

# Freedom of the media, pluralism, and transparency. European media policy on new paths?

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## Abstract

Although the European Union has been pursuing media policy for decades, its legal competence for the media sector remains limited. Since its inception in the 1980s, the EU had to base its media policy on its responsibility to enforce the internal market and the direct application of competition law, which has led to a one-sided economic perspective on the media. With references to the EU Charter of Fundamental Rights, the enshrinement of European values in the EU Treaty, the rule of law mechanism, and driven by the European Parliament, the EU Commission has recently shown a new direction in its media-related activities, which acknowledge the important role of the media in democracy and increasingly place media freedom and media pluralism at the center of its media policy. The draft European Media Freedom Act presented by the Commission in autumn 2022 brings together the numerous activities aimed at protecting the freedom of the media and their independence, and at the same time seems to test the limits of the scope for its media policy.

## Keywords

European Union, media policy, rule of law, freedom of the media, media pluralism

In September 2022, the EU Commission presented its draft for a European Media Freedom Act (EMFA). With its focus on media freedom, independence and transparency, the Commission set new accents in its media policy, which emphasizes European values

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as codified in the Treaty on European Union and the Charter of Fundamental Rights. This also demonstrates the Commission's determination to test and go beyond the limits of the narrow legal framework for its media policy, based mainly on the implementation of the internal market and the application of the EU's competition law, and to focus more on the democratic values of the Union and strengthen the media as pillars of democracy.

This article aims to trace how the new emphasis has emerged over the last years and to assess whether the Commission's media policy is on a new path. To this end, it begins by recalling the amendment of the Hungarian media law at the end of 2010, which made the Commission fear for the independence of the media in Hungary and at the same time demonstrated the EU's limited scope for action in matters of media policy. Next, this article briefly summarizes the tools available to the Commission for its media policy. Finally, it will be shown how the Commission has increasingly oriented its media policy beyond the economic perspective to European values in recent years. With this shift in emphasis, the Commission not only acknowledges the essential contribution of the media to the functioning and quality of democracy, but also shows its willingness to actively support them in this role. This shift is backed by a new sanction option vis-à-vis the Member States which has been in force since 2021 and can be used to enforce the rule of law and the European fundamental values. The line of argument here mainly follows those topics that the Commission has highlighted in its Rule of Law Reports since 2020 and has now brought into its draft EMFA.

## **In retrospect: Hungary 2011**

When the Hungarian Parliament, with the two-thirds majority of the Fidesz party, introduced a new media law threatening the independence of the media only shortly after its election victory and literally overnight at the end of 2010, the EU's powerlessness in the face of developments threatening democracy in the Member States became apparent. The media law, came into force as early as 1 January 2011, coinciding with the start of Hungary's EU Presidency. It established the Media Council, which is the most important body within the National Media and Communications Authority (NMHH) (Róka, 2019: 351). The NMHH is a convergent media and telecommunication authority. It monitors compliance with the media law and can impose sanctions in the form of heavy fines or temporary broadcasting bans in the event of violations. The President of the NMHH is also the Chairman of the Media Council and is appointed by the President of the Republic. The other members of the five-member Media Council are elected by a two-thirds majority vote of Parliament for nine-year terms. Due to the majority situation, all nominations are made by the Fidesz party (Polyák, 2019a: 284; cf. also Bajomi-Lázár, 2013).

Twelve years later, it turns out that all fears regarding the effects of the new media law were justified. Independent broadcasters have disappeared from the radio market. Due to the Media Council's say in the decisions of the Hungarian Competition Authority, the newspaper market has been reshaped, with Prime Minister Victor Orbán's supporters now calling the shots. The Media Service Support and Asset Management Fund (MTVA), also created by the 2010 media law, runs the financial management of public media, and also intervenes in production, provides for a centralized organization

of this media sector. As the provider of all public services, including radio and television as well as the national news agency, the law designated a private company whose supervision is mostly in the hands of the parliamentary majority (Polyák, 2019a: 287–288). Journalistic work is made more difficult by requirements for balanced reporting open to interpretation and the obligation to disclose sources of information for the protection of the public order or if the reporting concerns matters of national security. The restructuring of the media market has imposed significant restrictions on media freedom; self-censorship and intimidation have added to the problem. In the World Press Freedom Index drawn up annually by Reporters Without Borders (2022) and covering 180 countries, Hungary ranks 85th in 2022. Among EU Member States, only Bulgaria and, for the first time, Greece have worse ratings.

