis of the proposed regulation, appears construed and risks further transferring areas of competence, originally assigned to the member states, to the EU. They agree with the criticism contained in the opinion published by the *Bundesrat* (Federal Council) on 25 November 2022 concerning the choice of legal basis, but at the same time call for a constructive debate on the creation of a target-oriented EMFA that meets the aforementioned general aims.

The media authorities welcome the European Commission's initiative to draw on the work of the European Regulators Group for Audiovisual Media Services (ERGA), as well as its clear commitment to the independence of the national media authorities and the Board, and their separation from the state. However, the procedural structures described later in the proposal contradict this basic principle, since the European Commission is repeatedly given powers to intervene and its approval is often required. This applies to all relevant procedures described in Articles 12 to 21 and goes against the independence requirements. The media authorities recommend, firstly, removing any requirement for Commission approval from the relevant articles and, secondly, that the Board should be able to act under its own initiative at any time, as well as at the Commission's request.

The media authorities also welcome the European Commission's apparent attempt, in Article 16 of the EMFA proposal, to respond to the difficulties of enforcing rules against providers in non-member states that use questionable practices to influence the formation of public opinion within the EU. However, they do not consider this provision, in its current form, to be suitable to achieve this

objective: firstly, by referring to providers “established” outside the Union, it does not provide an adequate, legally secure distinction from the procedures of the Audiovisual Media Services Directive (AVMSD), which also apply to satellite distribution via a satellite of an EU member state. The measures provided for in Article 16 therefore do not rectify the shortcomings of the AVMSD procedures in relation to cross-border enforcement. In order to improve this situation, Article 16 would need to be worded in such a way that, where a serious infringement occurred, a regulatory authority in the destination country would, on the basis of a vote by an ad hoc group of the Board, be able to ask the regulator in the country of origin to take action against the provider concerned. Secondly, under Article 16, situations occurring completely outside the EU single market would automatically be dealt with by the Board, even though, in the absence of a country of origin, such measures would be the responsibility of each member state and would not, therefore, have a European dimension *per se*. The Board should only intervene if the case or the action of a national regulatory body has a cross-border, European element and if an ad hoc group of the Board asks the Board to act.

Several provisions of the proposal mention the Commission’s power to issue guidelines. For example, it can draw up guidelines with respect to national criteria for market concentration mechanisms. The state media authorities consider that the Commission’s competence to issue guidelines, enshrined in Article 15(2)(a) of the proposal, is particularly questionable since Article 7a of the AVMSD gives member states a high degree of flexibility in taking measures to give prominence to content of general interest. Since a service that serves the public interest must be tailored to national specificities, the flexibility of the norm makes sense in view of the regulatory purpose in question. In the media authorities’ opinion, existing national measures to give prominence to content of general interest should not be thwarted by the European Commission’s statutory competence.

In Article 17, the proposal reopens a debate relevant to the consultations on the Digital Services Act. In their position paper, the media authorities welcome the inclusion of measures to protect editorial content from being disproportionately restricted by online platforms on the basis of their terms and conditions. However, they stress that efforts should be made to ensure that content that is subject to national supervision is not re-examined by platforms.

Positionspapier der Medienanstalten zum Verordnungsvorschlag der EU-Kommission für einen European Media Freedom Act, 13. Dezember 2022

https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Ueber_uns/Positionen/Europa/2022-12-13_DLM_Positionspapier_EMFA.pdf

Media authorities' position paper on the EU Commission's proposal for a Regulation establishing the European Media Freedom Act, 13 December 2022

