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Centre for Media Pluralism and Media Freedom

# WORKING PAPER

**Consistent regulatory and self-regulatory  
mechanisms for media freedom in the Digital  
Single Market. The European Media Freedom  
Act (EMFA) as meta-regulation**

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## **Abstract**

This paper discusses how technology convergence is affecting the regulatory landscape of media freedom and media pluralism in Europe and draws relevant policy recommendations on its future development in light of the forthcoming proposal for a European Media Freedom Act.

## **Keywords**

European Media Freedom Act; media freedom; media pluralism; Digital Services Act; content moderation; algorithmic enforcement; platform regulation; internal market; digital single market

## 1. Introduction\*

Digital platforms added a new and powerful layer to the existing models of content and information distribution. We now consume media in different ways and formats than those we still often associate with legacy media such as press, radio, or television broadcast. In addition to digital outlets, citizens increasingly receive news and information from social media and search engines.<sup>1</sup>

Studies increasingly show how platforms curate content, and design and control exposure to social discourse content, exercising a considerable amount of editorial role, which interferes with freedom of expression,<sup>2</sup> and with greater effects where moderation is automated.<sup>3</sup> In principle, the content displayed in search engines and shared on social media is not created by the platforms themselves. However, it is through social media how user-generated content is distributed massively, and this can include partisan news<sup>4</sup> as well as defamatory<sup>5</sup> and unlawful content, contributing to growing disinformation. In the attention-based economy,<sup>6</sup> online platforms' algorithms are carefully designed to direct users' exposure to certain content. Thus, with behaviour design on a mass scale, platforms accumulate vast amounts of wealth and power.<sup>7</sup> This accumulation of power does not solely refer to market power but also to platforms' influence in the process of public opinion formation, shaping political views and voting attitudes. Today, platforms increasingly exercise a significant amount of editorial control and even of censorship, disturbing the healthy functioning of democracy. However, due to their role as intermediary services and the lack of editorial responsibility, platforms and aggregators are not subject, as a rule, to obligations arising from media law.

Instead, threats to pluralism and disinformation in social media are either broadly addressed as part of legislative initiatives aimed at regulating digital markets and services or scattered in compartmentalised rules to deal with hate speech, illegal content, or disinformation. At national level, several jurisdictions are amending or introducing provisions concerning the protection of

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- 1 Although with significant variations across countries around the world, studies show a growing tendency of using social media as a source for news. In Western Europe, 40% of citizens in the 18-24 age group rely on social media as their main source of news, see Andi, S. 'How and why do consumers access news on social media?' Reuters Institute Digital News Report 2021 - 10th edition. Reuters Institute for the Study of Journalism, available at [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/202106/Digital\\_News\\_Report\\_2021\\_FINAL.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/202106/Digital_News_Report_2021_FINAL.pdf).
- 2 Stasi, ML and Parcu PL (2021), 'Disinformation and misinformation: the EU response' in Pier L. Parcu and Elda Brogi (eds.), *Research Handbook on EU Media Law and Policy*, Edward Elgar. Klonick, K. (2017), 'The new governors: The people, rules, and processes governing online speech' 131 *Harvard Law Review*, 1598-1670.
- 3 Cobbe, J. (2021), 'Algorithmic censorship by social platforms: power and resistance', 34(4) *Philosophy & Technology*, 739-766.
- 4 Thorson, K., & Wells, C. (2016), 'Curated flows: A framework for mapping media exposure in the digital age', 26(3) *Communication Theory*, 309-328.
- 5 European Court of Human Rights, *Delfi AS v. Estonia*, ECHR 64669/09.
- 6 Goldhaber, M. H. (1997), 'The attention economy and the Net' *First Monday*, 2(4).
- 7 Zuboff, S. (2019), *The age of surveillance capitalism: The fight for a human future at the new frontier of power*, Profile Books. See also Cobbe, J. (2020), 'Algorithmic censorship by social platforms: power and resistance', 34 *Philosophy & Technology*, 739-766.

media freedom to fight political agitation through fake news in social media.<sup>8</sup> Due to the threats of disinformation, “online media freedom” is currently regulated at domestically to respond to the needs of the local markets. For example, legislation such as the German Network Enforcement Act (“NetzDG”) or the French Law on Countering Online Hatred (“Avia Law”) set different guidelines on content moderation. These rules do not have in mind the European internal market. The result is a fragmented regulatory landscape that presents unequal standards for media freedom protection across Europe and across technologies, creating barriers within the digital single market and preventing free movement of (information society) services.<sup>9</sup>

Another phenomenon to take into consideration is that the legislator is increasingly placing decision-making power on private actors by allocating law enforcement responsibilities to platforms, e.g., against copyright infringements, illegal content, or hate-speech. To comply with this ‘regulatory intermediary’ role,<sup>10</sup> platforms use a wide array of tools for enforcement such as users’ flags of inappropriate content, notice-and takedown, keywords, and algorithmic tools. Mandated content moderation is often implemented through algorithms, which constantly monitor users’ behaviour and content within the platform and that allow automated decision-making (ADM). Arguably, such approach acknowledges that platforms seem better equipped to enforce regulation and police online behaviour more effectively than the regulator, making highly efficient regulation possible.<sup>11</sup> However, the way in which these tools are built remain unknown not only to the public, but also to the users who are affected by platforms’ decisions, having a significant impact on due process rights and the right to an effective remedy.<sup>12</sup> Therefore, this approach can exacerbate problems of democratic accountability, by leaving in the hands of unaccountable structures the definition and protection of public interests.<sup>13</sup>

Despite the identified drawbacks, the capacity of platforms to enforce regulation more effectively than the state itself is changing the traditional top-down pattern of regulation, favouring co-regulation, regulatory intermediation, and polycentric structures of decision-making power. Hence, while regulatory action is needed at EU level, different policy options shall be considered. Any intervention for the protection of media freedom in the digital world shall include an assessment of current regulatory actions in different sectors and at different levels whose competences are distributed between the EU and the Member States. The complexity of this matter is explained by the politically sensitive nature of interventions at EU level for regulating media, where justifications based on internal market narratives might

8 Helberger, N. (2020), ‘The political power of platforms: How current attempts to regulate misinformation amplify opinion power’, *Digital Journalism*, 8(6), 842-854.

9 Spindler, G. (2017), ‘Internet Intermediary Liability Reloaded’ 8 *JIPITEC* 166.

10 See Busch, C (2020) ‘Self-Regulation and Regulatory Intermediation in the Platform Economy’, in M. Cantero Gamito and H. W. Micklitz, eds., *The Role of the EU in Transnational Legal Ordering*. Edward Elgar based on Abbott, KW., et al. (2017) ‘Theorizing Regulatory Intermediaries: The RIT Model’ 670 *Annals of the American Academy of Political and Social Science* 14–35.

11 Lessig, L. (1999), *Code and Other Laws of Cyberspace*. New York: Basic Books. See also Cantero Gamito, M. (2017) ‘[Regulation.Com](#). Self-Regulation and Contract Governance in the Platform Economy: A Research Agenda’ 9 *European Journal of Legal Studies* 53–67.

12 Belli, Luca, & et al (2020) “ANNEX: Best Practices on Platforms’ Implementation of the Right to an Effective Remedy,” 36 *Computer Law & Security Review* 105379. See also De Gregorio, G. (2020), ‘Democratising online content moderation: A constitutional framework’, 36 *Computer Law & Security Review*, 36, 105374; and Myers West, S. (2018), ‘Censored, suspended, shadowbanned: User interpretations of content moderation on social media platforms’ 20(11) *New Media & Society*, 4366-4383.

13 Scott, J., & Trubek, D. M. (2002), ‘Mind the gap: law and new approaches to governance in the European Union’ *European law Journal*, 8, 1.



not be sufficient. The result is overlapping objectives defined at different levels (national/supranational) that interact with multi-level (and multi-actor) enforcement structures.

Due to current EU plans to propose a framework for media freedom, the European Media Freedom Act (hereinafter 'EMFA'),<sup>14</sup> this paper assesses the feasibility and desirability of regulating media freedom at EU level.

There are important geographical and historical variations from country to country with regard to media governance.<sup>15</sup> While some countries follow a more interventionist approach, e.g. in Southern Europe, in others, media has been traditionally governed through institution building, based on self-regulatory professional bodies and non-binding rules to protect media autonomy such as in the UK or the US.<sup>16</sup> Despite that, a private regulatory approach is said to repeatedly fail to address endogenous problems, increasing the pressure to regulate self-regulation.<sup>17</sup>

Accordingly, this article suggests that EMFA should be designed as meta-regulation. Meta-regulation consists of a regulatory approach to procedurally frame private regulation.<sup>18</sup> It is argued that media freedom meta-regulation can successfully contribute to reconcile the inherent self-regulatory nature of the sector with the necessity to provide EU defined standards for media freedom in the internal market.