The introduction of the new media law in Hungary in 2011 drew fierce international criticism, and it put the EU to the test. Even though the then President of the European Commission, José Manuel Barroso, declared that freedom of the media was one of the EU's sacred principles (Euractiv, 2011), there was no hiding the fact that the Community had no instrument that could be used effectively against restrictions on media freedom in a Member State.

As the new law came into force shortly after its overnight vote in Parliament, the European Commission, which is in charge of monitoring compliance with the treaties, was only able to react *ex-post*. Under pressure from criticism from numerous international organizations, such as the OECD and the Council of Europe, and not least the European Parliament, the Commissioner responsible for the digital agenda at the time, Neelie Kroes, and the Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, announced that the law would be reviewed for compatibility with EU law. One basis for this was the Directive of 2007 that amended the 1989 Television Without Frontiers Directive (TWF) and which Member States had to transpose into national law by the end of 2009 (Directive 2007/65/EC). This amendment was also mentioned by the Hungarian government as an argument for enacting the new media law. Article 7 of the Treaty on European Union (TEU) could serve as another reference. Article 7 opens a possibility for the Union to determine “that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2”. The values laid down in Article 2 TEU “are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. If a breach of these values is established, the Council “may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”. (Consolidated version of ..., 2016). Since the decision requires unanimity, the hurdle for the application of Article 7 is particularly high.

At the insistence of Commissioner Kroes, Hungary finally agreed to amend the media law. However, no changes were made to the functions and composition of the NMHH and the Media Council, so that criticism continued in view of the resulting threats to media freedom. While the Commission seemed satisfied with these changes, the European Parliament adopted a resolution addressed to both Hungary and the Commission in March 2011 (European Parliament, 2012). The resolution prompted the Hungarian state “to restore the independence of media governance, halt state interference

with freedom of expression and ‘balanced coverage’” (European Parliament, 2012: 156) and involve all stakeholders in the revision of the media law. The Parliament called on the Commission to continue monitoring the compatibility of the Hungarian media law with European law even after the amendments (European Parliament, 2012: 157).

In addition to the Audiovisual Media Services Directive (AVMSD), which provides for the main regulatory basis for EU media policy, the Parliament also drew on Article 11 of the EU Charter of Fundamental Rights (CFR). Article 11 CFR stipulates the right to freedom of expression and information and assures respect for media freedom and plurality. In addition, the resolution referred to the ‘European Charter for Freedom of the Press’ formulated by editors-in-chief and senior journalists in 2009, as well as previous Parliament resolutions on, *inter alia*, threats to freedom of expression and information in the EU and, in particular, in Italy in 2004 (European Parliament, 2004).

## **The EU’s options for action**

In its 2011 Resolution, the European Parliament took the Hungarian case as an opportunity to ask the Commission to present a legislative initiative later that year “on freedom of the media, media pluralism and independent media governance [...] with a view to defining “at least the minimum essential standards that all Member States must meet and respect in national legislation in order to ensure, guarantee and promote freedom of information and an adequate level of media pluralism and independent media governance” (European Parliament, 2012: 157).

Dissatisfied with the Commission’s defensive stance and complaining about “the inadequate EU legal framework for the media,” the European Parliament (2012: 157) once again pointed to the Union’s lack of competences regarding the media sector and democratic values. Although the EU has been pursuing media policy for decades, it has to base its activities predominantly on its powers to implement the European internal market and on EU competition law. Thus, the Commission’s direct competence to enforce the four fundamental freedoms of the internal market (free movement of persons, goods, services, and capital) formed the essential basis for the drafting of the ‘Television Without Frontiers’ Directive (TWF) in 1989, which eventually led to the Audiovisual Media Services Directive (AVMSD) in 2010 and the once again amended and updated version adopted in 2018 (Directive 2010/13/EU; Directive (EU) 2018/1808). During the negotiations of the first Directive, divergences became already apparent between the Commission, which regarded television as a service from an economic perspective, and the Member States, where the public service model had shaped television, and which therefore also wanted its cultural services to be considered.

