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## Grounding media freedom in the EU: The legal basis of the EMFA

The article critically examines the choice of Article 114 TFEU as the legal basis for the European Media Freedom Act (EMFA), which aims to harmonise media regulation across Member States to support media freedom and pluralism. The study, firstly, identifies two contrasting perspectives (critics and supporters of the chosen legal basis) and, secondly, highlights two shortcomings of the EMFA (its focus on market-based solutions risks commodifying freedom of expression and its ex-ante regulatory framework). Despite these concerns, the author argues that the EMFA represents a constitutional evolution for the EU, bridging old and new media paradigms to ensure democratic values and the integrity of the digital market. The conclusion argues that the broad interpretation of Article 114 TFEU is justified and in line with the EU's role in safeguarding democracy and fundamental rights and signalling the new direction of EU integration. However, the success of the EMFA will depend on its effective implementation and the capacity of EU institutions to ensure freedom of expression, fair competition and robust regulation in the digital age.

*EMFA – Media Pluralism – Media Freedom – Harmonisation – Legal Basis*

### Il fondamento della libertà dei media nell'UE: la base giuridica dell'EMFA

L'articolo esamina criticamente la scelta dell'articolo 114 del TFUE come base giuridica dell'*European Media Freedom Act* (EMFA), che mira ad armonizzare la regolamentazione dei media tra gli Stati membri per sostenere la libertà e il pluralismo dei media. Lo studio identifica due prospettive contrastanti (critici e sostenitori della base giuridica scelta) e mette in evidenza due difetti dell'EMFA (il suo focus sulle soluzioni basate sul mercato rischia di mercificare la libertà di espressione e il suo quadro normativo *ex-ante* può mancare di precisione). Nonostante queste preoccupazioni, l'autore sostiene che l'EMFA rappresenta un'evoluzione costituzionale per l'UE, che collega i paradigmi dei vecchi e dei nuovi media per garantire i valori democratici e l'integrità del mercato digitale. La conclusione sostiene che l'interpretazione ampia dell'Articolo 114 del TFUE è giustificata e in linea con il ruolo dell'UE nella salvaguardia della democrazia e dei diritti fondamentali, oltre a segnalare la nuova direzione dell'integrazione dell'UE. Tuttavia, il successo dell'EMFA dipenderà dalla sua effettiva attuazione, garantendo la libertà di espressione, la concorrenza leale e una solida regolamentazione nell'era digitale.

*EMFA – Pluralismo dei media – Libertà dei media – Armonizzazione – Basi legali*

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## 1. Introduction

An examination of the evolution of European Union law and policies over the past two decades reveals a growing emphasis on creating a new regulatory framework for media services<sup>1</sup>. At the heart of this initiative is the need to shift from merely protecting media pluralism to actively promoting the freedoms of both recipients of media services and media service providers across all Member States<sup>2</sup>.

The principle of media freedom and pluralism is now established in Article 11, paragraph 2, of the Charter of Fundamental Rights of the European Union, reflecting an advancement from previous constitutional and international documents<sup>3</sup>. The drafters of the Charter have decided to emphasise

the decisive role of media for European integration in accordance with the constitutional traditions common to Member States and the European Court of Human Rights case law<sup>4</sup>. The aim was to underline the importance of media freedom and independence as a primary guarantee of a democratic system and as a prerequisite for exercising other fundamental rights of citizenship, such as the right to vote, referred to in Article 39(2) of the Charter<sup>5</sup>.

The need for new policies in the field of media services at the EU level is evident for several reasons<sup>6</sup>. Firstly, the media and information landscape is in a constant state of evolution and revolution<sup>7</sup>. Secondly, recent crises and conflicts are definitively highlighting the crucial role of the media

1. See MASTROIANNI 2011; PARCU–ROSSI 2021; HOLTZ–BACHA 2024; KOLTAY 2024.

2. See the European Parliament resolution of 11 November 2021 on "Strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society" (2021/2036(INI)) and Council conclusions of 18 May 2021 on "Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation" (2021/C 210/01).

3. NASCIMBENE–ROSSI DAL POZZO 2023; STROZZI 2013.

4. This relevance is underlined primarily by the relevant case-law of the Court of Justice of the European Union, such as *Sky Österreich* (case C-283/11) and *Vivendi* (C-719/18), where the EU judges affirmed that "the preservation of the pluralistic nature of the offer of television programmes, which is intended to guarantee a cultural policy may constitute an overriding reason in the public interest capable of justifying the restriction of the freedom to provide services". For more on this, see DONATI 2022.

