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## CONTRIBUTION

From:	General Secretariat of the Council
To:	Audiovisual and Media Working Party (Attachés) Audiovisual and Media Working Party
N° Cion doc.:	COM (2022) 457 final
Subject:	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) Interinstitutional File 2022/0277 (COD) - COM (2022) 457 final - EMFA Regulation – Articles 1 to 5 - Comments from Polish delegation.

Delegations will find attached comments on the subject mentioned above (Interinstitutional File 2022/0277 (COD) - COM (2022) 457 final) from the delegation of Poland.


**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)**

**Interinstitutional File 2022/0277 (COD) - COM (2022) 457 final**

**Articles 1 to 5**

*- Table for comments –*

<b>Commission proposal</b> Interinstitutional File 2022/0277 (COD) COM (2022) 457 final	<b>Comments and drafting suggestions from delegations</b>
<b>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)</b>	
<b>Chapter I</b> <b>General Provisions</b> <i>Article 1</i> Subject matter and scope	
1. This Regulation lays down common rules for the proper functioning of the internal market for media services, including the establishment of the European Board for Media Services, while preserving the quality of media services.	<i>In our opinion, the wording of the article 1 paragraph 1 is inappropriate. We have doubts if this regulation can ensure the proper functioning of single market.</i>

<p>2. This Regulation shall not affect rules laid down by:</p> <ul style="list-style-type: none"> <li>(a) Directive 2000/31/EC;</li> <li>(b) Directive 2019/790/EU;</li> <li>(c) Regulation 2019/1150;</li> <li>(d) Regulation (EU) 2022/XXX [the Digital Services Act];</li> <li>(e) Regulation (EU) 2022/XXX [the Digital Markets Act];</li> <li>(f) Regulation (EU) 2022/XXX [Regulation on the transparency and targeting of political advertising].</li> </ul>	
<p>3. This Regulation shall not affect the possibility for Member States to adopt more detailed rules in the fields covered by Chapter II and Section 5 of Chapter III, provided that those rules comply with Union law.</p>	<p><i>The article 1 paragraph 3 confirms the possibility of Member States to introduce more detailed regulations, in certain places, that are provided by the MFA regulation.</i></p> <p><i>This regulation therefore constitutes a minimum harmonization of the regulations at the EU level. In such a situation, it is necessary to consider changing the form of the proposed legal act into a directive, which is the most appropriate legal act to introduce minimum standards that may be extended by the Member States.</i></p> <p><i>In our opinion, the possibility for Member States to adopt more detailed or stricter rules should be provided for the entire regulation, not only sections indicated in this paragraph.</i></p>


<p><i>Article 2</i></p> <p>Definitions</p>	
<p>For the purposes of this Regulation, the following definitions shall apply:</p> <p>(1) ‘media service’ means a service as defined by Articles 56 and 57 of the Treaty, where the principal purpose of the service or a dissociable section thereof consists in providing programmes or press publications to the general public, by any means, in order to inform, entertain or educate, under the editorial responsibility of a media service provider;</p>	<p><i>Just a general comment. As Poland’s representative said on the meeting, we are still waiting for the opinion of the Council’s Legal Service of the article 114 TFUE as a legal basis of this regulation.</i></p> <p><i>In our opinion- all of the definitions should be in line with the AVMS directive. It’s necessary for all media players to have a legal certainty.</i></p> <p><i>We also would like to express that part of the matter covered by the MFA has been already regulated in Poland and is in line with MFA (as an example I can only mention: safeguards for the media service providers, public broadcasters etc.)</i></p>
<p>(2) ‘media service provider’ means 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;</p>	
<p>(3) ‘public service media provider’ means a media service provider which is entrusted with a public service mission under national law or receives national public funding for the fulfilment of such a mission;</p>	
<p>(4) ‘programme’ means a set of moving images or sounds constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider;</p>	
<p>(5) ‘press publication’ means a publication as defined in Article 2(4) of Directive 2019/790/EU;</p>	