The discrepancy between economic and cultural perspectives became even more apparent when the Commission took aim at public service broadcasting in the early 1990s following complaints from private broadcasters about distortions of competition. Essentially, the complaints were directed against the financing of public service broadcasting through fees, which allegedly constituted state aid. Therefore, the Commission invoked European competition law, which gives it direct decision-making powers. Article 107 of the Treaty on the Functioning of the European Union (TFEU) (Consolidated version of ..., 2012) in principle declares aid granted by a Member

State or through state resources that may distort competition or affects trade between Member States incompatible with the internal market. However, there are exceptions in certain cases, namely, to facilitate the development of an economic activity or to promote culture and heritage conservation. In the dispute over the financing of public service broadcasting, Article 106 TFEU came into play, which determines that undertakings providing services of general economic interest are also subject to European competition rules, but only “in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.” (Consolidated version of ..., 2012)

One reaction to the Commission activities that targeted public service broadcasting, which also raised issues of programming autonomy, was the 1997 Amsterdam Protocol on the system of public broadcasting in the Member States, which was incorporated into the EC Treaty and is now part of TEU (Protocol on the..., 1997). The Protocol emphasizes the competence of Member States “to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State [...]”. A 1999 Council Resolution reaffirmed “the unanimous will of the Member States to stress the role of public service broadcasting” and to ensure the necessary conditions for this (Resolution of the Council..., 1999). Finally, in a 2001 Communication “on the application of State aid rules to public service broadcasting,” the Commission set the conditions for the admissibility of the financing of public service broadcasters by means of license fees (European Commission, 2001). Thus, the Commission acknowledged the competence of the Member States for defining the public service remit and its funding and at the same time specified the conditions for its compliance with the European rules on State aid.

While the EU’s media policy activities have largely focused on the audiovisual sector with the TWF and its further development, European competition law has become more important for the print media in recent years. Since many Member States provide financial support to their newspapers in one way or another, EU state aid rules may also apply to the print media market. In many European countries, press subsidies have a decades-long tradition, yet it was only after the turn of the millennium that the Commission began to regularly investigate the compatibility of such state aid with EU competition law. In addition to decisions on support for individual newspapers, mostly aimed at language minorities, the first audits concerned Danish press support (2006) and state support for newspapers in Finland (2008) and Sweden (2010). In the three countries, press subsidies mainly aim at distribution and the measures are justified on the grounds of maintaining diversity in the newspaper market. The Swedish case is instructive as to the reason for the Commission’s approach and scrutiny procedure. As in the case of public service broadcasting, the Commission intervened after receiving a complaint about the Swedish support for newspaper distribution. This came from a media company whose newspapers were not entitled to press subsidies. Although the Commission recognized the objective of preserving pluralism in the media market, it concluded that the Swedish press subsidy, which had existed in this form since 1990, was not compatible with the rules of the common market. It therefore proposed several changes to prevent a distortion of competition. The Commission’s criticism was mainly directed against

“disproportionate” payments to large media companies or national newspapers with high circulations without fixing a maximum amount. In line with the Commission’s suggestions, Sweden subsequently adapted its support schemes, providing for maximum amounts for the large newspapers and for maximum support amounts graded according to the frequency of publication, and introduced a reporting obligation for the beneficiary companies (European Commission, 2010a, 2010b; 2013).

Also following a complaint from a competitor, the Commission examined support through state subscriptions for the French news agency AFP from 2010 onwards. In its decision published in spring 2014, the Commission specified the conditions under which it could authorize the measures in favor of AFP. Similar to its stance on public service broadcasting, the Commission required a precise definition of the service of general economic interest provided by the news agency, a formal remit and, in order to avoid cross-subsidization, separate accounts distinguishing services within the meaning of the remit from others (Commission Européenne, 2012).

The decisions of the European Commission on press subsidies in the Member States are based on the exception article in European competition law, according to which aid to promote the development of certain economic activities (Art. 107, 3c TFEU) or aid to promote culture (Art. 107, 3d TFEU) are permissible, provided they do not affect competition. Among the justifications, the Commission refers to the preservation of diversity in the media market, and it can now also invoke Article 11 CFR, which ensures respect for the freedom and plurality of the media in its second paragraph. It is in these circumstances that the Commission has, over the last years, repeatedly addressed the issue of state support for the press and news agencies in the Member States. With the onset of the pandemic, there has been an increase in the number of notifications of planned support packages for newspapers, which had already been struggling and got into more trouble due to sharp declines in advertising. Denmark and Latvia, for example, were among the first to submit their applications to the Commission as early as May 2020. Austria took the pandemic as an opportunity to expand its already extensive press subsidies system with a fund to promote the digital transformation, which is to benefit non-commercial radio stations as well as print media (Bundeskanzleramt, 2021). As the pandemic has further driven the digital transformation of the news business, from which international platforms have been able to benefit in particular, several Member States have applied to the European Commission for state aid to support their domestic media in their digital transformation (e.g., Belgium, France). Others have included the media sector in their aid packages for corporate economic recovery (e.g., Ireland).

