

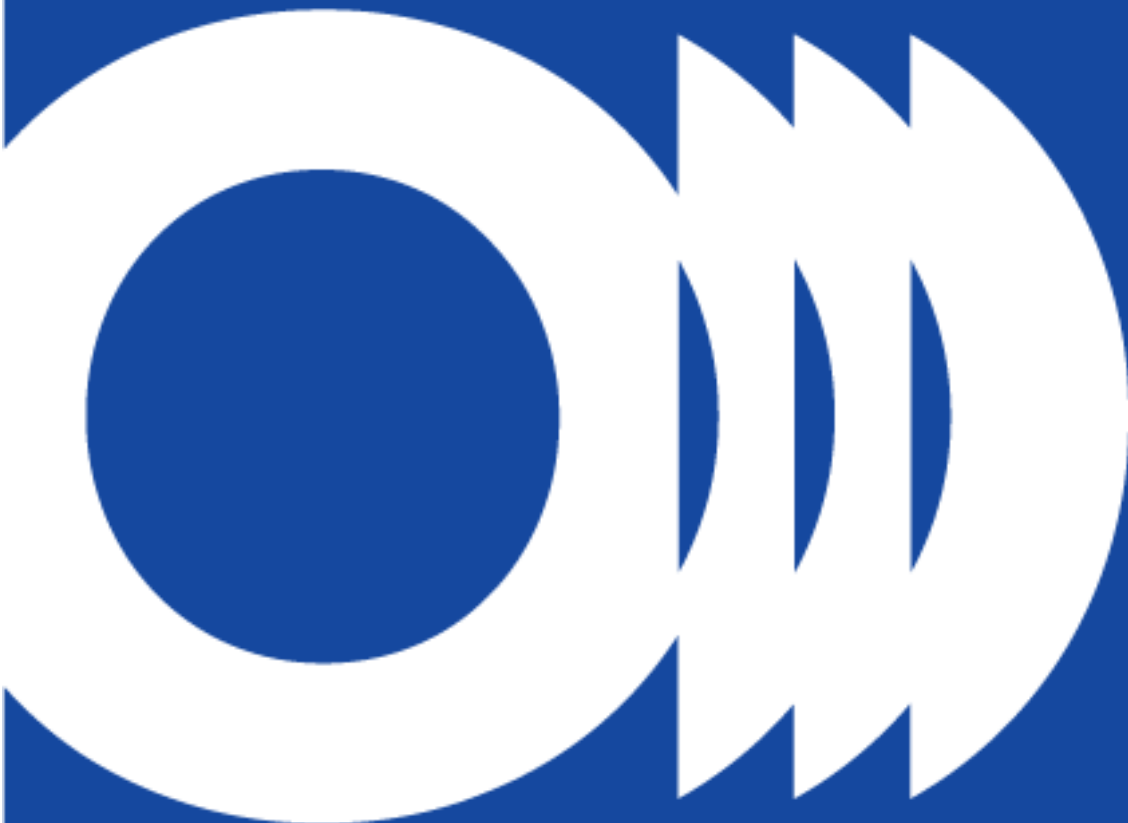
EBU

OPERATING EUROVISION AND EURORADIO

POSITION PAPER

EBU response to the European Commission's Public Consultation for a European Media Freedom Act

23 MARCH 2022



I. Introduction

1. On behalf of its members, public service media (PSM) organizations from across Europe, the European Broadcasting Union (EBU) welcomes the opportunity to provide feedback on the forthcoming European Media Freedom Act (EMFA). **We welcome the Commission's initiative and support its overall goal of securing and supporting independence and pluralism of the media in Europe.**
2. Media freedom and pluralism are core EU values enshrined in the European Charter on Fundamental Rights. Informed citizenship and the fundamental right to freedom of expression and information can only be guaranteed in any democratic society through media freedom and pluralism, supported by high-quality, independent and impartial news and other programming.
3. **Strong and independent PSM, alongside thriving and independent commercial media¹ and press, guarantee diverse, pluralistic and quality content and information for European citizens.** The crucial role of PSM in ensuring media pluralism as well as other cultural and social functions is clearly outlined in the EU Treaty Protocol on the system of public broadcasting.²
4. **We share the Commission's concerns when media freedom and pluralism is undermined.** The past decade shows a decline in levels of democracy³. Freedom of expression and of the media are often the first freedoms to suffer⁴. In parallel, there is the significant role played by global online players, which have the influence and access to information and opinion-forming. Global platforms should be free from undue political pressure, but equally they should not have unlimited unilateral power to decide what stays up and what comes down online. **The current debate is timely and important.**
5. Any threat to the independence and availability of media - whether via governmental interference, intimidation of journalists, lack of transparency in ownership structures and concentration, commercial pressure or abusive conduct blocking access to content - upsets the overall state of media freedom and pluralism in Europe.
6. We believe that the scope of the **EMFA must be comprehensive**, so that it supports and protects all relevant media providers (PSM, commercial media, press publishers) **from undue political or economic pressure; so that it addresses different types of threats to media freedom and pluralism, both offline and online.**
7. The EMFA is an **opportunity for Europe to delineate appropriate principles on transparency and independence that protect media against threats and interference.** Nonetheless, as Commission President Von der Leyen pointed out in her 2021 State of the Union address, media services cannot be treated like any other businesses. Indeed, the upcoming EMFA must recognize, protect and support the special role of media in society.