5. MASTROIANNI 2022.

6. Malferrari 2023 interestingly stresses three arguments in favour of a new media legislation in Europe: first, digitalisation and the changing media landscape have created a more international media landscape; second, the threat of media manipulation restricts the freedom to provide services and distorts competition in the internal market; third, there is a security threat posed by strategic disinformation as a hybrid threat, especially in times of war.

7. COLE–ETTELDORF 2023-B.

sector and its regulation in shaping public opinion, demonstrating its significance in promoting democracy and the rule of law<sup>8</sup>. Thirdly, the recent emergence of Generative Artificial Intelligence has brought to life a powerful tool that can disrupt the information environment and create new global threats<sup>9</sup>.

Against this background, approving the “European Media Freedom Act”<sup>10</sup> (EMFA) in 2024 marked a pivotal development in regulating media freedom and completing the regulation of information technologies across Europe<sup>11</sup>. This new Regulation emphasises the EU’s commitment to exploring and extending the boundaries of the existing, limited legal framework governing media policy, which primarily focuses on implementing the internal market and enforcing EU competition law<sup>12</sup>. EMFA includes a new European Board for Media Services (EBMS), to replace the European Regulators Group for Audiovisual Media Services (ERGA)<sup>13</sup>.

With the EMFA, EU intervention in the media sector has (potentially) evolved towards using dynamically consolidated instruments for market harmonisation and liberalisation<sup>14</sup>. EU institutions have demonstrated a genuine willingness to actively support the media environment in enhancing both the functionality and quality of democracy<sup>15</sup>. However, this evolution faces resistance because it

is considered an unauthorised strengthening of EU control over a politically delicate and controversial issue essential for democracy and human rights at the state and local levels<sup>16</sup>.

This article discusses a preliminary issue regarding the EU Institutions’ willingness to enhance media freedom in Europe: the chosen legal basis for the EMFA. As we know, since the introduction of the proposal for a regulation establishing a common framework for media services in the internal market and amending Directive 2010/13/EU, the Commission expressed the need to use only the legal basis provided by Article 114 TFEU. This latter is set up to adopt measures to approximate the provisions laid down by law, regulation, or administrative action in the Member States, which have as their object the establishment and functioning of the internal market.

Media sector regulation is one of the many areas of the Digital Single Market where this legal basis has been used<sup>17</sup>. The aim of these regulatory initiatives concerning digital technologies is always the same: the EU is taking action through harmonisation instruments to prevent national legislation fragmentation and reclaim European “digital sovereignty”<sup>18</sup>, ultimately aimed at better safeguarding fundamental rights and the rule of law. Two significant components underline this policy strategy: firstly, the use of the word “Act”

8. The established “Rule of Law Mechanism” at the EU level devotes a key section to media freedom and pluralism. The first Rule of Law Report covering all 27 Member States, published on 30 September 2020, presented both a synthesis of the rule of law situation in the EU and an assessment of the situation in each Member State, focusing on four main pillars: the judicial system, the anti-corruption framework, media pluralism and other institutional checks and balances. The fifth annual “Rule of Law Report” (2024) highlighted progress and ongoing challenges in the media landscape in all Member States. Despite the signs of progress, the last report expressed persistent concerns about the independent governance and financial stability of public service media, transparency of media ownership, access to public documents and the fair distribution of state advertising. For more information, see EUROPEAN COMMISSION 2024.

9. BAYER 2024-B.

10. Regulation (EU) No. 2024/1083.

11. This regulation completes at least the Digital Service Act, the Digital Markets Act, and the AI Act.

12. GARCIA PIRES 2017.

13. For other important elements of the new Regulation, see the [briefing of the European Parliament](#).

14. BAYER 2024-A.

15. HOLTZ-BACHA 2024.

16. BROGI-PARCU 2014.

17. On the importance of Article 114 for the improvement of the Digital Single Market, see FRANCK-MONTI-DE STREEL 2021; BÖTTNER-BLANKE 2023.

18. FAHEY-POLI 2022; MÜLLER-GRAFF 2024.

in the title of these regulations through a process referred to as *act-ification*<sup>19</sup>, and, secondly, the establishment of a new governance framework designed to protect specific markets related to the protection of certain fundamental rights<sup>20</sup>.

