

The Media Privilege in the European Media Freedom Act

PAOLO CESARINI,¹ GIOVANNI DE GREGORIO,² ORESTE POLLICINO³

ABSTRACT: The launch of the European Media Freedom Act is a landmark step in European media policy. The rapid evolution of digital technologies has transformed the media landscape, leading to more access and information dissemination. However, the equally rapid proliferation of harmful content on online platforms, including disinformation, has raised significant concerns and risks across Member States. To address these challenges, new rules and regulations have been introduced, such as the Digital Services Act to limit the spread of illegal and harmful activities online by regulating content moderation. However, the European approach to content moderation is still characterised by sectorial fragmentation and strategies dealing with online harms that are shaped around specific policy areas. The EMFA is a significant addition to this fragmented landscape, introducing a unique system that impacts content moderation practices, particularly regarding media outlets. Article 17 of the EMFA introduces a “media exemption”, also known as “media privilege”, which prevents VLOPs from moderating content by media service providers (MSP) discretionarily. As a result, online platforms are required to maintaining content published by media service providers online and take certain procedural steps before taking restrictive content moderation decisions, even in case of harmful content violating their terms of services. This policy paper explores the challenges raised by the introduction of the media privilege in the EMFA. By focusing on the evolving political discussion towards the adoption of EMFA in 2024, this paper aims to underline the key regulatory questions that such a proposal raises in respect of media freedom, pluralism and content moderation in the EU. The first part examines the rationale, the origin and the scope *ratione personae* of the media privilege. The second part focuses on the scope *ratione materiae* of the media privilege, particularly looking at the consequences for the internal market and the protection of fundamental rights. The third part examines enforcement issues and compliance challenges.

¹ Member of the Management Board, European Media and Information Fund (EMIF). Senior Advisor at TENEO.

² PLMJ Chair in Law and Technology at Católica Global School of Law, Universidade Católica Portuguesa.

³ Full Professor of Constitutional Law at Bocconi University, Milan.

SUMMARY: 1. Introduction. – 2. The Structure and Rationale. – 3. The Scope *Ratione Personae*. 3.1 The Notion of Media and Equal Treatment. 3.2 Fragmentation and Level-Playing Field in the Internal Market for Media. – 4. The Scope *Ratione Materiae*. – 5. The Enforcement. 5.1 The Designation of Media. 5.2 Public Enforcement and Compliance Challenges. – 6. Conclusions.

1. Introduction

The launch of the European Media Freedom Act (EMFA) is a landmark step in European media policy.⁴ As the media landscape continues to evolve rapidly in the digital age, concerns over media pluralism, journalistic independence, and the spread of disinformation have prompted policymakers to take decisive action. The new proposed regulation aims to safeguard media pluralism and independence within the EU.⁵ The EMFA ambitiously covers a wide range of issues, including measures to prevent political interference in editorial decisions, protect journalists against surveillance, ensure funding for public service media, strengthening the system of control of concentrations, audience measurement and more. It introduces cooperation mechanisms for national regulatory authorities and establishes the European Board for Media Services (Board) which replaces the European Regulators Group for Audiovisual Media Services.

The wide scope of EMFA also addresses the challenges faced by media outlets in the digital age. In order to address the challenges driven by the rapid evolution of digital technologies that threaten the integrity of media freedom and amplify the spread of disinformation in digital spaces, the EMFA introduces a “media exemption”, also known as “media privilege” which pre-empt very large online platforms (VLOPs), as defined by the Digital Services Act (DSA),⁶ from moderating

⁴ Proposal for a Regulation of The European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU.

⁵ M.D. Cole – C. Etteldorf, *European Media Freedom Act. Background Analysis*, European Parliament, Policy Department for Structural and Cohesion Policies, 2023.

⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC, Art. 33.

content by media service providers (MSP) discretionarily.⁷ As a result, online platforms are required to maintain content published by media service providers online and have limited discretion to intervene against risks posed by harmful content violating their terms of services, thus shaping the process of content moderation.

In recent years, the rapid proliferation of harmful content on online platforms, including disinformation, has raised significant concerns and risks across Member States.⁸ To address these challenges, new rules and regulations, such as the DSA, have been introduced with a view to limiting the spread of illegal and harmful activities online, by regulating content moderation.⁹ However, the European approach to content moderation is still characterised by sectorial fragmentation. The media privilege introduced by the EMFA is a significant addition to this fragmented landscape, which impacts content moderation practices, particularly regarding media outlets.

The political debate about the EMFA is far from smooth and predictable. The large number of amendments tabled in the Council and the European Parliament shows the complexity of finding a balanced solution, such as to preserve the effectiveness of the special treatment sought for MSPs, while tempering with potential constitutional weaknesses of the EMFA. Aware of this challenge, the Swedish Presidency of the Council presented a compromise proposal on 16 June 2023, whose purpose was “to strike the right balance between the interests of media service providers and VLOPs, while minimising the risks of disinformation or manipulation of information in line with the provisions of DSA Regulation”.¹⁰ On this basis, the negotiation mandate then adopted by the Council on 21 June 2023 includes a number of amendments giving MSPs the right to reply when

⁷ EMFA, Art. 17.

⁸ G. Pitruzzella – O. Pollicino, *Disinformation and hate speech. A European Constitutional Perspective*, Milan, 2020.

⁹ G. De Gregorio, *Democratising Online Content Moderation. A Constitutional Framework*, in *Computer Law and Security Review*, 36, 2020, 105374.

¹⁰ Council of the European Union, *Note to COREPER*, Inter-institutional File: 2022/0277(COD), N. 10570/23, in *europeanjournalists.org*, 16 June 2023.

content is suspended or restricted in visibility, while VLOPs would have better tools to determine the self-declarations from MSPs.¹¹

At the time of writing, the debate in the European Parliament is less advanced. Following the publication of a Draft Report by the rapporteur of the leading CULT Committee on 31 March 2023,¹² a large number of additional amendments have been tabled by Committee members from different political groups and the vote on the final Report is expected in September 2023. In parallel, the associated Committees, IMCO and LIBE, have pursued their work on the respective Opinions, with IMCO having been able to adopt its compromise amendments on 29 June 2023,¹³ and LIBE having published a draft Opinion on 16 April 2023.¹⁴

This policy paper explores the challenges raised by the introduction of the media privilege in the EMFA. By focusing on the evolving political discussion towards the adoption of this legal instrument in 2024, this paper aims to examine certain key regulatory questions concerning media freedom, pluralism and content moderation in the EU. The first part examines the rationale, the origin and the scope *ratione personae* of the media privilege. The second part focuses on the scope *ratione materiae* of the media privilege, particularly looking at its consequences for the internal market and the protection of fundamental rights. The third part examines enforcement and effective compliance issues raised by the media exemption.

¹¹ Council of the European Union, *Outcome of Proceedings*, Inter-institutional File: 2022/0277(COD), N. 10954/23, in eur-lex.europa.eu, 21 June 2023.

¹² Committee on Culture and Education, *Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022)0457 – C9-0309/2022 – 2022/0277(COD)) 2022/0277(COD)*, in europarl.europa.eu, 31 March 2023.

¹³ Committee on the Internal Market and Consumer Protection, *Opinion for the Committee on Culture and Education on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022)0457 – C9-0309/2022 – 2022/0277(COD)) 2022/0277(COD)*, in europarl.europa.eu, 29 June 2023.

¹⁴ Committee on Civil Liberties, Justice and Home Affairs, *Opinion for the Committee on Culture and Education on the proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (COM(2022)0457 – C9-0309/2022 – 2022/0277(COD)) 2022/0277(COD)*, in europarl.europa.eu, 16 April 2023.

