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Could European Media Freedom Act solve the problems of traditional media's content in the online sphere?

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Abstract The presence of traditional media content on online platforms is one of the critical issues nowadays, and Article 17 of the European Media Freedom Act (EMFA) seeks to regulate this. However, it can be seen that the current version of the text is not yet free of flaws: both its harmonisation with the Digital Services Regulation, its use of definitions and the media fast track mechanism it contains would require careful legislative scrutiny before the final text is adopted. The article examines if the self-declaration procedure envisaged by the EMFA would create a loophole for rogue media actors and bring confusion at both the European and horizontal levels or if it would fit the original goal of the EMFA, which is to improve the functioning of the internal European media market and to reinforce the independent media.

Keywords : European Media Freedom Act, EMFA, Article 17, very large online platform, VLOP, Digital Services Act, DSA

온라인 영역에서 유럽 미디어 자유법의 전통 미디어 콘텐츠 문제 해결 가능성에 관한 연구

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요약 오늘날 온라인 플랫폼에서 전통적인 미디어 콘텐츠의 존재는 중요한 문제 중 하나이며, 유럽 미디어 자유법 (EMFA) 제17조는 이를 규제하고자 합니다. 그러나 디지털 서비스 규정과의 조화, 정의의 사용, 미디어 패스트 트랙 메커니즘 등 현재 버전의 텍스트에는 아직 결함이 없는 것으로 보이며, 최종 텍스트가 채택되기 전에 신중한 입법적 조사가 필요합니다. 이 글에서는 EMFA가 구상하는 자진 신고 절차가 불량 미디어 행위자에게 허점을 만들어 유럽과 수평적 수준 모두에서 혼란을 가져올지, 아니면 유럽 내부 미디어 시장의 기능을 개선하고 독립 미디어를 강화하려는 EMFA의 원래 목표에 부합하는지 살펴봅니다

주제어 : 유럽 미디어 자유법, EMFA, 제17조, 초대형 온라인 플랫폼, VLOP, 디지털 서비스법, DSA

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I. Introduction

Since the adoption of its General Data Protection Regulation (GDPR)[1] in 2016, the European Union (EU) has liked to play a sort of guiding, trend-setting role, and for good reason, as it has served as the basis for many national regulations (Ruiz, 2020). Europe envisages a similar role for itself in the digital media environment, which is why those involved in media regulation at a practical or theoretical level have often been left scratching their heads over the last few years at the speed at which ideas and then complete regulations are being developed in this area. European countries, which for a long time had been reluctant to play an active role in regulating the digital world (Gosztonyi, 2023), changed their attitude in the 2010s. However, this has often resulted in a rush and a lack of professionalism in legislation, such as the already adopted Digital Services Regulation (DSA)[2] and the Digital Markets Regulation (DMA),[3] as well as the European Media Freedom Act (EMFA)[4] and the Artificial Intelligence Act (AI Act),[5] which have reached different levels of the legislative process. These pieces of legislation have been widely praised, but the lack of coherence received lots of attention.

Underpinning all these new public regulatory needs is a new European framework programme, the Digital Europe Programme (DIGITAL),[6] which focuses on five key areas (supercomputing, artificial intelligence, cybersecurity, advanced digital skills, and ensuring the widespread use of digital technologies in the economy and society) to make digital technology more accessible to businesses, citizens and public administrations. The biggest problem, however, is still not legal but rather business-economic: the majority of the EU's digital ecosystem is made up of small and medium-sized enterprises, so that the seemingly huge budgets are in vain, for example, "the United States and China together account for over 80% of the €25 billion of annual equity investments in AI and blockchain technologies, while the EU27 only accounts for 7% of this global amount, investing around €1.75 billion" (Verbeek & Lundqvist 2021: 2). This is supported by market value estimates (FasterCapital 2023), and the fact that out of the nineteen very large online platforms (VLOP)

1) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Regulation (EC) No 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, 1–88.

2) Regulation (EU) No 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation), PE/30/2022/REV/1, OJ L 277, 27.10.2022, 1–102.

3) Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on competitive and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), PE/17/2022/REV/1, OJ L 265, 12.10.2022, 1–66.

4) Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (the European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final.

5) Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules for artificial intelligence (AI legislation) and amending certain EU legislative acts, COM/2021/206 final.