This ambitious objective, which surpasses the previous applications of the legal basis, has been discussed on many occasions so far<sup>21</sup>. Our idea is to stress that the problem of the legal basis manifests a broader and different intensity in the context of the EMFA, which requires a thorough understanding of the role of the EU in the context of media freedom. At the same time, it is essential to explore the implications of this decision for the EU integration process and to assess whether European institutions can fully leverage the powers granted by the new Regulation<sup>22</sup>.

## 2. Two contrasting visions regarding the legal basis of the EMFA

The European Commission has grounded the EMFA proposal solely on Article 114 of the TFEU. This aspect is significant when examining the distribution of powers between the EU and its Member States and whether the Regulation has respected this distribution. Article 114 TFEU allows the adoption of measures relating to the approximation of the laws, regulations, and administrative provisions of the Member States, which have the establishment and functioning of the internal market as their object<sup>23</sup>. Accordingly, to achieve the objectives outlined in Article 26, paragraphs 1 and 2 of the TFEU – namely, to establish or ensure

the proper functioning of the internal market with the free movement of goods, persons, services, and capital – the EU is empowered to adopt measures aimed at approximating the laws, regulations, or administrative actions of Member States that pertain to the establishment and functioning of the internal market<sup>24</sup>.

Article 114 TFEU serves as a general legal basis that can only be invoked when the Treaties do not offer a more specific legal foundation relevant to a proposed measure. This article does not alter the principle of limited conferral of powers, which dictates that competencies not conferred to the EU remain with the Member States. Furthermore, regarding fundamental rights, Article 6 TEU and Article 51, paragraph 2, of the Charter of Fundamental Rights clearly state that the powers of the EU are neither expanded nor the division of competencies altered.

However, increasing media freedom requires action in areas where the Union has supporting, coordination and complementary competencies. As the EMFA addresses crucial issues of media pluralism<sup>25</sup>, a potential legal basis for this could be Article 167 of the TFEU, which pertains to culture and is the sole reference to (audiovisual) media within the TFEU. However, this cultural provision emphasises the cultural sovereignty of EU Member States by avoiding explicit harmonisation measures<sup>26</sup>.

Various scholars, policymakers, and now also a Member State<sup>27</sup> have contested the legitimacy of relying solely on Article 114 as the legal founda-

19. PAPAKONSTANTINOOU–DE HERT 2022; COLE 2024.

20. CUSTERS 2022.

21. COLE–ETTELDORF 2023-A.

22. MONTI 2024.

23. As stated by DE WITTE 2017, Article 114 is the most powerful tool for expanding the EU legislative activity. See also KOSTA 2015.

24. SCHÜTZE 2014; WEATHERILL 2016.

25. GRANDINETTI 2024.

26. The restrictive use of the “cultural clause” is stressed by COLE–ETTELDORF 2021.

27. Hungary is currently challenging this decision before the Court of Justice of the European Union. The country argues that differences in national regulations do not warrant the application of Article 114 TFEU, and it also questions the choice of using a regulation instead of a directive. The Action has been brought on 10 July 2024. *Hungary v European Parliament and Council of the European* (case C-486/2024). The Action asks the CJEU, with ten pleas in law, to annul Article 2, point 3, and Article 5; Article 2, point 20, and Article 4; Article 6; Article 7; provisions relating to the European Board for Media Services; Articles 21 to 23; and Article 2, point 19, and Article 25. See on this issues BROGI 2024.

tion for the European Media Freedom Act (EMFA). They raise concerns about whether the European Union is truly capable of achieving this goal in a realm that Member States predominantly govern. In contrast, many individuals have countered this sceptical perspective regarding EU competencies in this area. Let us explore both sides of the argument.

## 2.1. Argument against the chosen legal basis

The first position emphasises that the EU lacks the power to approve the EMFA, as there is no explicit reference in the Treaties regarding media pluralism<sup>28</sup>. Therefore, it would be better to maintain the power to protect media freedom and pluralism in the Member States jurisdictions because these are issues to be treated at a more national level<sup>29</sup>.