¹ Often referred to as the European dual system of public and private broadcasting or else the European audiovisual model, effectively involving a "race to the top" in terms of quality, objectivity and choice.

² *Official Journal C 340*, 10/11/1997 P. 0109. The Protocol highlights that national public broadcasting is "*directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism*".

³ <https://knowledgehub.ebu.ch/democracy>

⁴ See the EBU 2021 News Report 'What's Next? Public Service Journalism in the Age of Distraction, Opinion and Information Abundance'

https://www.ebu.ch/files/live/sites/ebu/files/Publications/strategic/open/News_report_2021.pdf

See also 2022 Freedom House Report on Freedom in the World highlighting that Independent media have suffered from attacks on journalists and blocks on access to information in established democracies, page 8:

https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf Reporters

Without Borders' 2021 World Press Freedom Index : <https://rsf.org/en/ranking>? Or

<https://www.cima.ned.org/publication/tipping-point-democratic-erosion-and-the-assault-on-press-freedom/>

8. **We welcome that the EMFA will build upon the AVMS Directive (AVMSD)**, a key legal instrument for audiovisual media providing a **uniquely European approach**. It allows media providers to deliver services in and across borders whilst allowing for specific EU and national rules and schemes to serve the public interest, promote pluralism and serve cultural diversity. This includes allowing national governments and regulators to define and, where needed, to design, practical regimes that are tailored to the national context.
9. **The EMFA must build on and perpetuate the same dynamic, respecting the delicate balance between single market objectives and the importance of national competencies to shape specific media pluralism and independence, social and cultural issues.** Member States should have sufficient discretion to safeguard the independence and pluralism of the media with due regard for the national context.⁵ The EMFA should carefully delineate areas where EU intervention brings added value, whilst promoting self- and co-regulatory initiatives or cooperation between national regulators where appropriate. A full harmonisation in the field of media regulation would possibly raise serious concerns in relation to proportionality and subsidiarity. Therefore, the legal form of the future EMFA should be carefully evaluated.
10. The EMFA must therefore be **consistent with EU primary and secondary law**, in particular with the Treaty principles of proportionality and subsidiarity and the Amsterdam Protocol, which provides that the conferral, definition of the remit, organization and funding of PSM is primarily the competence of Member States.⁶ The EMFA must not weaken or undermine the equilibrium of the Amsterdam Protocol through the use of secondary EU law.
11. Finally, we note that the success of the EMFA depends on the extent to which the EU can ensure respect for rule of law in Europe. **Without a genuine commitment to act against rule of law infringements, any efforts to promote media freedom and pluralism may be compromised from the outset.**

Below, we provide comments on specific sections of the Commission consultation.

II. Safeguarding media independence and media pluralism

12. Securing media independence and pluralism is reflected in national media laws across the EU as a cornerstone of democratic society. More coherence in national media regulation may promote the internal market, but this should never be at the expense of Member States' role to protect and promote media pluralism and other fundamental values.
13. National regulatory authorities (NRA) have an important role in regulating and ensuring media independence. To carry out this role effectively, NRAs must themselves be independent. Art. 30 AMVSD introduces an obligation for national regulatory authorities to be legally distinct from the government and functionally independent from their respective governments and any other public or private body. **We call upon all Member states to implement this new provision effectively.**⁷ Building on Art. 30 AVMSD, the Commission should also consider further specifying independence criteria which Member States have

⁵ This should follow established principles on the delineation of competences between the EU and Member States, as set out in e.g. the Amsterdam Protocol and the EC Merger Regulation.

⁶ See also Communication on the application of State aid rules to public service broadcasting (the Broadcasting Communication) [2009] OJ C 257/1, paras. 39 and 48.

⁷ Reference may be made to existing or future specialized tools measuring independence, e.g. annual Media Pluralism Monitor.

to respect, to ensure that NRAs do indeed play their role as guardians of free and independent media.