6) https://digital-strategy.ec.europa.eu/en/activities/digital-programme

or very large online search engines (VLOSE) identified by the European Commission (EC) on 25 April 2023 under Article 33(4) of the DSA, only one, the German Zalando, was European.[7)]

All this is compounded by the problems the EU has rightly identified for the European media market, all of which make it difficult to set up a single set of rules. These include diverging national rules on media pluralism, inadequate structures for cooperation between independent media regulators, public and private interference in media ownership, management or operation, or the lack of safeguards for media pluralism.[8)] As all these raise the possibility of distorting internal (media) market competition as well as influencing investment or market entry decisions, which could lead to a loss of diversity of media offer and media independence, the Media and Audiovisual Action Plan 2020[9)] has already noted that the legal separation of audiovisual and online content and formats could become obsolete due to accelerating convergence. The EMFA appears to be the next step in this legislative process, which, according to Polyák (2023), is "a very ambitious attempt at regulation that responds to real problems." A political agreement on the text was reached on 15 December 2023 between the European Parliament (EP) and the European Council (EC) and is now subject to formal approval. Once officially adopted and published in the Official Journal of the EU, the EMFA would be binding in its entirety and directly applicable in all Member States after fifteen months.

Ⅱ. EMFA Article 17, or the media privilege

VLOPs "play a key role in the content organisation, including by automated means or algorithms, but do not exercise editorial responsibility over the content to which they provide access" (EMFA Recital 8). However, it is clear that in recent years VLOPs have in practice suspended or restricted content from traditional media service providers in a number of cases, on the grounds of contractual terms.[10)] Article 17 of the EMFA was adopted in response to this situation and has undergone several drafting changes over the last two years.

The relationship between the DSA and the EMFA, i.e. the inclusion of media services in the VLOP, would be governed by Article 17 of the EMFA. The article in question "recognises the value of professional information by subjects who bear editorial responsibility for the contents they select, produce, and disseminate" (European

7) Of particular interest, Zalando filed an action with the Court of Justice of the European Union (CJEU) on 27 June 2023 challenging the EC's classification. Amazon has also joined the claim (Kirton, et al. 2023).

8) Commission Staff Working Document Executive Impact Assessment Report Accompanying the document 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, SWD(2022) 286 final.

9) Communication from the Commission to the Europea Parliament, the Counci, the European Economic and Social Committee and to the Committee of the Regions Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation, COM/2020/784 final.

10) See EMFA Recital 31 and DMA Article 3(1)–(2).

Parliament, 2023: 60). Consequently, the basic premise of the EMFA is that VLOPs should not, as a general rule, over-moderate traditional media services that adhere to basic standards and principles of journalism.

On this basis, VLOPs should provide a function whereby media service providers can declare themselves to be covered by Article 17 on the basis of a triple conditionality. On this basis, they must declare whether they A) qualify as media service providers under the EMFA,[11] B) are editorially independent from Member States and third countries, and C) are 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. If the declaration is granted, a specific content control practice would apply to the content they upload to VLOPs, based on the remainder of the relevant article. This has been referred to by many as a media privilege (Bayer, 2022) or media exception (Buijs 2022), in that if a VLOP decides that the content, while not posing a systemic risk under the DSA Article 34(1), is incompatible with its terms and conditions and suspends the provision of its online media service to the media service provider that has made the declaration, it must "take all possible measures (….) to communicate" (EMFA Article 17(4)) it before the suspension takes effect.

In addition, according to Article 17(3), if the VLOP acts against the above media service provider and the media service provider complains against the measure, the VLOP must have the technical and organisational means to deal with such complaints as a matter of priority and without delay and to take decisions on them as a matter of priority. The privileged position of media service providers' content under the EMFA would also be reinforced by the provision that if a media service provider making the above-detailed statement considers that it is being frequently and without due cause restricted or suspended by the VLOP, the VLOP "shall engage in a meaningful and effective dialogue with the media service provider, upon its request, in good faith" (EMFA Article 17(4)).

In a related matter, the media service provider may also notify the above dialogue to the newly-planned (EMFA Article 1(1)) European Board for Media Service (EBMS), which, according to Article 18(1), organises structured dialogues between VLOPs, media service providers and civil society representatives, with the aim of learning about best practice, strengthening independent media content and combating disinformation. Also included as a guarantee rule is the obligation for VLOPs to publish annually the justification and number of measures taken against media service providers

11) According to the EMFA Article 2, a media service provider is 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 manner in which it is organised". Read this with EMFA Recital 7, it is clear that the professional activity and the editorial responsibility are the two key factors that should be taken into account defining a media service provider (Seipp, et al. 2023: 41).

that have made a statement, both in terms of restrictions and suspensions.