In an initial response to the consequences of the pandemic for the media sector the Council appealed to Member States at the end of 2020 to “establish an adequate and independent framework for the economic sustainability of the national media landscape, including state aid, in order to support recovery from the crisis and thus ensure a pluralistic media system in the long term.” (Council conclusions..., 2020). The Council also called on the Commission to mitigate the negative impact of the pandemic by complementing national aid. At the same time, a Commission Communication entitled “Europe’s Media in the Digital Decade: An Action Plan to Support Recovery and Change” (European Commission, 2020b) was already on the table, with an annex

setting out an indicative timetable up to 2022 for a wide range of financial support measures and the digital transformation of the media sector.

## **Reorientation of EU media policy**

For some years now, the European Commission has been engaged in activities which indicate that it intends to orientate its media policy more strongly toward the fundamental values of the Union in the future and thus to realign it. The experience of its powerlessness in trying to persuade Hungary to change its controversial media law and concerns about developments in other EU member states may have played an important role in this reorientation. Until the proclamation of CFR in 2000, the EU did not have its own catalogue of fundamental rights, but because all Member States are also members of the Council of Europe, the European Court of Justice referred to the European Convention on Human Rights (ECHR) when necessary. Since the European Constitutional Treaty failed, CFR only became legally binding with the entry into force of the Treaty of Lisbon in 2009. However, Poland has so far not submitted to being bound by the Charter.

In 2013, the High Level Group on Media Freedom and Pluralism set up by the then Vice-President of the Commission, Neelie Kroes, while acknowledging the primary competence of the Member States for media policy, stated that the EU should play a role in safeguarding fundamental rights beyond internal market regulation and competition policy. The Group pointed to the link between media freedom, media pluralism, and democracy thus justifying its belief that the EU should have broader competence in this area than for other fundamental rights enshrined in the Charter (High Level Group on Media Freedom and Pluralism, 2013: 2).

The first Report on the State of the Rule of Law in the European Union from September 2020 (European Commission, 2020a) shows that the European Commission has meanwhile embraced this view and is bringing a new perspective to media policy. The preceding excerpt from the State of the Union 2020 speech by Commission President von der Leyen, in which she addresses the rule of law as a guarantor of freedom of expression and freedom of the press, as well as a separate chapter on media pluralism and freedom of the media, highlight the reference to the common values of the EU Member States. With this, the Commission recognizes the special role of the media for democracy and the rule of law in a way that has been missing so far and, for example, in the reaction to the Hungarian media law of 2010. The references to CFR and to the Venice Commission, which is the Council of Europe's advisory body on constitutional matters, also speak for the new focus of its media policy.

The summary of the 2020 Rule of Law Report focused on the status of media freedom and media diversity in the EU. However, the report did not consider the role and independence of public service media and, even though it is at the core of their remit, their contribution to diversity. The Commission uses the independence of media regulators, transparency of ownership, political influence, access to information, and the danger of threats and attacks against journalists as criteria for assessing the situation in the Member States. The 27 country chapters present the findings for the individual Member States. The second report on the rule of law in the European Union, which

the Commission presented in September 2021, followed the same structure (European Commission, 2021c). However, in its third report of July 2022, the Commission went a step further by deriving specific recommendations for reforms and the identification of challenges from the assessments for each Member State (European Commission, 2022a). For the first time, the report also included public service media in its media sector assessment and thus entered sensitive terrain.