Scholars highlight another element. The interpretation of Protocol 29 regarding the system of public broadcasting in the Member States, which is annexed to the Treaty of Amsterdam, underscores that the public service mandate is entrusted to, defined by, and organised by each Member State. The Treaties do not affect the competence of Member States to provide funding for public service broadcasting as long as such funding is allocated to broadcasting organisations to fulfil their public service obligations.

Furthermore, Article 167 TFEU, which explicitly refers to audiovisual media, should be interpreted as confining the EU's competence to the support activities outlined within that article and exclusively in the audiovisual sector<sup>30</sup>. Given these principles and considering media diversity, cultural differences, and national specificities, EU involvement in media regulation could compromise the diversity and independence of national media<sup>31</sup>.

Member States are primarily obligated to guarantee freedom of expression for all citizens, a

responsibility reinforced by national and supranational courts. Consequently, the EU should focus on regulating only limited and market-related issues of media services rather than legislating on broader concepts of media freedom and freedom of expression (including regulations concerning national security and criminal offences)<sup>32</sup>. Therefore, there is limited potential for expanding EU competencies through the principles of subsidiarity and proportionality to facilitate the regulation of freedom of expression<sup>33</sup>. It is essential to consider the allocation of powers and the limitations on EU action when determining the appropriate legal basis and type of legislative instrument for specific initiatives. Deviating from this approach could jeopardise the principle of conferred competencies, as it may significantly expand internal market competencies in a way that could fundamentally alter the constitutional framework of competence in competition law, as outlined by the Lisbon Treaty<sup>34</sup>.

Furthermore, while it is important to recognise that the internal market objective is central to the EMFA, Article 114 TFEU stipulates the necessity of demonstrating actual obstacles to the internal market that the regulation aims to address. Since the EU does not possess the authority to create uniform domestic conditions across all Member States independently, the barriers to trade or pertinent distortions in competition must be evidenced<sup>35</sup>.

This position also stresses that the impact assessment accompanying the EMFA proposal deliberately concentrated on sector-specific and country-specific issues rather than broader European concerns that might warrant supranational regulation of freedom of expression. Thus, it would have been more accurate to avoid using the term “fragmentation” and instead focus on the specific challenges faced by individual Member

28. For a complete understanding of this position, see COLE-ETTELDORF 2021.

29. ETTELDORF 2023.

30. This is the first argument of the Hungarian Action brought in the summer of 2024 (*supra* n. 27).

31. This position is well summarised by BROGI et al. 2023.

32. See also the arguments of the Hungarian Action (*supra* n. 27).

33. See also the arguments of the Hungarian Action (*supra* n. 27).

34. ENGEL 2023.

35. ETTELDORF 2023.



States, particularly Poland and Hungary, along with various media-related regulatory issues<sup>36</sup>.

For some scholars, the rules that govern the allocation of powers associated with the EMFA warrant careful examination, particularly concerning the specific legislative instrument chosen for this action<sup>37</sup>. Despite the coherent form of a Regulation, the wording of some parts of the EMFA resembles that of a Directive, leaving the Member States' scope for implementation. However, for some open-ended formulations, such as parts of the chapter on rights and duties, the rules on media market concentration and, especially, the rules on the allocation of economic resources, the harmonising effect of EMFA could lead to challenges in interpretation for Member States<sup>38</sup>, resulting in a puzzling situation that would open up controversies on competences.

## 2.2. Arguments in favour of the chosen legal basis

On the contrary, the second position claims that the EU does have the power to regulate freedom of expression and can use Article 114 TFEU to do so in a more "creative way." In the past decades – as earmarked by the Commission Staff Working Document in 2007 –<sup>39</sup>, it became clear that the problem with media pluralism is more complex than one simply arising from the protection against the concentration of ownership in the market<sup>40</sup>.

Regulatory frameworks at the national level frequently fail to address the growing concentration of media power due to weak enforcement mechanisms or deliberate inaction driven by political complicity. When systemic failures of democracy are suspected, all social subsystems, including the

use of public resources, the economy, and institutional structures, could be in danger<sup>41</sup>.

The erosion of media pluralism has numerous harmful effects on EU citizens that extend beyond the borders of individual Member States. Firstly, it hinders the very idea of European integration, including the free movement of media services and persons. Secondly, the goals of the intervention cannot be effectively addressed through the isolated actions of individual states, as the risks at hand are increasingly cross-border and not confined to specific nations<sup>42</sup>.