2. *The Structure and Rationale*

The media privilege introduced by the EMFA is designed to complement the DSA by introducing a special protection against restrictive content moderation decisions of VLOPs in respect of editorial content produced by MSPs. The Commission's proposal includes three main elements: a safe harbour for editorial content; a preferential lane for complaints; and a structured dialogue between the Board and stakeholders.¹⁵

First, the EMFA sets out a safe harbour for editorial content, whereby VLOPs would be prohibited from enforcing their terms and conditions and "suspending their online intermediation services" prior to the notification of a statement of reasons to the MSP concerned. This would mean in practice that, differently from what applies to other users, VLOPs could not take immediate action, including through the use of automated means, when certain problematic content originates from eligible MSPs. Nonetheless, the Commission's proposal includes an important caveat whereby, despite the above-mentioned obligations, VLOPs should not be prevented from taking "expeditious measures either against illegal content disseminated through (their) service, or in order to mitigate systemic risks posed by dissemination of certain content through (their) service",¹⁶ in accordance with to the DSA.

Second, the EMFA establishes a preferential lane for complaints lodged by MSPs, which VLOPs would have to deal with as a matter of priority, relative to complaints pursuant to the DSA coming from other users.¹⁷ Moreover, in case of frequent suspensions, VLOPs should engage in a meaningful and effective dialogue with the MSP concerned, with a view to finding an amicable solution. In this connection, VLOPs would also be subject to obligatory annual reporting, covering all content moderation decisions taken towards MSPs during each reference year.

Third, these provisions are accompanied by a structured dialogue involving VLOPs, the media sector and civil society, and organised by the newly created Board. The aim of this forum would be "to foster access to diverse offers of independent media on very large online platforms and to

¹⁵ EMFA, Art. 17.

¹⁶ *Id.*, Recital 31. See also Art. 17(2).

¹⁷ DSA, Art. 20.

monitor adherence to self-regulatory initiatives aimed at protecting society from harmful content, including disinformation and foreign information manipulation and interference”.¹⁸

A number of recitals of the EMFA explain the rationale underpinning the proposed “media privilege”. Moving from the premise whereby independent media services represent a fast-changing and economically important sector in the internal market, which “fulfils the general interest function of public watchdog”,¹⁹ the Commission further observes that media markets have become increasingly digital and international and that “global online platforms act as gateways to media content, with business models that tend to disintermediate access to media services and amplify polarising content and disinformation”.²⁰

Against this backdrop, MSPs exercising editorial responsibility over their content “are expected to act diligently and provide information that is trustworthy and respectful of fundamental rights, in line with the regulatory or self-regulatory requirements they are subject to in the Member States”.²¹ Hence, should a VLOP consider that certain content originating from an MSP is incompatible with its terms of services, it should duly acknowledge the primacy of media freedom and pluralism and “minimise the impact of any restriction to that content on users’ freedom of information”.²² It appears therefore that the key tenet underlying the logic of the proposed media privilege is the need to ensure, in the digital media space, a heightened protection of users’ freedom of information, which is an intrinsic component of the right to freedom of expression enshrined in the European Charter on Fundamental Rights,²³ and the European Convention on Human Rights.²⁴

The need for special safeguards for editorial content distributed thorough digital channels was first voiced in January 2022, during the final phase of the legislative debate on the DSA, when 46

¹⁸ EMFA, Art. 18.

¹⁹ *Id.*, Recital 3.

²⁰ *Id.*, Recital 4.

²¹ *Id.*, Recital 31.

²² *Ibid.*

²³ European Charter of Fundamental Rights (2012), Art. 11.

²⁴ European Convention on Human Rights (1950), Art. 10.

MEPs from across the political spectrum tabled an amendment aimed at sheltering MSPs from discretionary content moderation decisions of online platforms.²⁵ Rejected at the final plenary vote on the DSA,²⁶ this amendment was largely similar to the provisions that have now resurfaced in the media privilege introduced by the EMFA.²⁷

The proposal for an amendment under the DSA was strongly backed by press publishers and broadcasters. In particular, a number of European associations representing the media industry advocated that “without amendments to safeguard the fundamental rights enshrined in the Charter, including media freedom and freedom of speech, online platforms would be legally allowed to remove editorial content entirely on the basis of their terms and condition”,²⁸ resulting in a situation where the boundaries of press freedom would not be defined by law but by private companies. Echoing such concerns, the European Broadcasting Union further stressed the need to prevent powerful platforms from “arbitrarily applying their own unilaterally set terms and conditions to media content that already adheres to rigorous standards”,²⁹ emphasising that broadcast media, in particular, are heavily regulated both at European and national level, have complaints mechanisms in place, and are overseen by regulators.

Such concerns were compounded by fears that the strict duties of care regarding both illegal and harmful content imposed on online platforms in the DSA, as well as additional self-regulatory instruments such as the Code of Practice on Disinformation,³⁰ could harshen platforms’ content

²⁵ AER Europe, *The Digital Services Act must safeguard freedom of expression online*, in aereurope.org, 18 January 2022.

²⁶ L. Bertuzzi, *Media exemption ruled out in DSA negotiations, but could return*, in euractiv.com, 24 November 2021. See also EU DisinfoLab, *Fact-checkers and experts call on MEPs to reject a media exemption in the DSA*, in disinfo.eu, 5 November 2021.

²⁷ D. Buijs, *The Digital Services Act and the implications for news media and journalistic content (Part 1)*, in dsa-observatory.eu.

²⁸ Notably, the European News Publishers Association (ENPA), the European Magazine Publishers Association (EMMA), the Association of European Radios (AER), the European Publishers Council (EPC), the European Broadcasting Union (EBU), News Media Europe (NME), and the Association of television and radio sales houses (EGTA). See AER Europe, cit.

²⁹ N. Curran, *Protecting media content online: A decisive moment*, in ebu.ch, 29 October 2021.

³⁰ *Strengthened Code of Practice on Disinformation*, in digital-strategy.ec.europa.eu, 16 June 2022.

moderation policies overall, resulting in wholesale removals, or restrictions of access to media content that would ultimately interfere with MSPs' editorial freedom, undermine pluralism and lead to censorship.

It should be acknowledged that risks of over-enforcement of platforms' terms of services are not merely hypothetical. There are several examples showing actual recurrences of such a risk. YouTube has been involved in restricting Russian media content even before the conflict.³¹ A well-known case is a Guardian article that featured an image from the 1890s portraying Aboriginal prisoners in chains in Western Australia, which was incorrectly tagged as nudity and blocked by Facebook.³² More recently, a survey conducted by the Media Development Foundation few months after the Russian invasion of Ukraine found that 47% of Ukrainian independent media were partially or totally demonetised since the outbreak of the war, without clear explanations by Meta. In the opinion of the affected editorial teams, the reasons were linked to the publication of images reporting on the Bucha massacre and the use of allegedly derogatory terms to describe the invading troops, which appeared to be against the social media' community rules on violence.³³ Moreover, interferences with editorial content may take different forms, including blocking of entire apps or accounts, such as in a case concerning the Swedish Radio's Instagram account, or removals of individual pieces of content, such as in the case of a France Télévision's youth programme with information on contraception, which was blocked to minors by Snapchat.³⁴

However, the picture is not just black and white. MSPs might also, directly or indirectly, often inadvertently, contribute to a systemic risk such as disinformation, for which VLOPs would ultimately have to bear responsibility under the DSA.³⁵ Several journalists, human rights NGOs as well as the research community engaged in countering disinformation have strongly opposed a

³¹ P. Dave, *YouTube blocks Russian state-funded media channels globally*, in *reuters.com*, 11 March 2022).

³² J. Taylor, *Facebook blocks and bans users for sharing Guardian article showing Aboriginal men in chains*, in *theguardian.com*, 15 June 2020.

³³ A. Boborykin – M. Sribnyy, *Study: Almost Half of Ukrainian Independent Local News Publishers is Restricted on Facebook*, in *research.mediadevelopmentfoundation.org*, 2022.

³⁴ Examples reported by EBU in N. Curran, cit.

