
The regulatory road to the European Media Freedom Act: opportunities and challenges ahead*

Vincenzo Iaia

Abstract

This paper presents an overview of the evolution of the European media regulation and recent developments. The analysis is made up of three main parts: (i) an analysis of the European legal framework in the media field before the EMFA; (ii) a comparison with foreign media regulations – especially those enacted in Florida and Texas – and case-law; (iii) an assessment of the challenges and opportunities that are likely to arise from the EMFA in the current ever-growing “phygital” world.

Summary

1. The European background. – 2. Transatlantic food for thought: selected case-law in the U.S. – 3. The European Media Freedom Act: main features and possible challenges ahead. – 4. Concluding remarks

1. The European background

The digital platform-based economy has *inter alia* reshaped how content is created, distributed and consumed. Consequently, the media landscape has shifted dramatically over the last twenty years. For instance, millions of European families now watch online content on mobile devices rather than sitting in front of the TV¹. It would not be hasty to acknowledge that social media platforms have transformed into the new public town square². If on the one hand such a scenario has made access to information more democratized, on the other hand the information provided does not necessarily originate from regulated sources, as it can come from amateur and unreliable ones or, even worst, from entities interested in manipulating the electoral processes

* L'articolo è stato sottoposto, in conformità al regolamento della Rivista, a referaggio “a doppio cieco”

¹ European Commission, Press release *Revision of the Audiovisual Media Services Directive (AVMSD)*, 23 September 2021, available at the following link: [Digital-strategy.ec.europa.eu/en/policies/revision-avmsd](https://digital-strategy.ec.europa.eu/en/policies/revision-avmsd).

² Florida Senate Bill no. 7072, 24 May 2021, Sec. 1, para. 4.

and/or polarising the public opinion³.

A recent example of the social media platforms' power in the dissemination of information and misinformation can be seen with the Coronavirus Disease 2019 pandemic (and infodemic), complicating the corresponding public health response⁴.

Established literature describes media and press as the “fourth estate” or the “fourth power” because of its watchdog function over the well-functioning of the other free powers⁵. Historically, newspapers were regarded as guardians of the interests of the people⁶. The blooming of new actors delivering information has created new dynamics and regulatory gap at the expenses of traditional elite media organizations. The ever-growing laws in this field are aimed to iron out some of these inconsistencies by enhancing media pluralism and freedom in the increasingly digitised and globalized world. Indeed, such values are regarded as *sine qua non* preconditions for the rule of law, and, as a result, essential safeguards for a healthy democracy⁷.

It should be premised that the European intervention in the media sector was originally confined to the regulation of electronic commerce and audiovisual services. The e-Commerce Directive⁸, adopted in 2000, limited liability for intermediary service providers, allowing public discourse over the Internet to flourish without any major boundaries. In particular, Arts 12, 13 and 14 of the E-Commerce Directive set out the so-called safe harbor system by allowing certain online intermediaries, including hosting providers, to be exempted from liability for the hosting of unlawful content⁹ uploaded by users of their service, unless they fail to comply with the notice and take down mechanism. Moreover, art. 15 expressly exonerated digital platforms from a general obligation to monitor the activities carried out by their users.

As such, the E-Commerce Directive created the legal conditions for the rise and development of the Internet infrastructure and the information society. In fact, at the start of the millennium, about 20 years ago, the Internet was almost an unexplored

³ Y.M. Citino, *Verso l'European Media Freedom Act: la strategia europea contro le minacce al pluralismo e all'indipendenza dei media da una prospettiva de iure condendo*, in *Rivista di Diritto dei Media*, II, 2022, 2.

⁴ J.A. Gallo - C.Y. Cho, *Social Media: Misinformation and Content Moderation Issues for Congress*, Congressional Research Service, 2021, 1.

⁵ J. Rowbottom, *Media Law*, Oxford, 2018, 2, 3, highlighting that media is powerful because a set of media institutions has the capacity to expose abuses of power and inform the audience on a scale not found with most other speakers. See also G.A. Borchard, *The SAGE Encyclopedia of Journalism*, II ed., Thousand Oaks, 2022, 675, and the here-cited bibliography.

⁶ W.T. Stead, *Government by Journalism*, in *The Contemporary Review*, 49, 1886, 653.

⁷ R. Mastroianni, *Freedom of pluralism of the media: an European value waiting to be discovered?*, in *Rivista di Diritto dei Media*, I, 2022, spec. 100, 101 e 103, relying upon three decisions of the European Court of Human Rights (ECHR) underscoring the inextricable link between freedom of expression and pluralism, namely ECHR, *Informationsverein Lentia and Others v. Austria*, app. 13914/88 (1993); ECHR, *Centro Europa 7 S.R.L. v. Italy*, app. 38344/09 (2012); ECHR, *Associazione Politica Nazionale Lista Marco Pannella et Radicali Italiani v. Italy*, app. 20002/13 (2021).

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular, electronic commerce, in the Internal Market, L 178.

⁹ The notion of unlawful content can cover several types of activities (from intellectual property infringements to defamation, hate speech, and terrorism-related speech) depending on each national law.

and risky land. No company would have the financial and technical resources to monitor the massive amount of information daily uploaded by their users. From a socio-economic perspective, the safe harbor was the most efficient policy option to direct investments towards what will become a strategic sector worldwide.

The first European intervention in the audiovisual sector dates to 1989 with the enactment of the Televisions Without Frontiers Directive (TVWF Directive)¹⁰. The Directive rests on two basic principles: (i) the free movement of European television programmes within the internal market and (ii) the requirement for TV channels to reserve, whenever possible, more than half of their transmission time for European works (“broadcasting quotas”). The TVWF Directive also safeguards certain important public interest objectives, such as cultural diversity, the protection of minors and the right of reply.

In December 2005, the Commission submitted a proposal to revise the TVWF Directive to broaden its scope considering the growing popularity of non-linear television services. After five years, the EU adopted the Audiovisual Media Service Directive¹¹ (“AVMSD”). The AVMSD Directive covered more than just traditional linear television and shared similar objectives of the previous regulation, being aimed at breaking down the barriers that hinder the proper functioning of a single European market for audiovisual media services, while contributing to the promotion of cultural diversity, and providing an adequate level of protection for consumers and minors. This regulatory framework has facilitated the emergence of a vibrant market, as witnessed by the following data:

almost 9.000 TV channels were established in the EU at end 2013 and about 2.000 of them had a cross-border dimension;

there were over 2.500 VOD services in the EU at end of 2014, 195 of them being established in one Member State and targeting another Member State;

between 2009 and 2013, EU broadcasters’ net revenues grew by 2.9% (from 69.6 billion to 71.6 billion euros) whereas VOD online revenues (including taxes) grew from 248 million in 2009 to 1,526 million (up 515%)¹².