6) 'audiovisual media service' means a service as defined in Article 1(1), point (a), of Directive 2010/13/EU;	
(7) 'editor' means a natural person or a number of natural persons possibly grouped in a body, regardless of its legal form, status and composition, that takes or supervises editorial decisions within a media service provider;	
(8) 'editorial decision' means a decision taken on a regular basis for the purpose of exercising editorial responsibility and linked to the day-to-day operation of a media service provider;	
(9) 'editorial responsibility' means the exercise of effective control both over the selection of the programmes or press publications and over their organisation, for the purposes of the provision of a media service, regardless of the existence of liability under national law for the service provided;	
(10) 'provider of very large online platform' means a provider of an online platform that has been designated as a very large online platform pursuant to Article 25(4) of Regulation (EU) 2022/XXX [Digital Services Act];	
(11) 'video-sharing platform service' means a service as defined in Article 1(1), point (aa), of Directive 2010/13/EU;	

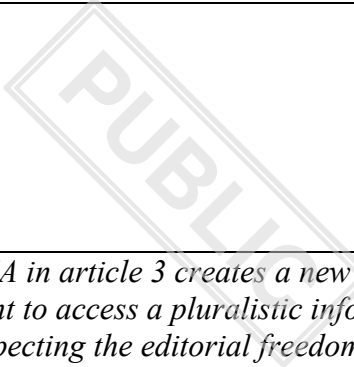
(12) 'national regulatory authority or body' means the authority or body designated by Member States pursuant to Article 30 of Directive 2010/13/EU;	
(13) 'media market concentration' means a concentration as defined in Article 3 of Regulation (EC) No 139/2004 involving at least one media service provider;	
(14) 'audience measurement' means the activity of collecting, interpreting or otherwise processing data about the number and characteristics of users of media services for the purposes of decisions regarding advertising allocation or prices or the related planning, production or distribution of content;	
(15) 'State advertising' means the placement, publication or dissemination, in any media service, of a promotional or self-promotional message, normally in return for payment or for any other consideration, by, for or on behalf of any national or regional public authority, such as national, federal or regional governments, regulatory authorities or bodies as well as state-owned enterprises or other state-controlled entities at the national or regional level, or any local government of a territorial entity of more than 1 million inhabitants;	

(16) ‘spyware’ means any product with digital elements specially designed to exploit vulnerabilities in other products with digital elements that enables the covert surveillance of natural or legal persons by monitoring, extracting, collecting or analysing data from such products or from the natural or legal persons using such products, in particular by secretly recording calls or otherwise using the microphone of an end-user device, filming natural persons, machines or their surroundings, copying messages, photographing, tracking browsing activity, tracking geolocation, collecting other sensor data or tracking activities across multiple end-user devices, without the natural or legal person concerned being made aware in a specific manner and having given their express specific consent in that regard;

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<p>(17) ‘serious crime’ means any of the following criminal offences listed in Article 2(2) of the Council Framework Decision 2002/584/JHA<sup>58</sup>:</p> <ul style="list-style-type: none"> <li>(a) terrorism,</li> <li>(b) trafficking in human beings,</li> <li>(c) sexual exploitation of children and child pornography,</li> <li>(d) illicit trafficking in weapons, munitions and explosives,</li> <li>(e) murder, grievous bodily injury,</li> <li>(f) illicit trade in human organs and tissues,</li> <li>(g) kidnapping, illegal restraint and hostage-taking,</li> <li>(h) organised or armed robbery,</li> <li>(i) rape,</li> <li>(j) crimes within the jurisdiction of the International Criminal Court.</li> </ul> <p><sup>58</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1-20).</p>	
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<p style="text-align: center;"><b>Chapter II</b></p> <p style="text-align: center;"><b>Rights and duties of media service providers and recipients</b></p> <p style="text-align: center;"><i>Article 3</i></p> <p style="text-align: center;">Rights of recipients of media services</p>	
<p>Recipients of media services in the Union shall have the right to receive a plurality of news and current affairs content, produced with respect for editorial freedom of media service providers, to the benefit of the public discourse.</p>	<p><i>MFA in article 3 creates a new right for EU citizens: the right to access a pluralistic information offer, created while respecting the editorial freedom of media service providers. Very similar regulations are already in force in Poland.</i></p> <p><i>In Poland, the right to information is guaranteed by the Constitution and acts for the broadcasting sector. According to the Art. 1 paragraph 1 point 1 of the polish Broadcasting act, one the task of broadcasting is to 'provide information' Moreover, we have the provisions of the Press Law. Art. 1 indicates that the press, pursuant to the Constitution of the Republic of Poland, has the right to freedom of expression and realises the right of citizens to reliable information, transparency of public life as well as social control and criticism</i></p> <p><i>Therefore, Poland does not question the essential content of the proposed provision - the media in the form described in this provision must function in every democratic state. However, bearing in mind the legal basis proposed by the European Commission aimed at ensuring the proper functioning of the single market, we have doubts, how creating such a right for media recipients will affect the achievement of the desired effect. In our opinion, the regulation of the media market can be carried out by imposing obligations on media providers, states or regulators - not by granting rights (which are already granted in the Polish Constitution) to recipients.</i></p>