³⁵ N. Krack, *DSA proposal and disinformation – Should “traditional media” be exempted from platform content moderation?*, in *law.kuleuven.be*, 7 December 2021.

blanket exemption for media organisations, fearing that it could facilitate the online dissemination of disinformation and pave the way to covert influence operations, while doing little to foster a more transparent, trusted and resilient media ecosystem in Europe. Their position stems from the observation of two ongoing trends.³⁶

The first concerns the case of established news brands turning from providers of information to agents of disinformation. Besides well-known examples of conspiracy drifts by once reputable news outlets such as FranceSoir or Fox News, the survey points to sources with an “excessively factional” editorial line, including brands such as Breitbart or Russian state-owned news agencies as Sputnik (banned in the EU following the invasion of Ukraine), as well as mainstream media in certain EU countries. The latter case was mentioned in a survey by the Institute for Strategic Dialogue concerning the 2018 Swedish elections, according to which “nationalist, populist media outlets and politicians in Poland spread disinformation about the Swedish government and society both in Sweden itself and in English and Polish language media”.³⁷ Moreover, according to EU DisinfoLab, there are instances where “media outlets spreading disinformation go as far as obtaining recognition as registered newspapers”.³⁸

The second trend relates to the case of media outlets with false pretence of authenticity and/or fake personas pretending to be journalists, taking an active role in foreign or domestic disinformation operations. Examples of strategic use of seemingly professional media include the Dutch Bonanza Media, a special-purpose disinformation media project aimed at propagating

³⁶ These were recently analysed by EU DisinfoLab in the context of an investigation on the role of media in producing and spreading disinformation, see EU DisinfoLab, *The role of “media in producing and spreading disinformation campaigns*, in *disinfo.eu*, 13 October 2021.

³⁷ C. Colliver – P. Pomerantsev – A. Applebaum – J. Birdwell, *Smearing Sweden: International Influence Campaigns in the 2018 Swedish Election*, in *isdglobal.org*, 2018.

³⁸ *Ibid.* An interesting example concerns a network of Italian online media outlets which, during the Covid-19 pandemic, shared the same anti-vaccine content throughout a co-ordinated disinformation campaign. This network included *Oltre.tv*, a COVID-19 disinformation super-spreader that reached approximately 1.5 million users, which is not a registered news media, as well as *Gasp.news*, which is instead a registered online newspaper under Italian law. The EU DisinfoLab’s investigation found that the two websites had the same editorial team, and its owner managed a network of seven Italian websites and Facebook pages that amplified each other’s content simultaneously.

conspiracy narratives about the causes of the Malaysia Airlines Flight 17 (MH17) crash,³⁹ or FranceLibre24, a French-language media covertly operating as part of a controversial Polish far-right media network, which claims to distribute content from credible sources and whose articles are instead often manipulated to include misleading messages on sensitive topics such as identity, religion, security, and migration.⁴⁰ While this type of bogus media would not fall, in principle, within the scope of the media privilege, the ability of the actors behind such operations to masquerade as professional media to circumvent the good intentions of the law should not be underestimated.

From a more general perspective, a recent study found that, despite the growing academic attention towards the phenomenon of online disinformation during the last few years, the role of mainstream news media in the dissemination of fake news has still not been fully researched. One of the conclusions of this study is that “larger proportions of the public are exposed to the more visible and newsworthy fake news stories through the coverage that these stories garner in mainstream news media than directly through social media”.⁴¹ In part, this seems to be due to the fact that mainstream news media may feel compelled to cover fake news stories because other news media cover them, while for certain partisan media fake news stories may fit their ideological lines.

All these arguments have been put forward again in the context of the debate around the media privilege.⁴² Hailed by some as “an effort to address one of the failures of the recently adopted Digital Services Act”,⁴³ the EMFA has also reignited critical comments from civil society,

³⁹ See also Bellingcat, *The GRU's MH17 Disinformation Operations Part 1: The Bonanza Media Project*, in *bellingcat.com*, 12 November 2020.

⁴⁰ See also L. Kayali – Z. Wanat, *French far-right site powered from Poland*, in *politico.eu*, 14 January 2020.

⁴¹ Y. Tsfati – H.G. Boomgaarden – J. Strömback – R. Vliegthart – A. Damstra – E. Lindgren, *Causes and consequences of mainstream media dissemination of fake news: literature review and synthesis*, in *Annals of the International Communication Association*, 44-2, 2020, 160 ff.

⁴² D. Buijs, *Article 17 Media Freedom Act & the Digital Services Act: aligned or alienated?*, in *dsa-observatory.eu*.

⁴³ European Publishers Council, *European Commission unveils bold and ambitious Media Freedom Act*, in *epceurope.eu*, 16 September 2022.

journalists and the research community,⁴⁴ who have recommended alternative strategies, including competition regulatory instruments.⁴⁵ Among the latter, Nobel Price laureates Maria Ressa and Dmitry Muratov urged the EU to “protect media freedom by cutting off disinformation upstream” and recommended not to grant any “special exemptions or carve-outs for any organisation or individual in any new technology or media legislation” because “with globalised information flows, this would give a blank check to those governments and non-state actors who produce industrial scale disinformation to harm democracies and polarise societies everywhere”.⁴⁶

Needless to add that the media privilege has also raised strong concerns from those stakeholders who are directly targeted by the proposal. DOT Europe, the European trade association representing online platforms, has taken issue in particular with the definitions in the Commission’s text, notably the definition of ‘media service provider’, which would be too vague, inconsistent with the existing legislative framework, and too broad in scope “to act as proper foundation for the ambitious goals of the new legislation”.⁴⁷ Moreover, it stressed that, by heavily relying on MSPs’ self-declarations, the proposed safeguards might be vulnerable to manipulation by dubious actors, including rogue media, and put VLOPs in the “perilous position” of assessing whether an MSP fulfils the criteria foreseen in the media exemption. This would be especially problematic “as the proposed criteria are subjective, difficult to evaluate and heavily dependent on national laws”.⁴⁸ In addition, given the variety of violations potentially involved and the need for VLOPs to take swift action under the DSA, prior notification of envisaged content moderation decisions is regarded as not always appropriate or possible. Therefore, to avoid unacceptable levels of legal uncertainty, DOT Europe pleads for the DSA to remain “the baseline for notice and action as well as the provision of statements of reasons”.⁴⁹

⁴⁴ EU DisinfoLab, *Policy Statement on Article 17 of the proposed European Media Freedom Act*, in *disinfo.eu*, 24 January 2023.

⁴⁵ Article19, *EU: How to protect media freedom in new regulation*, in *article19.org*, 1 March 2023.

⁴⁶ D. Muratov – M. Ressa, *A 10-point plan to address our information crisis*, in *peoplevsbig.tech*, 2 September 2022.

⁴⁷ DOT Europe, *European Media Freedom Act*, in *doteurope.eu*, 2023.

⁴⁸ *Ibid*

⁴⁹ *Ibid*.

The foregoing observations suggest that, while the problem that the media privilege seeks to address is indeed real, the proposed solution may not be so straightforward. On the one hand, nobody contests that the digital transformation of the media ecosystem calls for a heightened protection of citizens' right of information, including rules that shelter reliable and trustworthy sources of information from interferences and censorship from both public authorities and private interests. On the other hand, online platforms, and in particular VLOPs, are bound to ensure users' safety by averting risks of viral spread of illegal and harmful content, which may originate from a wide range of information sources. The current debate, and the controversy that it has generated, shows that finding the right balance between these two key policy goals is a complex exercise and that simplistic solutions may ultimately prove worse than the illness they try to cure.

3. *The Scope Ratione Personae*

Pursuant to the Commission's proposal, the media exemption would be beneficial for those entities that fulfil three cumulative criteria, based on their own self-declarations. Firstly, they must operate as MSPs,⁵⁰ i.e. must be natural or legal persons whose professional activity is to provide a media service and which retain editorial responsibility for the choice and the organisation of their content. Secondly, they must be editorially independent from governments.⁵¹ And thirdly, they must be "subject to regulatory requirements for the exercise of editorial responsibility" in one or more Member States, or must adhere to co- or self-regulatory editorial standards "widely recognised and accepted in the relevant media sector in one or more Member States".⁵²

The amendments agreed in Council narrow down somewhat the eligibility scope for MSPs by referring to a number of transparency obligations that MSPs would be required to fulfil, notably as regards media ownership and potential conflicts of interest.⁵³ Hence, pursuant to the Council's text, the editorial responsibility criterion is coupled with an additional accountability element. As

⁵⁰ EMFA, Art. 2(2).

