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DOT Europe position paper

European Media Freedom Act

DOT Europe, the voice of leading Internet companies operating in Europe, and its members are committed to the principles of media plurality and welcome the underlying objectives set out in the European Media Freedom Act to protect media plurality and editorial independence.

We share the objectives of the proposal to bring more harmonisation to the internal market and media regulation. Fragmentation of the legislative framework and national rules often lead to lack of legal certainty for stakeholders. Our platform members are committed to linking their users to quality media content, in a transparent manner, and support free, pluralistic and independent media. Furthermore, the industry has openly stepped up the fight against disinformation and foreign interference.

In order to achieve the goals laid out in the proposal, we believe some points need to be clarified. In this paper we outline our key concerns with the proposal and recommendations to strengthen the functioning of the internal media market and bolster the practical implementation of the provisions.

Definitions and coherence with the existing legislative framework

The Media Freedom Act is one of the building blocks of European Union acquis to consolidate cooperation across the region, ensure European citizens have access to high-quality journalistic content and promote media pluralism. While DOT Europe fully supports these objectives, we are concerned that the definitions proposed in the Commission's text are too vague to act as proper foundations for this ambitious Regulation.

DOT Europe's key concern with the current proposal is that it **seems to ignore the legislative framework already in place and sometimes blurs the lines established by EU law**. First, the definition of 'media service provider' in the proposal is different from the definition of 'media service provider' enshrined in the Audiovisual Media Services Directive (AVMSD)[1]. This could lead to a re-interpretation of EU legislation and cause legal confusion. Second, the proposed definition is overly broad. The inclusion of press publications (see Art. 2(1)) is a significant step and extends media regulation in a way that serves as a poor international precedent. Furthermore, many entities or individuals would fall under the wide umbrella of media service provider because they offer programmes aiming to "inform, entertain or educate" (Art. 2(1)). This is probably not the intention of the proposal and needs to be addressed.

The broad definition of 'media service provider' is also accompanied with a significant extension of the powers of ERGA, or rather the newly introduced European Board for Media Services. The agency

[1] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) EUR-Lex - 02010L0013-20181218 - EN - EUR-Lex (europa.eu)

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is now also supposed to have oversight of press publications (Art. 12) and this could potentially conflict with national approaches to press regulation (which often rely on self-regulation with independent oversight) and raises questions of independence of the new Board, something it has pointed out itself[2].

In addition, the broad definitions combined with the new proposals set out in Article 17 create worrying avenues for abuse, for example by creating a dangerous precedent where Very Large Online Platforms (VLOPs) might be put in a position to enforce media regulation through Article 17. As they currently stand, these provisions run the risk of being misused by States who may not be fully respectful of the rule of law.

DOT Europe, therefore, urges policy makers to clarify and narrow the definitions of 'media service' and 'media service providers' to ensure this proposal can be practically implemented and does not unintentionally open the door to abuse by dangerous actors.

Additional work on the definitions is also essential to ensure **coherence with existing legislation** and not to unintentionally blur the boundaries which have been established by previous laws. In the AVMSD, the concept of an 'audiovisual media service' (Art. 1(1(a))) is distinct from that of a 'video-sharing platform service' (Art. 1(1(aa))). This distinction is rightly based on the nature of the services provided, with the understanding that the algorithmic presentation of content does not equate to editorial control over that content (as pointed out in recent Court of Justice of the European Union rulings[3]). Still, Recital 8 of the proposal appears to merge the two concepts by implying that VSPs and media service providers are increasingly converging, and that the algorithmic presentation of content might amount to a level of editorial control over that content. This is not the case. Moreover, VSPs are online platforms under the Digital Services Act[4] (DSA) which has **reaffirmed the limited liability regime in place for online service providers**. The Media Freedom Act should maintain the status quo and keep the established regime as it is to preserve legal certainty for the providers concerned. Similarly, the Media Freedom Act **should not seek to weaken the Country of Origin principle**, a cornerstone of the Single Market, which has and continues to serve an essential function for businesses operating in Europe.

