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The governance framework of the European Media Freedom Act

The present contribution deals with the governance framework of the recently adopted European Media Freedom Act (EMFA). After providing an introduction on the structures and mechanisms envisaged by previous European regulatory settings, from the 1989 Television without Frontiers Directive (TwFD) to the revised 2018 Audiovisual Media Services Directive (AVMSD), the article proceeds with an analysis of the governance and cooperative infrastructure designed for the new 2024/1083 Regulation, with a special focus on the measures designed for guaranteeing the independence of the actors involved, provided in Chapter III of the Act (Framework for regulatory cooperation and a well-functioning internal market for media services).

*EMFA – European Board for Media Services (EBMS) – National Regulatory Authorities (NRAs) – Independence
Institutional framework – Regulatory cooperation and convergence*

Il sistema di governance del Regolamento europeo sulla libertà dei media

L'articolo si propone di analizzare il sistema di governance del recente Regolamento europeo sulla libertà dei media (EMFA). Partendo da un'introduzione sulle strutture e i meccanismi istituiti attraverso le precedenti normative, dalla Direttiva Televisione senza frontiere del 1989 (TSF) alla revisione della Direttiva sui Servizi di Media Audiovisivi del 2018 (AVMSD), il contributo procede con un'analisi dell'infrastruttura di governance e di cooperazione che emerge dal nuovo Regolamento 2024/1083, con un'attenzione specifica alle misure volte a garantire l'indipendenza degli attori coinvolti, configurate nel Capitolo III del Regolamento (Quadro di riferimento per la cooperazione normativa e per il buon funzionamento del mercato interno dei servizi di media).

*EMFA – Comitato europeo per i servizi di media (EBMS) – Autorità indipendenti di regolamentazione (NRAs)
Indipendenza – Quadro istituzionale – Cooperazione e convergenza normativa*

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1. Introduction: the path towards a European framework for media services

On 7 May 2024, two years after the publication of the Proposal on September 16, 2022, the European Media Freedom Act (EMFA) was published in the Official Journal of the European Union¹. This new and sector-specific regulatory framework represents a turning point for media freedom and pluralism in the European Union, providing a new and relevant set of tools and safeguards.

While adopted in a relatively short period of time, the final text is the result of a process spanning more than three decades, characterised by an increasing convergence on technological, economic, and industrial aspects. This dynamic was soon addressed by the European institutions, which intervened with the adoption of the Television without Frontiers Directive (TwFD) in 1989².

Designed in a time when the transborder transmission of television programs was expanding through cable and satellite technologies, the Directive was aimed at protecting the free provision of television services in the internal market, while concomitantly harmonising a set of requirements linked to important public interest objectives³.

The unfolding potential and developments in the audiovisual sector in the following years prompted the European institutions to further evolve the regulatory framework. First amended in 1997, the TwFD was recodified in the 2007 Audiovisual Media Services Directive (AVMSD) and, subsequently, in its 2010 and 2018 versions. As a matter of fact, the AVMSD struck “a balance between promoting the free circulation of audiovisual content, protecting consumers, and upholding public policy objectives”⁴, coming to represent “a cornerstone of media policy at European level”⁵.

1. Regulation (EU) [2024/1083](#) of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act).
2. Council Directive [89/552/EEC](#) of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.
3. Another effort to harmonise the European television sphere was the European Convention on Transfrontier Television (ECTT), which entered into force in 1993. However, this was not “inspired by the EU’s free-market orientation”, but “embedded in the cultural policy tradition of the Council of Europe and sought to encourage the free flow of information”. See KATSIREA 2014.
4. BROGI-BORGES-CARLINI et al. 2023, p. 25 ss.
5. *Ivi*, p. 25.

This whole process, and the last two steps particularly, was characterised by the increased interplay of a wide range of institutional and non-institutional stakeholders, which accompanied the development of a pan European framework for the governance of the audiovisual media sphere. At the centre of the process were the national regulatory authorities (NRAs), entrusted with the national transposition of the EU Directives, and their cross-national harmonisation through the European Regulators Group for Audiovisual Media Services (ERGA).

Following the 2022 Commission Proposal for a European Media Freedom Act, this institutional architecture underwent significant innovation, both on the side of the governance structures and the cooperation mechanisms aimed at the supra-national coordination. This has ultimately matured into Chapter III of the new EMFA Regulation, and specifically in Section 1 (Independent Media Authorities), Section 2 (European Board for Media Services), and Section 3 (Regulatory Cooperation and Convergence).