In addition to evidence from field visits, the country chapters draw on the work of those organizations that regularly monitor media freedom and pluralism and thus provide the Commission with the possibility to make a direct link to CFR and European values. The most important sources for the Rule of Law Report are the findings of the Media Pluralism Monitor (MPM), the assessments of the Council of Europe as expressed in its recommendations and resolutions, and the evaluations of Reporters without Borders based on its annual World Press Freedom Index. MPM is operated by the Centre for Media Pluralism and Media Freedom (CMPF) at the European University Institute in Florence. The instrument is used to continuously monitor and identify the risks to media pluralism in currently 32 European countries and is co-financed by the EU (cf. Centre for Media Pluralism..., 2020; 2022). For the first time, with the report presented in 2022, CMPF drew up a ranking of the countries involved according to their risk to media pluralism, which only lists Germany with a “very low risk” and, at the other end, Turkey with a “very high risk” (Centre for Media Pluralism..., 2022: 121).

The first two reports presented on the state of the rule of law in the EU were overshadowed by the pandemic, which brought restrictions on fundamental rights in many countries. This also applied to the media sector, where, on the one hand, the work of journalists was threatened by lockdowns, restrictions on freedom of assembly and movement, controlled access to information and direct interference in reporting, and, on the other, by attacks, particularly during demonstrations against the measures taken to contain the pandemic (Holtz-Bacha, 2022). The reports also noted the support programs that some Member States have put in place for the media to counter the crash in advertising revenue.

Using MPM, the 2021 Rule of Law Report showed a deterioration in three key indicators compared to the previous year, namely freedom of expression, protection of the right to information, and protection of journalists (European Commission, 2021b). This development could be particularly attributed to the measures taken in connection with the pandemic. In its report, the Commission assessed the transparency of media ownership at medium risk, which it ascribed to the lack of effective legislation and the fact that information is only made available to public bodies and not to the public. As in 2020, the 2021 report spotlighted six Member States where the political independence of the media is at high risk, namely Bulgaria, Hungary, Malta, Poland, Romania and Slovenia (European Commission, 2021c: 19). Again based on the MPM, the 2022 Rule of Law Report notes no significant changes from the previous year. While transparency regarding media ownership has improved, there has been a deterioration in the indicator relating to the journalistic profession and its protection. Political independence remains at “medium risk” and news media concentration continues to be subject to very high risk. For the first time in 2022, the Media Pluralism Monitor introduced an overall ranking of Member States clustered according to five levels of risk. With the



deterioration of the media situation in Greece, the number of countries attributed to the high risk cluster increased to seven (European Commission, 2022a: 17).

The Commission's reports on the rule of law situation are prepared in the framework of the so-called rule of law mechanism. They complement other measures designed to safeguard the rule of law in EU Member States. These measures include the Article 7 procedure, introduced in 1997 by the Treaty of Amsterdam, which provides for a preventive mechanism in the event of a risk of a breach of fundamental values and a sanction mechanism in the event of a serious and persistent breach being detected (European Parliament, 2018). In addition, the Regulation on the Protection of the EU Budget and European Values (Regulation of the European Parliament..., 2020; European Parliament, 2020a) entered into force on 1 January 2021, allowing the Council to reduce or suspend payments from EU funds to Member States if they violate the EU's fundamental values (Rule of Law Conditionality Regulation).

It was above all the European Parliament that pushed for the establishment of the new mechanism and then also pushed for its application (European Parliament, 2020d). By pointing to the possibility of an action for failure to act, the Parliament on several occasions called on the Commission to respond to the increasing threats to EU fundamental values, including attacks on media freedom and journalists, by using the instruments of the rule of law mechanism (European Parliament, 2020d, 2021b, 2021c). In the meantime, the Commission based a request to the European Court of Justice for the imposition of fines on Poland on the conditionality regulation (European Commission, 2021f). This was specifically directed against the restructuring of the Polish judicial system. In December 2022, the Council applied the conditionality mechanism against Hungary after assessing breaches of the rule of law concerning public procurement, the effectiveness of prosecutorial action and the fight against corruption (Council of the EU, 2022).

In addition to the Rule of Law Reports, other activities show that the Commission is more and more committed to strengthening freedom and pluralism of the media in the Member States and protecting the work of journalists. For example, in its December 2020 European Action Plan for Democracy (European Commission, 2020c), the Commission announced plans to develop a recommendation on the safety of journalists, to launch an initiative to protect journalists from lawsuit abuse (SLAPP), to fund projects to provide legal and practical support to journalists inside and outside the EU, and to strengthen media pluralism and transparency in the media sector, including transparency of ownership and state advertising. These plans are complemented by projects to combat disinformation, to develop tools to combat external interference in the European information space, and to promote media literacy.