However, while EMFA is primarily aimed at mitigating regulatory uncertainty and domestic regulatory abuses in state advertising and state control of the media, this paper assesses this supranational public policy intervention from the perspective of protecting media freedom and pluralism *online*.<sup>19</sup> Thus, the paper focuses on the horizontality of content moderation and explains how both traditional media *and* online intermediaries put media freedom and pluralism at risk, calling for technology neutral regulation. From the perspective of technology neutrality,<sup>20</sup> the paper builds on the idea that, despite forthcoming rules in the Digital Services Act ('DSA'),<sup>21</sup> the EMFA should be an opportunity to address media freedom and media pluralism across services and business models.

The paper is structured as follows. In section 2, the paper identifies the challenges arising from conceptual and regulatory fragmentation for media freedom *online*. Section 3, maps existing and forthcoming rules in the digital single market that may impact media freedom. The

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14 <https://digital-strategy.ec.europa.eu/en/news/european-media-freedom-act-commission-launches-public-consultation>.

15 Hallin, D. C., & Mancini, P. (2004), *Comparing media systems: Three models of media and politics*. Cambridge university press.

16 Tambini, D. (2021) *Media Freedom*. Polity.

17 Kaye, R. P. (2006), 'Regulated (self-) regulation: A new paradigm for controlling the professions?', 21(3) *Public Policy and Administration*, 105-119.

18 Hutter, B. (2001), *Regulation and Risk: Occupational Health and Safety on the Railways*, Oxford University Press. Coglianesi, C., & Mendelson, E. (2010), 'Meta-regulation and self-regulation', in Robert Baldwin, Martin Cave, and Martin Lodge (eds.), *The Oxford Handbook of Regulation*. Oxford University Press.

19 A reconceptualisation of media freedom due to technological change is found in Brogi, E. et al (2021), 'The media pluralism monitor: conceptualizing media pluralism for the online environment', in P. Parcu and Elda Brogi (eds.), *Research Handbook on EU Media Law and Policy*, Edward Elgar. See also Jakubowicz, K. (2015), 'New media ecology: Reconceptualizing media pluralism' in P Valcke, M Sükösd RG Picard, *Media Pluralism and Diversity. Concepts, Risks and Global Trends*. Palgrave.

20 See Reed, C. (2007), 'Taking sides on technology neutrality', *SCRIPTed*, 4, 263.

21 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. COM/2020/825 final; hereinafter 'DSA Proposal'.

regulatory necessity, legal basis and different policy options for EMFA are examined in section 4. Section 5 proposes a set of principles underpinning the design of EMFA as meta-regulation.

## 2. The challenges of media freedom online

There are several factors that are contributing to the deterioration of media freedom and media pluralism and hence to a worrying erosion of democracy. This section presents the challenges for the protection of media freedom, which are arguably the result of a conceptual and regulatory fragmentation.

### 2.1. Conceptual fragmentation

Media freedom and media pluralism are essential pieces in any democratic society and necessary for the materialisation of human rights.<sup>22</sup> However, while media freedom and pluralism are corollaries of the fundamental right to freedom of expression,<sup>23</sup> neither 'media' or 'pluralism' are defined in a consistent manner throughout the EU. On the one hand, the lack of common definition responds to the need to preserve pluralist views and different cultural values within each member state as part of their idiosyncrasy. On the other, the resulting supranational conceptual deficiency has been further accentuated by the arrival of social media platforms, where news are constantly shared, blurring the lines between traditional and non-traditional ways of consuming media. Yet, although social media and search engine platforms provide information and news in a manner which is similar to the role of traditional media, traditional and non-traditional media providers are, to date, subject to very different rules. This has led domestic legislators to establish specific rules dealing with new media based on their own understanding of media pluralism.

The 2021 Media Pluralism Monitor (MPM) has reported a worrying landscape in the protection of freedom of expression, journalism and the right to information in the period 2020-2021.<sup>24</sup> The increasing level of concern is largely due to the Covid-19 pandemic that, in addition to recovery measures to alleviate the decrease of revenues from advertising, led to the introduction of specific measures to prevent and reduce disinformation with specific mechanisms for controlling the spread of information.<sup>25</sup> In the long run, however, these limitations, which significantly impact freedom of expression, would be difficult to reverse.<sup>26</sup> Connected to the pandemic or not, media freedom and independence seem to be at risk in the EU and in Europe at large, particularly in countries from the Balkan Peninsula and in East Europe.<sup>27</sup>

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22 European Commission (2021), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *2021 Rule of Law Report. The Rule of Law Situation in The European Union* - COM/2021/700 final. (Rule of Law Report).

23 Council of Europe, Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance (Adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers' Deputies).

24 MPM2021, available at <https://cmpf.eui.eu/mpm2021-results/>.

25 Tagliabue, F., Galassi, L., & Mariani, P. (2020), 'The "pandemic" of disinformation in COVID-19', *SN comprehensive clinical medicine*, 2(9), 1287-1289.

26 Radu, Roxana (2020), 'Fighting the 'Infodemic': Legal Responses to COVID-19 Disinformation', 6 *Social media + society*. July-September 2020.

27 MPM2021.

Focusing on the formation of a media freedom theory, Tambini resorts to Rawls' foundations for any theory of freedom such as the possibility to identify who are the actors/agents that enjoy freedom, what are the freedoms that they enjoy, and what is the reach of that freedom.<sup>28</sup> He claims that, as it currently stands, the existing theory of media freedom 'does not meet this standard', highlighting the necessity of a theory of media freedom and its current deficiencies.<sup>29</sup> The result is confusion about what media freedom actually is, leading to fragmentation at different levels. As part (or perhaps as a corollary) of the fragmented conceptual, political and legal landscape, he presents two different approaches to protect media freedom.<sup>30</sup> These approaches represent divergent forms of protecting media freedom either providing positive rights based on state's obligations to protect those rights or negative rights where media freedom is not limited by state action but by other conflicting rights; e.g. safe harbours for online intermediaries.

The resulting conceptual, regulatory, and theoretical fragmentation in the understanding of media freedom is a key problem in the current quest for principles to preserve media freedom in the digital public space. Building on Tambini's identified patterns of confusion, the rest of this article elaborates on the regulatory consequences of inconsistent regulatory approaches to media freedom in a technologically convergent scenario.

## 2.2. Regulatory fragmentation

Conceptual fragmentation arguably contributes to further regulatory fragmentation – it is difficult to draw the limits of media regulation if there is no consensus on what *media* is. To date, the regulation of media freedom is largely concerned with traditional media providers. As such, media regulation is scattered across technologies with different rules for broadcast, press and internet media.

Widespread access to internet has meant a wider participatory platform for communication and greater involvement in political debates.<sup>31</sup> The transfer from the offline to the online sphere of the political debate involves –or at least it did during the early days of the internet- more decentralised and distributed networks for information access and sharing. However, network externalities soon triggered the emergence of dominant platforms and social media that (re-) channelled and (re-)centered communications networks.<sup>32</sup> The result is that platforms and aggregators have disrupted the market, shattered traditional media business and revenue models,<sup>33</sup> and relocated the legal and moral duty of media services providers to preserve media freedom.

Aware of the transformation of the media and audiovisual sectors, national legislators are taking action to monitor and restrict/control increasing platforms' power over opinion formation such as the German NetzDG or the French Avia Law abovementioned. In addition to national

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28 Tambini, D. (2021). 'A theory of media freedom', *Journal of Media Law*, (published online).

29 Ibid.

30 Ibid.

31 Campante, F., Durante, R., & Sobbrío, F. (2018), 'Politics 2.0: The multifaceted effect of broadband internet on political participation' 16 *Journal of the European Economic Association* 4, 1094-1136.

32 Cantero Gamito, M. (2022), 'Regulation of Online Platforms', in Smits et al (eds.) *Elgar Encyclopedia of Comparative Law*, Edward Elgar (forthcoming).

33 Report of the Committee on Culture and Education (CULT) on Europe's Media in the Digital Decade: an Action Plan to Support Recovery and Transformation (2021/2017(INI)).

variations, there are also a variety of approaches that involve combinations of public regulation, self-regulation and private ordering, national, supranational and subnational rules, some of which are directly concerned with media freedom and some others are concerned with other sectors such as telecommunications, platform regulation, copyright or even data protection, but whose safeguards could be extended to protect media freedom.<sup>34</sup>

As a result, the EU landscape for addressing the role of platforms and aggregators in the context of media freedom is both fragmented and complex. Fragmented because it follows a piecemeal approach with different areas of action and degrees of integration. The following section presents a short overview of the resulting regulatory cacophony of norms and assesses whether current threats to media freedom are effectively mitigated with the existing approaches.