Ⅲ. Critical analysis of EMFA Article 17

The presentation of critical comments on the legislation on freedom of the media in Europe is essential, and several digital rights defenders and civil society organisations expressed their professional objections by regarding the practical appearance and implementation of the provision. Of particular note is the joint policy statement issued in January 2023 by digital rights groups (AccessNow, et al., 2023), whose signatories included international organisations of high professional standing in the field of digital rights, in particular freedom of expression and freedom of the press, which expressed their deep concern specifically about Article 17. While stressing that legislation needs to address the asymmetry of power in the media economy, given the power imbalance between VLOPs and media service providers, the organisations strongly reject the provisions of the given Article. The primary reason for this is that the relevant section proposes a mechanism that involves the identification of media service providers on the basis of self-declaration, but this may at the same time leave room for transparency as a protected value to be compromised. Iva Nenadić and Elda Brogi (2023) argues that the main problem with the self-declaration process "reflects the inability (both for policy and for academia) to clearly define the media today and to separate the media from bad actors and propagandistic outlets who disguise and self-present as media." Indeed, a self-declaration-based identification process could create a paradoxical situation by "opening the door to rogue actors intent on distorting democratic public discourse" (AccessNow, et al., 2023: 1). In the latter case, the statement underlines that not only media service providers that it considers to be rogue could benefit from privileged treatment under the provision, but also media service providers that serve the views and will of a party or political entity, portraying themselves as public service broadcasters, which would also be completely counterproductive to the legislative intent behind the EMFA. The report also highlights the issue of platform over-regulation (Lemley, 2021). Smith (2023) states that although the Council proposed more information on independence and compliance with legal requirements to be provided by the media during their self-declaration, "however, this model still creates an inequality of freedom of speech, does not deal with the problematic question of who would be in charge of controlling these self-declarations". They also call this to be a harmful model. We agree that although the process of self-declaration certainly needs clarification and consolidation, the alternative could be to give the planned EBMS some control over it.

The identification procedure described above would require VLOPs to comply with new rules in addition to their obligations as extensively defined in the DSA, which would jeopardise the implementation of Article 17 on the one hand and the DSA on the other. This horizontal regulation will ultimately make the assessment of media service providers' statements a

discretionary right for VLOPs. This phenomenon could create a particularly polemical situation for VLOPs such as Twitter,[12] which, under Elon Musk's leadership, has taken a number of politically and economically sensitive measures (Mac, 2022). The question is therefore whether it is appropriate – and even safer – to give discretion to a platform to assess the reliability and integrity of a media service provider that itself has reliability and integrity problems (Zannettou, et al., 2019). This discretionary power goes beyond the status of a media service provider: the presence of a particular media service provider on the platform can ultimately be interpreted as an entry and elevation into democratic discourse (Papp, 2022), and more broadly as an integration of that service provider into public discourse, or, in the case of restrictions, their exclusion from it. The last passages of the declaration also highlight one of the most sensitive issues of platform regulation; in many cases, content is created, displayed and shared on VLOPs in an algorithm-driven way, which may not only shape, or in worse cases distort, the media market but also media pluralism. Article 34(1) of the DSA requires VLOPs and VLOSEs to diligently identify, analyse and assess the systemic risks arising from the design or functioning of their services and related systems, including algorithmic systems, or from the use of their services, the EMFA instead of strengthening this mechanism, imposes a new obligation on platforms.

Collins and Schmon (2023) argue that "VLOPs should not be exempt from moderation protocols through a carte blanche exception from regulation provisions." According to them the new provision would facilitate an environment of disinformation and undermine existing provisions outlined under the DSA. Berthélémy and de Olazábal (2024) also severly critised this "blanket exception" from regulatory provisions. The alternative suggestion could be to keep the same level of accountability and transparent content moderation systems for all content online regardless of the fact who created it.

The International Press Institute (2023) expressed a concurring view: by circumventing mechanisms based on self-declaration, disinformation campaigns and content can gain ground. The organisation suggested that Article 17 should be aligned with the ownership transparency requirements of Article 6 of the EMFA to prevent the potential proliferation of the aforementioned rogue media service providers.

On Article 17, Barata (2023) has probably taken the most radical position. In his view, the article in question is the most problematic provision of the EMFA, inter alia because it creates confusion in both European and horizontal regulation. Linked to the above-mentioned risk assessment mechanisms in the DSA, Barata (2023) expressed concern that platforms may not perceive or take into account

12) At the time of writing, the new name of the service is X (Conger 2023).

the different political and other issues between content, and therefore apply uniform rules to each borderline issue to decide whether the content contributes to some systemic risk.