In fact, in 2021, the Commission took the first steps towards making these projects a reality. On the same day that Commission President von der Leyen delivered the 2021 State of the Union address (European Commission, 2021i), in which she reaffirmed her determination to defend European values, called for improving the safety of journalists and announced a media freedom law, the Commission circulated a Recommendation to Member States "on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union" (European Commission, 2021e). The Commission understands protection and safety in a broad sense and provides guidance

to Member States to address the “increasing number of physical, legal and online threats and attacks” (European Commission, 2021e: 8) against media professionals. Since a Recommendation, unlike a Directive, is not legally binding, the Commission can only offer advice to the Member States. However, the breadth of the proposals to safeguard journalistic activities, together with the country-by-country rule of law reports identifying problems in individual Member States, reflects the importance the Union attaches to, and intends to promote, free and independent media in and for democracy.

The Commission Recommendation was preceded by a European Parliament report “on strengthening media freedom: protecting journalists in Europe, hate speech, disinformation and the role of platforms” (European Parliament, 2020b) and a Resolution (European Parliament, 2020c) under the same title, both of November 2020, which built on numerous previous resolutions in this subject area. The Parliament’s Resolution went further than the Commission’s subsequent Recommendation by accentuating in several points the irreplaceable role of public service broadcasting in media pluralism and calling for ensuring its independence and funding. This reflects the broader approach of the Parliament, which places the protection of media professionals in the wider context of media freedom, whereas the Commission Recommendation, while emphasizing free, pluralistic, and independent media as a “central component of democratic systems based on the rule of law” (European Commission, 2021e), focuses more directly on the protection and security of journalistic work.

As envisaged in its December 2020 Democracy Action Plan, the Commission launched an initiative in autumn 2021 to “protect journalists and human rights defenders against abusive litigation” (European Commission, 2021h). Such strategic lawsuits, known by their acronym SLAPP (Strategic Lawsuits Against Public Participation), are designed to financially harm and silence media professionals and human rights defenders. SLAPP suits have become common in many EU Member States. For example, Maltese investigative journalist Daphne Caruana Galizia, who was murdered in 2017, had 42 such strategic lawsuits pending against her at the time of her death, and her assets were frozen in connection with defamation lawsuits against her (European Parliament, 2021a). One country where SLAPP suits against media figures have been used for some time is Slovenia, which has also contributed to reservations about Slovenian Prime Minister Janez Janša taking over the EU presidency in the second half of 2021, known for his attacks on the media (e.g., Pengov Bitenc, 2020). It was during his term that the Commission presented its roadmap for a draft directive on the protection of media professionals and human rights defenders. This initiative can also be placed in a context of the Directive on the protection of whistleblowers adopted by the EU in October 2019 (Directive (EU) 2019/1937), which was to be transposed into national law by the end of 2021.

To promote media pluralism and transparency in the media sector, the Commission has also taken first steps to strengthen transparency of ownership and state advertising. The 2018 AVMSD already emphasized the relevance for freedom of expression of disclosing the ownership structure of media service providers. Insight into the ownership structure allows users to identify any influence on the content offered and to include it

in their assessment (Directive (EU) 2018/1808: 71). To create transparency in the ownership structure of the media markets, the Commission launched a “Media Ownership Monitoring Project” in the fall of 2021 (European Commission, 2021g). The Ownership Monitor is coordinated by the University of Salzburg and will develop a country-based database containing information on media ownership that allows to identify possible risks to ownership transparency (European Commission, 2021g). The recording of ownership structures could be a step towards addressing concentration in the media sector once again. Earlier Commission proposals for a directive on the subject, which the Parliament has repeatedly pushed for, came to nothing because of fierce criticism from the Member States.

State advertising is one of the instruments for subsidizing the press, which in some EU Member States is taking on considerable proportions (cf. Bátorfy and Urbán, 2020; Polyák, 2019b). The criteria for the allocation of advertising by state agencies are usually not defined or are opaque; occasionally, it is revealed how the awarding of advertising contracts to the press is used for political influence. For instance, the Commission noted in the 2021 Rule of Law Report on Austria that large and growing amounts of money flow to the media through state advertising and expressed concerns about fairness and transparency in their allocation (European Commission, 2021a: 16-17). The same admonition appears in the 2022 Rule of Law Report on Austria, which, however, also points to the government’s announcement that it will confront the problems with the allocation of press subsidies in general and of state advertising in particular (European Commission, 2022e: 17). Similar comments as on Austrian state advertising were made in the 2021 and 2022 country reports on Bulgaria, Malta, Poland, Slovenia, and Hungary, for example.