### **3. Media freedom and pluralism in the regulation, self-regulation and co-regulation of digital platforms**

The 2010 Audiovisual Media Services Directive (AVMSD) was one of the first comprehensive steps towards the harmonisation of the audiovisual media sector across jurisdictions but also for levelling the playing field across business models.<sup>35</sup> The policy objectives of the current AVMSD are media pluralism, cultural diversity, consumer protection, the proper functioning of the internal market and the promotion of fair competition.<sup>36</sup> Although the purpose of the AVMSD is not to regulate online platforms, some social media services fall under the scope of the revised AVMSD where the audiovisual media content shared among users constitutes an essential functionality of the social media service (e.g. YouTube or TikTok),<sup>37</sup> subject to the compliance with the Commission's Guidelines on the practical application of the essential functionality criterion.<sup>38</sup> The scope's expansion to video-sharing platforms (VSPs) was primarily intended to provide a more robust framework for the protection of minors from harmful content, fighting hate speech and illegal content, and establishing common standards on advertising. While the regime of liability exemptions provided in the 2001 eCommerce Directive<sup>39</sup> remains applicable, especially the prohibition of general monitoring obligations of Article 15, the AVMSD mandates Member States to introduce provisions requiring VSPs to include the requirements about protected content in their terms and conditions and to establish flagging mechanisms

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34 See De Streel, A. and Hoepied, C. (2021), 'The EU regulation of electronic communications networks and services' and Maroni, M. and Brogi, E., 'Freedom of expression and the rule of law: the debate in the context of online platform regulation' in in P. Parcu and Elda Brogi (eds.), *Research Handbook on EU Media Law and Policy*, Edward Elgar.

35 See Recital 4 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 95, 15.4.2010, p. 1–24.

36 Recital 53 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities.

37 Ibid. Recital 5.

38 Communication from the Commission Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive 2020/C 223/02, C/2020/4322 - OJ C 223, 7.7.2020, p. 3–9.

39 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). OJ L 178, 17.7.2000, p. 1.

for reporting inappropriate content.<sup>40</sup> The inherent tension between the eCommerce regime of intermediaries' safe-harbours and the application of the AVMSD to VSPs is one of the many motivations that justify the long-awaited overhaul of online intermediaries liability's regime.<sup>41</sup>

This inherent tension is more evident if considering the policing nature of the recent EU Regulation on terrorist content online,<sup>42</sup> which limits the liability exemption for hosting services provided in Article 14 of the eCommerce Directive, or the introduction of filtering and monitoring obligations under the much-discussed Article 17 of the Copyright Directive,<sup>43</sup> which runs against the spirit of the prohibition of general monitoring obligations contained in the eCommerce Directive.<sup>44</sup> The "prosecutorial/inquisitorial" character of the Regulation on terrorist content or the Copyright Directive contrasts with the more "adversarial" approach of the AVMSD's flagging system.

Naturally, there are (and there will be) areas where emerging problems will require innovative solutions that will challenge existing approaches. Sector-specific derogations to the safe harbour regime gradually increased as the capacity of platforms to better enforce regulation developed, giving rise to friction points like the ones abovementioned. This, together with current shifting public attitudes towards increasing platforms' responsibilities, called for a more horizontal and serious treatment of platforms providers at EU level.

In such light, the Proposal for a Digital Services Act (DSA) intends to set a more comprehensive and up-to-date framework for *all* intermediary services. The rules propose to establish a conditional regime of liability exemptions as well as due diligence obligations while maintaining the no general monitoring approach. However, the new rules reveal an increasing understanding of online intermediaries as 'regulatory intermediaries'<sup>45</sup> provided that the proposed rules entrust the enforcement of public regulation by ordering intermediaries to act against illegal content by the relevant national judicial or administrative authorities.<sup>46</sup>

The new DSA proposed rules could indeed serve as a support to policies safeguarding media freedom and media pluralism. More specifically, the DSA proposal tackles potential risks of biased civil discourse or disinformation based on a risk-assessment by very large online platforms (VLOPs) that might include any negative impact on fundamental rights (including actions that would distort electoral processes) followed by risk-mitigation actions.<sup>47</sup> In its Opinion on the DSA Proposal, the European Parliament's Committee on Legal Affairs (JURI)

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40 Article 28b(3) AVMSD.

41 Sartor, G. (2021), 'The secondary liability of online intermediaries' in Pier L. Parcu and Elda Brogi (eds.), *Research Handbook on EU Media Law and Policy*, Edward Elgar.

42 Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online. OJ L 172, 17.5.2021, p. 79–109.

43 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.

44 Frosio, G. (2018), 'To Filter, or Not to Filter-That Is the Question in EU Copyright Reform' *Cardozo Arts & Ent. LJ*, 36, 331. Senftleben, M., & Angelopoulos, C. (2020), 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market'. Available at SSRN ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3717022](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717022)). Quintais, J. (2020), 'The new copyright in the digital single market directive: A critical look', 1 *European Intellectual Property Review* 28.

45 See Busch (2020), supra n 10.

46 Article 8 DSA Proposal.

47 Article 26 and 27 DSA proposal (Original text proposed by the Commission).

proposes to specifically consider any negative effect for the exercise of freedom and pluralism of the media as one of the 'systemic risks',<sup>48</sup> and recommends the introduction of specific actions for mitigating risks for freedom of expression and freedom and pluralism of the media. In particular, JURI proposes an amendment to the DSA proposal prohibiting VLOPs that allow for the dissemination of press publications<sup>49</sup> from 'removing, disabling access to, suspending or otherwise interfering with such content or services or suspending or terminating the service providers' accounts on the basis of the alleged incompatibility of such content with their terms and conditions, as well as on the basis of any self-regulatory or coregulatory standard or measure (...).<sup>50</sup>

As mentioned above, in the media sector, and particularly regarding the protection of media pluralism and media freedom, self-regulation by journalists and other media professionals has been a significant tool in the media sector to limit state interference.<sup>51</sup> Due to the potential of self-regulatory professional and ethical standards for governing the industry and preserving its autonomy, the legislator has recognised and even mandated self-regulation in the sector.<sup>52</sup> These self-regulatory and to some extent co-regulatory<sup>53</sup> instruments such as codes of conduct are complementing legislative rules to mitigate the impact of online risks over media freedom and media plurality.<sup>54</sup> For example, the EU Code of practice on disinformation, published in 2018, is a voluntary commitment to monitor and prevent disinformation through a set of best practices.<sup>55</sup> The Code, to be soon strengthened, includes specific practices to be observed for preserving transparency in political advertising, for instance. The Annex of Best Practices annexed to the Code collects a set of examples of policies from some leading platforms on political advertising and how they inform users that they are being exposed to political advertising.

In sum, the growing catalogue of EU rules for regulating the online ecosystem increasingly covers media freedom and media pluralism. Yet, horizontal rules for new actors based on the technology and business model used to provide their services can be seen as a duplication of legislation (one regime for online platforms, one for traditional media), which widens the gap between the regulatory regime of traditional media and rules for the online landscape. The result is a lack of consistent safeguards for protecting media freedom and media pluralism online that, instead, makes these two democratic pillars more vulnerable.

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48 See Article 26 Opinion of the Committee on Legal Affairs for the Committee on the Internal Market and Consumer Protection on the proposal for a regulation of the European Parliament and of the Council on Single Market for Digital Services (Digital Services Act), 11.10.2021, 2020/0361(COD). The Opinion of the Committee on Culture and Education (CULT) on the DSA, 5.10.2021/2020/0361(COD) also proposes to specifically consider any negative impact on media freedom and media pluralism as a systemic risk but, unlike JURI, it does not suggest any specific action for risk mitigation aimed at safeguarding media freedom and media pluralism.

49 Here, the article makes a cross references to Article 2(4) of the Copyright Directive and Article 1(1)(a) for the definition of 'press publication' and 'audiovisual media service' respectively.

50 See Article 27a of JURI Opinion on DSA, supra n 48.

51 Tambini, supra n 16.

52 Hulin, A. (2014), 'Statutory media self-regulation: beneficial or detrimental for media freedom?' *Robert Schuman Centre for Advanced Studies Research Paper* No. RSCAS, 127.

53 See Prosser, T. (2008), 'Self-regulation, co-regulation and the audio-visual media services directive', *Journal of Consumer Policy*, 31(1), 99-113, for a broad definition of co-regulation.

54 Marsden, C., Meyer, T., & Brown, I. (2020), 'Platform values and democratic elections: How can the law regulate digital disinformation?' *Computer Law & Security Review*, 36, 105373.

55 <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>.

## 4. European Media Freedom Act: A European framework for media freedom

### 4.1. Do we need a European framework for media freedom?

A possible solution to the problem of regulatory fragmentation in the protection of media freedom in the EU is to provide a supranational regulatory instrument that, while respecting the Amsterdam Protocol on the domestic governance of the funding of public media,<sup>56</sup> ensures the impartiality and integrity of the EU media market. This was one of the reasons to include specific provisions on transparency of ownership structures in the revised AVMSD. Yet, in addition to ownership transparency and harmonisation of national media rules on traditional media, EU-level standards might be also needed to fight disinformation and to preserve media freedom and pluralism by ensuring access to diverse media sources, both offline and online, including social media in the digital single market. Hence, and due to the limited impact of the new AVMSD on media plurality and ownership transparency, the European Commission is taking a step forward to protect media freedom under an integrated framework and a proposal for a *European Media Freedom Act* (EMFA) is expected in Q3 2022.<sup>57</sup>

A European framework for media freedom can be seen as an opportunity to increase plurality safeguards and regulatory cooperation by reinforcing the EU's capacity to sanction and monitor political interventions and conflict of interests that limit media freedom. Yet, this approach raises important questions.