For a few years, it appears that the AVMSD reached its objective of enhancing the prosper of a dynamic market of audiovisual services across Europe¹³. However, the fast-evolving changes arising from the digital technologies led the European Commission (“EC”) to propose a revision of the AVMSD¹⁴ (“revised AVMSD”), which was

¹⁰ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298

¹¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, L 95/1.

¹² Commission Staff Working Document, *A Digital Single Market Strategy for Europe – Analysis and Evidence*, 6 May 2015, SWD (2015) 100 final, para. 4.2.

¹³ R. Viola, *La riforma del quadro normativo dell’audiovisivo tra mercato unico digitale e valori fondamentali*, in E. Apa - G. Abbamonte - O. Pollicino (eds.), *La riforma del mercato audiovisivo europeo*, Torino, 2019, XII.

¹⁴ Directive 2018/1808/EU 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

approved by the European Parliament and the Council in 2018. The revised AVMSD offers many new elements, such as:

- an extension of certain audiovisual rules to video sharing platforms and social media services¹⁵;
- better protection of minors against harmful content in the online world, including strengthening protection on video-on-demand services¹⁶;
- reinforced protection of TV and video-on-demand against incitement to violence or hatred, and public provocation to commit terrorist offences¹⁷;
- favour for product placement¹⁸;
- increased obligations to promote European works for on-demand services¹⁹;
- more flexibility in television advertising, allowing broadcasters to choose more freely when to show ads throughout the day²⁰;
- independence of audiovisual regulators²¹ and official establishment of the European Regulators Group for Audiovisual Media Services²² (ERGA)²³.

It is worth noting that art. 1(a) of the TWFD directive defined “television broadcasting” as the «transmission of programmes intended for the general public» while art. 1(a) of the AVMSD Directive adopted the same definition to define an audiovisual media service but adds that service providers carried editorial responsibility when they exercise an effective control both over the selection of the programmes and over their organisation.

A comprehensive look at the European legal framework outlines a tension between this last provision and the liability exemption provided by the E-Commerce Directive. To this purpose, Recital 25 of the Revised AVSMD tries to find a consistent solution

services (Audiovisual Media Services Directive) in view of changing market realities, L 303/69.

¹⁵ Art. 1, revised AVMSD.

¹⁶ Art. 6a, revised AVMSD.

¹⁷ Art. 6, revised AVMSD.

¹⁸ Art. 11, revised AVMSD. Recital 93 of the AVSMD looked unfavorably on product placement by stating that «sponsorship and product placement should be prohibited where they influence the content of programs in such a way as to affect the responsibility and the editorial independence of the media service provider».

¹⁹ Art. 13, para. 1 of the revised AVMSD obliges Member States to ensure that on-demand audiovisual media service provides secure at least 30% share of European works in their catalogs and ensure prominence of those works. Art. 13, para. 2 of the Directive also allows Member States to require media service providers to contribute financially to the production of European works, including via direct investment in content and contribution to national funds.

²⁰ According to art. 23, para. 1 of the revised AVMSD, the overall limit is set at 20% of broadcasting time between 6:00 to 18:00 with the same share allowed during prime time (from 18:00 to midnight). Recital 87 of the AVSMD required companies to organize advertisements hourly, having maximum 12 minutes per hour. The *ratio* under the increased flexibility in the management of advertisements resides on greater consumer choice since the advent of online media platforms.

²¹ In compliance with art. 30 of the revised AVMSD, the regulatory authorities designated by Member States should be legally distinct from the government and functionally independent of their respective governments and of any other public or private body.

²² Art. 30b, revised AVMSD. The group has existed since 2014, being a forum for the exchange of best practices amongst national authorities.

²³ European Commission, Press release *Revision of the Audiovisual Media Services Directive (AVMSD)*, cit.

with the two (opposite) regimes by limiting editorial responsibility to those services the principal purpose of which is the provision of programmes in order to inform, entertain or educate.

However, with so much audiovisual content now online, the boundary between services that fall under the AVMSD and those eligible for the safe harbour under the E-Commerce Directive (ECD) had become increasingly blurry²⁴. Expanding (or restricting) the scope of the AVMSD entails a delicate balancing exercise amongst freedom of expression and freedom to conduct a business, with major consequences for national media industries and for consumers. This thorny issue has also been addressed by the proposal for the European Media Freedom Act (see *infra* para. 3).

In recent years, a more horizontal and direct approach to media issues has replaced the sector-specific intervention. Europe's response counts various soft law acts, including the EP resolution on media pluralism and media freedom in the European Union²⁵, the recommendation of the Council of Europe on media pluralism and transparency of media ownership²⁶, the EC Communication on the European democracy action plan²⁷, the EC Communication on Europe's Media in the Digital Decade²⁸, the EC recommendation on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union²⁹. As regards hard law acts, the European Commission has issued a proposal for a directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings³⁰.

In addition to direct measures, European institutions have indirectly addressed media issues through collateral regulations. One of the most prominent packages of measures is to tackle the knotty problem of platform liability for illegal activities carried out by third parties on digital platforms³¹. To that end, art. 17 of the Copyright in

²⁴ S.B. Micova, *The Audiovisual Media Services Directive*, in P.L. Parcu - E. Brogi (eds.), *Research Handbook on EU Media Law and Policy*, Cheltenham, 2021, 264.

²⁵ European Parliament Resolution of 3 May 2018 on media pluralism and media freedom in the European Union (2017/2209(INI)).

²⁶ Recommendation of the Committee of Ministers to Member States on media pluralism and transparency of media ownership, 7 March 2018, CM/Rec (2018)1[1].

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan, 3 December 2020, COM (2020) 790 final.

²⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation, 3 December 2020, COM (2020) 784 final.

²⁹ Recommendation of the Commission on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union, 16 September 2021, COM (2021) 6650 final.

³⁰ European Commission, Proposal for a directive of the European Parliament and the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), 27 April 2022, COM (2022) 177 final.

³¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe, 25 May 2016, COM (2016) 288

the Digital Single Market Directive³² (CDSM Directive) focuses on platform liability for copyright infringements for the content uploaded by their users. This provision should be read in tandem with art. 2 (g), of the proposal for a Single Market For Digital Services³³ (Digital Services Act or DSA) which adopts a broader approach to the notion of unlawful content by covering any information which, in itself or by its reference to an activity, including the sale of products or provision of services, is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law. The DSA pursues the wider goal of formalizing private ordering measures into legislatively mandated obligations, under a stricter application of the principle of proportionality and protection of fundamental rights, thus promoting constitutionalisation of platform responsibility³⁴.