⁵¹ *Id.*, Art. 17(1)(b).

⁵² *Id.*, Art.17(1)(c).

⁵³ Council of the European Union, Art. 6(1).

regards the European Parliament, at the current stage of the process, both CULT and LIBE Committee seem to align with the Commission's approach, while IMCO put the emphasis on the effective "supervision" of MSPs by an independent national regulatory authority or a co- or self-regulatory body, rather than on the mere adherence to relevant requirements.

Despite these differences, the legislator's approach is clearly inclined towards granting a differentiated treatment for MSPs' content on the basis of 'organic' criteria, i.e. reflecting the organisational structures and institutional characteristics of the content provider. Such a differentiated treatment may be justified by the specific duties and responsibilities by which media outlets must abide. In this respect, generally agreed international standards set out within the Council of Europe acknowledge that all actors who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection, while establishing clear duties and responsibilities "having regard to the actor's specific functions in the media process".⁵⁴ This implies that media policy may set out "graduated and differentiated" responses, based on the part media services play in the content production and dissemination processes, in particular by distinguishing between actors that operate as media providers, intermediaries or auxiliaries.

3.1. The Notion of Media and Equal Treatment

The notion of media is not clear-cut. As a general rule, while distinguishing media from other forms of communication enabled by the digital transformation of the information ecosystem, prerogatives and legal protections offered to media organisations increasingly tend to encompass all actors that exercise a similar function in democratic societies.

The Council of Europe's Recommendation on the Protection of Journalism and the Safety of Journalists and Other Media Actors of 2016 stressed that the definition of media actors has expanded, due to "new forms of media in the digital age", and includes other "media actors" who "contribute to public debate and who perform journalistic activities or fulfil public watchdog

⁵⁴ Committee of Ministers of the Council of Europe, *Recommendation CM/Rec(2011)7 on a new notion of media*, in *edoc.coe.int*.

functions". Moreover, already in 2011, the UN Human Rights Committee endorsed a broad notion of journalism by stating that "[j]ournalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere".⁵⁵

These political declarations are firmly grounded on the case-law of the European Court of Human Rights (ECtHR), which has confirmed on several occasions that the degree of protection offered to media actors should be designed in such a way as to reflect their "public watchdog" role, which should not be restricted to traditional media but extended without discriminations to all actors that deploy a comparable role in the wider, and increasingly digital, information space.

In *Delfi AS v. Estonia*,⁵⁶ the ECtHR expanded the guarantees of press freedom to new electronic media, acknowledging that "in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general".⁵⁷ In *Magyar Helsinki Bizottság v. Hungary*,⁵⁸ the ECtHR has also acknowledged that the function of creating various platforms for public debate "is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate".⁵⁹ More specifically, in *Animal Defenders International v. the United Kingdom*, the Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may warrant similar protection under the Convention as that afforded to the press.⁶⁰ Crucially, in *Centre for*

⁵⁵ Human Rights Committee, *General comment No. 34 on Article 19: Freedoms of opinion and expression*, United Nations, CCPR/C/GC/34, in *ohchr.org*, 12 September 2011.

⁵⁶ ECtHR, *Delfi v. Estonia*, App. 64669/09 (2015). See also ECtHR, *OOO Regnum v. Russia*, App. 22649/08 (2020).

⁵⁷ *Delfi v. Estonia*, cit. §133.

⁵⁸ ECtHR, *Magyar Helsinki Bizottság v. Hungary*, App. 18030/11 (2016).

⁵⁹ *Id.*, §166.

⁶⁰ ECtHR, *Animal Defenders v. the United Kingdom*, App. 48876/08 (2013).

Democracy and the Rule of Law v. Ukraine,⁶¹ the ECtHR went on stating that “[g]iven the important role played by the Internet in enhancing the public’s access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of ‘public watchdogs’ in so far as the protection afforded by Article 10 is concerned”.⁶²

The European Court of Justice (CJEU) has taken a similar approach as regards the interpretation of Article 11 of the Charter. In *Satamedia*,⁶³ the CJEU stated that “[i]n order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly”.⁶⁴ The Court specified that prerogatives pertaining to freedom of expression apply not only to media organisations “but also to every person engaged in journalism”,⁶⁵ and that journalistic activities include all types of communication whose purpose “is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them”.⁶⁶

Moreover, in *Sergejs Buivids*,⁶⁷ the CJEU addressed a case concerning an individual who had recorded his interaction with the police in a Latvian police station and had uploaded the video to YouTube. The CJEU held that even if the individual was not a professional journalist, the recording of the video and its publication on YouTube could come within “the scope of journalistic purposes”.⁶⁸ The determinant factor was not the subjective position of the author, nor the medium used, but whether the sole purpose of the video “was the disclosure to the public of information,

⁶¹ ECtHR, *Centre for Democracy and the Rule of Law v. Ukraine*, App. 10090/16 (2020).

⁶² *Id.*, §87.

⁶³ CJEU, C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* (2008).

⁶⁴ *Id.*, §56.

⁶⁵ *Id.*, §58.

⁶⁶ *Id.*, §61.

⁶⁷ CJEU, C-345/17, *Sergejs Buivids v. Datu valsts inspekcija* (2019).

⁶⁸ *Id.*, §55.

opinions or ideas”,⁶⁹ which included the intention of the individual to “draw to the attention of society to alleged police malpractice”.⁷⁰ In other words, as the ECtHR, the CJEU put the emphasis on the intention of the individual to act as “public watchdog”.

By contrast, the proposed media privilege seems to rely on a traditional notion of media provider, which does not take into full account the emergence, in the digital space, of other actors providing news and information on current affairs in a professional way (often monetised through advertising) and exercising a similar “public watchdog” function, without claiming to fulfil the status of a media organisation. Recent research suggests that, within the fast-evolving online media environment, the notion of media provider should extend beyond traditional media and include new actors such as NGOs, individual journalists, whistleblowers, researchers, well-known social media users, bloggers and podcasters.⁷¹ It follows that, as currently designed, the definition of eligible MSPs proposed in the EMFA is not well aligned with international standards, nor with the relevant case-law of the ECtHR and the ECJ, which may entail a risk of discriminatory treatment towards actors that do not fit the organic criteria underpinning the media exemption.

In principle, in order to avoid legal challenges, the media privilege should adopt a functional and broader MSP definition. However, such an adjustment would substantially expand the range of potential beneficiaries, thereby increasing the risks of circumventions by malicious actors. Moreover, the process of verification by VLOPs of the self-declarations submitted by potential beneficiaries would become extremely cumbersome if not impossible to implement, taking into account the fluid and fast-changing landscape of media actors in the digital space.

It is precisely in view of such a complexity that certain amendments from the CULT Committee ask for the media privilege to simply be removed.⁷² Other amendments, notably from LIBE Committee, which are aimed at narrowing down the scope of these obligations only to VLOPs (as

⁶⁹ *Id.*, §59.

⁷⁰ *Id.*, §60.

⁷¹ For a comprehensive survey of the evolution of the notion of MSP throughout the digital transformation of the media ecosystem, see P.L. Parcu and others, *Study on Media Plurality and Diversity Online – Final Report*, Luxembourg, 2020.

⁷² CULT, Amendment 968.

well as very large search engines) that “provide access to news and current affairs information”⁷³, may somewhat limit the far-reaching consequences of the proposal, but are not such as to overcome the legal challenge related to the definition of media.

It should be added that issues of unequal treatment are strictly linked to the material scope of the prerogatives granted to eligible MSPs, as the wider and deeper is the scope of the exemption, the more serious are the risks for the proposal to encroach on the principle of equality of freedom of expression.

3.2. Fragmentation and Level-Playing Field in the Internal Market for Media

The second condition to be considered from a constitutional perspective relates to the existing fragmentation of regulatory and self-regulatory frameworks for media across Member States, regarding editorial responsibility, media independence and journalistic standards. Recent comparative analyses of European co-regulation practices in the media sector highlight how the characteristics of self- or co-regulatory systems are linked to a combination of elements of national contexts in which they originate, making the identification of a typical European model of co-regulation virtually impossible.⁷⁴ Substantial differences exist within the EU, in terms of conception of relevant standards, implementation, enforcement and relationship with statutory regulation,⁷⁵ and such differences include issues of editorial responsibility, media independence and professional journalistic standards,⁷⁶ i.e. the very same criteria that determine the eligibility to

⁷³ LIBE, amendment 96.