Helberger, et al. (2023) also highlighted the issue of individual journalists. The situation of individual journalists is also a relevant issue in the context of EMFA because in December 2022, Twitter suspended the accounts of several prominent journalists without any notice, claiming that the suspended account holders had violated Twitter's policies by reporting on their work (Olander, et al., 2022). Article 2(2) of the EMFA states that a media service provider may be a natural person, Helberger, et al. (2023) point out that journalistic work does not necessarily entail editorial tasks, i.e. for example a journalist responsible for critical reporting who does not undertake editorial work will not be a media service provider and therefore Article 17 will not apply to him. Reflecting on the Twitter case above, another thorny question is whether the suspension of services related to the content of the article in question also extends to the suspension of an entire account (European Parliament, 2023: 62). Article 17 should be amended in a number of ways to ensure broad legal protection for journalists, one of which would be to broaden the scope of the relevant article or to clarify whether the above-mentioned category of journalists is included in the definition of media service provider. It could also be suggested that VLOPs should be included in the scope of the article, alongside VLOSEs.

Helberger, et al. (2023) raise an interesting question about structured dialogue also. It seems obvious to them that VLOPs will cooperate with large media outlets such as CNN or the New York Times, but they question if a smaller media outlet be treated similarly. This may raise concerns not only at global level but also at regional or national level. In our view, the fact that smaller and lower-funded media service providers may face multiple and manifest disadvantages on multiple fronts in a structured dialogue, which may be felt and manifested on multiple fronts, is a very complicated issue that is not yet resolved by the EMFA and may even have a deterrent and exclusionary effect.

With regard to Article 17, it should also be pointed out that its mechanisms do not seem to be aligned with those of the DSA and that the procedures and concepts used in the article are much broader than necessary. The question arises also in Article 17(3)–(4) as to what is meant by "frequently restricts or suspends" or lack of justification for suspension and the meaning of "without undue delay" and "priority" decision in relation to the moderation measure complained of does not seem clear. Nor is the legislative intention regarding the degree of independence clear(Barata, 2022), and according to Tambini (2023) it could lead to the so-called media privilege paradox, which means that "any law that grants special protections for the media requires definition of who are the media, and therefore creates a potential for media control." And the term in Article 17(1) a) "widely recognised and accepted" in the context of co- or self-regulatory mechanisms raises further questions. Although it is well known

from the case law of the European Court of Human Rights that in the context of freedom of expression " many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice",[13] in the present case, the requirement of forseeability of the law would certainly not meet the standards of the three-part test (Oster, 2015: 123-124).

Ⅳ. Conclusions

The main aim of the proposal for the EMFA is to improve the functioning of the internal media market and to reinforce the fact that independent media "play a crucial role in preserving the integrity of the European information space and are essential for the functioning of our democratic societies and economies" (Explanatory Memorandum, 1). Although, it seems from the above opinions that Article 17 raises doubts about platform regulation (especially on transparency: Van Durnen, et al. 2023), freedom of expression, media pluralism and journalism.

It also seems problematic that the media fast-track or media privilege and the associated self-declaration procedure envisaged by the EMFA would impose on VLOPs, in addition to their obligations as extensively defined in the DSA, a new compliance obligation under similar rules. In the worst case scenario, this could also function as "a loophole for rogue actors to exploit the system and distort public discourse – undermining the equality of free speech as well as democratic debate"(Collings & Schmon, 2023). This is made more difficult by the fact that horizontal regulation would ultimately make the assessment of media service providers' self-declarations a discretionary right of VLOPs. We must state that setting up clear and foreseeable procedural rules (obligation of public authorities and the possible judicial review) regarding the above will have as much importance than the EMFA itself.

A formal approval of EMFA is soon to come in Europe, but some issues could be recommended for the final text. It is clear that the wording of Article 17 of the EMFA certainly needs clarification, and it would be desirable to ensure coherence in the operational and terminological use of the EMFA and the DSA-DMA. In this context, Jorge-Ricart (2022) calls for more links with other existing EU documents. It is also worth pointing out that the structured dialogue does not make it clear whether it is a classic legislative fig leaf or whether there is a genuine intention to resolve moderation measures through dialogue. We believe that if the asymmetrical balance of power is overridden by the final corpus of the EMFA as adopted, the structured dialogue set out in Article 18 could be a forward-looking instrument for resolving conflicts between platforms and media service providers. Although the NGO Article-19 (2023) calls for the repeal of the whole part, we believe

13) *Lindon, Otchakovsky-Laurens and July v. France* App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007), [41.]

that the consolidation and broadening of the scope of Article 17 could point in a progressive direction for media service providers and media services on VLOPs. If those changes are not made in due course, different European courts will face an enormous task ahead of them.

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