In addition, digital technologies have transformed the media market, especially in financing, distribution, and consumption, so the principles and rules regarding this market, especially pluralism, have acquired a different dimension<sup>43</sup>. Thus, while in the past the problem of pluralism was considered only in the wake of the market players, today we have to consider the issue of protecting consumers' right to choose among many different services<sup>44</sup>.

Following this argument, scholars assert that freedom of expression has an EU dimension, which is closely related to the development of democracy in the Union<sup>45</sup>. Therefore, protecting freedom of expression is important for the survival of our supranational institutions. Even the more sceptical scholars regarding Union citizenship acknowledge that safeguarding democracy and freedom of expression is essential to the unwritten social contract among European peoples.

At the same time, giving to the EU institutions only crisis-driven enforcement mechanisms would not protect citizens' freedom of expression adequately. Instead, a methodologically sound,

36. KOZAK 2024.

37. COLE 2024.

38. KERŠEVAN 2024.

39. EUROPEAN COMMISSION 2007.

40. DOYLE 2002.

41. TAMBINI 2021.

42. FLEAR 2017.

43. See BAYER 2024-A: 92 cites an intriguing [public lecture](#) by Monroe E. Price at the Central European University on 27 April 2017. During his talk, he discussed the emerging era of "hyper pluralism," in which every conceivable scenario and opinion can be published and is readily accessible.

44. PARCU–BROGI 2021.

45. BROGI et al. 2023.

reliable, permanent and periodic monitoring and evaluation process based on objectivity and equality (monitoring) is recommended to assess potential risks in Member States.

While the regulatory framework governing the media encompasses both cultural and economic aspects, clearly distinguishing between the two is not always feasible. As such, regulating the market dimensions of media services can fundamentally rely on the internal market clause, even though there may be intersections with cultural considerations<sup>46</sup>.

In addition, where some find inconsistency, others see the possibility to regulatory cooperation and establishing a framework that is also consistent with the principle of technology neutrality<sup>47</sup>.

### 3. Two shortcomings regarding the EMFA's approach and the relative counterargument

Responding to advocates for new regulatory interventions in media freedom, sceptics highlight two shortcomings inherent to the Commission's policy approach to enacting the EMFA.

The first one regards the category of regulation to which EMFA belongs. The EMFA, together with the DSA, the DMA, the AI Act, and the Data Act, falls into the category of *ex-ante* regulation, mostly directed at specific private operators, stressing the decisiveness of free movement of digital services before competition law applies. While, on the one hand, such regulation has been dictated by the need to realise the markets of the information society, it is also aimed at overcoming the enforcement difficulties of other rules, in particular competition law<sup>48</sup>. The question has arisen regarding whether the market power amassed by online platforms and their ability to create barriers to entry in preferred markets has been effectively and timely addressed through the enforcement of Article 102

TFEU and merger control. Alternatively, it may be argued that the *laissez-faire* approach – and not the excessive fragmentation that has characterised the development and consolidation of the digital market – has contributed to failures within this market and related sectors, such as the media industry, resulting in distortions that necessitate the implementation of sector-specific regulation<sup>49</sup>.

In the digital market, where traditional factors of scarcity – such as frequencies and the considerable resources required for disseminating information – are no longer present, the protection of external pluralism by Member States alone does not ensure that all citizens have genuine access to a diverse array of information sources. The information ecosystem offered by the platform economy has additional characteristics inherent in the relationship between competition and pluralism, differentiating it from the old media and creating new scarcities and new “market failures of ideas”<sup>50</sup>. This is the reason why some scholars argue for a “broad base of intervention”<sup>51</sup> that stresses the need for a new understanding of “diversity” (as a way to focus on demand instead of solely supply) and for technical measures that empower the consumer to better choice among alternative options<sup>52</sup>.

The second shortcoming addresses the possibility – through the EU's intervention – of treating freedom of expression only as a commodity or service that can be bought and sold in a marketplace. This interpretation, which is far from the doctrine of freedom of expression in many EU countries, can be implied if we stretch the chosen policy option (encouraging undistorted competition, ensuring fair allocation of resources, and avoiding fragmentation), which is used to justify an intervention broader than market regulation. This is also evident in the overlap between premises and consequences in Recital No. 2 of EMFA, where aspects of a cultural nature are prerequisites for the effective provision of services in their eco-

46. Of course, this argument cannot be stretched too much, harming the principle of enumerated powers.

47. CANTERO GAMITO 2023.

48. CSERES 2024.

49. For a different understanding of this evolution, see CANTERO GAMITO 2023.

50. NICITA 2024; MANGANELLI–NICITA 2022.

51. PARCU–ROSSI 2021.

52. MANGANELLI 2023, p. 893 ff.

nomic context<sup>53</sup>. From both fundamental rights and power allocation perspectives, this reasoning may result in framing the concept of freedom of expression within a market context, leaving aside the priority of liberty.