The catalogue of initiatives indirectly touching media issues is further enriched with Creative Europe, the project within the Next Generation EU³⁵ with a budget of € 2.53 billion to develop innovative audiovisual content, provide support to the news media sector, foster pluralism and cross-border collaboration, and promote media literacy. Lastly, the Regulation on contestable and fair markets in the digital sector³⁶ (Digital Markets Act or DMA), aimed at ensuring dynamic competition in markets where gatekeepers are present, can guarantee a certain degree of media diversity as well as respect for consumer autonomy and choice³⁷.

2. Transatlantic food for thought: selected case-law in the U.S.

The regulation of the media industry is similarly at the epicentre of a vigorous debate in the U.S. Since 1996, Section 230 of the Communications Decency Act³⁸ has allowed

final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms, 28 September 2017, COM (2017) 555 final.

³² Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, L 130/92.

³³ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act), 15 December 2020, COM (2020) 825 final.

³⁴ G. Frosio, *Platform Responsibility in the Digital Services Act: Constitutionalising, Regulating and Governing Private Ordering*, in A. Savin - J. Trzaskowski (eds.), *Research Handbook on EU Internet Law*, forthcoming, 2022.

³⁵ Next Generation EU is a € 800 billion temporary instrument designed to boost recovery from the Covid-19 pandemic. For more information see European Union, Next Generation EU, available at the following link: next-generation-eu.europa.eu/index_en.

³⁶ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), L 265/1.

³⁷ For some comments on the DMA, see M. Wörsdörfer, *The Digital Markets Act and E.U. Competition Policy: A Critical Ordoliberal Evaluation*, in *Philosophy of Management*, forthcoming 2022; A. De Streel (ed.), *The European proposal for a Digital Markets Act. A first assessment*, Centre on Regulation in Europe, Brussels, 2021.

³⁸ 47 U.S. Code, Section 230, Protection for private blocking and screening of offensive material, 1996.

almost absolute freedom of online speech, shaping the Internet as we got to know it³⁹. According to the provision, «No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider».

This broad immunity does not cover the content that infringes criminal law, electronic communications privacy law, and intellectual property law⁴⁰. It implies that conducts sanctioned as torts rather than crimes are considered less harmful than intellectual property infringements. For instance, in *Jones v Dirty World Entertainment Recordings*⁴¹, the owner and operator of the popular gossip site www.thedirty.com escaped liability despite encouraging defamatory statements⁴². If the plaintiff had filed a complaint grounded on copyright infringement for the sharing of a picture, for example, the hosting provider would have risked liability if it failed to remove it⁴³.

The interpretation of Section 230 represents a hostile battleground between the Democrats and the Republicans. While the formers have increasingly been challenging Section 230, asking for more regulatory tools to fight disinformation and illegal and harmful speech, the latter have frequently criticised deplatforming and content moderation as censure mechanisms.

In 2021, Florida⁴⁴ and Texas⁴⁵, both ruled by Republican governors, passed two acts imposing content moderation restrictions and disclosure requirements on social media platforms. These laws have been challenged as violating the First Amendment on the grounds that they hinder the platforms' ability to speak through content moderation. Indeed, platforms are prohibited to deprioritise certain types of content resulting in hate speech or disinformation. The Conservatives complain that social media platforms discriminate against them by suspending or shadow-banning their account for sharing political speech. In contrast, platforms counterargue they only enforce rules against hate speech or misinformation.

³⁹ J. Kossseff, *The twenty-six words that created the Internet*, New York, 2019.

⁴⁰ As regards liability for copyright infringement(s) in the digital environment, the Digital Millennium Copyright Act ('DMCA') can be considered as equivalent to the E-commerce directive. Indeed, Section 512 of the DMCA introduced a notice and take down regime excluding an Internet service provider from being liable on the condition that it «(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; (C) upon notification of claimed infringement as described in paragraph, responds expeditiously to remove, or disable access to, the material that is claimed to be infringing to be the subject of infringing activity». For a worldwide perspective of the intermediary liability regulation and Internet users' rights, see the World Intermediary Liability Map provided by the Stanford Center for Internet and Society at the following link: wilmap.lam.stanford.edu.

⁴¹ U.S. District Court, 6th circuit, decision of 6 June 2014, no. 13-5964.

⁴² E.B. Laidlaw, *What is a joke? Mapping the path of a speech complaint on social networks*, in D. Mangan - L.E. Gillies (eds.), *The Legal Challenges of Social Media*, Cheltenham, 2017, 140.

⁴³ *Ibidem*.

⁴⁴ Florida Senate Bill no. 7072, 24 May 2021.

⁴⁵ Texas House Bill no. 20, 9 September 2021.

The U.S. Courts of Appeals have recently taken opposite positions on whether these laws are likely to violate online platform constitutional free speech rights⁴⁶. On the one hand, the Eleventh Circuit⁴⁷ largely upheld a preliminary injunction ruling on the Florida Senate Bill as likely to be unconstitutional, preventing the law from taking effect. On the other hand, the Fifth Circuit⁴⁸ rejected this challenge regarding the similar Texas law. The two decisions have been referred to the U.S. Supreme Court to settle the case law contrast.

Additionally, the U.S. Supreme Court was tasked with resolving two other significant cases related to the social media landscape.

In *Twitter Inc. v. Taamneh*, the Supreme Court decided whether Twitter was jointly liable for aiding and abetting an act of terrorism under Section 2333 of the Antiterrorism Act⁴⁹. The plaintiff accused Twitter of having hosted pro-ISIS content that communicated the terrorist group's message, radicalized new recruits, and furthered its mission. The Ninth Circuit declined to consider Section 230 in this case. Moreover, it held that Twitter, Google, and Facebook could be liable for aiding and abetting an act of international terrorism because they provided generic, widely available services to billions of users, some of whom were allegedly supporters of ISIS⁵⁰. The Supreme Court⁵¹ rejected this theory highlighting the lack of concrete causal nexus between the creation (and the provision) of social media platforms and the ISIS attack. Indeed, bad actors can use cell phones, email, or the Internet but the producers of these services/infrastructures cannot be deemed liable simply for having granted access to them. According to the Judge Clarence Thomas the «companies relationship with ISIS and its supporters appears to have been the same as their relationship with their billion-plus other users: arm's length, passive, and largely indifferent». The Supreme Court affirmed that the plaintiffs' allegations did not show that Twitter knew and gave substantial assistance to ISIS in the Reina attack. There was also any evidence that Twitter gave ISIS any special assistance for the success of this attack. However, Justice Ketanji Brown Jackson specified in a brief concurring opinion that the safe harbour have no unlimited boundaries by stressing that «other cases presenting different allegations and different records may lead to different conclusion».

In *Reynaldo Gonzalez v. Google LLC*, the Court was called upon to determine whether tech platform recommendation algorithms were shielded from lawsuits under Section 230 of the Communications Decency Act. The case involved claims against Google (as a mother company of YouTube) for direct and secondary liability due to its algorithms recommending ISIS-created content. The Ninth Circuit concluded that most of the plaintiffs' claims were barred by Section 230 since the algorithms did not treat

⁴⁶ V.C. Brannon, *Free Speech Challenges to Florida and Texas Social Media Laws*, Congressional Research Service, 22 September 2022, available at crsreports.congress.gov.