First: Do we want/need similar rules to those of traditional media for content on social media? While it has been found that traditional media and political campaigns alone are more effective in spreading disinformation than dedicated and massive disinformation operations over social media platforms,<sup>58</sup> further action is also needed to prevent deliberate manipulation of opinion formation through social media.<sup>59</sup> There is growing evidence that content shared on social media and accessible through news aggregators and content moderation practices have an impact media freedom and media pluralism.<sup>60</sup> Recent events such as the Cambridge Analytica scandal, Trump's bans from social media participation or the halting of Russian propaganda channels in major platforms because of the war in Ukraine are examples of the increasing power of social media to shape public discourses. This triggers the following question: what vision of society do platforms provide to their users? This is a question that perhaps was not on the table when the eCommerce Directive was drafted in 2000. Platforms of information have changed and so should the rules –and the underlying values– that govern them.

Second: Do we need EU rules to preserve media freedom in the different Member States? A basic argument could suggest that a borderless technology cannot be regulated with border-

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56 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on the system of public broadcasting in the Member States - OJ C 340 , 10.11.1997 P. 0109.

57 European Commission, *Commission Work Programme 2022*. Annexes, 19 October 2021.

58 Benkler, Y. et al, (2020) 'Mail-In Voter Fraud: Anatomy of a Disinformation Campaign', *Berkman Center Research Publication* No. 2020-6, available at SSRN: <https://ssrn.com/abstract=3703701>.

59 Pollicino, O. (2017), 'Fake News, Internet and Metaphors (to be handled carefully)' *Italian Journal of Public Law*, 9, 1. See also Mastroianni, R. (2019), 'Fake News, Free Speech and Democracy: A (Bad) Lesson from Italy', 25 *Southwestern Journal of International Law*, 42-74.

60 Parcu, P. L., & Rossi, M. A. (2021), 'Policy changes to strengthen the protection of media freedom and media pluralism in the EU' in Pier L. Parcu and Elda Brogi (eds.), *Research Handbook on EU Media Law and Policy*. Edward Elgar Publishing. Stasi, M. L. (2020). Ensuring pluralism in social media markets: some suggestions. *Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2020/05*.

related rules. A more sophisticated opinion would require an analysis on subsidiarity (see *infra* 4.2). But before moving into subsidiarity considerations, we shall also consider the necessity of EU-level rules pending parallel approaches such as the DSA.

This conclusion can be achieved by replying to a third question: Is the DSA the right place to regulate media diversity?<sup>61</sup> Answering this question would require assessing the mechanisms contained in the DSA proposal that will potentially have an impact on media plurality and opinion formation. For example, ‘content moderation’ is an umbrella concept in the DSA that covers from illegal content to information incompatible with the terms and conditions of intermediary services providers.<sup>62</sup> Moreover, pursuant to the DSA proposal, adherence and compliance with specific codes of conduct are an ‘appropriate mitigation risk measure’ against disinformation.<sup>63</sup> The DSA’s approach towards disinformation has wider consequences. The lack of a definition in the DSA of what constitutes ‘harmful’ content can be seen as a response to stakeholders’ concerns about the impact on fundamental rights of a rigid definition, but it poses serious risks in terms of lack of harmonisation across countries and potential criminalisation arising from recent domestic initiatives on disinformation.<sup>64</sup>

Another problematic angle of regulating media diversity in the DSA relates to the possibility of introducing media exemptions, as currently discussed in the European Parliament.<sup>65</sup> A media exemption would prohibit any kind of moderation (including removal, suspension of access, or interference) by intermediary services providers of content by press publications or by editorial content providers. Without disregarding press freedom, it should be acknowledged that media exemptions could open the door to disinformation in a context in which fake news are primarily shared through social media.

Lastly, in line with the European case law,<sup>66</sup> conditional immunity from liability to intermediaries based on compliance with DSA provisions<sup>67</sup> can be seen as a step in the right direction to remove illegal content from public accessibility. However, this can unnecessarily impact freedom of expression, especially in cases where platforms adopt a cautious approach and remove dubious content to avoid losing immunity.

Accordingly, as it currently stands, the DSA will not (and perhaps should not) replace or provide a specific framework for media content providers. Therefore, a more dedicated framework establishing harmonised supranational standards to address and protect online media freedom and media pluralism should at least be pondered.

#### **4.2. What legal basis?**

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61 ML Stasi, intervention during EDMO Workshop, *Media exemption in the DSA: protecting editorial independence or a loophole for disinformation?*, organised by the European Digital Media Observatory (EDMO) – Policy Research and Analysis, which is coordinated by the Centre for Media Pluralism and Media Freedom (CMPF). 22 November 2021 (online).

62 Article 2, let p) DSA Proposal.

63 See Recital 68 DSA Proposal.

64 Ó Fathaigh, R., Helberger, N., & Appelman, N. (2021), ‘The perils of legally defining disinformation’ *Internet Policy Review*, 10(4).

65 Amendment proposing introduction of Article 27a, JURI on Opinion DSA Proposal supra n 48. Amendment proposing introduction of Article 7a, CULT Opinion on DSA Proposal supra n 33.

66 Case C-324/09 – *L’Oréal*, see para. 124.

67 E.g. Article 5(1) and 14(3) DSA Proposal.



To regulate media freedom and pluralism at supranational level, the EU Commission plans actions under both the European Democracy Action Plan<sup>68</sup> and the Media and Audiovisual Media Plan.<sup>69</sup> The overarching goal is to set a framework that, while advancing an internal market for the media sector, protects media freedom and media pluralism. However, reluctance to intervene on media at EU level is often supported on the lack of EU's competence in the field of media policy.<sup>70</sup> In this light, developing a complete framework that enables sanctioning any actions that impair media freedom such as the forthcoming European Media Freedom Act is a highly sensitive issue, which requires a convincing analysis of legal competence.

EMFA will be a Regulation based on Article 114 TFEU.<sup>71</sup> This legal basis enables the adoption of measures for the harmonisation of Member States' rules that could frustrate the adequate functioning of the internal market and have an effect on its fundamental freedoms.

In situations where internal market harmonization is used as a legal basis, it is important that the legal instrument passes the subsidiarity (and proportionality) test,<sup>72</sup> given that Article 114 TFEU does not give the 'exclusive competence to regulate economic activity in the internal market'.<sup>73</sup> This means that the EMFA text would have to pass the threshold of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality and the scrutiny criteria shaped over time by the Court of Justice of the European Union (CJEU).<sup>74</sup> In this regard, the CJEU has long sustained that any divergence needs to significantly distort the internal market, not abstract risks.<sup>75</sup> Therefore, any action will be justified if it prevents the emergence of potential barriers to trade and contributes to eliminate the distortion of competition.<sup>76</sup>

According to the European Commission, the internal market is affected by: '(i) different national rules on media pluralism, (ii) insufficient structures for cooperation between independent media regulators, (iii) instances of public and private interference in the ownership, management or operation of media outlets, and (iv) lack of media pluralism safeguards, including online'.<sup>77</sup>

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68 European Commission, Communication on the European democracy action plan. Brussels, 3.12.2020. COM(2020) 790 final.

69 European Commission, Communication Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation. Brussels, 3.12.2020. COM(2020) 784 final.

70 Craufuird Smith, R. (2004), 'Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship' 29(5) *European Law Review*, 652-672. See also European Commission, Green Paper 'Pluralism and media concentration in the internal market' (COM(92) 480) and the Proposal for a Directive amending the AMVSD, COM(2016) 287 final. Besides the adoption in 1989 of Television Without Frontiers Directive, the Commission has been reluctant to regulated aspects that go beyond mere economic relevance, since broadcasting is an aspect more cultural than purely economic. See Cornils, M. (2020), 'Designing platform governance: A normative perspective on needs, strategies, and tools to regulate intermediaries', Algorithm Watch; available at <https://algorithmwatch.org/en/wp-content/uploads/2020/05/Governing-Platforms-legal-study-Cornils-May-2020-AlgorithmWatch.pdf>.

71 European Commission, Call for evidence for an Impact Assessment on the Media Freedom Act, available at [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13206-Safeguarding-media-freedom-in-the-EU-new-rules_en).

72 Article 5(3) TFEU.

73 Case C-58/08, *Vodafone*.

74 On specific analyses on subsidiarity, see Granat, K. (2018), *The principle of subsidiarity and its enforcement in the EU legal order: The role of national parliaments in the early warning system*. Hart Publishing. See also Zgliniski, J. (2018), 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' 55 *Common Market Law Review* 1341-1385.

75 *Tobacco* case, para. 75.

76 See para. 84 Case 376-98, *Federal Republic of Germany v European Parliament and the Council of the European Union*.

77 Call for evidence for an Impact Assessment on the Media Freedom Act, supra n 71.

Internal and external entry and trade barriers can become a risk to fundamental freedoms, in particular free movement of services within the digital single market. Divergent laws dealing with media content in the different member states can indeed pose a barrier to the internal market.<sup>78</sup> Moreover, it can be argued that there is also a considerable risk of impact on media freedom and pluralism within the internal market due to media power concentration in domestic markets. In this regard, Article 114 TFEU can be relied upon to 'prevent the emergence of future obstacles to trade resulting from multifarious development of national laws'.<sup>79</sup>

In the regulation of online intermediaries, specifications defined at national level may threaten regulatory harmonisation and violate EU law.<sup>80</sup> Even technical regulations<sup>81</sup> at domestic level that seemingly have little to do with media freedom can have an impact if member states intend to set their own technical specifications for the elaboration of transparency reports or for the functioning of automated processes for content removal. This is the case, for instance, of the German NetzDG. Gorwa provides a very comprehensive insight of how NetzDG's regulatory approach did not only raise concerns as to posing a potential barrier to the internal market but how, by being at odds with the EU's legal agenda, it might have significantly contributed to change the course of EU-level regulation.<sup>82</sup> Yet, although such discussion concerns content moderation and it more directly relates to the preparation of DSA, divergent domestic rules will also have an impact on an even more sensitive issue such as media freedom.