For several years now, the EU has been addressing the problems caused by the spread of disinformation. It justifies these activities with the dangers that misinformation can pose to democracy, and the freedom of expression guaranteed by CFR. Shortly thereafter, and with an eye to the European Parliament elections in May 2019 and possible disinformation campaigns, the European Council tasked the Commission in 2018 with presenting an action plan with concrete proposals for the EU’s response to the challenges arising with disinformation (European Council, 2018a, 2018b). In April 2018, the Commission presented “a European approach” to combating disinformation online (European Commission, 2018a), which also took into account the recommendations of the High Level Group on Media Freedom and Pluralism (2018) on fake news and online disinformation for a multidimensional approach to dealing with disinformation. The European approach articulated four principles for action to combat disinformation: increasing transparency on the origins of information, its generation and dissemination; promoting diversity of information; increasing credibility by indicating its reliability and the possibility to trace and authenticate information providers; awareness-raising measures; and increasing media literacy (European Commission, 2018a: 7-8). The Action Plan against Disinformation was presented by the Commission at the end of 2018 (European Commission, 2018b), highlighting in particular the threat of disinformation activities from Russia and taking up those measures that were already identified in the European approach. One consequence of the effort was the Code of Practice on Disinformation, which was signed by the major online platforms (European

Commission, no year). Following the first experiences, the Commission prepared guidelines for strengthening the Code of Practice in March 2021 (European Commission, 2021d) which was taken up by the signatories and developed into a revised version of the Code presented in June 2022 (European Commission, 2022d).

## **The European Media Freedom Act**

At the end of 2022, the many diverse activities of the Commission in recent years relating to freedom and independence of the media culminated in the presentation of a draft European Media Freedom Act (EMFA) (European Commission, 2022c). Even though the Commission's media policy has recently repeatedly emphasized its orientation toward CFR and the fundamental European values and revealed a departure from the one-sided, purely economic perspective on the media sector, it must still base the justification for EMFA on its limited legal competence. This is above all Art. 114 TFEU, which provides for the approximation of the provisions aimed at the establishment and functioning of the internal market. Therefore, and although EMFA aims at the defense and protection of media freedom as part of "a new push for European democracy" (European Commission 2021b:9), the explanatory memorandum accompanying the draft EMFA goes to great length to elaborate on the obstacles to the internal market as well as cross-border activities in the media sector and, as required by the EU's subsidiarity principle, the need for action at the supranational level. Consequentially, the Commission points to consistency with existing regulations, primarily AVMSD, and mentions filling regulatory gaps and supplementing competition rules as its objective.

EMFA was first announced by Commission President von der Leyen in the 2021 State of the Union address (European Commission, 2021i: 19) and its tabling incorporated in the Commission's work program for 2022 (European Commission, 2021b: 9). The draft EMFA published in mid-September 2022 focuses on independence and pluralism of media services in the internal market, audience measurement, transparency and concentration of ownership and rules for fair and transparent allocation of state advertising (European Commission, 2022c). EMFA thus brings together the issues that the Commission has highlighted in the Rule of Law Reports and in the Country Reports for the media sector and presents arguments that consider the interests of the diverse stakeholders—media service providers, journalists, and recipients.

While the Commission has long remained reticent about the public service media and only took them into account in the third Rule of Law Report, EMFA emphasizes their particular role in the internal market. In order for the public service media to fulfill their mission, EMFA calls for guarantees for their independent functioning (European Commission, 2022c: 13) and stable and sufficient funding (European Commission 2022c: 19; Art. 5).

Justified by the reference to the European internal market and with the reference to the economic pressure on the press particularly through the loss of income from advertising and thus on press freedom, the definition of media services also includes press publications (European Commission 2022c: Art. 2), which, unlike audio-visual media service providers, have so far received relatively little attention from the Commission because of the predominantly national relevance of the printed press.