⁴⁷ U.S. Court of Appeal, 11th circuit, decision of 23 May 2022, no. 21-12355.

⁴⁸ U.S. Court of Appeal, 5th circuit, decision of 16 September 2022, no. 21-511.

⁴⁹ Antiterrorism and Effective Death Penalty Act of 1996, Public Law no. 104-132.

⁵⁰ U.S. Court of Appeal, 9th circuit, decision of 22 June 2021, no. 18-17192.

⁵¹ U.S. Supreme Court, decision of 18 May 2023, no. 21-1496, *Twitter Inc. v. Taamneh et al.*

ISIS-created content differently from other third-party content⁵². The Supreme Court endorsed this reasoning stating that much (if not all) of plaintiffs' complaint fail under the *Twitter Inc. v. Taamneh* decision⁵³. As regards to the other charges, there was no proof that Google reached an agreement with ISIS or that it intended to intimidate or coerce a civilian population, or to influence or affect the government.

The common interpretative problem stemming from the two mentioned cases concerns the breadth of the editorial control that can be expected of online platforms. Indeed, their editorial influence is manifested in the organization of the content rather than its production, as older types of media, such as broadcasting⁵⁴. It seems that time has come to revise the understanding of editorial competence, almost as regards large online platforms. For instance, platforms may be excluded from exercising editorial power when their algorithms display content according to neutral criteria, like the chronological or the alphabetical ones as well as according to users' preferences and interactions⁵⁵. Conversely, algorithms that organize content in ways to polarize users towards a political party witness an editorial influence of the platform. From a technical viewpoint, this presupposes the power to access and examine (and understand!) the computer program in order to understand its effective functioning.

A last glimpse of the fundamental role played by the U.S. Supreme Court in shaping the interpretation of the First Amendment to accommodate the challenges of the digital platform economy emerges in *Mahanoy Area School District v. B.L.*⁵⁶. In the case at hand, the parents of B.L., a cheerleader at Mahanoy Area High School ('MAHS') claimed the violation of the First Amendment because the school suspended their daughter for the upcoming year after being informed that she had posted a picture of herself on Snapchat with the caption «F*** school, f*** softball, f*** cheer, f*** everything». The photo, posted in the weekend and lasting for 24 hours, reached about 250 people, many of whom were student at MAHS and some of whom were cheerleaders.

The Third Circuit upheld a district court injunction⁵⁷, ordering MAHS to reinstate B.L. to the cheerleading team because the school lacked authority to regulate this kind of off-campus speech, neither it could invoke the *locus parentis* doctrine⁵⁸. The Supreme Court came to the same conclusion on the grounds that the content has been

⁵² U.S. Court of Appeal, 9th circuit, decision of 22 June 2021, no. 18-16700.

⁵³ U.S. Supreme Court, *Reynaldo Gonzalez v. Google*, no. 21-1333, 2023.

⁵⁴ E. Kukliš, *Video-sharing platforms in AVMSD: a new kind of content regulation*, in L. Parcu - E. Brogi (eds.), *Research Handbook on EU Media Law and Policy*, cit., 307.

⁵⁵ See also J. Rowbottom, *Media Law*, cit., 351, 352, who argues that another option to avoid editorial liability could be that of arranging the algorithm to ensure that people are confronted with diverse opinions and sources. He interestingly submits that the organization of content according to user's preference might lead that user to get trapped in a "bubble", hearing messages that reflect existing interests rather than diverse views.

⁵⁶ U.S. Supreme Court, no. 594 (2021).

⁵⁷ U.S. District Court, 3rd Circuit, decision of 21 March 2019, no. 3:17-CV-01734.

⁵⁸ The *in loco parentis* has long been condemned as a principle used to rationalize oppression and even violence against public school students. For a further analysis of the doctrine see *Mahanoy Area School District v. B. L.*, in *Harvard Law Review*, 135, I, 2021, 353 ss.

posted outside of school hours from a location outside the school and did not identify the school or target any member of the school community with vulgar or abusive language. It has also been specified that the school's power to punish off-campus student speech is limited to specific circumstances, like serious bullying or harassment; threats aimed at teachers or other students; failure to follow rules concerning lessons and homework, the use of computers, or participation in online school activities; breaches of school security devices. Based on these premises, the Supreme Court considered B.L.'s post as not involving features that would place it outside the First Amendment's ordinary protection⁵⁹.

3. The European Media Freedom Act: main features and possible challenges ahead

On 10 January 2022, the European Commission launched a public consultation to collect views by relevant interested parties on the most important issues affecting the functioning of the internal media market. According to Věra Jourová, Vice-President for Values and Transparency, «Media are a pillar of democracy. But today this pillar is cracking, with attempts by governments and private groups to put pressure on the media. This is why the Commission will propose common rules and safeguards to protect the independence and the pluralism of the media. Journalists should be able to do their work, inform citizens and hold power to account without fear or favour [...]»⁶⁰. The consultation focuses on three core areas of media markets: (i) how to guarantee transparency and independence of media providers (e.g., scrutiny of media market transactions, transparency of media ownership⁶¹ and audience measurement); (ii) which conditions trigger their healthy functioning (e.g., exposure of the public to a plurality of view, media innovation in the EU market, freedom of journalism); (iii) how to ensure fair allocation of state resources (e.g., independence of public service media, transparency and fair distribution of state advertising).

The call attracted 917 responses, most of which supported the idea of a legislative proposal based on a principle-based approach rather than detailed standard-setting or no action at all. However, each type of stakeholder expressed its own needs and concerns. In particular, non-governmental organisations and public service broadcasters

⁵⁹ Justice Stephen Breyer, the Judge who wrote the opinion for this case, expressed its concerns of crystallizing in the decision the specific circumstances under which the school would have a special interest in regulating off-campus speech: «Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list. Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself». For further thoughts see M. Coyle, *Justice Breyer scouts a path through a sticky thicket of student speech*, National Constitution Center, 25 June 2021, available at constitutioncenter.org.

⁶⁰ European Commission, press release *European Media Freedom Act: Commission launches public consultation*, 10 January 2022, available at ec.europa.eu.

⁶¹ On the heterogeneous legal framework concerning media ownership see R. Crafurd Smith - B. Klimkiewics - A. Ostling, *Media ownership transparency in Europe: Closing the gap between European aspiration and domestic reality*, in *European Journal of Communication*, 36, 2021, 547 ss.

were in favour of an EU-level action to introduce safeguards for editorial independence, seeking guidance on the appropriate prominence of audiovisual media services of general interests. Private broadcasters supported the introduction of common principles for media pluralism measures and audience measurement, like transparency, objectivity, and verifiability. Conversely, publishers expressed a general preference for self-regulation. Citizens voice the need for transparency and fairness in the allocation of state advertising. Finally, broadcasters and publishers share the urge to set out an effective regulation for online platforms.