This limitation can indeed be significant. However, the argument broadens the scope of state competencies to such an extent that it introduces considerable rigidity at the EU level. The importance of freedom of expression in today's context far surpasses that of previous eras, as the Digital Single Market increasingly shapes citizens' lives while also posing greater risks than ever before<sup>54</sup>.

The unparalleled viral spread of disinformation and hate speech, coupled with the lack of transparency surrounding algorithm-driven news intermediaries, the growing influence of private technology companies in regulating online communication, the polarisation of public discourse, and the diminishing sustainability of traditional news media and journalism, all pose significant challenges to the functioning and legitimacy of democracies across Europe. These issues necessitate a unified response at the EU level<sup>55</sup>.

#### 4. Our answer: A different interpretation regarding the "If" of the Regulation

Recognising the EMFA's significance for media freedom in Europe is crucial to understanding and enforcing it, even before delving into its operational details. To encapsulate this perspective, we should emphasise that any discussion regarding the legal foundation of the new Regulation must begin with assessing the "if" involved.

The European Commission embarked on an extensive journey to create the new Regulation that began far beyond its walls. This process involved thorough proposals, discussions, and consultations, reflecting a commitment to gathering diverse perspectives and ideas.

European institutions have long debated the necessity of a unified response to this issue. Numerous European Parliament Resolutions have underscored the increasing threat posed by a lack of media pluralism<sup>56</sup>. The European Citizen Initiative for Media Pluralism of 2015<sup>57</sup> showed the erosion of democracy and the necessity to promote the adoption of European legislation, which could guarantee the independence of the media from economic and political interests<sup>58</sup>. The High-Level Group on Media Freedom and Pluralism created in 2011 recommended an active approach of the EU on media pluralism against the likely restrictions by Member States<sup>59</sup>.

The need for specific regulation is also highlighted by the significant emergence of new unregulated and unreliable sources of information, or at other times, cleverly created by foreign authorities or private entities to manipulate electoral processes and destabilise states (as happened even recently with the Romanian case). The possibility of quality information was evident during the Covid-19 pandemic. In this context, it is important to emphasise that the EMFA aligns with the objectives of the EU's "Democracy Action Plan"<sup>60</sup>. This plan aims to promote free and fair elections, enhance democratic participation, support independent media, and combat disinformation through various initiatives.

53. ETTELDORF 2023.

54. PARCU-BROGI 2021.

55. PARCU 2020; Malferrari 2023.

56. European Parliament 2013, Resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) ([2012/2130\(INI\)](#)) 'the Tavares Report' of 3 July 2013; European Parliament 2015, Resolution on the situation of fundamental rights in the European Union (2013–2014), ([2014/2254\(INI\)](#)); European Parliament 2015, Plenary debate on the 'Situation in Hungary: follow-up to the European Parliament Resolution of 10 June 2015', 2 December 2015.

57. This initiative did not receive enough support as requested by the Regulation (EU) n. 211/2011. For more on the initiative, see 'European Alternatives' website. Unfortunately, the proposal website is not available anymore.

58. MASTROIANNI 2022.

59. The report concluded that harmonisation of market rules would benefit the EU from multiple points of view. See VİKE-FREIBERGA-DÄUBLER-GMELIN-HAMMERSLEY-POIARES PESSOA MADURO 2013.

60. EUROPEAN COMMISSION 2020.



In addition, the EMFA proposal coincided with the final stages of the legislative process for the Digital Services Act (DSA) and the Digital Markets Act (DMA). Indeed, the EMFA aims to tackle a disease while acknowledging significant limitations associated with harmonisation in areas beyond the Union's authority. Protecting freedoms involves the most intimate constitutional aspects of each State. Without these, access to the EU is precluded, and, above all, it is impossible to adopt a uniform legislative text among all 27 Member States.