⁷⁴ J.F. Furnémont – T.K. Smokvina, *European Co-regulation Practices in the Media: Comparative analysis and recommendations with a focus on the situation in Serbia*, in *rm.coe.int*, October 2017.

⁷⁵ European Federation of Journalists, *Media councils publish first-ever review of journalistic self-regulation in Europe*, in *europeanjournalists.org*, 29 September 2020.

⁷⁶ *Codes by Country*, in *research.tuni.fi*.

the media privilege. Besides, some studies confirmed that models that function well in some political contexts can be toothless or even detrimental in others.⁷⁷

Due to these disparities, VLOPs will have to face the daunting task of ensuring a fair and non-discriminatory application of the media privilege while having to verify self-declarations submitted by media organisations based on criteria which are nominally uniform but very different in substance. The likely outcome of this vetting process is that the benefit of the exemption will be awarded to organisations subject to different regulatory constraints, and abiding by different standards. This will not contribute to levelling out the playing field, but rather lead to more fragmentation of the internal market for media.

Aware of these shortcomings, the Commission's proposal contains a useful reference to the Journalism Trust Initiative,⁷⁸ which is an attempt to set a common denominator for editorial standards at European level. However, while it is doubtful that this reference alone can respond to the challenge that VLOPs will have to face when assessing MSPs' self-declarations, some amendments currently in discussion before the European Parliament suggest the suppression of this reference.

Moreover, risks of market distortions may occur for two additional reasons. Firstly, the EMFA refers to editorial standards widely recognised and accepted "in one or more Member States".⁷⁹ It is therefore unclear how these standards could be fulfilled and possibly confirmed by competent authorities or self-regulatory bodies when it comes to MSPs not established in one Member State. Secondly, the position of smaller media and newcomers could be negatively impacted, as such outlets may not have the organisational size to demonstrate their compliance with the relevant requirements or be simply too new in the market to leverage on a robust track record to underpin their eligibility claims.⁸⁰ Therefore, to avoid legal uncertainty and risks of market distortions,

⁷⁷ A. Hulin, *Statutory media self-regulation: beneficial or detrimental for media freedom?*, EUI Working Papers RSCAS 2014/127.

⁷⁸ EMFA, Recital 33.

⁷⁹ *Id.*, Article 17(1)(c).

⁸⁰ On this latter aspect, see European Independent Media Publishers, *European Media Freedom Act (EMFA): EIMP statement on Article 17*, 24 April 2023.

running counter one of the fundamental goals of EMFA, Article 17 should be accompanied by concrete measures ensuring a fair and non-discriminatory designation process for eligible MSPs.

4. *The Scope Ratione Materiae*

So far, the European approach to content moderation has focused more on online platforms' accountability than on diversified standards for different types of online content or must carry obligations based on different types of users. While European institutions have gradually acknowledged, in recent years, challenges and risks connected to content moderation, notably through the introduction of new rules under the DSA, the EMFA changes this scenario significantly. Considering that not all users are equal in digital spaces, Article 17 assumes that content published by established media outlets is different from content uploaded by other users active in reporting events, and that such a difference would warrant a diversified treatment.

There are a few cases where platforms are required to differentiate their content moderation processes based on the role of their users. For instance, the DSA provides for a preferential lane for trusted flaggers⁸¹ and obliges online platforms to take the necessary technical and organizational measures to ensure that notices submitted by such actors are processed with priority and without delay. However, strictly speaking, trusted flaggers are not content providers but rather entities designed to assist platforms in their content moderation efforts. Moreover, while platforms have specific duties regarding certain types of content, such as terrorist or copyright content (derived from the Copyright Directive,⁸² or the TERREG),⁸³ they still have discretion in moderating content from different types of users.

The introduction of the media privilege fits into an overall picture of sectorial fragmentation characterising the European approach to content moderation. Even if the DSA has introduced a

⁸¹ DSA, Art. 19.

⁸² 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.

⁸³ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

new horizontal system focusing on online platforms' accountability rather than content, sectorial fragments of European legislation apply to online content in various policy areas. Among others, the latest amendments to the Audiovisual Media Service Directive,⁸⁴ the TERREG, as well as the proposal for a Regulation to prevent and combat child sexual abuse,⁸⁵ are clear examples of such a fragmented strategy aimed at countering illegal and harmful content by addressing content moderation practices. These instruments can be considered as *lex specialis* in respect of the DSA, thus defining a mosaic of horizontal and vertical approaches to online content in Europe.

Against this backdrop, the proposed media privilege requires VLOPs to ensure that their content moderation processes guarantee freedom of expression and information, including media freedom and pluralism of news and information provided by media service providers. This rule is intimately connected to the DSA, which requires not only VLOPs but all online service providers to act diligently, objectively, and proportionately when applying and enforcing restrictions, by considering the rights and legitimate interests of all parties involved⁸⁶. This includes protecting freedom of expression, freedom and pluralism of the media, as well as other fundamental rights and freedoms enshrined in the European Charter of Fundamental Rights.

However, while the DSA regulates content moderation by requiring a careful balance and effective protection of the various constitutional interests at stake, the EMFA only focuses on media freedom and does not follow the same balanced approach. Even if the EMFA can be considered as *lex specialis* in relation to the DSA, the primary risk is that the specific requirements introduced by Article 17 might clash with the DSA's general aim of establishing an overarching framework for content moderation that balances all relevant rights and freedoms. More specifically, these divergent policy approaches entail a number of problematic consequences.

Firstly, the EMFA creates a discrepancy as regards moderation of media content by different online intermediaries. As Article 17 only applies to VLOPs, other online intermediaries, notably

⁸⁴ 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.

⁸⁵ Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse.

⁸⁶ DSA, Art. 14(4).

smaller platforms, would still be subject to the requirements set out in Article 14 of the DSA and obliged, when defining their terms of service and taking individual content moderation decisions, to conduct a comprehensive assessment by balancing the various constitutional rights enshrined in the European Charter of Fundamental Rights.

As a result, if a rogue player, for instance, claims the benefit of the media privilege by self-declaring its role as media, VLOPs could not implement expeditious measures against harmful content such as hate speech or disinformation but should first notify to such a player their intention to take action. By contrast, other intermediaries would have to balance media freedom with other interests at stake, such as users' safety, human dignity, as well as users' right of information, and take immediate restrictive measures in respect of the same content.

Secondly, most amendments under discussion point to a likely widening of the material scope of the media privilege. Such a step would not only amplify the risks of discriminatory treatment and market distortions, but also create a legal conundrum due to conflicting requirements stemming from different regulatory frameworks. In broad strokes, the 'safe harbour' proposed by the Commission would cover only content moderation decisions leading to a "suspension of the service". By contrast, the Council would significantly extend the scope of the safeguards by including any "restriction of visibility" of MSPs' content, while specifying that "the use of labelling or age-gating should not be understood as a restriction of visibility".⁸⁷ Taking a far-reaching step forward, the draft CULT report would further extend the material scope of the media privilege to "any restriction" that VLOPs may envisage in respect of MSPs' content (e.g. down-ranking, restrictions to further sharing, demonetisation measures etc.). The IMCO compromise amendments would go mostly in the same direction, with an additional emphasis on users' freedom of information and media pluralism, underpinning a positive duty for VLOPs to "contribute to the plurality of media", "in an appropriate manner", and deploy adequate human resources for content moderation purposes.⁸⁸

It should be acknowledged that, in all the variants proposed by the co-legislator, the media privilege would apply only insofar as the content does not contribute to a systemic risk as defined

⁸⁷ Council of the European Union, Recital 31.