Self-declaration of media service providers

Fostering media freedom and diversity online is a crucial element to ensure EU citizens make informed choices and participate in democratic life. Article 17 tries to support that goal. However, several aspects should be clarified in order for the provisions to work in practice and guarantee that only legitimate actors benefit from the advantages granted in the proposal.

[2] ERGA welcomes the objectives of the EMFA proposal and highlights the importance to secure an effective independence and adequate resources for its implementation, 4th October 2022, https://erga-online.eu/wp-content/uploads/2022/10/2022-10-04_ERGA-PR-EMFA_published.pdf

[3] See Joined Cases C-682/18 and C-683/18 https://curia.europa.eu/juris/document/document.jsf;jsessionid=845B66BA3056E0BA4ECB8C79F9CDDDF8?text=&docid=243241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1286374

[4] REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) EUR-Lex - 32022R2065 - EN - EUR-Lex (europa.eu)

Firstly, the scope of the Article includes VLOPs even if they do not provide services in relation to content from media service providers, such as travel booking, e-commerce or transportation. The **scope of this Article therefore needs to be more precise** to avoid capturing online services which do not contain content of media service providers and/or allow these actors to post content thereon.

Second, DOT Europe reiterates that the **concept of "media service provider" is overly broad** and includes not only well-known press agencies, newspapers and television channels but also encompasses dubious actors or "rogue media service providers" (Recital 26) which do not "act diligently and provide information that is trustworthy and respectful of fundamental rights" contrary to what Recital 31 expects them to do. This is why it is important to carefully delineate the outer boundaries of the media service provider definition. Furthermore, VLOPs should not be responsible for vetting media service providers. Indeed, the former are put in the perilous position of having to assess whether a media service provider meets the criteria provided in Article 17, when they receive a self-declaration pursuant to this Article. DOT Europe emphasises that **it should not be the role of VLOPs, especially as the proposed criteria are subjective, difficult to evaluate and heavily dependent on national laws**. For instance, 'editorial independence' is not defined in law and is very complex to define and achieve even[5]. Hence the importance of providing safeguards to the mechanisms established in Art. 17(1) and (2), in order to avoid granting any random entity a beneficial treatment which VLOPs would find impossible to implement and enforce. Moreover, Art. 17(2) requires VLOPs to communicate a statement of reasons to a media service provider before it decides to suspend the provision its services in relation to a media provider's content based on an internal policy or a terms of service violation. Given the different types of violations that might be involved, prior notification may not always be possible or appropriate in certain cases – particularly when other regulations encourage swift action by VLOPS. New rules on notice and action have only recently been adopted in the DSA, and with content specific rules in place for both copyright and terrorist content, this is quickly becoming a congested area of regulation. We would submit that **the new rules set out in the DSA ought to be the baseline for notice and action** as well as the provision of statements of reasons.

Finally, as emphasized by Vice President Jourova, the Media Freedom Act is not meant to impose a media exemption. However, we are concerned that this could become the case should stakeholders seek similar statements of reasons where the presentation of their content has been impacted, or an exemption from VLOPS' terms of service altogether. This is of particular concern if the definition of a media service provider remains untouched. **We do not want Article 17 to become a provision that safeguards the dissemination of harmful content on online platforms**. Even in its current form, Article 17 runs the risk of directly contradicting some providers' competing safety obligations e.g. to ensure minor safety under the AVMSD (Article 28b). Additionally, some providers of online platforms are signatories to the Strengthened Code of Practice on Disinformation[6], in which they have committed to several measures to fight against disinformation on their services.

In order for the final text to be workable for online platforms, it should remain coherent with the legislative framework currently in place for this kind of actors: the DSA must stay the main regulatory

[5] See for instance Governance and independence of public service media, European Audiovisual Observatory, February 2022, available at https://rm.coe.int/iris-plus-2022en1-governance-and-independence-of-public-service-media/1680a59a76

[6] 2022 Strengthened Code of Practice on Disinformation | Shaping Europe's digital future (europa.eu)

instrument applying horizontally for online actors and the Media Freedom Act should complement this framework.