On 16 September 2022, the European Commission tries to bring together all the opinions in the proposal for a regulation establishing a common framework for media services in the internal market⁶² (European Media Freedom Act or EMFA). The proposal is aimed at achieving balanced and impartial media coverage, based on transparency, deeper regulatory convergence and cooperation between Member States, and an enabling environment for innovative media. The pressure for specific treatment of media companies arises from their crucial role in effectively ensuring democracy across European Member States by providing access to a plurality of views and reliable sources of information to citizens and businesses alike.

The proposal takes account of the ongoing disruption of the media industry in the fast-changing digital environment which has also blurred the line between independent and corporate-owned media providers⁶³. The need to preserve media companies' independence and transparency has gained momentum in order to fight against the erosion of fundamental rights, namely freedom of expression and information, as well as media freedom and pluralism. Indeed, these rights, explicitly protected by art. 11 of the European Charter of Fundamental Rights⁶⁴, are currently under threat due to the fragmented responses across European Member States⁶⁵. Hence, the EMFA is founded on the premise that transparency and independence of media undertakings must be ensured through a horizontal instrument based on maximum harmonisation. Such consideration is bolstered by the fact that the media sector falls within the 14 key ecosystems for an inclusive and sustainable recovery and for the European economy's twin (green and blue) transition⁶⁶.

Getting into *medias res*, the EMFA covers several key aspects for the preservation and promotion of media industries, dealing with (i) safeguards for the independent and transparent functioning of public service media providers; (ii) strengthening the pow-

⁶² Proposal for Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market, 16 December 2022, COM (2022)457 final.

⁶³ World Economic Forum, White Paper *Understanding Value in Media: Perspectives from Consumers and Industry*, Geneva, 2020, 12.

⁶⁴ Charter of Fundamental Rights of European Union, 26 October 2012, C 326/391. See also the Protocol no. 29 on the system of public broadcasting in the Member States, annexed to the Treaties, 26 October 2012, C 326/1, affirming that «the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and on the need to preserve media pluralism».

⁶⁵ See in particular the study commissioned by the European Parliament *The fight against disinformation and the right to freedom of expression*, July 2021, available at europarl.europa.eu.

⁶⁶ EMFA, 1.

er of the European Board for Media Services; (iii) stricter rules for providers of very large online platforms; (iv) the introduction of a right of customisation of audiovisual media offer; (v) the assessment of media market concentrations.

Art. 5 deals with independence of public service organizations (PSOs), requiring them to provide in an impartial manner a plurality of information and opinions. They should also appoint their management through a transparent, open, and non-discriminatory procedure. Moreover, Member States should ensure that PSOs have adequate and stable financial resources for the fulfilment of their public service mission. The ambitious goal is to grant independence of editorial board from the property of the media entity. This is very delicate because every Member State has its own attitude on this. For instance, in Italy, whereas there is a clear regulation dealing with the independence of the journalists *vis à vis* the directors and owners, there are no rules about independence of editors *vis à vis* ownership because it is considered protected under the freedom to conduct a business⁶⁷. The relationship between editors and owners falls within the freedom to conduct a business. It is just governed by labor law, according to which the owner can fire the editor without justification because of the fiduciary duty of this job.

Art. 6 contains the guarantees of transparency with which media service providers should comply. They can be divided into disclosure and organizational obligations. As regards the former, media service providers should disclose (a) their legal name and contact details; (b) the names of their direct or indirect owners with shareholdings enabling them to exercise influence on the operation and strategic decision making; (c) the names of their beneficial owners. For what it concerns the latter, media service providers should take measures that (a) guarantee editors' freedom over their editorial decisions; (b) ensure disclosure of any actual or potential conflict of interests.

Arts. 8-12 set up the European Board for Media Services. The new Board should replace the ERGA and receive further tasks and responsibilities, having a pivotal role in the implementation of the new legal framework. Amongst the several tasks provided by art. 12, the Board shall draw up opinion with respect to enforcement measures in case of disagreement between two national authorities on the actions for the effective enforcement of the obligation to ensure the right of reply in the case that a natural or legal person has been damaged by an assertion of incorrect facts in a television programme, pursuant to art. 28 AVSMD⁶⁸. It should also assist the Commission in establishing common guidelines with respect to factors to be taken into account when applying the criteria for assessing the impact of media market concentrations⁶⁹. Despite its proclaimed independence, there are different cases that condition Board's action upon the agreement of the Commission. There is an ongoing negotiation as to how increase the distance between the Commission and the Board⁷⁰.

Art. 17 establishes a framework of duties intended exclusively for providers of very

⁶⁷ O. Pollicino, *PromethEUs workshop on the European Media Freedom Act (EMFA)*, Athens, 20 October 2022.

⁶⁸ EMFA, art. 12, lett. e), (ii).

⁶⁹ EMFA, art. 12, lett. h), (ii).

⁷⁰ M. Killeen, *EU Council's agreement in sight on media freedom*, 8 June 2023, available at euractiv.com.

large online platforms⁷¹, including the obligation: (a) to communicate to the media service provider the statement of reasons accompanying the decision to suspend the provision of its online intermediation services in relation to a specific content; (b) to take all the necessary technical and organization measures to ensure that complaints under art. 11 of Regulation 2019/1150/EU⁷² are processed and decided upon with priority and without undue delay; (c) to engage in a meaningful and effective dialogue with media service providers that frequently undergo the suspension or restriction of the online intermediation services by the very large online platform without sufficient grounds; (d) to declare that it is subject to regulatory requirements for the exercise of editorial responsibility in one or more Member States, or adheres to a co-regulatory or self-regulatory mechanism governing editorial standards, widely recognised and accepted in the relevant media sector in one or more Member States; (e) to disclose the number of instances where they imposed any restriction or suspension of their services and the grounds for imposing such restrictions.

The stricter accountability framework targeting large professional intermediaries is likewise grounded on an emergent emphasis on corporate social responsibility (CSR)⁷³. According to this business model under expansion, undertakings are expected to integrate the current environmental, social, and ethical values into their strategies. Thus, they should consider the impact of their business operations also on freedom of expression and other fundamental rights. These fair and responsible conducts find justification under the Directive on non-financial reporting⁷⁴ which requires public-interest companies in EU Member states with more than 500 employees to disclose certain types of non-financial and diversity information in their yearly management reports. On 21 June 2022, the Council and European Parliament reached a provisional political agreement on the corporate sustainability reporting directive (CSRD) to address shortcomings in the existing directive, especially as regards the quality of information delivered to investors⁷⁵.

