

25.11.22**Decision
of the Bundesrat**

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 to amend regulation 2010/13/EU**COM(2022) 457 final; Council doc. 12413/22**

In its 1028th session held on 25 November 2022, the Bundesrat adopted the following opinion pursuant to sections 3 and 5 of the Act on Cooperation between the Federation and the Federal States in European Union Affairs (EUZBLG)):

General comments

1. The Bundesrat takes note of the proposed regulation on a European Media Freedom Act (hereinafter “EMFA”) submitted by the Commission on 16 September 2022. The Bundesrat has already adopted a decision on 11 March 2022 (cf. BR Official Document 52/22 (Decision)), to which full reference is made. The Bundesrat considers the fundamental objective of the Commission of guaranteeing and preserving diverse and independent media in Europe worth supporting. However, the German Länder do not consider the harmonisation and centralisation provided for in the proposed regulation to be the correct solution. A regulation of the media that focuses on the internal market cannot eliminate existing deficits in terms of the rule of law. In its efforts to improve media diversity and independence in countries that have deficits in securing media diversity and independence, the initiative must not at the same time harm functioning media systems such as the one in Germany. In the view of

*) First decision of the Bundesrat of 25 November 2022, Bundesrat Official Document 514/22 (Decision)

the Bundesrat, the Commission's proposal for a regulation does not do justice to these basic principles and requires a fundamental readjustment in compliance with primary EU law.

Regarding the legal basis

2. The Bundesrat emphasises the central importance of the cultural sovereignty of EU Member States, which in Germany is exercised by the Länder. The competence of the Länder for broadcasting and for ensuring diversity of opinion is closely linked to the fundamental decision enshrined in the German constitution (the "Basic Law") to establish a federal state. The Länder are assigned essential legislative competences in order to take account of particular regional circumstances in the field of broadcasting and the media. A comprehensive legislative act such as the EMFA, which aims to realise an internal market in the field of media, would violate the exclusive legislative powers of the Länder in the field of broadcasting in a way that would impact the constitution.
3. The Bundesrat does not consider article 114 TFEU to be a suitable legal basis for the proposed legislation. In particular, the proposed EMFA regulation contains a large number of provisions that are primarily aimed at ensuring editorial freedom. Furthermore, it includes media sectors – such as the press and radio – that primarily have local or regional reach and therefore lack a cross-border dimension. This means that the internal market is neither established nor is its functioning ensured as required by article 26(1) TFEU.
4. The creation of purportedly good competitive conditions alone cannot be sufficient to ensure the broadest possible range of topics and opinions in the media as well as their accessibility for users. A purely economic view of the media and its actors falls short and reinforces concentration tendencies in the media sector (judgment of the German Constitutional Court, BVerfGE 149, 222, 261 et seq.). When considering the provisions of the proposed EMFA regulation, which on the basis of article 114 TFEU can be aimed solely at improving the internal market, the Bundesrat sees a threat to diversity at national, regional and local level. The Commission has not demonstrated that diverging national rules to ensure diversity of opinion could create obstacles to the internal market for media services. On the contrary, the Audiovisual Media Services Directive is a

good example to illustrate that there is no need for a regulation to strengthen the internal market for media services at a European level. In the view of the Bundesrat, the principles of subsidiarity and proportionality are not being complied with.