Customisation of audiovisual media offer

DOT Europe deeply understands the value of personalisation of content for online users. Our platform members always strive to deliver the best content that is of interest to their users. That is why the approach adopted by Article 19 on the customisation of news is intriguing. However, further clarification on Article 19 is needed, especially with regards to the following points:

- It is unclear what the 'right of customisation of audiovisual media offer' entails at this stage. DOT Europe strongly calls on policy makers to consider whether a service's user interface allows for such functionality and the proportionality of such an obligation before imposing any requirement of this kind. It **should not go beyond platforms' technological possibilities**.
- As the proposal stands, manufacturers and developers have 48 months from the date of entry in to force to ensure that the device or interface they place on the market includes a functionality enabling users to freely and easily change the default settings. Paragraph 1 provides the right for users to change the default settings of their interface or device from 6 months from the entry into force of the Regulation. The **two implementation deadlines within the Article are confusing**, especially as both provisions are almost identical. If this differentiation is maintained, both provisions should have a similar implementation timeframe, preferably in line with current technological possibilities.
- It is important to ensure **any proposed obligation is consistent with the internal market legal basis** (in this case, Article 114 Treaty on the functioning of the EU) and objectives of the proposal (here, addressing the fragmented national regulatory approaches related to media freedom, pluralism and editorial independence in the EU[7]). Particular attention should be paid to consistence with DSA provisions in order to avoid uncertainty for platform providers and duplication of compliance efforts.
- Legal clarity would be appreciated also with regards to the interplay between the right of users to customise their media offer and the obligation put on providers, developers and manufacturers to ensure users have access to "quality media services, which have been produced by journalists and editors in an independent manner" (Recital 11).

While Article 19 is an acknowledgment of the value of personalisation online, the aspects outlined above need clarification and tightening to ensure legal certainty for providers. Article 23 is another innovative part of the text where providers need to be certain of what is expected from them.

Audience measurement

Article 23 sets criteria as a basis for the regulation of audience measurement systems. However, more **clarity is needed to understand exactly what is covered in this Article**. The explanatory note infers that "proprietary audience measurement" is the key area of concern but this is not defined in Article 2 nor in Recital 9. There are a number of non-proprietary and independent audience measurement schemes which provide transparency for media buyers. The Commission should clarify that these are

[7] See the Explanatory Memorandum attached to the Proposal, p. 3.

not in scope of the proposal and that the policy goal is to encourage more media owners to adopt such services to improve transparency.

Furthermore, while we understand the logic of the new obligations on transparency of methodologies for providers of audience measurement systems, which would be to better identify the influence of governments on media organisations via advertising spend, DOT Europe remains cautious regarding the inclusion, in the scope of Article 23, of organisations that collect data for "the related planning, production or distribution of content" (Article 2(14)). Indeed, the activities of these entities are not related to the central aim of the Article, but rather moves the focus into commercial decisions made by companies commissioning content.

This section of the proposal also encourages stakeholders' cooperation to ensure compliance of measurement systems providers. DOT Europe welcomes the importance given to stakeholder dialogue. This is indeed becoming an essential element of sound law making for the future of the Internet.

Conclusion and recommendations

The Media Freedom Act is an ambitious proposal with clear objectives. DOT Europe fully shares them and its members are ready to do their utmost to defend and support free, pluralistic and independent media while stepping up the fight against disinformation and foreign interference online. However, the text needs to match the aspirations and make sure there is no unintended consequences to several provisions.

That is why DOT Europe recommends to:

- **Narrow the definitions** to specify the types of content intended to be in scope and to capture only the platforms offering the sharing of media content by users and media service providers. Tighten the scope of 'media service providers' to ensure that the text is practical to implement for online service provider and to guarantee that only legitimate actors benefit from the advantages granted in the proposal.
- **Align the Media Freedom Act with the broader regulatory landscape** to avoid tensions with existing law or confusion as regards online service providers' other legal obligations and the liability regime, which has repeatedly been reaffirmed by EU law and case-law.
- **Provide workable rules for platforms** as regards definitions proposed in Article 17 and implementation deadlines in order for them to be able to comply with their obligations under this proposal, in coherence with horizontal regulation.