However, the inability of individual Member States to develop an adequate response individually highlights the need to adopt a common European approach. The production and consumption of multimedia content, including news, has become supranational *per se*. For this reason, a common European approach makes it possible to guarantee legal certainty (given the differences between the various Member States' legal systems), fair competition between the various multimedia service providers, and the opportunity for transnational investments to consolidate the sector<sup>61</sup>.

With no EU-level policy alternatives available to regulate the digital market, the Commission delved into regulating the internal market. In the absence of a treaty change, the competencies and procedures granted by Article 114 are the only viable path forward, even because they facilitate a high level of parliamentary involvement during the approval phase and establish shared competencies with Member States according to Article 5 TEU<sup>62</sup>.

Additionally, it is important to highlight the distinction between Article 114 and the competence outlined in Article 103 regarding "competition". The harmonisation competence related to the

internal market allows for greater flexibility in drafting measures, unrestrained by mere competition law objectives<sup>63</sup>. This may include a potentially pre-emptive effect on the entire policy area within the Digital Single Market<sup>64</sup>.

This interpretation would also follow the rulings of the Court of Justice of the European Union in famous cases regarding Article 114, such as *Tobacco Advertising*<sup>65</sup>, where the CJEU allowed the EU's legislative organs to design measures according to their desired legal base<sup>66</sup>. Furthermore, opting for regulation instead of a directive is justified when considering the need for rapid regulation of the digital market.

From a constitutional law perspective, the shift in the EMFA from media pluralism to media freedom represents a potential constitutional advancement for the EU<sup>67</sup>. The regulation indicates that the Commission prioritised addressing the "distortions" within the internal market and aimed to enhance cross-border competition in the media sector, particularly for audiovisual media services and video exchanges.

Although the Charter of Fundamental Rights of the EU cannot be regarded as a legislative basis for enacting laws at the Union level, the significance of Article 11 should not be overlooked. Its implications extend beyond its apparent scope, as it pertains not only to the Court of Justice – which is required to interpret EU legislation in accordance with the principles of media freedom and pluralism – but also to the political institutions and the European legislator particularly<sup>68</sup>. Even though the harmonising competencies cannot be expanded in a way that adversely affects the interests of Member States, these States must not jeopardise pluralism as a constitutional European value by

61. Authors have stressed the importance of this shift as a new constitutional moment because of this new interpretation of Article 114 TFEU. See MONTI 2024.

62. Article 103 TFEU merely requires consultation of the European Parliament, while Article 114 TFEU follows the ordinary legislative procedure with the European Parliament as co-legislator and qualified majority voting in the Council.

63. FAHEY 2022.

64. ENGEL 2023, p. 674.

65. Case C-376/98. *Germany v. Parliament and Council*.

66. ENGEL-GROSSOT 2024; WEATHERILL 2016.

67. MONTI 2024.

68. MASTROIANNI 2022.

justifying national measures that could restrict the free movement of services.

The Union is not only obligated to uphold the general principles that govern the exercise of its competencies – namely, subsidiarity and proportionality – but also, in a more proactive manner, to take into account the sector’s specific characteristics<sup>69</sup>. This involves aligning regulatory interventions with the fundamental principles outlined in Articles 2 and 6 TEU (dignity, freedom, democracy, and respect for human rights) as well as the Charter of Fundamental Rights (Article 11). Access to a diverse array of information sources plays a crucial role in enabling informed and conscious engagement in democratic participation rights, including the right to vote, which is recognised within the framework of European citizenship (Article 22 TFEU).

In addition, the inherently transnational nature of the broadcasting of media services cannot be reconciled with a purely national approach to solving the problems of media pluralism and limited EU interventions to purely antitrust rules. This was true in the past with audiovisual media services and is even more critical today after the hybridisation of traditional media and new digital services<sup>70</sup>.

Past negative experiences and new worrying situations emerging in other EU Member States called for an urgent common European solution. In this gap, the aforementioned European Citizens’ Initiative (“ECI”) for Media Pluralism in 2015, which unfortunately did not reach the minimum number of signatories required, aimed to promote the adoption of EU legislation to ensure the independence of the media from political and economic interests. At the same time, the European Parliament has also repeatedly called for EU action on media pluralism<sup>71</sup>.