⁸⁸ IMCO, Recital 31, Art. 17(1)(e).

by the DSA.⁸⁹ In principle, therefore, VLOPs should not be prevented from taking “expeditious measures either against illegal content disseminated through (their) service, or in order to mitigate systemic risks posed by dissemination of certain content through (their) service”.⁹⁰ However, at the present stage of the legislative process, it is unclear whether such a caveat is meant to narrow down the scope of the media privilege as such, or to provide instead a basis for a statement of legitimate reasons in individual cases of envisaged restrictive decisions.

Should the caveat be meant to narrow down the material scope of the media privilege, then the actual effects of Article 17 would be unsubstantial. The notion of ‘systemic risks’ established in the DSA covers a wide range of situations encompassing the dissemination of illegal content, as well as any actual or foreseeable negative effects for the exercise of fundamental rights (in particular human dignity, privacy, freedom of expression and information, including freedom and pluralism of the media, non-discrimination, respect for the rights of the child and consumer protection), or on civic discourse, electoral processes, public security, gender-based violence, public health and the person’s physical and mental well-being.

Given such a broad definition of systemic risks and the need for VLOPs to transpose the relevant mitigating measures into their terms of services, it is difficult to imagine restrictive content moderation decisions that would not be directly or indirectly linked to a systemic risk within the meaning of the DSA. Therefore, should Article 17 leave VLOPs free to address systemic risks even when certain problematic content is provided by a MSP, then the practical relevance of the media privilege would be *de facto* severely limited. This observation is not a call to extend the media privilege. It rather aims to underscore the challenging consequences of a system which widely overlaps with the DSA. Moreover, the compliance costs involved in the implementation of Article 17 procedures (ranging from the verification of MSPs’ self-assessments to the management of complaint and mediation processes) would likely offset any potential benefit of the provision.

Conversely, should the caveat be meant to provide a basis for a statement of legitimate reasons in individual cases of envisaged restrictive decisions, then the broad scope of the media privilege (which might emerge from the on-going legislative process) would create a serious loophole in the overall regulatory system. By limiting the moderation of content published by MSPs, Article 17

⁸⁹ *Id.*, Art. 34.

⁹⁰ EMFA, Recital 31.

could contribute to the spread of disinformation, particularly considering the potential manipulation of the system by rogue actors. For instance, false information about war could be spread on social media, while platforms would need to send a detailed statement of reasons and wait for 48 hours (according to certain amendments in discussion within the EP) or a reasonable time (according to the Council proposal) for the MSP concerned to reply, before taking action on such content. This could be enough time for false information to become viral online, thus nullifying the efforts deployed to counter harmful disinformation operations. Moreover, in Member States where the ruling party or a political coalition can exercise influence on public service broadcasting state media or, more generally, on media outlets,⁹¹ the proposed exemption would allow propaganda to gain traction online.

Moreover, the limited reference to the Strengthened Code of Practice on Disinformation amplifies the risks of collision between conflicting policy goals.⁹² For instance, under the code, signatories have committed to defund the dissemination of disinformation and improve policies and systems that determine the monetisation of content, the controls for ad placements, and the data to report on the accuracy and effectiveness of the measures taken to this effect.⁹³ Should the scope of the media privilege be so defined as to encompass “any restriction” (e.g. including content demonetisation, as proposed by the EP), the effective application of risk mitigating measures in the form of content demonetisation would be severely hindered. The same would apply in respect of a range of different mitigating measures committed under the code which, without involving an outright suspension of the service, seek to address the challenges of disinformation through proportionate means (i.e. by balancing freedom of expression against users’ safety), such as content de-ranking, labelling, or frictions to limit further sharing. Likewise, the EMFA also raises questions when it comes to other signatories of the code, particularly fact-checkers.⁹⁴ The code addresses the crucial issue of fact-checking and focuses on the role of fact-checkers in combating disinformation. These organisations can operate either as stand-alone

⁹¹ K. Bleyer-Simon and others, *Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the year 2021*, San Domenico di Fiesole, 2022.

⁹² Strengthened Code of Practice on Disinformation 2022.

⁹³ *Id.*, Commitment 1.

⁹⁴ *Id.*, Section VII.

entities or in-house units within media outlets, thus raising questions about the moderation of fact-checking organisations' content by online platforms.

Thirdly, the compliance burden for VLOPs is further compounded by additional procedural obligations. In practice, should VLOPs envisage suspending the provision of their service or restricting access in relation to media content deemed incompatible with their terms of service, they would be required to immediately communicate to the MSP concerned a detailed statement of reasons, prior to the suspension or restriction taking effect, and without undue delay.⁹⁵ If, following the concerned MSP's reaction, they would nevertheless decide to remove or block the controversial content, they would have to provide an additional written justification. Furthermore, complaints against these decisions should be prioritized.

Certain amendments from the Council would entail even stricter procedural obligations. In particular, the Council proposes that content moderation decisions may take effect only after the reply by the MSP concerned to a VLOP's statement of reasons to be communicated "within an appropriate period".⁹⁶ Furthermore, the Council also proposes the introduction of a mediation mechanism, mirroring the P2B regulation,⁹⁷ in case of rejection of the MSP's self-declaration or in case the search for an "amicable solution" were to fail.⁹⁸ As regards the EP, it should be noted that the draft CULT report would favour a solution where, in case of complaint, VLOPs must reply within 24 hours, failing which no suspension or restriction can be maintained.⁹⁹

An example of the consequence of the media privilege is the proposed amendments by CULT to require VLOPs to process media outlets' requests fairly and transparently with priority and not later than 24 hours.¹⁰⁰ This requirement does not only increase the pressure on platforms to moderate content but also raises questions about the coordination between different notice

⁹⁵ *Id.*, Art. 17(4).

⁹⁶ *Ibid.*

⁹⁷ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, Art. 12.

⁹⁸ Council of the European Union, Art. 4(a).

⁹⁹ CULT, Art. 17(3),

¹⁰⁰ CULT, Art. 17(3).

systems. On the one hand, the EMFA requires notification before the suspension, on the other hand, the P2B Regulation establishes that notification shall occur prior to or at the same time as the suspension, unless the notification involves the entire account.¹⁰¹ Therefore, by introducing an obligation to notify MSPs in any case prior to the decision, the EMFA limits the possibility for online platforms to intervene in their digital spaces. This divergence also concerns the DSA, which requires notification “at the latest from the date that the restriction is imposed”.¹⁰² Moreover, while the EMFA does not clarify the deadline for of the prior notification, the P2B Regulation refers to 30 days.¹⁰³ Therefore, the system introduced by the EMFA overlaps with the DSA and the P2B Regulation, thus increasing the complexity in the process of notice and action.

This type of preferential treatment for MSPs could give rise to two types of undesirable scenarios. On the one hand, strict procedural safeguards (including short deadlines for replying to complaints), could prove excessively cumbersome for VLOPs with the result that, failing a response within the mandatory deadlines, any decision against illegal or harmful content would have to be repealed, and problematic content restored, thus undermining one of the key objectives of the DSA. On the other hand, a massive use of such a preferential lane by MSPs could shift VLOPs’ resources away from complaints lodged by other business users under the DSA,¹⁰⁴ with a discriminatory effect towards all those who would not qualify for priority treatment under the EMFA.

In addition to risks of regulatory fragmentation and conflicts between different legal instruments, Article 17 also gives rise to legal uncertainty as regards the process of content moderation. The CULT committee has proposed to enlarge the media privilege by limiting VLOPs’ power to restrict or suspend content of media service providers unless it is illegal under national law.¹⁰⁵ This approach limits the role of VLOPs in countering harmful content which can be

¹⁰¹ P2B Regulation, Art. 4(1).

¹⁰² DSA, Recital 31.

¹⁰³ P2B Regulation, Art. 4(2).

¹⁰⁴ DSA, Art. 20.

¹⁰⁵ CULT, Art. 17.

considered legal under EU or national law, the assessment of which would be based on the reasonable demonstration by media outlets of the legality of the content in question.

Nonetheless, the EMFA does not provide criteria of reasonableness and does not clarify the role of VLOPs in this assessment. As a result, VLOPs would be required to keep online harmful content not aligned with their terms of services if it comes from media service providers and does not clash with national law, as harmful content is not necessarily illegal. In a democratic society even unpleasant or unkind statements should be tolerated as underlined in the case of *Handyside v. The United Kingdom*. However, these considerations do not mean that legal content cannot be harmful. For instance, relying on harsh statements to stimulate more engagement and, therefore, more advertising revenues, generally does not qualify as criminal conduct, but may still make social media spaces less safe for users.