5. With the proposed legislation, the Commission has not adequately taken into account cultural sovereignty according to article 167 TFEU and thus the fact that media regulation falls within the competence of Member States. The relevant cultural provision of article 167 TFEU is not mentioned at all in the proposed regulation, although cultural and economic regulatory interests should have been weighed up. The Bundesrat is concerned that, by taking this regulatory approach, the EU is encroaching upon the cultural area of competence of the Member States, and strongly objects to this shift in competence.
6. In the view of the Bundesrat, the fact that economic and cultural regulatory interests have not been weighed up is reflected in many provisions in the proposed regulation:
7. Article 1(3) in conjunction with article 4(1) of the proposed EMFA regulation, according to which the Member States would only be allowed to adopt more detailed rules within the framework set by the EU but no additional rules, results in harmonisation which is precluded by article 167(5) TFEU.
8. Article 3 of the proposed regulation addresses the guarantee of media pluralism even though this is part of the core area of the cultural sovereignty of the Member States. The fact that the Member States are responsible for guaranteeing media pluralism is not reflected, neither in the proposed regulation nor in the accompanying recitals.
9. The provisions on the organisation of public service media providers in accordance with article 5 and on the internal structure of media companies in accordance with article 6(2) of the proposed EMFA regulation would clearly encroach on the cultural sovereignty of the Member States. The former affects the core area of national media regulation, particularly with the Amsterdam Protocol in mind. The latter is also in conflict with national press and broadcasting freedom guaranteed by the Basic Law. These constitutional freedoms require restraint with regard to any state rules on the internal

organisation of media companies.

10. Neither the (new) competences for national media regulatory authorities and bodies proposed in articles 5, 10, 20 to 22 of the proposed EMFA regulation nor the detailed requirements on procedures or complaints take into account the structures developed in Member States over time, such as any existing mechanisms and the existing legal process.
11. The Bundesrat doubts, in particular, that article 3 to 6(2), article 20(3) to (5) and article 25 of the proposed EMFA regulation can be based on internal market competence.

Lack of legislative certainty

12. The Bundesrat points out that, in key parts, the proposed EMFA regulation does not meet the requirements for the necessary certainty of legal norms:
 - The essential definitions under article 2 no. 1, 2 and 4 of the proposed EMFA regulation are based on a meaningless tautology, in that they consist of circular definitions that refer back to the term to be defined at the end of the definition string.
 - Article 3 of the proposed EMFA regulation also contains extremely general criteria that will require a great deal of interpretation. It is impossible at present to assess their scope and effects, including on the media and on media professionals. The uncertainties associated with this are reinforced by the Commission's power to issue guidelines in article 15(2) in conjunction with recital 28 of the proposed EMFA regulation. The scope of this power appears equally uncertain.
 - In chapter III, section 5, the proposed regulation uses uncertain terms which, due to the regulatory approach taken, which provides inter alia for national law to adopt more specific legislation, are unlikely to be adopted in a legally certain manner in practice. Due to these broad terms and their need to be implemented in more specific rules by national law, it is unclear when Member State measures within the meaning of the provision would still be in accordance with the proposed regulation.

Rights and obligations of media service providers and recipients

13. The Bundesrat does not regard the right of recipients of media services set out in article 3 of the proposed EMFA regulation and of the provision of article 4(2) of the proposed EMFA regulation regarding editorial freedom as being relevant to the internal market and therefore questions the legal basis for these provisions.
14. It considers it necessary to clarify the extent to which the right of media service providers set out in article 4(1) of the proposed EMFA regulation takes into account the cultural sovereignty of the Member States.
15. The Bundesrat points out that the scope of the rights in article 3 and article 4(1) of the proposed EMFA regulation and their relationship, in particular, to the rights in article 11 of the EU Charter of Fundamental Rights, article 10 of the European Convention on Human Rights and article 5 of the Basic Law are not clear. Among other things, article 3 and article 4(1) of the proposed EMFA regulation do not seem to allow for any weighing up with other fundamental rights. Detailed rules regarding any legal rights would need to be introduced at Member State level and such rules must not be excluded.
16. The Bundesrat also sees a need for clarification as to which bodies should be responsible for compliance with and enforcement of the regulation. This concerns, in particular, the supervision of compliance with the rights and obligations of media service providers and recipients laid down in chapter II of the proposed regulation.