Obstacles to the internal market are also the result of the inconsistent implementation of the revised AVMSD regarding media ownership and the independence of the national regulator. For example, the developments in Poland and Hungary are likely to impact not only media pluralism but also cross-border intra-EU trade as the market is currently distorted by the increasing state control over the media. For example, the controversial Polish Lex TVN that puts the spotlight on the largest independent US broadcaster in the country, TVN.

Undistorted competition can also be endorsed by Article 114 TFEU, which can be used to harmonise legislation with the aim of making markets more competitive.<sup>83</sup> In fact, similar to roaming charges,<sup>84</sup> potential abuses by domestic media players and the eventual failure to protect media freedom could result in anticompetitive effects in media markets that can harm citizens and their right of access to balanced and plural media coverage.

We shall also consider the suitability of Article 114 TFEU to achieve regulatory objectives that go beyond pure internal market considerations such as freedom of information, freedom

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78 Ó Fathaigh, R., Helberger, N., & Appelman, N. (2021), *supra* n 64.

79 Franck, J.-U., Monti, G., and De Streel, A., 'Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers' Legal Opinion commissioned by the Federal Ministry for Economic Affairs and Energy of Germany, September 2021, available at [https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?\\_\\_blob=publicationFile&v=5](https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?__blob=publicationFile&v=5), at p. 34.

80 Spindler, G. (2017), *supra* n 9.

81 Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1–15.

82 Gorwa, R. (2021), 'Elections, institutions, and the regulatory politics of platform governance: The case of the German NetzDG' 45(6) *Telecommunications Policy*, 102145. In this article, Gorwa illustrates how, before NetzDG, the Commission did not intend to establish law-level standards for content moderation. Instead, at that time the Commission was favoring self- and co-regulatory solutions such as the Code of Conduct on Hate Speech.

83 Franck et al, *supra* n 79 at p. 30.

84 See para. 39 Case C-58/08, *Vodafone*.

of expression and, particularly, free expression of the opinion of the people in the choice of the legislature.<sup>85</sup> This also covers situations in which EMFA establishes rules not only concerning the approximation of national laws but also individual measures that are legally binding on individuals such as, for example, rules on VLOPs to take action against disinformation. In this regard, the CJEU has held that, if needed, ‘measures from the approximation’ encompasses the power to establish individual measures.<sup>86</sup> Moreover, it is argued that the internal market can function as a ‘normative corridor’ in which social interests and fundamental rights are protected with harmonisation and free movement rules.<sup>87</sup> One important implication of this approach is that requires private actors to horizontally apply fundamental rights, requiring private actors to pursue collective interests. This is an issue long debated within EU legal scholarship.<sup>88</sup> While it had been long recognised that private regulation has an impact on free movement,<sup>89</sup> *Viking* and *Laval* deployed full effect of the horizontal application of primary EU law.<sup>90</sup>

Subsidiarity requires that EU-level interventions are justified due to the absence of alternative regulatory methods. This applies with regard to the chosen regulatory instrument as well as alternative legal basis. In relation to the chosen regulatory instrument, Article 114 TFEU can be used to issue both Regulations and Directives.<sup>91</sup> And while Article 167 TFEU for cultural diversity or Article 173 TFEU can be considered an alternative legal basis to Article 114 TFEU, the CJEU has considered that internal market competence can be used despite the fact that other objectives are also pursued.<sup>92</sup>

Lastly, part of a subsidiarity analysis involves the examination of whether national action or the lack of EU action would conflict with the Treaty.<sup>93</sup> In this regard, it has been extensively argued that the lack of free and independent media is at odds with the healthy functioning of democracy.<sup>94</sup> In this regard, a supranational framework for the protection of media freedom and pluralism with rules that ensure media coverage and access to balanced and plural media,

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85 Article 3 of the Protocol to the European Convention on Human Rights and Fundamental Freedoms.

86 See para. 37, Case C-359/92 *Germany v Council*.

87 De Vries, S.A. ‘The EU Single Market as a ‘Normative Corridor’ for the protection of Fundamental Rights: The Example of Data Protection’ in SA de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Oxford, Hart Publishing, 2015).

88 Gerstenberg, O. (2004), ‘Private law and the new European constitutional settlement’ *European Law Journal* 10, 766; Kumm, M. (2006), ‘Who is afraid of the total constitution? Constitutional rights as principles and the constitutionalization of private law’ *German Law Journal*, 7(4), 341-369; N Reich, N. ‘The Public/Private Divide in European Law’ in Micklitz and Caffagi (eds.), *European Private Law after the Common Frame of Reference* (Cheltenham: Edward Elgar, 2010), Micklitz, H. (ed.), *The Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014).

89 Case 36/74 *Walrave* [1974] ECR 1405.

90 For a comprehensive and critical examination of this approach, see Schepel, H. (2012), ‘Constitutionalising the market, marketising the constitution, and to tell the difference: On the horizontal application of the free movement provisions in EU law’ *European Law Journal*, 18(2), 177-200.

91 The Treaty [in Article 114] gives discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features. See Case C-66/04, *United Kingdom v Parliament and Council* [2005] ECR I-10553, para 45, and Case C-270/12, *UK v European Parliament and Council* (‘ESMA’) paras. 100-104. Case C-66/04, *UK v European Parliament and Council* (‘Smoke Flavourings’).

92 See para. 88 Case C-376/98, *Germany v Parliament and Council* (‘Tobacco’).

93 European Commission, ‘Better regulation’ toolbox’ November 2021 edition, available at [https://ec.europa.eu/info/sites/default/files/br\\_toolbox-nov\\_2021\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/br_toolbox-nov_2021_en_0.pdf).

94 In particular, Article 2 on the Treaty of European Union. See for extensive references of the role of media freedom in democracy, 2021 Rule of Law Report.

especially in countries where independence of the media has been questioned, has become necessary to strengthening democracy in the EU.<sup>95</sup> Therefore, regulatory action is needed and EMFA should level the playing field for media services providers across the EU, recognizing the role of media service providers and online intermediaries in the preservation of media freedom.

### 4.3. Policy options

The choice between different regulatory solutions for the media sector will be determined by the objectives to be achieved. Each objective will require the design of specific policies.<sup>96</sup> For example, important threats to the right to receive information and democracy posed by massive disinformation campaigns will need significantly different actions than those to protect the rights of individuals whose posts have been removed for allegedly infringing platforms' terms and conditions on other more minor grounds.

Pursuant to the recent Call for evidence for an Impact Assessment on the Media Freedom Act (EMFA) the new regulatory instrument would pursue four key objectives:<sup>97</sup> first, to establish consistent regulatory standards on media freedom and pluralism for media companies operating in the internal market; second, to ensure EU citizens' access to diverse online and offline media; third, to preserve editorial independence and prevent political interference in the management of media; and fourth, to encourage undistorted competition ensuring fair allocation of resources.

Among the different policy options to achieve those aims, the Commission has put on the table two options. One is to issue a Recommendation aimed at encouraging Member States to take action to better scrutinise media market operations, increase ownership transparency, protect editorial independence and media plurality, and to promote a transparent allocation of state resources (Option 1).<sup>98</sup> Under this model, the European Regulators Group for Audiovisual Media Services (ERGA) would work as a framework for exchanging best practices.

The second policy option (Option 2) involves the creation of a specific legislative framework containing 'common principles' for supervising media market transactions and market distortions at national level. This legislation would also set principles for protecting editorial independence and the transparent allocation of state resources and would create a framework to foster innovation and cooperation across borders of media companies that contributes to financial independence and long-term sustainability of the media sector.<sup>99</sup>

Most remarkably, Option 2 mentions that EU legislation would also aim to 'foster consistent regulatory and self-regulatory standards relevant for media pluralism, offline and online'. This means that, under this option, the Commission plans to tackle any limitations to media pluralism regulating not only traditional media but also new actors such as social media. What the concrete actions in this regard will be is still unknown and, therefore, the variety of approaches turns any assessment of existing and forthcoming regulatory solutions into a

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95 Call for evidence for an Impact Assessment on the Media Freedom Act, supra n 71.

96 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Better regulation: Joining forces to make better laws*. COM/2021/219 final.

97 Supra n 71.

98 Ibid. at p. 3

99 Ibid.

purely normative exercise. Therefore, based on the normative nature of this appraisal, the next session proposes what could be those common principles towards consistent regulatory standards for online media freedom.