Based on these crucial novelties, the aim of the present contribution is to analyse the governance design of the EMFA, with particular attention to the requirements of independence foreseen for the major actors involved. The article will proceed as follows: first, it will provide an analysis of the governance and cooperative mechanisms already defined in the 2018 AVMSD, while contextualising the role and characteristics of its major institutional players. Second, it will investigate the novelties foreseen in Sections 1-3 of Chapter III of the EMFA Regulation, dedicating special attention to the governance system of the newly-established European

Board for Media Services (EBMS). Third, it will highlight the main points of contention related to Chapter III that have emerged since the beginning of the legislative process, up to the adoption of the final text, opening a reflection on the side of independence and enforceability.

2. The governance structures of the revised AVMSD: Article 30 and the European Regulators Group for Audiovisual Media Services (ERGA)

The ultimate basis for the governance design of the European Media Freedom Act is Article 30 of the revised AVMS Directive. Located in Chapter XI (*“Authorities and Regulatory Bodies of the Member States”*), the article places the NRAs at the centre of the entire AVMSD structure, specifying their characteristics, their functions, and setting the framework for their cooperation⁶.

While the origins of Article 30 can be traced back to the 1990s, specific criteria for the independence of pan European architecture started to be postulated more clearly only in the late 2000s, especially in light of the emerging evidence of regulatory capture⁷ in some of the newer Member States, which had the potential to undermine the effective implementation of the Directive⁸. As a last step, the 2018 AVMSD provided that NRAs shall be “legally distinct from the government and functionally independent of their respective governments and of any other public or private body”, that they “shall exercise their powers impartially and transparently”, “shall not seek or take instructions from any other body”, and must be provided with “adequate financial and human resources and enforcement powers”⁹. As it will

6. Art. 30 (b) of AVMSD refers to “national regulatory authorities or bodies in the field of audiovisual media services with primary responsibility for overseeing audiovisual media services, or where there is no national regulatory authority or body, by other representatives as chosen through their procedures”. As such, a National Regulatory Authority may not necessarily coincide with a media authority.

7. Regulatory capture occurs when the regulatory agency aimed at regulating and protecting an industry in the public interest, is in turn subjected to commercial and political interference. The risk is the distortion of its supervisory power in favor of the interests of the industry which is supposed to be regulated. See STIGLER 1971.

8. A first discussion on independence began in 1998 following the European Commission’s “Oreja Report”; however, it was only with the 2005 Proposal for revising the TwFD that preliminary measures were suggested, while an explicit reference to “independent regulatory bodies” had to wait until the 2010 AVMSD. See OREJA 1998.

9. Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative

be further explained in the following paragraphs, these provisions were designed without prejudice to the power of Member States to define the procedures for the appointment and dismissal of the respective NRAs' Boards.

In terms of cooperation structures, Article 30 specifically built on the provisions of the Commission Decision of 3 February 2014¹⁰, which marked the establishment of the European Regulators Group for Audiovisual Media Services (ERGA). Designed as an advisory body to the European Commission (hereinafter, the "Commission") to face the cross-border distribution of audiovisual services and the challenges posed by on-demand ones, the setting up of ERGA constituted a significant step change, as it offered the systematisation of a new supranational governance structure aimed at fostering advice and cooperation between NRAs, as well as "a direct channel to the Commission and the chance to form common position and voice common concerns"¹¹. Notably, it also served to complement such a framework with a body provided with a different membership compared to both the Contact Committee inherited by the TwFD¹² and the European Platform of Regulatory Authorities (EPRA)¹³.

The creation of ERGA – the first output of which was, precisely, a study on the independence of NRAs¹⁴ – represented an essential passage towards the definition of Article 30 and the related

institutional framework. This ultimately resulted in a tripartite governance mechanism involving the European Commission, the Member States, and national regulators, with their confrontation being disposed of in two organisms: the Contact Committee, characterised by the participation of Government ministers or senior civil servants, and chaired by the Commission; and ERGA, composed of representatives of NRAs, with the Commission being downgraded from chair to participant in the meetings¹⁵.