14. We advocate an approach developing **appropriate and proportionate principle-based rules to safeguard (editorial) independence of all types of media** from government, political and economic actors, or any other relevant vested interest. We also support that Member States guarantee more generally media pluralism and freedom of expression, in accordance with the Treaties, the Charter of Fundamental Rights and AVMSD.
15. With respect to PSM, and noting the delicate balance of competences set out in the EU Treaty and Amsterdam Protocol, **the Commission may take inspiration from the Council of Europe standards** for the EMFA.⁸ In particular, the EMFA could encourage Member States to ensure:
 - PSM have their **own legal personality**, separate from State institutions;
 - a **clear separation between the executive (i.e., managerial) and supervisory bodies**;
 - **appointment of senior PSM management** should be made according to transparent processes and clear and objective criteria; **dismissal of senior PSM management** should only be for objective and appropriate reasons according to a clear procedure and immune from political motivations.
 - **appointment of management and supervisory bodies** cannot be used to exert political or other influence over the operation and no State representatives or active politicians should have any decisive role;
 - **management is protected from external political or other interference** in the exercise of its duties, and strict rules on conflicts of interest apply;
 - **appointment of supervisory bodies should be open and transparent and for a specified term** that can only be shortened in limited and legally defined objective circumstances;
 - **supervisory bodies should be composed in a balanced and pluralistic way**, representing the whole spectrum of society. They should not exercise any editorial control over content;
 - **PSM should always operate according to strong and transparent** editorial guidelines and codes of ethics.
16. There are different ways and approaches to achieve the overall goals, that should be **left to Member States or the appropriate independent national bodies**, taking into account different legal, cultural and institutional systems.⁹ There is no need to adapt systems of PSM governance that are already working well in ensuring PSM independence.
17. Meanwhile, we are also mindful of **global online platforms' significant and growing influence** on distribution of and access to content and information. They determine who sees what and when (based on their algorithms, content recommendation systems, community standards and terms and conditions) and imposing private choices and values on audiences. Without adequate safeguards, this will have major implications for freedom

⁸ Notably, Recommendation CM/Rec(2012)1 of the Committee of Ministers to member states on public service media governance, Adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers' Deputies..

⁹ For further considerations, see EBU Legal Focus on Governance Principles for PSM: <https://www.ebu.ch/publications/strategic/open/governance-principles-for-psm>

of expression, media freedom and pluralism, as well as for the ability of citizens to easily access and find European audiovisual media.

18. We urge the EU in particular to set the bar high for global platforms to commit to fairness and to respect media freedom and media standards.¹⁰ Currently, platforms moderate, remove or limit access to editorial content and services solely based on their own terms and conditions. In the absence of any rules or oversight, it undermines respect for media rules in Europe and affects trust and viability in media online. Failure by platforms to properly attribute the identity (logos or trademarks) from media appearing on platforms also prevents citizens from understanding where content and services come from. If the proposed Digital Services Act/Digital Markets Act do not provide adequate safeguards in these fields, the EMFA must **ensure that the identity and integrity of European media is adequately protected online**, and help secure access and findability of media services of general interest for European citizens.

III. Transparent and independent media markets

19. **Media ownership transparency is not only important to secure fair and effective competition but also to strengthen pluralism and promote informed citizenship.** As set out in the AVMSD¹¹, knowing who is responsible for media content enables informed judgement.
20. The AVMSD currently encourages Member States to take measures regarding media ownership. We believe that the EMFA is an opportunity to **develop general EU transparency principles on media ownership**, regardless of the way the media are financed (publicly or commercially funded) or the type of output they provide (audiovisual, audio, press, online). Increased transparency can facilitate the public in assessing commercial interests and motivations. It can also foster trust in the media and reinforce legitimacy. However, transparency principles should be **proportionate in application and in the overall objective of enhancing freedom of expression and information**. In this context, we recommend drawing inspiration from the **2018 Council of Europe guidelines on media pluralism and transparency ownership**.
21. In its questionnaire, the Commission identifies the lack of data as a critical issue. PSM need accurate and relevant data to continue offering innovative and appealing services, **Lack of data can also undermine media providers in terms of advertising revenue**. The Commission further refers to the lack of transparency of **audience measurement**. Although audience measurement for television and radio is generally well developed, **media providers often struggle to obtain reliable and meaningful audience data from online platform and IPTV operators**.
22. Whilst the proposed Digital Markets Act (DMA) should introduce strong obligations for gatekeepers to provide access to data to media providers online,¹² the **EBU advocates developing general audience measurement principles** (transparency, auditable and audited results, etc.). We are also in favour of **fostering effective self/co-regulatory initiatives** in the sector, noting that prescriptive and legally binding conditions on measurement methods are less suitable for the dynamic and innovative online environment.