## 5. EMFA as meta-regulation. Some principles

The move of public opinion and social discourse from traditional media to the online platform ecosystem has resulted in a complex set of relationships, significantly altering the traditional media's architecture of control of information. Thus, when new relations and interactions are formed in the regulatory landscape it is important to design fundamental regulatory principles.<sup>100</sup>

Understanding the complexity of regulating media freedom at EU level and across technologies is a first step towards designing workable regulatory solutions. The challenge lies in the difficulty to simultaneously pursue conflicting goals. On the one hand, the desirability of protecting and even supporting the self-regulatory nature of the media (including online platforms) to preserve the independence of media. On the other, the necessity to regulate the action of media providers due to their capacity to (massively) administer freedom of speech. To accommodate both objectives, this article suggests that the forthcoming regulatory instrument, EMFA, should be an instance of meta-regulation.

Meta-regulation can be broadly understood as the public oversight of private regulation.<sup>101</sup> Providing a meta-regulatory framework can be an attractive and preferred option for the following reasons: first, it aligns two conflicting objectives. Arguably, the dichotomy between protecting (control) and enabling (independence) media freedom can only be overcome by benefiting from the autonomy of the media sector to self-regulate while providing a minimum set of protections and safeguards afforded by the law. This can be used as an opportunity to decentralise content moderation and making it more transparent and inclusive.<sup>102</sup> Second, meta-regulation has potential for long term sustainability. A reflexive meta-regulatory framework can better accommodate the long-term vision of the regulatory intervention, while facilitating its alignment with regulatory and policy goals. And third, a meta-regulatory framework can provide harmonised standards focused on increasing regulatory cooperation and to establish a framework that is also consistent with the principle of technology neutrality. Despite the complexity of regulating media at substantial level, an EU intervention based on meta-regulation can be an opportunity to create a governance framework based on institutional and procedural mechanisms and harmonised rules for decision-making. In the context of media freedom this means establishing mechanisms towards convergent regulatory and self-regulatory standards since they both function as the basis to adjudicate fundamental rights.<sup>103</sup> Such meta-regulatory design would facilitate the achievement of the pursued regulatory objectives, while making EMFA a long-lasting and dynamic instrument to govern media freedom in the 21st century. The following principles provide some guidance on how meta-regulation for media freedom would work.

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100 Tambini (2021), *A Theory of Media Freedom*, supra n 28.

101 Hutter, B. (2001), *Regulation and Risk: Occupational Health and Safety on the Railways*, Oxford University Press. Coglianesse, C., & Mendelson, E. (2010), 'Meta-regulation and self-regulation', in Robert Baldwin, Martin Cave, and Martin Lodge (eds.), *The Oxford Handbook of Regulation*. Oxford University Press.

102 Kaye (2018), supra n 17.

103 Quintel, T., & Ullrich, C. (2020), 'Self-regulation of fundamental rights? The EU Code of Conduct on Hate Speech, related initiatives and beyond' In B. Petkova and T. Ojanen (eds.) *Fundamental Rights Protection Online. The Future Regulation of Intermediaries*. Edward Elgar Publishing.

## **#1 – EMFA should provide a horizontal framework that covers all media**

The legislator should use this opportunity to limit *any* action(s) that may endanger media freedom.<sup>104</sup> A dedicated framework for media freedom is indeed an opportunity to horizontally address threats to media diversity across technologies but also to fill the gaps left by sector-specific instruments. Moreover, EU-level interventions in media should not be limited to the impact of domestic market concentration in the internal market. Instead, the transnational nature of the digital single market requires supranational attention.

Traditional/legacy media power, once in the hands of national powerful players, is increasingly hoarded by transnational corporations. With an increase of the international activity of the media and big corporations operating across countries, commonly defined guidelines and principles to ensure media independence and transparency of ownership in the EU internal market are needed, as signalled in the 2021 MPM and EU Rule of Law Report. But this approach should also apply to new media services providers, which operate in a highly concentrated sector due to network externalities.

In the online sphere, opinion power is increasingly in the hands of online platforms and aggregators. Regulatory standards for media freedom protection based on competition in the internal market should rely on a harmonised but also all-encompassing understanding of ‘media’. In other words, eventual EU media freedom standards should cover *all* media. However, this does not mean that the legislator should provide a definition of ‘media’ or a list of the services that would be covered. The preferred approach is, instead, a dynamic scope that understands media freedom as a framework through which freedom of expression can be effectively exercised, including the delineation of parameters to identify what type of services do, and do not, benefit from exemptions and privileges. This would contribute to identify what understanding of media freedom serves best to the objective of a careful regulatory intervention.

Despite the difficulties of providing a dynamic definition, it remains to be seen what categories of services will be included in the forthcoming proposal. Indeed, this will be a good opportunity to provide a set of parameters that would help to delimitate the scope of the intervention.

## **#2 – EMFA should not be seen as an alternative but complement to existing rules (DSA, AVMSD, etc)**

EU-level rules setting up better mechanisms of content moderation and transparent recommender system are already put forward in the DSA proposal.<sup>105</sup> Nonetheless, manipulative polarisation of the public opinion can still occur with the capture of traditional media, regardless of whether polarised views are shared in social media platforms or aired on TV.<sup>106</sup>

Based on the policy objectives for a European framework preserving media freedom, top-down legislation seems the preferred policy instrument for effectively regulating limitations to media freedom and independence by political and economic interferences. EU-level rules on media ownership and independence of the regulators can create uniformity across the EU

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104 See para 25 of Report of the Committee on Culture and Education (CULT) on Europe's Media in the Digital Decade: an Action Plan to Support Recovery and Transformation (2021/2017(INI)), 6.10.2021. See also Report of the Committee on Legal Affairs and the Committee on Civil Liberties, Justice and Home Affairs on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society (2021/2036(INI)), 27.10.2021.

105 Article 14 and 29 DSA Proposal.

106 See Benkler et al, *supra* n 58.

and can contribute to overcome the reported deficiencies of the implementation of the AVMSD rules by the Member States. EU intervention can contribute to reducing existing barriers to internal market freedoms and prevent anti-competitive behaviour where competition law alone is not enough. For example, EU level harmonization legislation on media freedom can prevent legislation like the Polish law on media ownership that prohibits foreign media (particularly, Discovery's TVN) in the domestic market. The DMA does not seem enough to address the impact on media freedom because 'fairness' requires a different treatment in the media sector due to the influence and power of platforms. Therefore, a *lex specialis* on media freedom would establish a framework of minimum set requirements to specifically protect media freedom in traditional and new media.

Rules on advertising, including political advertising, not only for traditional media but also for online platforms would also level the playing field between traditional media and intermediary services providers.<sup>107</sup> In this regard, proposed rules on political advertising aim at putting forward measures to ensure the transparency of political advertising across the different technologies used by citizens to obtain accurate information, especially during political campaigns. The DSA proposal also contains provisions on transparency of online advertising.<sup>108</sup> Yet, these might not be enough if considering how traditional media providers have been hit by the pandemic and how platforms are disrupting their revenue model.<sup>109</sup> Accordingly, a prospective EU framework for media freedom should address revenue models for both platforms (and aggregators) and traditional media. Here, however, the definition of specific limits should be left to the Member States, to better adapt interventions to domestic needs.

### **#3 – EMFA should be designed as a reinforced governance framework for media (internal) market regulation underpinning self-regulation and privatised enforcement**

Compared to conventional regulation, meta-regulation acknowledges the discretion of self-regulation to set out specific operational details.<sup>110</sup> A meta-regulatory approach is compatible with the aspirations of the European Commission, which recognises the potential of self-regulation to preserve media freedom and media coverage online and, hence, it calls for preserving self-regulatory approaches in the sector.<sup>111</sup>

Self-regulatory tools are varied. They can range from codes of conduct, best practices or industry standards to contracts.<sup>112</sup> In this regard, and in a consistent manner with the DSA proposal or even the proposal for regulating AI,<sup>113</sup> it is suggested that the use and supervision

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107 The Commission has recently put forward a proposal for a Regulation on the transparency and targeting of political advertising. Brussels, 25.11.2021. COM(2021) 731 final. The proposal establishes harmonised transparency obligations for providers of political advertising as well as harmonised rules on the use of targeting and amplification techniques for the purposes of political advertising that involve the use of personal data. The explanatory memorandum accompanying the document includes guidance on how such instrument will interplay with DSA but there is no reference to whether and how this proposal will impact media freedom.

108 Articles 24 and 30 DSA Proposal.

109 Radu (2020), supra n 26.

110 Coglianese & Mendelson (2010), supra n 18.

111 See Call for evidence for an Impact Assessment on the Media Freedom Act supra n 71, at 3.

112 Cantero Gamito, M. (2020), 'The role of the EU in the transnational governance of standards, contracts and codes' in M. Cantero Gamito and H-W. Micklitz (eds.) *The Role of the EU in Transnational Legal Ordering*, Edward Elgar Publishing.

113 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative Acts. COM/2021/206 final.

of these mechanisms is designed under a *risk-based approach* that takes into consideration the impact of leaving social interests' aspects to private regulation. Therefore, we shall consider the scope and limits of different private regulatory tools in the context of media freedom.