The draft EMFA also proposes the establishment of a new supranational European Board for Media Services (EBMS) to replace the European Regulators Group for Audiovisual Media Services (ERGA) and, accordingly, delete Article 30b AVMSD which refers to the establishment of ERGA, its composition and its tasks. ERGA was established in 2014 by a Decision of the Commission as an advisory board and consists of the national regulatory authorities for audiovisual media services (European Commission 2014). As its predecessor, the new Board will be composed of representatives of the national regulatory authorities. It is supposed to act as an independent body overseeing the implementation of EMFA and advising the Commission on regulatory, technical or practical aspects of the application of both EMFA and AVMSD (European Commission 2022c: Art. 8–12).

To end the “regulatory cacophony” (Cantero Gamito 2022: 6) of the European media landscape and different from AVMSD, EMFA takes the form of a regulation which provides for directly applicable and consistent provisions and avoids a lengthy transposition process (European Commission, 2022c: 9–10). The draft Regulation is accompanied by a Recommendation on internal safeguards for editorial independence and ownership transparency in the media sector (European Commission 2022b, European Commission 2022c: 4). Directed towards Member States and media companies and setting out a catalogue of good practices, the Recommendation advocates self-regulatory measures to foster editorial independence and media ownership transparency in the internal market.

## Conclusion

When Hungary passed a new law restricting media freedom in an overnight action at the end of 2010, critics hoped for EU intervention. Although the Commission tried to persuade the Hungarian government to make changes, it nevertheless remained rather cautious and was satisfied with small concessions. Ten years later, activities are emerging in the EU that move European values and freedom of the media and the safety of journalistic work closer to the center of its media policy and now also allow a more effective approach to infringements in the Member States.

Until now, the EU has little room for manoeuvre in its media policy activities. TWF, first adopted in 1989, found its justification in the competence of the European Commission for the realization of the internal market. In addition, the Commission can rely on European competition law. Cultural aspects are only open to the EU to a limited extent, as the cultural sector is largely a national competence of the Member States. Only since the Maastricht Treaty (1993) has there been an article relevant to the field of culture which speaks of a “contribution” by the Union to the flowering of the cultures of the Member States and requires the Union to take cultural aspects into account in its decisions (today: Consolidated version of the Treaty..., 2012, Art. 167). Thus, when TWF was drafted in the 1980s, there were doubts among some Member States as to whether television was in the right hands at the EU. The antagonism between the Commission and the Member States once again came to the fore when, following complaints of distortion of competition, the Commission began to investigate the financing of public service broadcasters. With the Amsterdam Protocol, the Member States secured their competence over public service broadcasting.

In the meantime, the legal situation for EU media policy has not changed. Nevertheless, a shift in the focus of the Commission's media policy activities has been apparent during the last years, and for their justification the Commission seems to be testing the legal limits. More and more, the Commission is focusing on freedom and independence of the media and the safety of media professionals, referring to CFR as well as the European values enshrined in Article 2 TEU. This focus is also reflected in the Rule of Law Reports, which have been presented annually since 2020.

With the draft EMFA presented in the fall of 2022, the Commission confirms its new course. Even if it has to justify its proposal with its responsibility for enforcing the internal market due to its limited competence for the media sector, as was already the case with the AVMSD, the draft quite obviously aims at protecting the freedom and independence of the media in the Member States. The fact that EMFA also includes press publications, advocates for the public service media, calls for transparency of ownership, revives the issue of media concentration and makes detailed proposals for safeguarding the independence of editorial decisions attests to the Commission's attempt to expand the radius of its activities. It remains to be seen whether and to what extent it will stand up to the Member States, which guard their legal competence for the media sector and also pursue different interests in their national media policies. The intention of the Commission to introduce EMFA as a regulation and not as a directive that gives the individual member states leeway in its transposition into national law could indicate that it wants to be a bit bolder this time. However, the Commission must also juggle between journalists on the one hand, many of whom welcome the initiative and would even like to see tighter and more precise regulations in support of media freedom and independence, and media companies on the other hand, who fear supranational intervention.

With the Rule of Law Conditionality Regulation, in force since 2021, the Union has established an instrument that makes it easier to prosecute breaches of the rule of law by suspending payments from EU funds than is possible under Article 7 TEU, which provides for the suspension of certain rights deriving from the Treaties. The hurdles for such sanctions remain high and the Regulation so far does not refer to the media sector, but it is nevertheless conceivable that it could one day also be applied to infringements of media freedom.

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