⁷¹ The definition of “very large online platforms” is laid down in art. 25 of the Digital Services Act, referred to as «online platforms which provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million».

⁷² Regulation 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, L 186/57.

⁷³ G. Frosio, *Platform Responsibility in the Digital Services Act: Constitutionalising, Regulating and Governing Private Ordering*, cit., 6. For a multidisciplinary analysis of corporate social responsibility see D. Caterino - I. Ingravallo (eds.), *L'impresa sostenibile. Alla prova del dialogo dei saperi*, EuriConv, Lecce, 2020. See also A. Rasche - M. Morsing - J. Moon (eds.), *Corporate Social Responsibility. Strategy, Communication, Governance*, Cambridge, 2017.

⁷⁴ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, L 330/1.

⁷⁵ The directive will introduce more detailed reporting requirements and ensure that large companies are required to report on sustainability issues such as environmental rights, social rights, human rights, and governance factors. The CSRD will also introduce a certification requirement for sustainability reporting as well as improved accessibility of information, by requiring its publication in a dedicated section of company management reports. For more information see the press release by the Council of the EU, *New rules on corporate sustainability reporting: provisional political agreement between the Council and the European Parliament*, 30 June 2022, available at consilium.europa.eu.

At international level, social accountability is rooted in the United Nations (UN) Human Rights Council declaration of Internet freedom as a human right⁷⁶, in the UN Guiding Principles on Business and Human Rights⁷⁷, and in the preamble of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises⁷⁸.

Art. 19 entitles users of media services to the right of customisation of audiovisual media offer. According to it, manufacturers and developers shall ensure a functionality enabling users to freely and easily change the default settings controlling or managing access to and use of the audiovisual media services offered.

Art. 21 concerns the assessment of media market concentrations. It gives to media authorities a greater say over mergers having an impact on media pluralism and editorial independence. In parallel with the standard antitrust test on whether the merger would entail a substantial impediment to effective competition⁷⁹, media market concentrations require further elements to be taken into account, namely: (a) the impact of the concentration on media pluralism, including its effects on the formation of public opinion and on the diversity of media players on the market, taking into account the online environment and the parties' interests, links or activities in other media or non-media businesses; (b) the safeguards for editorial independence, including the impact of the concentration on the functioning of the editorial teams and the existence of measures by media service providers taken with a view to guaranteeing the independence of individual editorial decisions; (c) whether, in the absence of the concentration, the acquiring and acquired entity would remain economically sustainable, and whether there are any possible alternatives to ensure its economic sustainability. The obligation to consider the impact on the media market arising from the concentration acknowledges the pitfalls of the current antitrust test to ensure democracy as it is exclusively dedicated to guarantee market efficiency⁸⁰. Although for the sake of brevity we cannot dig into antitrust underpinnings, it suffices to note that the approach set out by the EMFA embraces the neo-Brandeis movement (also called hipster antitrust) according to which excessive concentrations does not only yield economic consequences, being able to jeopardize democratic values, too⁸¹. In this perspective, antitrust authorities should be empowered to block a merger also when it could undermine media freedom. However, the present disagreement on the most

⁷⁶ United Nations, resolution of 13 July 2021 on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/47/L.22.

⁷⁷ United Nations, Guiding Principles on Business and Human Rights, 16 June 2011, Geneva and New York.

⁷⁸ United Nations, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 26 August 2003, Geneva.

⁷⁹ For an in-depth analysis of the SIEC test see I. Kokkoris - H. Shelanski, *EU Merger Control: An Economic and Legal Analysis*, Oxford, 2014.

⁸⁰ On this topic, see widely B.P. Paal, *Current issues and recent developments on media concentration in the context of competition law and media law*, in *Journal of Intellectual Property Law & Practice*, 12, VII, 2017, 610 ss.; K. Bania, *The role of media pluralism in the enforcement of EU competition law*, doctoral thesis discussed at the European University Institute, Florence, 2015.

⁸¹ A thorough explanation and promotion of the New Brandeis school is given by T. Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, New York, 2018.

reliable indicators to monitor media freedom and pluralism requires ERGA to provide some coordinates in order to apply common standards across the EU⁸².

That said, the proposal is not immune from criticism in the light of some controversial issues that it is likely to arise. First and foremost, we refer to the competence conundrum. In this regard, art. 167(5) of the Treaty on the Functioning of the European Union (TFEU) prevents EU from adopting instruments that would harmonize national media laws and regulations, being its competence limited to provide incentive measures and recommendations⁸³. The European Commission, aware of this limit, identified the legal basis of the EMFA in art. 114 TFEU, which is basically the wildcard provision to extent European competences over the borders established by the Treaties. Indeed, it empowers the EU to approximate the provisions adopted by Member States which have as their object the establishment and functioning of the internal market.

The CJEU has adopted a restrictive interpretation of art. 114 TFEU in *Commission v Council*⁸⁴, under which it has been affirmed that «Recourse to Article 114 TFEU is not justified where the measure has only the incidental effect of harmonizing market conditions within the Union»⁸⁵. It is true that media might come under the category of internal market interventions, which is shared competence, but it also might be regarded as falling within culture, where only supporting action is allowed⁸⁶. The creation of categories of competence inevitably creates difficulties in deciding which aspects of social policy fall within the boundaries and which overcome them.

The EMFA seems to deal with some aspects that are supposed to be regulated by national laws as having only incidental effects to the market. Indeed, the state interference in public service media, the restrictions to sources and communications of journalists as service providers, the strategies to enhance media pluralism seem to fall within the constitutional identity of the Member States and their political sovereignty. From this point of view, the EMFA stretches legal competence of the EU through a regulation – the most invasive policy instrument – in a field whereby the EU legislative power appears to be limited to soft law acts⁸⁷. It should be reminded that back in

⁸² E. Brogi - R. Carlini - I. Nenadić - P. Luigi Parcu - M. Viola de Azevedo Cunha, *EU and media policy: conceptualising media pluralism in the era of online platforms. The experience of the Media Pluralism Monitor*, in P.L. Parcu - E. Brogi (eds.), *Research Handbook on EU Media Law and Policy*, cit., 16 ss.

⁸³ M.D. Cole - J. Ukrow - C. Etteldorf, *On the allocation of competences between the European Union and its Member States in the media sector. An analysis with particular consideration of measures concerning media pluralism*, Institute of European Media Law, 2020, available at orbilu.uni.lu; A. Garcia Pires, *Media Pluralism and Competition*, in *European Journal of Law and Economics*, vol. 43, II, 2017, 255-283.

⁸⁴ CJEU, decision of 18 November 1999, Case C-209/97, *Commission v. Council*, EU:C:1999:559.

⁸⁵ *Ivi*, para 35.

⁸⁶ P. Craig - G. de Búrca, *EU Law: Text, Cases, and Materials*, 7th ed., Oxford University Press, Oxford, 2020, 115, *passim*.