*Codes of conduct:* The DSA supports and promotes the development of voluntary codes of conduct as the most appropriate instrument for certain areas of consideration and mentions, in particular, the significance of codes of conduct for risk mitigation concerning specific types of illegal content.<sup>114</sup> Yet, in the event of systemic risks for democracy and society, including disinformation and abusive practices, the unjustified failure to observe the code by VLOPs could be considered infringements of the obligations arising from the DSA.<sup>115</sup> In the context of media freedom, a meta-regulatory approach could promote the adoption of codes of conduct for the design and implementation of actions to tackling not only disinformation but also the inclusion of pluralist views.

*Industry standards:* The DSA proposes that the Commission supports and promotes the creation and adoption of international and European voluntary industry standards that streamline the submission of notices, including those submitted by trusted flaggers through specific APIs, interfaces for complying with obligations regarding transparency of online advertising and data access and data scrutiny, procedures for auditing VLOPs, inventories of advertising repositories, and the transmission of data between advertising intermediaries.<sup>116</sup> Industry standards often function as a necessary point of reference for regulatory compliance through essential requirements set out by the legislator but further defined by specialised industry actors.<sup>117</sup> From the perspective of the legislator, the benefits of leaving certain aspects to standardisation are apparent. While standardisation delegates law-making power to private actors, it allows the participation of new actors into the regulatory process,<sup>118</sup> especially in areas where the legislator lacks the necessary expertise and knowledge in areas characterised by technological opacity. However, the delegation of law-making power to standardisation is often controversial and contested.<sup>119</sup> This is most problematic especially in cases where the definition of technical standards involves fundamental rights considerations.<sup>120</sup> In this regard, attention should be paid to standardization, where actual value choices affecting fundamental rights are to be made. A metaregulatory framework can reinforce standard-setting with sufficient procedural rules ensuring better representation, legitimacy and democratic accountability.<sup>121</sup>

*Terms and conditions:* In the online environment, the regulation of online behaviour is left to platforms terms and conditions, which work as a regulatory framework containing the rules that define permitted and non-permitted behaviour and establishing the consequences and

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114 Recital 68 and Article 35 DSA proposal.

115 Recital 68 DSA proposal.

116 Article 34 DSA.

117 Schepel, H. (2005) *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Hart publishing.

118 Minow, M. (2003), *Partners, not Rivals: Privatization and the Public Good*, Beacon Press.

119 Curtin, D., & Senden, L. (2011). Public Accountability of Transnational Private Regulation: Chimera or Reality. *Journal of Law and Society*, 38(1), 163–188; Eliantonio, M. & Cauffman, C. (Eds.) (2020), *The Legitimacy of Standardisation as a Regulatory Technique*. Edward Elgar Publishing.

120 DeNardis, L. (2012). Hidden levers of Internet control: An infrastructure-based theory of Internet governance. *Information, Communication & Society*, 15(5), 720-738.

121 See below, #6.



remedies for violating them. This would allow platforms to delete content or preventing users from accessing the platform by using their T&C as the legal basis for it. In fact, private actors are increasingly seen as a necessary tool in the enforcement of regulation. The capacity of private platforms to massively adjudicate disputes and to operationalise large-scale decision-making cannot be easily replicated by the courts,<sup>122</sup> calling for a more proactive approach that delegates enforcement to private actors. This explains why legislators are gradually embracing the idea behind ‘code is law’,<sup>123</sup> which is particularly visible in algorithmic moderation. Particularly, the ability of platforms to enforce rules, especially if embedded in algorithms, is seen by the legislator as a tool to enforce public regulation and to police online behaviour.<sup>124</sup> For example, despite the prohibition of general monitoring obligations that follows intermediaries’ safe harbours, legislative obligations are currently requiring online intermediaries to incorporate architectural arrangements to enforce regulation. This approach is visible in the regime of conditional immunity of the eCommerce Directive and reinforced in the DSA text,<sup>125</sup> or in the controversial Article 17 of the Copyright Directive.<sup>126</sup> However, while potentially effective, this approach to internet regulation poses serious risks as it can result in undesired censorship, interfering with the fundamental right to freedom of expression. Therefore, an in line with the DSA (Article 12 of the Proposal), a metaregulatory framework will ensure that policies and procedures leading to decisions made on the basis of T&C regarding the removal of media content should be publicly accessible.

#### **#4 – EMFA as a procedural framework for privatised enforcement.**

The shift of regulatory and enforcement power from the public to the private sphere needs to be framed within the procedural guarantees acquired over time in order to prevent illegitimate derogations from freedom of expression. The self-regulatory nature of the online world in the early days of the internet has resulted in the displacement of the architecture of control of information, but the transition cannot be one from ‘control without government’ to ‘government without control’.<sup>127</sup> And, most importantly, the regulatory intermediary role of private actors<sup>128</sup> shall not be seen a *carte blanche* to set up a system of control with the collusion of the state.<sup>129</sup> Particularly in relation to mandated moderation, how can such close relationship to the government(s) ensure media freedom?

Acknowledging this substantial risk is a first step towards the design and necessary establishment of procedural safeguards for the legitimacy and accountability of private adjudication. In this regard, meta-regulation for media freedom can work as a model that

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122 Cantero Gamito (2017), Regulation.com, supra n 11.

123 Lessig, L. (1999) *Code and Other Laws of Cyberspace*. New York: Basic Books.

124 Busch, C. (2020), supra n 10. Elkin-Koren, N. & Haber, E. (2016) ‘Governance by Proxy: Cyber Challenges to Civil Liberties’ 82 *Brooklyn Law Review* 12.

125 Although it remains to be seen to what extent the framework for conditional liability exemptions will interplay with the platforms’ community policies when content moderation is carried out to perform a legal obligation.

126 Dusollier, S., (2020) ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition’, 57 *Common Market Law Review*, 979-1030; Lambrecht, M. (2020), ‘Free Speech by Design – Algorithmic protection of exceptions and limitations in the Copyright DSM directive’, 11(1) *JIPITEC*, 68-94.

127 Lessig, *Code 2.0*.

128 Abbott, Kenneth W. *et al.* (2017) ‘Theorizing Regulatory Intermediaries: The Rit Model’ 670 *Annals of the American Academy of Political and Social Science* 14–35.

129 Lessig, *Code 2.0*.

protects freedom of expression by providing procedural mechanisms to offset legitimacy concerns regarding the use of private regulation and privatised enforcement. In fact, it can be argued that, despite national procedural autonomy, a transformation from content to procedure can be identified in the latest EU regulatory initiatives. For example, the DSA proposal largely puts in place a procedural framework for private enforcement of broadly defined goals and concepts. Such regulatory strategy assumes that endorsing enforcement powers to private platforms can arguably contribute to more effective enforcement due to the monitoring capacity of platforms. EMFA will more likely be consistent with this approach.

Despite the possibility and desirability to introduce self-regulatory mechanisms in the regulation of media freedom, it has been argued that the responsibility to assess what is the adequate balance between the fundamental rights should not be (entirely) left to private actors.<sup>130</sup> Thus, there should be mechanisms for monitoring that platform effectively contrast information and respect due process, for example by providing rights of reply and other procedural guarantees for contesting the removal of online content. Unfortunately, current lack of access to data on platforms' moderation practices makes it difficult to provide sensible recommendations for specific policy interventions. This will hopefully change with the entry into force of the DSA.

In the context of media freedom, one question that arises is whether private adjudicator should decide on, or even define, what constitutes content diversity. In this example, while private monitoring can be problematic, the requirement of internal complaint-handling systems and certified and independent out-of-court dispute settlement bodies for redress against restrictive decisions, as required by the DSA,<sup>131</sup> can work as a buffer to prevent abuses by platforms when moderating content and behaviour. A similar approach within EMFA should be considered, and maybe even expected. Yet, it is important to note that while in the DSA independence is considered *vis-à-vis* online platforms, a framework for media freedom should establish independent bodies not only free from platforms' control but also from governmental interference.

## **#5 – Media freedom needs independent institutions**

Setting up sufficiently reinforced and independent media regulators and adjudicators is a challenge in a context in which national governments can exercise control over domestic regulatory authorities.<sup>132</sup> This difficult reconciliation can be overcome with supranational and clear rules for the independence of national regulators.<sup>133</sup> In this regard, a reinforced role for ERGA, with further oversight powers, is a likely outcome of the EMFA proposal.<sup>134</sup> In an attempt to centralise and harmonise media governance in the EU, the plan to reinforce powers and resources for establishing a strengthened body (ERGA+), is indeed a necessary

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130 Pollicino, *supra* n 59.

131 Article 17 and 18 DSA proposal. Article 18(2) contains a minimum set of procedural guarantees.

132 See Irion, K., & Radu, R. (2014), 'Delegation to Independent Regulatory Authorities in the Media Sector: A Paradigm Shift through the Lens of Regulatory Theory', in W. Schultz, P. Valcke, & K. Irion (Eds.), *The Independence of the Media and Its Regulatory Agencies: Shedding new light on formal and actual independence against the national context* (pp. 15-54). (ECREA Book Series). Bristol: Intellect.

133 Llorens, C., & Costache, A. M. (2014), 'European Union media policy and independent regulatory authorities: A new tool to protect European media pluralism?', *Journal of information policy*, 4(1), 396-420.