Therefore, the EMFA addresses a critical gap in EU policies regarding harmonising national media ownership regulations and managing conflicts of in-

terest. Given that the Commission has the exclusive authority to propose EU legislation aimed at harmonising national laws to enhance the functioning of the internal market, its failure to submit a proposal would have effectively diminished the likelihood of any EU legislation promoting media pluralism.

If no EU legislation effectively safeguards pluralism for all media services by prohibiting dominant positions in media markets or ensuring media freedom and independence, the EMFA dispels doubts about the lack of a legal basis to regulate media pluralism. Consequently, the arguments we outlined earlier are unconvincing.

Variations and discrepancies in Member States’ laws regarding media independence, restrictions on media ownership by individuals in public office, and the disparities within dominant positions in mass media markets present significant threats to the operation of the internal market<sup>72</sup>. Such occasions of market dominance pose a likely threat to freedom of expression. This risky situation has already invoked (and continues to trigger) the EU’s authority to legislate under the Treaty articles that focus on harmonising national laws to enhance the functioning of the internal market – with Article 114 TFEU as the stronger basis in supporting this objective.

In this context, the public consultation initiated by the Commission in January 2022, aimed at adopting a new regulation proposal on media freedom based on Article 114 TFEU, is the most effective starting strategy.

Furthermore, the EMFA should be regarded as a vital component of a broader framework that encompasses the regulation of content distribution. Alongside the DSA and DMA, it is essential to consider a network of supplementary secondary legislation and forthcoming proposals, including rules on the transparency and targeting of political advertising, as well as self-regulatory efforts addressing hate speech and disinforma-

69. SMITH 2004.

70. MASTROIANNI 2013.

71. For example, in its resolution of 10 March 2011, the European Parliament called on the Commission to propose a legislative initiative, using its powers in the fields of internal market, competition and audiovisual policy, to define at least minimum standards of media pluralism to be respected by all Member States. See “European Parliament Resolution on Media Law in Hungary”, in Eur. Parl. Doc. PVII\_TA(2011)0094 (2011), § 6.

72. VALCKE–PICARD–ZOTTO et al. 2015.

tion and funding initiatives under the Media and Audiovisual Action Plan<sup>73</sup>.

## 5. Conclusions

It is essential to conclude the legal foundation of the new Regulation. The EU appears to have utilised all available competencies to enhance the protection of media freedom across all Member States. The trend of broadly interpreting Article 114 TFEU is justified and in harmony with safeguarding vital freedoms necessary for ensuring democracy and upholding shared values in Europe. Despite some criticism, there is a substantial consensus among the Commission, the Council, and the Parliament on the need to strengthen EU authority in this field.

Regarding the Member States, two potential scenarios can be envisioned. The first scenario would unfold if they continue to accept the use of Article 114 TFEU as the legal basis for digital regulations. Should this occur, we could witness an erosion of state sovereignty alongside a corresponding strengthening of European technological sovereignty, which may facilitate advancements in the European integration process. However, it remains uncertain whether this outcome will materialise as anticipated. In addition to Hungary, some other countries may seek to challenge and annul future measures to enhance European digital sovereignty. In this sense, the answer of the CJEU will not be the final round but the starting point for the following political and judicial developments.

Against the odds, the EMFA aligns well with the emerging EU legal framework for digital

technologies<sup>74</sup>, whose cornerstone is the administrative structure for the Digital Single Market. The relationship between traditional and new media necessitates a novel approach to regulating the media market and highlights the need to harmonize this regulation with that of digital services and AI<sup>75</sup>.

Concerning specifically the new framework created for the Digital Single Market, a critical question arises: will the responsibilities and powers assigned to this new network of institutions and private entities effectively address the challenges related to freedom of expression across the EU?

This regulation has brought a novel institutional role for the Commission, establishing (in every sector) a network of administrative authorities that actively engages the Member States and private media industries and platforms. A serious question regarding the new framework is whether the responsibilities and powers assigned to this new network of institutions and private entities will effectively address the challenges of freedom of expression across the EU.

The positive answer to this question depends on the ability of all EU institutions to properly use EMFA in three directions: fostering an environment of freedom and opportunity for everyone, deploying technologies aimed at protecting the Digital Single Market from excessive dominance, and ensuring that the preservation of freedom of expression remains a primary goal of all economic activities within it.

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73. COLE-ETTELDORF 2023.

74. COLE 2024; PAOLUCCI 2023.

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