⁸⁷ In even stronger terms see V. Zeno-Zencovich, *The EU regulation of speech. A critical view*, in *Rivista di Diritto dei Media*, I, 2023, 16, 17, who clearly outlines that «The summit of Commission's invasion of the field of freedom of expression is represented by [...] the "European Media Freedom Act. [...] The intention of regulating "media service providers" is simply a way of extending – completely *ultra vires* – the competences of the Commission [...]». For an opposite perspective see G. Muto, *European Media Freedom Act: la tutela europea della libertà dei media*, *ivi*, III, 2022, 225.

1995, the European Commissioner Mario Monti tried to harmonize media pluralism in a proposal of directive which has been rejected by Germany and United Kingdom because of the lack of competence by the EU over media issues⁸⁸. The above-mentioned arguments persuaded some scholars to argue that, as EU law currently stands, a recommendation seems to be the most suitable instrument to incorporate media policies⁸⁹. Nonetheless, a minority position has submitted that the differences in Member States' legislations in media independence, restrictions on media ownership by person holding public office, and contrast to dominant positions in the mass media markets are evident threats to the functioning of the internal market, leading undertakings to find some Member States more appealing than others to establish or invest⁹⁰. Taking these diverging opinions into account, it would not be surprising if Member States will challenge the validity of art. 114 TFEU as legal basis of the EMFA before the CJEU.

Moreover, it has been clear for Europe that online platforms play a key role in the content organization, but they do not bear editorial responsibility over the content to which they provide access. The EMFA tackles this issue by considering providers of video-sharing platforms and very large online platforms as media service providers for the sections of their services in which they exercise an editorial power⁹¹. To this purpose, a media service provider is defined as a natural or legal person whose professional activity is to provide a media service and who has editorial responsibility for the choice of the content of the media service and determines the way it is organised⁹². Hence, the classification as media service provider prevents any escape from liability exemption(s) and create a legitimate expectation to act diligently as well as to provide information that is trustworthy and respectful of fundamental rights.

As much as the new legal framework can be welcome, it raises some practical questions. They especially relate to the determination of the threshold of influence above which an online platform can also be considered as media service provider. It is not clear how to identify the specific sections subjected to the editorial power of the provider. This requires a disclosure obligation on how the content are organized. But what if the content organization and moderation is delegated to algorithms, especially those equipped with Artificial Intelligence (AI)⁹³? One solution could be that of con-

⁸⁸ For wider comments see S. Kaitatzi-Whitlock, *Pluralism and Media Concentration in Europe: Media Policy as Industrial Policy*, in *European Journal of Communication*, 11, IV, 1996, 453 ss.

⁸⁹ M.D. Cole - J. Ukrow - C. Etteldorf, *On the allocation of competences between the European Union and its Member States in the media sector. An analysis with particular consideration of measures concerning media pluralism*, cit.; A. Garcia Pires, *Media Pluralism and Competition*, cit.

⁹⁰ R. Mastroianni, *Freedom of pluralism of the media: an European value waiting to be discovered?*, cit., 106.

⁹¹ EMFA, Recital 8.

⁹² EMFA, art. 2, para. 1.

⁹³ As noted by G. Frosio, *Platform Responsibility in the Digital Services Act: Constitutionalising, Regulating and Governing Private Ordering*, cit., 3, 4, «The terms of the debate that online content moderation entails, via filtering and monitoring and the use of automated tools in particular, has been spelled out by the Court of Justice of the European Union (CJEU) multiple times. When imposing obligations on internet service providers a trifecta of interests must be taken into consideration, including the freedom of those service providers to conduct a business, guaranteed in Article 16 of the Charter, the fair balance between that freedom, the right to freedom of expression and information of the users of

sidering the (natural or legal) person deploying such a computer program accountable for its choices, thus piercing the algorithmic veil.

A more reasonable policy option could be to pretend that the service provider would disclose its algorithm to the media authority in order to allow an expert to assess the extent to which the computer program can influence the organization of content. Although for some people AI appears as a black box⁹⁴, there is an increase of studies devoted to Explainable AI, which is a research area aimed at allowing humans to understand the processes and methods followed by machine learning algorithms to reach a certain result or to produce a specific content⁹⁵. As such, the need of an explainability-by-design approach to AI systems cannot be ignored no more in view of granting a fair allocation of responsibilities. This is bolstered by the fact that platforms may be incentivised to set the algorithm to take down all the contents that slightly – if not remotely – infringe other parties' rights to quickly avoid any risk of liability. Such an excessive prudent approach would likewise hinder freedom of expression since it risks turning into private censorship.

Another issue pertains to the enforcement of the EMFA. In the early reaction by Civil Liberties Union for Europe to the proposal, it has been argued that the EMFA fails to offer strong oversight on how existing and newly established media rules will be enforced⁹⁶. The Commission has for years declined to launch investigations against the Member States, such as Hungary or Poland (the main targets of some intrusive interventions), where free media is under threat. The EMFA tries to deal with such democratic asymmetries in the Eastern Europe⁹⁷ through a regulation. But the problem is that, as being a regulation, this law is supposed to apply all over Europe, where the issue of editorial independence is less striking. Hence, the regulation should contain more detailed enforcement measures for those Member States where systemic attacks to democracy are perpetrated. A proportionate response to media issues across the EU requires a granular approach based on the level of media freedom ensured in each Member State, considering that some stronger measures would not be necessary for those States where the media market operates well.

Finally, some press publishers argue that the EMFA will have the opposite effect than

their services, enshrined in Article 11 of the Charter, and the right to intellectual property of the rightholders, protected in Article 17(2) of the Charter». Compare CJEU C-314/12, *UPC Telekabel Wien GmbH vs. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH* (2014); CJEU, C-401/19, *Republic of Poland v European Parliament and Council of the European Union* (2022), § 80.

⁹⁴ On this topic see A. De Strel - A. Bibal - B. Frenay - M. Lognoul, *Explaining the black box: when law controls AI*, Centre on Regulation in Europe, Brussels, 2020; F. Pasquale, *The Black Box Society. The Secret Algorithms That Control Money and Information*, Cambridge, 2016.

⁹⁵ R. Hamon - H. Junklewitz, I. Sanchez, *Robustness and Explainability of Artificial Intelligence. From technical to policy solutions*, Publications Office of the European Union, Luxembourg, 2020; A. Adadi - M. Berrada, *Peeking Inside the Black-Box: A Survey on Explainable Artificial Intelligence (XAI)*, in *IEEE Access*, 6, 2018, 52138-52160.

⁹⁶ Liberties, *Liberties' Comment on the European Commission's European Media Freedom Act Proposal*, 16 September 2022, available at liberties.eu.