Furthermore, under the media privilege, media outlets would have the power to trigger “a meaningful and effective dialogue” with a VLOP which is considered as “frequently” restricting or suspending the provision of its services.¹⁰⁶ This dialogue should be conducted in good faith with a view to finding an amicable solution for terminating unjustified restrictions or suspensions and avoiding them in the future. However, the proposal does not provide further guidance as to how to conduct such processes. It relies on broad expressions, including “frequently”, “meaningful and effective dialogue” and “amicable solutions”, but does not introduce clear rules or criteria framing the use of such a mechanism, thus creating a possibility for MSPs to abuse the system by flooding VLOPs with requests. Moreover, the proposal does not clarify the characteristics of this dialogue, thus opening the door to unaccountable and opaque arrangements between media outlets and online platforms, which could distort fair competition among media outlets in the internal market.

5. *The Enforcement*

The challenges related to the media privilege are not only related to potential impacts on the internal market and fundamental rights but also to the institutional complexity of the enforcement system. On the one hand, as regards the designation of the beneficiaries of the media exemption,

¹⁰⁶ EMFA, Art. 17(4a).

Article 17 introduces a self-declaration regime for VLOPs to determine the trustworthiness of MSPs and their compliance with editorial standards. However, the lack of institutional guidance leaves VLOPs with considerable discretion, leading to a debate on the role of European and national authorities in this process. On the other hand, differently from the DSA, Article 17 sets up a soft system of enforcement where the European Commission plays a limited role and the Board acts as an advisory body, which is deemed to facilitate cooperation among VLOPs and media outlets. Hence, effective compliance with the rules relies on a combination of horizontal coordination mechanisms involving regulators at the EU and national levels, as well as vertical collaboration among private stakeholders.

5.1. The Designation of Media

The Commission's proposal relies on a self-declaration regime that leaves VLOPs with a large margin of discretion, and little guidance as to how ascertain the trustworthiness of MSPs' statements. By entrusting VLOPs with discretionary power to assess the integrity and reliability of media service providers' self-declaration, Article 17 would grant them substantial power to shape the public sphere. As a result, the Commission's proposal would not only strengthen (instead of limiting) the gatekeeper role of large platforms but also, more broadly, expand private governance of free speech and media pluralism in the digital sphere.

In response to such criticism, the general agreement reached by the Council points to an enhanced role for European and national authorities. In particular, the Council has proposed a process based on the scrutiny and confirmation of MSPs' self-declarations by national regulators or self-regulatory bodies as regards the effective exercise of editorial responsibility and compliance with editorial standards.¹⁰⁷ Furthermore, the Council aims to involve civil society, fact-checking organisations and other professional actors, who may flag cases where an MSP would fail to abide

¹⁰⁷ Council of the European Union, Art. 17(1a).

by relevant editorial standards, while referring to future Commission's guidelines to improve this process.¹⁰⁸

While IMCO's compromise amendments broadly converge with the solutions agreed in the Council, the CULT Committee seems to seek a stronger role for national regulatory authorities and the Board in the designation process of MSPs. In particular, the CULT Committee has proposed an obligation for VLOPs to decline MSPs' self-declarations only following clarifications by the competent national regulatory authority and, in certain cases, only following a verification by the Board.¹⁰⁹

The challenges raised by a deeper involvement of national regulatory authorities in this process is primarily related to the risk of media capture by Member States. Such challenges are related to both the diverse notions of media and fragmentation of ethical standards in the EU, as well as to risks of interferences that some public actors could exercise over media outlets in some Member States. As a result, expanding the role of governments and national regulatory authorities in the process of self-declaration could prove problematic. This approach would also limit the discretion of online platforms to oppose possible abuses of their services by rogue actors.

These risks would also affect the Board if involved in the designation process. Pursuant to Article 10 of the EMFA, the Board shall be composed of representatives of national regulatory authorities. However, given the persistent differences in the degree of independence of different national authorities, the risk of political influences from Member States in the assessment of MSPs' self-declarations cannot be ruled out. Another factor of complexity and potential source of legal uncertainty stems from a lack of clarity regarding the coordination (or possible overlaps) between the Board set up under the EMFA and the European Board for Digital Services, which represents an independent advisory group of Digital Services Coordinators established under the DSA.¹¹⁰

This approach also raises doubts regarding the protection of other fundamental freedoms in the internal market, notably freedom to conduct business. As business actors, online platforms, including social media, rely on automated technologies to cope with the scale of content whose

¹⁰⁸ *Id.*, Recital 33.

¹⁰⁹ CULT, Recital 33; Art. 17(1a).

¹¹⁰ DSA, Art. 41.

non-automated management would require enormous costs in terms of human, technological and financial resources. The exemption does not only limit online platforms' discretion in moderating media content, but would also require platforms to set a dedicated bureaucracy for managing the assessment of MSPs' self-declarations, including the allocation of adequate and sufficient human and financial resources, as well as the provision of specific training on linguistic and cultural diversity.

5.2. The Public Enforcement and Compliance Challenges

As regards enforcement and compliance, the risk is that vague requirements and open-ended clauses could make this instrument a suasion rather than a binding legal tool. In particular, Article 17 does not define the consequences for failing to comply with its rules. Particularly in this case, the EMFA does not grant strong powers to the Commission and the Board. The Board mainly works as an advisory body, with a view to preparing consultations, organising cooperation, and issuing opinions. It cannot impose obligations on national regulatory authorities or Member States. Likewise, the Commission can only intervene in structured dialogues, issue guidelines, and monitor the process annually. While the EMFA stresses the need for horizontal and vertical cooperation, its approach is fundamentally different from the one underpinning the DSA, which empowers the Commission and national regulatory authorities with new powers, including the application of fines in case of infringements.

The EMFA focuses more on building collaboration among VLOPs and media outlets, leading to relatively weak enforcement mechanisms. In particular, pursuant to Article 18, the Board organises a structured dialogue between VLOPs, representatives of MSPs and representatives of civil society to discuss experience and best practices in the application of the media privilege. This system aims to increase diverse offers of independent media on VLOPs' services and monitor the adherence to self-regulatory initiatives designed to protect society from harmful content, including

disinformation. However, it is rather toothless when it comes to providing for investigatory and remedial actions.¹¹¹

Given such limited enforcement powers, the reference to voluntary regulatory instruments in Article 18 could *de facto* shift the regulatory oversight towards the control of VLOPs' effective adherence to sector-specific codes of conduct, such as the Strengthened Code of Practice on Disinformation. Importantly, the outcomes of these dialogues are to be shared with the Commission, which will use them to assess VLOPs' compliance with their risk mitigation obligations.¹¹² Moreover, the risk of hefty sanctions under the DSA (resulting for instance from a violation of commitments taken under a sector-specific code of conduct within the meaning of Article 45) could induce VLOPs to take a conservative position and, in case of doubt, prioritise the implementation of the risk mitigating measures they are required to adopt pursuant to the DSA over the strict adherence to the procedural safeguards foreseen in Article 17. As a result, the effective enforcement of the media exemption would be severely weakened.¹¹³

In addition, Article 17 does not consider the crisis response mechanism introduced by the DSA.¹¹⁴ A crisis is defined as an extraordinary circumstance leading to a serious threat to public security or public health in the Union or in significant parts of it. In this case, the Commission can require VLOPs to take actions to assess whether and to what extent the functioning and use of

¹¹¹ J. Bayer – K. Cseres, *Without Enforcement, the EMFA is Dead Letter: A Proposal to Improve the Enforcement of EMFA*, in *verfassungsblog.de*, 13 June 2023.

¹¹² According to the DSA, VLOPs are required to “diligently identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services”, Art. 34(1). The connection with the EMFA is also underlined by the need to take into account not only the role of content moderation but also intentional manipulation of their service, including by inauthentic use or automated exploitation of the service, as well as the amplification and potentially rapid and wide dissemination of illegal content and of information that is incompatible with their terms of services, Art. 34(2).