Independence of media regulatory authorities and bodies

17. Media supervision that is independent and at arm's length from the state is a mandatory prerequisite for free and diverse media regulations under the German constitution. The Commission having decisive influence in this area would contradict these principles which apply in Germany. However, the proposed regulation provides for far-reaching decision-making competences of the Commission as well as possibilities to influence decisions of the European Board for Media Services, which essentially concern questions of media regulation and cannot be justified in reference to its role as "guardian of the treaties". Nor does it constitute "independent monitoring" of various market-related regulations by the Commission (which is not organised at arm's length from the state) as described in article 25 of the proposed EMFA regulation.
18. As the Bundesrat has pointed out, inter alia, in paragraph 14 of its decision of 11 March 2022 (cf. BR Official Document 52/22 (Decision)), there is no need to superimpose supervisory structures at European level beyond these principles and structures beyond a meaningful and necessary cooperation between national regulatory bodies.

Media privilege

19. The Bundesrat welcomes the fact that article 17 of the proposed EMFA regulation is intended to readjust certain provisions of the Digital Services Act. However, it would like to note that article 17 of the proposed EMFA regulation would not prevent the very large online platforms from deleting journalistic-editorial content in accordance with the procedures applicable to other content under the Digital Services Act because of alleged illegality or because of a contradiction with the general terms and conditions of the services and, in this respect, refers to paragraph 54 of its opinion of 26 March 2022 (cf. BR Official Document 96/21 (Decision)). In the view of the Bundesrat, it is not sufficient for the protection of journalistic-editorial content to provide media service providers with a statement of reasons if the provision of online mediation services is to be suspended and to create transparency and dialogue obligations.

Media concentration

20. With regard to the provisions on the assessment of concentrations in the media market in articles 21 and 22 of the proposed EMFA regulation, the Bundesrat explicitly refers to paragraphs 8 and 9 of its aforementioned decision. It doubts that harmonisation that concerns purely national or regional issues would improve the internal market. Instead, there is a risk that regional and local media diversity would be (indirectly) jeopardised (cf. also paragraph 9 of its aforementioned decision).
21. Taking into account the case-law of the ECJ (cf. ECJ judgment of 12 December 2006 – C-380/03 – Germany v Parliament and Council, paragraphs 36 et seq. and 92 et seq.), the Bundesrat doubts whether the provisions on media concentration are lawful, insofar as they are based on purely market-economy criteria. The explicit regulatory objective of media pluralism was recognised by the Commission itself as a special protected interest beyond market-economy standards. Therefore, the conclusion must be that there is a lack of a link between the “internal market for media services” and the safeguarding of media pluralism and editorial independence, which is necessary for legislation on the basis of article 114 TFEU.

Monitoring by the Commission

22. According to article 25 in conjunction with recital 50 of the proposed EMFA regulation, the media markets and national regulation of the Member States should be subject to full “independent monitoring” by the Commission. Such an idea of centralisation is inconsistent with the Basic Law.
23. The proposed “monitoring” in article 25 of the proposed EMFA regulation includes, inter alia, a forward-looking assessment of the media markets of the Member States by the Commission, including the definition of “key performance indicators” in this regard. The scope, lack of certainty and absoluteness of the mechanism, which does not provide for any Member State rights, combined with centralisation, would in itself constitute a risk to diversity of opinion.

Procedural concerns

24. The Bundesrat reminds the Federal Government of its demand that its opinions pursuant to article 23(5) sentence 2 of the Basic Law and Section 5(2) EUZBLG be afforded the greatest possible respect and of its demand that the conduct of negotiations in the Council be transferred to the Länder pursuant to article 23(6) of the Basic Law and section 6(2) EUZBLG (cf. paragraph 15 of its aforementioned decision). The proposed regulation primarily affects the powers of the Länder to legislate with regard to the structuring of broadcasting law in and for Germany. In accordance with established constitutional law, the Federal Government has no right to legislate in this area. Rather, the Länder have legislative power in accordance with article 30 and 70 of the Basic Law.

25. The Bundesrat will transmit this opinion directly to the Commission.