⁹⁷ The 2022 Rule of law report of the European Commission of 13 July 2022, COM(2022) 500 final, invites Poland, Rumania, Slovenia, Slovak, Check Republic, Hungary and Cyprus to strengthen the rules and mechanisms to enhance the independent governance of public service media taking into account European standards on public service media.

that of protecting media organizations from political and economic meddling⁹⁸. New publishers' lobbies fear the regulation could affect their editorial power over their publications, advocating for a proportionate approach in support of Member States' power to guarantee media pluralism and freedom of expression⁹⁹. According to this perspective, there is no need to adapt systems of public service media governance that are already performing good in ensuring their independence.

4. Concluding remarks

The proper functioning of media companies is quintessential for ensuring freedom of expression and information, which are in turn a relevant litmus paper to measure the effective level of democracy. The urge to preserve media companies' independence and transparency has gained momentum in the digital platform economy whereby content are produced, distributed and consumed according to innovative channels. The disruption of the media industry with the progressive emergence of important new players has also blurred the line between independent and corporate-owned media providers. This may constitute a threat to art. 11 of the EU Charter of Fundamental Rights, aimed at granting freedom of expression and information, as well as media freedom and pluralism.

National interventions to curb media freedom and pluralism backsliding in Member States seem to be inadequate, considering the cross-border nature of digital platforms. A homogeneous legal response can originate at European level inasmuch it complies with the subsidiarity¹⁰⁰ and proportionality¹⁰¹ principles. In this regard, the European Union has issued several acts of soft and hard law to govern the digital platform economy so as to unleash its unique opportunities. Some of them directly address media issues while others are more generally intended to make Europe fit for the digital age. The puzzle of legal policies in the media field is complicated by their uncertain target, considering that some online operators (social media, search engines and application platforms) fall into the grey zone of providing user-generated content with an undetermined control over their ranking and moderation¹⁰². This is exacerbated by the different standards applied by Member States to measure the audience of media organizations even if it is crucial to ascertain their real market positioning¹⁰³. However,

⁹⁸ C. Goujard, *We're fine as we are, Press tells EU as Brussels plans media freedom law*, in *Politico.eu*, 16 September 2022, available at *politico.eu*.

⁹⁹ Nordvision, *Response to European Commission public consultation for a European Media Freedom Act*, 6 March 2022, available at *nordvision.org*.

¹⁰⁰ Art. 5, para. 3, TEU.

¹⁰¹ Art. 5, para. 4, TEU.

¹⁰² According to A. Koltay, *New Media and Freedom of Expression. Rethinking the Constitutional Foundations of the Public Sphere*, Bloomsbury, London, 2019, 83, all these online operators «routinely make 'editorial' decisions on making content unavailable, deleting or removing it (whether to comply with a legal obligation, to respect certain sensibilities, to protect their business interests or to act at their own discretion)».

¹⁰³ Y. Citino, *Verso l'European Media Freedom Act: la strategia europea contro le minacce al pluralismo e*

it appears undisputed that large media undertakings cannot longer rely on private (dis) ordering, made up of diverse forms of self-regulation, like ethics code, press and media councils, or ombudspersons¹⁰⁴. These operators are often not neutral in relation to the content they display – especially search engine results or feed on social networks – since they discriminate between messages by prioritizing or shadow-banning them according to biased criteria, regardless of their origin from humans or algorithms (which are in any case designed by humans)¹⁰⁵.

The EMFA represents an ambitious milestone to protect the rule of law for the preservation and promotion of quality media services by strengthening the free and pluralistic media system across Europe. Apart from requiring substantial coordination with the existing EU *acquis*, which constitutes a patchwork of direct and indirect measures, there is a heated debate over the most suitable policy tool to address media issues, together with its enforcement and potential unintended consequences. The new regime will not apply to all online actors, but only to those covering a special position to influence their users' ability to access information and their interaction with it, thus fulfilling a democratic function by acting as facilitators of users' speech, creativity and exchange of ideas¹⁰⁶. To this purpose, scholars have pointed out that information gatekeepers should bear the delicate responsibility to support the public interest, assuming an obligation as trustees of the greater good based on the social function of information¹⁰⁷.

The media regulation is in great ferment also in the U.S., representing a further animated battleground between Republicans and Democrats. The U.S. Supreme Court is playing a central role for the development of media law, assessing whether and to which extent the current rules can accommodate the multiple challenges arising from the increasingly pervasive use of digital platforms. In *Mahanoy Area School District v. B. L.*, the Supreme Court sided for freedom of expression. It would be interesting to analyse how the two contrasts between District Courts concerning the interpretation

all'indipendenza dei media da una prospettiva de iure condendo, cit., 13; V.H. Tien Vu, *The online audience as gatekeeper: The influence of reader metrics on news editorial selection*, in *Journalism*, 2014, 1094-1110.

¹⁰⁴ Indeed, allowing digital platforms to self-regulate the traffic of content risks that effectiveness of the protection against unlawful moderation will depend on the willingness of the platform to remove the content according to its own standards. See for instance Facebook community standards: «Governments also sometimes ask us to remove content that violates local laws but does not violate our Community Standards. If after careful legal review, we find that the content is illegal under local law, then we may make it unavailable only in the relevant country or territory». See also the [speech by President of the European Commission von der Leyen at the European Parliament Plenary on the inauguration of the new President of the United States and the current political situation](#), Brussels, 20 January 2021, according to which «No matter how right it may have been for Twitter to switch off Donald Trump's account five minutes after midnight, such serious interference with freedom of expression should be based on laws and not on company rules. It should be based on decisions of parliaments and politicians and not of Silicon Valley managers».

¹⁰⁵ J. Rowbottom, *Media Law*, cit., 351.

¹⁰⁶ N. Elkin-Koren - M. Perel, *Guarding the Guardians: Content Moderation by Online Intermediaries and the Rule of Law*, in G. Frosio (ed.), *The Oxford Handbook of Online Intermediary Liability*, Oxford, 2020, 669-678.

¹⁰⁷ A. Shapiro, *The Control Revolution: How the Internet is Putting Individuals in Charge and Changing the World We Know*, II ed., New York, 2000, 225.

of Section 230 of the Communications Decency Act will be handled. Considering the growing role of EU as a standard setter, we can infer – or almost hope – that the U.S. Supreme Court will align the next landmark rulings to the higher standards that are likely to set out by the EMFA (unless it will be reviewed by the CJEU).

In conclusion, the complex marvels of cyberspatial communication may create difficult legal issues¹⁰⁸ and many official institutions in the world, legislators or Courts based on the respective legal system, are seeking to keep up with them by balancing the different fundamental rights in tension for the healthy functioning of the fourth power in a democratic society.

¹⁰⁸ The adage was quoted by the U.S. District Court for the Southern District of New York, decision of 4 May 2000, *UMG Recordings Inc. vs. Mp3.com Inc.*, no. LEXIS 5761.