¹⁰ See EBU position for trilogue with respect to the [DSA](#) and [DMA](#).

¹¹ Recitals 15, 16 and Article 5(1) AVMSD

¹² Proposed Article 6 (1) (g).

IV. Allocation of public resources in the media markets

23. An **appropriate and secure funding framework** which guarantees PSM organizations the financial means necessary to fulfil their remit is essential for PSM independence. Equally, there must be an **appropriate and transparent system to define and update the public service remit when necessary**.
24. We call on Member States to ensure that PSM receive stable, adequate and independent funding. They must take the necessary measures (irrespective of the method and the level of funding) to ensure:
- an effective mechanism so that **decisions made about the level of funding are not influenced by undue political or commercial interests**;
 - **secure, adequate and sustainable funding to enable the PSM to fulfil its role and remit**, with sufficient security for the future to allow for reasonable future planning.¹³
25. **There is no need for the EU to introduce additional mechanisms to monitor funding or the public service remit, since this is already covered by the EU State aid rules in line with the Amsterdam Protocol.** Meanwhile, as recipients of public funding, PSM acknowledge their responsibility to be transparent in how that funding is used, ensuring annual accounts and budgets are sufficiently transparent.
26. For all media providers, the allocation of public resources in the form of State advertising is problematic when used to favor media outlets that display government-friendly views, thus threatening the financial viability of independent media organizations.
27. The EBU proposes that the EU could introduce **principles to ensure fairness and transparency in the allocation of State advertising by the Member States**. There should be clear criteria and transparent procedures for the allocation of all advertising placed by the State, irrespective of its nature (i.e. whether politically motivated; legislative or regulatory; or commercial etc.). This should include regular reporting on who the beneficiaries are, and what amounts are received. As an additional measure, media providers might properly inform their audience about any advertisement or announcements placed by the State (or government).
28. Any such principles should be mindful of the fact that **State advertising is heavily regulated or prohibited in a number of Member States**. Any new EU principles should leave such existing frameworks intact. They should also be **coherent** with the recently published proposal for a Regulation on the transparency and targeting of political advertising.

V. Regulatory cooperation and governance options

29. NRAs and supervisory bodies for the media play a key role in the oversight of media providers, including PSM, and their compliance with national and European legislation and standards. They are a guardian of freedom of expression and pluralism in broadcast and online media.

¹³ Ideally, the decision setting the level of the funding (i) must be distinct from the definition of the remit itself and (ii) should follow the adoption of instrument that defines such public service remit. Acting otherwise, any unexpected reduction in the budget would inevitably prevent the PSM from fulfilling its public service remit. See further, EBU Legal Focus on Funding Principles for PSM: https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Legal-Focus-Pub-Fund_EN.pdf

30. Given the rapid technical advances in the media sector, the presence of global players, and also legislative changes, NRAs constantly have to adapt their activities, take over new tasks and responsibilities, and develop new regulatory approaches.
31. Against this backdrop, cooperation between NRAs in Europe becomes increasingly important. Article 30b of the revised AVMSD formally established the European Regulators Group for Audiovisual Media Services (ERGA), which is composed of NRAs from across the Member States of the Union. As part of its role, ERGA facilitates cooperation amongst its members for the sake of consistent implementation of the revised AVMSD.
32. **Effective cooperation between NRAs around key principles** at EU level in the context of the EMFA will be important, in particular in the online sphere. Such enhanced cooperation would not only support effective enforcement of existing EU media rules, but also allow coordinating national approaches where appropriate, building on best practices developed at national level.
33. **The EBU notes that one of the key areas for more coordination between regulators is the appropriate prominence of general interest content.** Following the revised AVMSD, national governments are invited to provide for adequate prominence regimes for general interest content, including PSM services. Given the slow implementation of prominence regimes at national level after the revised AVMSD, the EBU urgently calls for enhanced dialogue and cooperation between NRAs in this area. Drawing on best practices in certain Member states, this could inspire and guide governments and NRAs to implement Article 7a of the revised AVMSD into national regimes. Prominence measures are of fundamental importance for our democratic societies. They enable citizens to receive and consume accurate and trustworthy information and contribute to freedom of expression, diversity of opinions and countering disinformation. Recent political developments have shown that access to general interest content is vital and should in no way be considered as a barrier to the functioning of the single market.
34. Enhanced cooperation among NRAs could build on existing structures such as ERGA. Further reflection is, however, necessary to ensure that **all relevant NRAs and supervisory bodies for the media can play a role.** Not all supervisory bodies of PSM are represented in ERGA.