¹¹³ As observed above in Section 4, the media exemption is designed to be applied without prejudice to the risk mitigating measures adopted pursuant to Article 34 of the DSA. As currently drafted, the implications of such a caveat are still unclear. If it would be meant to limit the scope of the media exemption, then the practical relevance of Article 17 would be very limited. Given the wide variety of systemic risks considered under the DSA, it would be difficult to imagine a restrictive content moderation decision taken in respect of content provided by an MSP, which would be not directly or indirectly linked to one or another of these possible systemic risks.

¹¹⁴ *Id.*, Art. 36.

their services significantly contribute to serious threats, to identify effective and proportionate measures to prevent such threats, and to report mitigation measures. In case of external interferences and disinformation driven by certain media outlets, VLOPs should also take into account their position and implement the procedures foreseen by the media exemption. Due to the complexity of such procedures, some disinformation operations could spread around Europe, thus triggering a negative risk assessment regarding VLOPs' compliance with the DSA, which would be primarily caused by the media privilege.

Finally, as it stands, Article 17 does not fully consider the complex compliance challenges that VLOPs are required to face. The process (and the logic) of content moderation is based on a mix of automated or semi-automated systems based on human moderators. These procedures govern most of the phases of content moderation in the platform environment, from indexation, organisation, filtering, recommendation and, eventually, removal of expressions and accounts. The large use of artificial intelligence systems in content moderation increases the challenges for the protection of rights and freedoms. It would not be possible to talk about content moderation online without considering to what extent algorithms are widely used for organising, filtering, and removal procedures. Platform policies are interpreted by algorithmic calculation which is opaque and not entirely accountable. The information uploaded by users, including media outlets, is processed by automated systems that define (or at least suggest to human moderators) content to remove in a bunch of seconds.

However, online platforms' systems can fail to effectively moderate content. In the last years, the large discretion that platforms have enjoyed in defining their policies, the increasing pressure of States and the lack of oversight over artificial intelligence technologies has led to troubling consequences, showing how online speech can produce consequences far beyond digital boundaries. In particular, in situation of conflicts, content moderation has not been enough to stop hate and violence. In the Central African Republic, the spread of online hate speech has contributed to mass atrocities between Christians and Muslims.¹¹⁵ In Sri Lanka, rumours on social media have led to a number of religious attacks, including the 2019 Easter Sunday church and hotel bombings,¹¹⁶ while the use of Facebook in inciting violence against Myanmar's minority

¹¹⁵ L. Schlein, *Hate Speech on Social Media Inflaming Divisions in CAR*, in *reliefweb.int*, 2 June 2018.

¹¹⁶ M. Fisher, *Sri Lanka Blocks Social Media, Fearing More Violence*, in *nytimes.com*, 21 April 2019.

Muslim population has elevated concerns about the role of social media in perpetrating genocides.¹¹⁷ Likewise, TikTok has repeatedly failed to limit the spread of harmful content, including hate speech, in different cases.¹¹⁸ The media privilege could amplify this challenge by requiring online platform to keep content of rogue media outlets online.

It follows from the above that the EMFA approach seems to neglect the positive role of content moderation in keeping online spaces safe and limiting the spread of harmful content, including disinformation. Indeed, the possibility for platforms to moderate content is a primary tool to enable these actors to achieve public policy goals. It would be paradoxical to vest platforms with more responsibilities to tackle harmful content while pre-empting the efforts that these actors are expected to make for the pursuit of this goal.

6. *Conclusions*

The above-mentioned conflicting positions are symptomatic of the constitutional challenges raised by the media privilege. As discussed in detail, the envisaged introduction of the exemption risks interfering with two of the most relevant European constitutional goals, notably a well-functioning internal market and the protection of fundamental rights, thereby encroaching with the very same policy objectives pursued by the EMFA.

The political debate about the media privilege has not been exhausted yet. By and large, the amendments tabled so far focus on three specific key aspects of the proposal: first, the definition of eligible MPs; second, the material scope of the media privilege and its consistency with other legal instruments, notably the DSA; and third, the enforcement mechanisms foreseen as regards both the designation of the entities benefitting from the exemption and the oversight role of national regulators and the Board.

While it is too early to predict the political outcome, it is nevertheless possible, based on the indications emerging from the current debate, to infer three policy recommendations. The spirit of

¹¹⁷ S. Stecklow, *Why Facebook is losing the war on hate speech in Myanmar*, in *reuters.com*, 15 August 2018.

¹¹⁸ A.W. Ohlheiser, *Welcome to TikTok's endless cycle of censorship and mistakes*, in *technologyreview.com*, 13 July 2021.

the following recommendations is constructive and primarily aims to strike a balance between the interests of ensuring internal market goals and protecting media freedom and pluralism. Each of these recommendations comes with policy challenges. The goals of the media privilege should be driven by a commitment to maintaining media freedom and ensuring accountability and fairness in content moderation. In this case, it is critical to ensure collaboration among different stakeholders to ensure a proportionate enforcement of EMFA.

Removing the Media Privilege

The first policy option would consist in simply removing the media privilege. This option would avoid the legal shortcomings arising from the problematic scope *ratione personae* of the exemption and would be in line with the position expressed by several stakeholders, including civil society organisations, smaller media and online platforms, which are strongly opposed to any media privilege. In particular, this approach would avoid risks of unequal treatment, possible distortions of the internal market and inconsistencies with the policies set to counter disinformation. However, it would likely face significant political resistance. Indeed, removing the media privilege could be viewed as incompatible with the objective of protecting media content from online platforms' discretion in content moderation. Furthermore, the simple removal of the exemption would not soften, but rather perpetuate the existing conflicts between media organisations claiming protection for their content and platforms defending their freedom to moderate content on their services. The limits of this approach would also arise from the principle of proportionality, which would entail a case-by-case balancing of media accountability and safeguards for media freedom which, in turn, would require some form of structured collaboration between various stakeholders, including media professionals, online platforms and civil society organisations.

Limiting the Scope of the Exemption

The second option would focus on limiting the scope *ratione materiae* of the exemption. Rather than removing the media privilege, the material scope of the media privilege could be narrowed down, for instance, by covering only the most intrusive forms of content moderation, such as outright suspensions of the service, while clarifying the relationship of the EMFA with other legal

instruments, primarily the DSA. This approach would limit the risks of discrimination and market distortions by reducing the gap between the treatment enjoyed by the media benefitting from the media privilege and other actors who would not fulfil the eligibility conditions under the EMFA while coming within the broader definition of media adopted by the Council of Europe and relevant case-law. Moreover, to mitigate unintended consequences arising from the multiple intersections with other legal instruments (including the DSA and the Code of Practice on Disinformation), the EMFA should set out clearer rules to regulate possible conflicts of norms, while empowering the Commission to issue guidelines designed to address specific policy areas where such conflicts would be most likely to emerge such as in the field of disinformation. This approach would also increase legal certainty for online platforms when moderating media content.

Introducing an Inclusive Designation Process

The third option, which could be combined with the second option, would consist in setting up a comprehensive certification and verification process to designate eligible entities. Rather than relying on a self-declaration system based on the exclusive oversight of VLOPs, or leaving the designation process to national administrative authorities, an alternative system of certification could be based on criteria defined by law and involve the participation of different stakeholders, including civil society organisations. This approach would avoid concentration of power, which could arise from private governance of media freedom by online platforms, and also prevent risks of political interference by administrative authorities. The introduction of reliability indicators, similar to those referred to in the Code of Practice on Disinformation, could further enhance media accountability, thus ensuring that the eligible beneficiaries are designated on the basis of a broad and legally sound notion of media while reserving the benefit of the exemption only to those media with a strong track record of continuous and consistent adherence to editorial standards. However, striking the right balance between inclusivity, efficiency, and safeguards against manipulation would be critical to ensure the credibility of the process and an unbiased evaluation. Different stakeholders, including civil society, academics, fact-checkers, and competent authorities should be part of such a process, the coordination of which could be entrusted to the Board.