3. Governance and cooperative structures of the European Media Freedom Act: Independent Media Authorities (Art. 7), The European Board for Media Services (Artt. 8-13), and Regulatory cooperation and convergence (Artt. 14-17)

As provided by Section 1¹⁶ of the European Media Freedom Act – hereinafter "the Act" – the application of Chapter III¹⁷ is conferred to the NRAs, whose definition activities are bound to the requirements already set out in Article 30 of the AVMSD.¹⁸ In addition, in the text it has been ensured that they are provided with "adequate financial, human and technical resources", along with the ability to request data and information that are "proportionate and necessary" for the tasks defined in Chapter III.

action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

10. Commission Decision of 3 February 2014 on establishing the European Regulators Group for Audiovisual Media Services, [C\(2014\) 462](#).

11. BROUGHTON MICOVA 2021, p. 279.

12. As per the TwFD and the subsequent AVMSD (Art. 29), the Contact Committee is participated by representatives of the national government ministries, which makes it unsuitable in terms of ensuring independence. See WOODS 2018.

13. In fact, EPRA Board Members "are not representatives of their respective authorities, but individuals elected through nomination, performing their duties on a philanthropic basis (...)". Moreover, "its statutes expressly prohibit the adoption of common positions or declarations". See CAPPELLO 2019, p. 15. Moreover, it has also to be underlined that EPRA is not only participated by EU Member States.

14. See ERGA 2015.

15. This is something to be considered as highly relevant in terms of ERGA's independence from both Member States, commercial interests, and the Commission. See WOODS 2018.

16. Independent Media Authorities, Art. 7.

17. Framework for regulatory cooperation and a well-functioning internal market for media services.

18. As already anticipated, Art. 30 (b) AVMSD does not exclude that an NRA could be an authority or body other than an audiovisual media regulator.

The structure, governance system, and core functions of the newly established European Board for Media Services (EBMS) are provided in Section 2 (Artt. 8 to 13), which restored most of the provisions foreseen by the 2014 Commission Decision on establishing ERGA, and the 2018 revised Directive. Article 8 establishes that the EBMS will replace and succeed ERGA through a targeted amendment of Directive 2010/13/EU (Art. 30b), while Article 9 (Independence of the Board) provides that it shall act in “full independence”, meaning “neither seek nor take instructions from any government, institution or body”. Compared to the AVMSD, Rules of Procedure will have to be adopted “in consultation” (and not anymore “in agreement”) with the Commission; importantly, these shall also include measures against conflicts of interest of the members of the Board.

The composition and governance of the EBMS are detailed by Article 10 EMFA (Structure of the Board). As well as in the case of ERGA, the Board will be composed of representatives of the regulatory authorities, and provided with one vote each for decisions to be deliberated in a two-third majority ballot¹⁹. The Chair and a Vice-Chair will be elected amongst the Board’s members, with the term of office of the Chair being of one year, renewable once. A representative of the Commission will be also designated, however without voting rights, while the Board “should be able to set up” a Steering Group, invite experts and (in agreement with the Commission) permanent observers to attend its meetings. Moreover, a Commission-based Secretariat aimed at administrative and organisational support is also to be established according to Article 11, along with a consultation mechanism (Article 12) with relevant representatives in the case of dealing with matters beyond the audiovisual media sector.

Article 13 (Tasks of the Board) lists the core functions of the Board. The EBMS shall provide technical expertise to the Commission, promote cooperation and the effective exchange of information, experience and best practices among NRAs.

Save for the cases where the Board can act on its own initiative – a relevant novelty, compared to the initial 2022 proposal – it shall provide opinions on technical and factual issues to be initiated upon request of, or delivered in consultation with, the Commission. Among others, opinions might concern measures that are likely to affect the internal market (such as, for example, media concentrations), cases of disagreement between NRAs, as well as national measures concerning media services from outside the Union.

Chapter III concludes with section 3, specifically dedicated to regulatory cooperation and convergence. It details procedural rules for structured cooperation and mutual assistance between NRAs (Art. 14), it regulates requests for enforcement of obligations of video-sharing platform providers (Art. 15) and defines the specific cases for which the Board shall assist the Commission for the issuing of guidelines (Art. 16). Notably, it also provides with specific provisions for the coordination of measures concerning media services from outside the Union that prejudice or present a serious and grave risk of prejudice to public security (Art. 17).