	<p><i>In this part, we have to ask how the correct application of this provision will be look like? Will the Commision evaluate implementation of this provision? Evaluation will be based on what criteria? We would like to know if this provision has only a declarative character.</i></p> <p><i>In addition, we are afraid that jurisprudence can extract from this article a new subjective right- a right to access the pluralistic media. In such situation, some users could lodge a complaint to the courts for the media that, in their opinion, do not meet their expections. We think that this article should very strictly define the consequences of this right for the users.</i></p> <p><i>To sum up, this article, in this wording, does not provide legal certainty for the media service providers.</i></p>
<p><i>Article 4</i></p> <p>Rights of media service providers</p>	
<p>1. Media service providers shall have the right to exercise their economic activities in the internal market without restrictions other than those allowed under Union law.</p>	<p><i>The guarantees of independence for all media service providers in Polish law are included both in the Polish Constitution and in the Broadcasting Act. Freedom of speech is guaranteed both by the Polish Constitution and by the acts. The Polish constitution guarantees freedom of the press (Article 14) and freedom of expression, as well as the prohibition of censorship (Article 54 of the Constitution).</i></p> <p><i>Polish Broadcasting Act also guartantee the freedom of functioning by media service prviders. According to the article 13 of polish Broadcasting Act, Broadcasters will enjoy full independence in determining the content of the programme service with a view to fulfilling the tasks referred to in Article 1 paragraph 1, and will be responsible for the contents thereof. No public administration body may</i></p>