134 See Call for evidence for an Impact Assessment on the Media Freedom Act at p. 3.

measure towards more effective and independent monitoring mechanism. However, some observations shall be made.

First, a supranational supervisory mechanism does not necessarily mean supranational supremacy. A reinforced ERGA will indeed contribute to set common principles to monitor media freedom at the domestic level and to prevent the re-politicisation of national regulators. However, the legal text shall also include clear rules on whether a supranational entity is to define concepts such as 'media diversity'. In this regard, it is important to strike a balance between institutionalisation and proceduralisation.<sup>135</sup>

Second, the legislator should refrain from creating institutions and mechanisms that could become points of friction and increase the probability to be subject to capture by the governments, endangering media freedom and editorial independence.<sup>136</sup> Therefore, reinforcing ERGA rather than creating *ex-novo* authorities seems a sensible option.

Third, in the institutional and procedural design the legislator should acknowledge the substantial differences between private adjudicators or even internal appeal bodies, such as for example Facebook Oversight Board (FOB), and the courts. The opposite could result in the horizontal application of fundamental rights.<sup>137</sup> The problem with the horizontal application of fundamental rights in the context of media freedom is associated with delegating decision-making on fundamental rights issues to non-monitored actors, especially where decisions have been automated with algorithms.

Accordingly, it is suggested that any regulatory reform takes into consideration the necessity of institutional separation. This requires understanding content moderation as an administrative function rather than a judicial one.<sup>138</sup> This not only contributes to a better design of procedural guarantees but also to establishing mechanism for monitoring algorithmic decision-making in line with the approach to be followed under forthcoming AI rules.

#### **#6 – EMFA should include a certification mechanism for more transparent and inclusive algorithmic moderation**

Case-by-case moderation is highly complex in a context where millions of communications exchanges take place every hour in social media, making algorithmic moderation a workable technical solution to massively monitor and adjudicate free speech.<sup>139</sup> But who controls the controllers? Here again, the legislator should establish independent and inclusive mechanisms to oversight automated content moderation.

From the perspective of regulatory coherence, here it is suggested that, in line with the EU approach to the regulation of AI systems, the use of algorithms for content moderation in the EU digital market should comply with European standards containing the specifications to essential requirements set out in the regulation before they are placed in the market. This

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135 Point raised by D. Tambini in the Workshop 'Towards Digital Constitutionalism' EUI (Florence), 26 November 2021.

136 Tambini (2021), *Media Freedom*, supra n 16.

137 For example, it is of utmost importance that the function of private adjudication is not confused with the role of the courts. In this regard, references to the FOB as a Supreme Court should be avoided, especially if they come from lawyers.

138 Douek, E, 'Content moderation as Administration' forthcoming in *Harvard Law Review* Vol. 136, Available at SSRN: <https://ssrn.com/abstract=4005326>.

139 Gorwa, R., Binns, R., & Katzenbach, C. (2020), 'Algorithmic content moderation: Technical and political challenges in the automation of platform governance' *Big Data & Society*, 7(1), 2053951719897945.

market regulation approach will be not only consistent with forthcoming risk-based AI rules, which consider law enforcement using AI dealing with fundamental rights as high-risk and that leaves the definition of the requirements to standardisation, but also with the use of Article 114 TFEU as a legal basis.

The main problem with regulatory delegation to (private) standard-setting bodies is that standardisation is often considered utilitarian, technocratic, and undemocratic.<sup>140</sup> As the invisible foundation of the internal market, European standards provide the conditions for the mutual recognition under free movement of goods and (information society) services. Moreover, in addition to making the internal market technically interoperable, it is argued that standardisation contributes to incorporate EU democratic values inside and outside the internal market.<sup>141</sup> Due to the potential of standardisation to set globally dominant standards, the European Commission is using the current proposal amending the EU Regulation on Standardisation<sup>142</sup> as an opportunity to reinforce the democratic credentials of standardisation bodies by improving decision-making processes within the European Standardisation Organisations (ESOs) and requesting them to 'modernise their governance to fully represent the public interest'.<sup>143</sup>

Accordingly, certification mechanisms using EU harmonised standards can arguably contribute to alleviate problems associated with the related to opacity, (lack of) fairness and politisation of algorithmic moderation. Following the approval of the amendment to the EU Regulation on standardisation, EU national standardisation bodies will hold decision-making power in the development of EU-mandate standards.<sup>144</sup> Representation in these bodies includes societal stakeholders. Seen this way, standardisation can be considered a way to replace self-regulatory solutions with co-regulatory ones in the private adjudication of fundamental rights.<sup>145</sup> Therefore, in the context of media freedom, despite well-founded concerns about delegating regulatory power to standard-setting bodies, standardisation stands as a more inclusive mechanism for regulating algorithms for content moderation than unmonitored private regulation while preventing state interference through public regulation.<sup>146</sup> Ultimately, the incorporation of democratic values and interest into European standards is monitored by the Court of Justice of the European Union since standards published in the EU Official Journal are considered part of EU law and, consequently, can be interpreted by this Court.<sup>147</sup>

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140 For a discussion in relation with the democratic and legitimacy reservations of the role of standardization in the governance of AI, see Veale, M., & Borgesius, F. Z. (2021), 'Demystifying the Draft EU Artificial Intelligence Act—Analysing the good, the bad, and the unclear elements of the proposed approach' *Computer Law Review International*, 22(4), 97-112.

141 The European Commission explicitly acknowledges the role of standardization to export EU values beyond the internal market in the latest EU Strategy on Standardisation, EU Commission Communication 'An EU Strategy on Standardisation. Setting global standards in support of a resilient, green and digital EU single market', COM(2022) 31 final. In this regard, see Bradford, A. (2012), 'The Brussels effect', *Northwestern University Law Review*, 107, 1; Bradford, A. (2020), *The Brussels effect: How the European Union rules the world*, Oxford University Press; and Cantero Gamito & Micklitz, *The Role of the EU...* supra n 11.

142 Proposal for a Regulation amending Regulation (EU) No 1025/2012 as regards the decisions of European standardisation organisations concerning European standards and European standardisation deliverable, COM(2022) 32 final

143 Ibid. Article 10(2a), and European Commission (2022), *EU Strategy on Standardisation*, supra n 141.

144 Ibid, at 4.

145 Quintel & Ullrich (2020), supra n 103.

146 In fact, one of the ESOs, the European Committee for Standardisation (CEN, *Comité Européen de Normalisation*) together with the Journalism Trust Initiative (JTI), have developed industry standards (CWA 17493:2019) to ensure that news media operate according to criteria that promote transparency and accountability.

147 C-613/14 - *James Elliott Construction*, see paras. 34, 35 and 47.

## **6. Conclusion**

Recent regulatory initiatives such as the DSA show that, due to their capacity to manage countercultures, controlling speech and ultimately increasing threats to democracy, online platforms and aggregators should no longer be treated as “lemonade stands”; they are too big to self-regulate. Yet, in the context of media freedom, a compromise shall be reached due to, first, the need to preserve self-regulatory structures as a buffer against undesired governmental control of the media and, second, to benefit from the capacity of platforms to enforce regulation massively and effectively. Despite the difficulty to strike such a balance, regulating media freedom and pluralism in the online ecosystem cannot be a mere exercise of wishful thinking.

In this light, this article has shown how legislators are increasingly shifting their attention towards platforms and aggregators to better understand how they provide content to users in order to design specific interventions for preventing illegitimate uses of the technology that put democracy at risk. However, the lack of supranational coordination involves significant challenges for the protection of EU fundamental rights and values in a consistent manner due to diverging rules and approaches as well as different understandings of media freedom and independence. Moreover, this regulatory fragmentation is juxtaposed with different media rules for different technologies, namely traditional and new media. Therefore, it is argued that resulting gaps in the protection of media freedom and pluralism in the digital single market need to be bridged with harmonised EU rules, further regulatory cooperation, and a regulatory framework consistent with the principle of technology neutrality in a context of technological change.

Notwithstanding increasing pressures to provide supranational regulatory solutions, the EU legislator should not be rushed, and any regulatory intervention should be sufficiently and carefully pondered. Emerging problems require innovative solutions. Accordingly, this article calls for designing the forthcoming European Media Freedom Act (EMFA) as meta-regulation. Meta-regulation can contribute to establishing a dynamic and non-hierarchical architecture establishing, under a single instrument, consistent regulatory and self-regulatory standards for media freedom. Thus, in a manner consistent with the EU regulatory approach in the draft DSA and the proposal for an AI Regulation (AI Act), a meta-regulation approach can include a primary legislative layer that functions as a safety net consisting of legally binding rules and including any institutional alterations. The definition of certain aspects should be left to those who more effectively can regulate and enforce regulatory solutions, creating a secondary, more self-regulatory, layer. Within this framework, interactions among the two layers are possible; for example, the primary layer can require drawing up regulatory private contracts that incorporate public policy considerations into platforms’ terms and conditions.<sup>148</sup> The system will then be wrapped with specific guarantees, monitoring mechanisms and objectives defined at EU level to ensure media independence and avoid state interferences.

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<sup>148</sup> Such as for example Article 12 DSA proposal.

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