	<p><i>influence the media service providers. The censorship and political control is prohibited by the law.</i></p> <p><i>We have to underline that the competences in the media law field are shared between the member states and the European Union. Member states have their own legal systems (some of them are very extensive) with the basis on their regulatory traditions and practice. Some regulations for the radio market, press or even television are not covered by the scope of the european law. It's permissible in the light of the Treaties recognizing that at the EU level we regulate only some aspects of the audiovisual services. For the rest, the right to regulate the markets remained with the Member States.</i></p> <p><i>There are doubts concerned the possible cosequences of this article. Below, we have hihghlighted some of them:</i></p> <ul style="list-style-type: none"> <li><i>- the possibility to conduct business in media (radio and television) market is dependent on obtaining a license,</i></li> <li><i>- the possibility of imposing an obligation on the press publisher to file a press title with the court;</i></li> <li><i>- regulations connected with the press rectification.</i></li> </ul> <p><i>We have even more examples. So, this is extremely important to clearly define which regulations from member state's legal systems can be still in force after the entry into force of the MFA regulation.</i></p> <p><i>-</i></p> <p><i>.</i></p>
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<p>2. Member States shall respect effective editorial freedom of media service providers.</p> <p>Member States, including their national regulatory authorities and bodies, shall not:</p> <p>(a) interfere in or try to influence in any way, directly or indirectly, editorial policies and decisions by media service providers;</p> <p>(b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers or, if applicable, their family members, their employees or their family members, or their corporate and private premises, on the ground that they refuse to disclose information on their sources, unless this is justified by an overriding requirement in the public interest, in accordance with Article 52(1) of the Charter and in compliance with other Union law;</p> <p>(c) deploy spyware in any device or machine used by media service providers or, if applicable, their family members, or their employees or their family members, unless the deployment is justified, on a case-by-case basis, on grounds of national security and is in compliance with Article 52(1) of the Charter and other Union law or the deployment occurs in serious crimes investigations of one of the aforementioned persons, it is provided for under national law and is in compliance with Article 52(1) of the Charter and other Union law, and measures adopted pursuant to sub-paragraph (b) would be inadequate and insufficient to obtain the information sought.</p>	<p><i>In terms of art. 4 par. 2 b) and c) of the MFA, it should be indicated that pursuant to Art. 51 of the Constitution of the Republic of Poland, no one may be obliged, other than under the Act, to disclose information about him. Public authorities cannot obtain, collect and share information about citizens other than that necessary in a democratic state ruled by law.</i></p> <p><i>All activities related to detain, surveillance and spyware are specifically regulated in the national legislation.</i></p> <p><i>It should be emphasized, however, that regulations in this area are regulated by legal acts within the scope of criminal proceedings. The regulations drafted by the MFA may therefore interfere with the regulations on criminal proceedings in individual Member States, for which we do not see a legal basis</i></p>
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<p>3. Without prejudice and in addition to the right to effective judicial protection guaranteed to each natural and legal person, Member States shall designate an independent authority or body to handle complaints lodged by media service providers or, if applicable, their family members, their employees or their family members, regarding breaches of paragraph 2, points (b) and (c). Media service providers shall have the right to request that authority or body to issue, within three months of the request, an opinion regarding compliance with paragraph 2, points (b) and (c).</p>	<p><i>We do not support to create such a new „independent authority or body”. These above mentioned activities, carried out without the Court’s control, in polish law are illegal. People who comitted them bear the criminial liability. From the other side, to carry out such activities as mentioned in the article 4. Par. 2 b) i c) in accordance with the law- the court approval is needed. People have right to make a complaint to many public bodies- Police, Courts, to the prosecutors Office or Ombudsman.</i></p>
<p style="text-align: center;"><i>Article 5</i></p> <p style="text-align: center;">Safeguards for the independent functioning of public service media providers</p>	
<p>1. Public service media providers shall provide in an impartial manner a plurality of information and opinions to their audiences, in accordance with their public service mission.</p>	<p><i>The guarantees of independence and pluralism of public service media proposed by Article 5 of the MFA regulation have been fully implemented in the Polish legal system.</i></p> <p><i>We have to express that the Treaties (primary legislation), especially the Protocol of Amsterdam, clearly demarcates the competences of states and the EU in the field of the functioning of public media. Those principles we can read in the Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01). According to this Communication, the Comission has competences to evaluate the criteria of proportionality of the financing and can check if the national legislation does not have evident mistakes in the definition of public service mission. Commsion can also evaluate if the obligations connected with the public service are directly communicated and the supervision is correct.</i></p> <p><i>It is not clear why the public media should meet the standards of impartiality and pluralism only. Regulations of</i></p>

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	<i>EU law, but also of Member States, impose numerous <u>equivalent</u> obligations on public broadcasters - independence, balance as well as innovation and high standards. Why, in the opinion of the EC, these two values (impartiality and pluralism) are of key importance and should be treated as a priority.</i>
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<p>2. The head of management and the members of the governing board of public service media providers shall be appointed through a transparent, open and non-discriminatory procedure and on the basis of transparent, objective, non-discriminatory and proportionate criteria laid down in advance by national law.</p> <p>The duration of their term of office shall be established by national law, and be adequate and sufficient to ensure effective independence of the public media service provider. They may be dismissed before the end of their term of office only exceptionally where they no longer fulfil the legally predefined conditions required for the performance of their duties laid down in advance by national law or for specific reasons of illegal conduct or serious misconduct as defined in advance by national law.</p> <p>Dismissal decisions shall be duly justified, subject to prior notification to the person concerned, and include the possibility for judicial review. The grounds for dismissal shall be made available to the public.</p>	
<p>3. Member States shall ensure that public service media providers have adequate and stable financial resources for the fulfilment of their public service mission. Those resources shall be such that editorial independence is safeguarded.</p>	<p><i>According to the article 6 pont 3 of FMA-How the Comission is going to verify if the MS ensure to the public media service providers adequate and stable financial resources for the fulfilment of their public service mission? In accordance with the Communication, Comission can only take actions in the scope of the proportionality of the financing.</i></p>
<p>4. Member States shall designate one or more independent authorities or bodies in order to monitor compliance with paragraphs 1 to 3.</p>	

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