4. Reflections on the independence of the core institutional actors involved in the enforcement of EMFA

It can be argued that the above-mentioned provisions have positively boosted the institutional structures in support of a cooperative and independent pan European media framework. While confirming most of the AVMSD stipulations²⁰, EMFA offers a broadened scope of action, entrusting the newly-created EBMS with a wide-ranging set of competences which extend to printed press, online media, as well as to the relationship with online platforms (Article 18). Importantly, it also provides a detailed framework for cooperation and mutual assistance between NRAs, involving an accelerated procedure for particular cases²¹.

At the same time, the process and subsequent debate leading to the approval of the Regulation have unearthed significant problematic points,

19. Where a Member State has more than one national regulatory authority or body, a joint representative shall be elected.

20. Such as the requirements of independence for NRAs, the governance structures envisaged for ERGA, including the nomination system based on a two-thirds majority ballot, and the Commission-based Secretariat.

21. See Art. 14 (6) of the Act.

which from the initial proposal to the final text have found only limited solutions. For what specifically concerns the infrastructure defined in Chapter III, criticism was mainly expressed in relation to the independence of the EBMS from the Commission²², and the independence of NRAs from Member States²³, which might have consequences for the independence of the EBMS as well, and the effectiveness of the whole EMFA structure²⁴.

Regarding the first consideration, several stakeholders pointed to the cumbersome involvement of the Commission in both the design of the EBMS, its tasks, and the Secretariat. In fact, if considering the 2022 Proposal, the tasks were largely subjected to the request or the agreement of the Commission, implying potential leverage from its part²⁵. Besides, the Board was not provided with the right of initiative at its own discretion, whereas the Secretariat was designed as a Commission-based administrative branch, which also raised concerns²⁶.

Although in the final text the role of the Commission can be still considered rather relevant²⁷, some major adaptations have been provided. First, the Board's Rules of Procedures are now to be adopted "in consultation with the Commission", and not "on the Commission's proposal" like in the AVMSD, or "in agreement with" as per the EMFA initial text. Moreover, the agreement of the Commission, which in the Proposal was largely needed before any action to be poten-

tially undertaken by the Board, has been in general transformed into a requirement of consultation. This adds to the fact that the Board has been granted with the possibility to provide opinions on its own initiative²⁸, which is to be considered as a major improvement, compared to the initial proposal. Not least, Article 11(2) EMFA specifies that "the secretariat shall act on the sole instructions of the Board regarding its tasks under this Regulation", subsequently limiting the concern expressed against the Commission's leverage. In these terms, the final text appears certainly more balanced.

The second consideration to be developed here questions the sufficiency of the safeguards for the independence of NRAs, which might also affect the EBMS. As a matter of fact, the NRAs will be the core bodies for the implementation of the Regulation in the single EU countries: subsequently, their potential dependency on political power might negatively interfere with the implementation and effectiveness of the whole regulatory infrastructure. As argued by Bayer, "if an authority is captured, and serves the particular interests of a ruling government, as in illiberal systems, then these powers and resources serve that capturing power, and further aggravate the rule of law situation within the Member States, and on the affected media market. Their switchboard function threatens with the unintended result that instead of implementing the European principle of media freedom and pluralism at the national level, they

22. See ERGA 2022; COLE-ETTELDORF 2023; AER 2023; ARTICLE 19 2023.

23. See BAYER-CSERES 2023.

24. See CMPF 2023.

25. See EFJ 2023; ARTICLE 19 2023; COLE-ETTELDORF 2023.

26. As argued by COLE-ETTELDORF 2023, the Secretariat did not appear to be designed as a mere administrative support structure. In consequence of that, some of the stakeholders involved in the consultation process expressed their preference for an agency-based Secretariat. See CMPF 2023, ARTICLE 19 2022.

27. Consultation is requested for opinions related to cooperation between NRAs, requests for enforcement measures in the event of disagreement between NRAs, and national measures concerning media services from outside the Union. Moreover, the Board is asked for opinions upon request of the Commission, something that, according to Bayer, is to be considered as "a clear informal pressure on national measures". See BAYER 2024, p. 141.

28. The Board can opine on its own with respect to "regulatory or administrative measures which are likely to significantly affect the operation of MSPs in the internal market, in accordance with Article 21(4)"; "draft assessments or draft opinions of national regulatory authorities or bodies, in accordance with Article 22(5)"; "media market concentrations which are likely to affect the functioning of the internal market for media services, in accordance with Article 23(1)" (in such cases, the opinions can be initiated also at the request of the Commission or upon a duly justified and reasoned request of a media service provider that is individually and directly affected).

will either block the process or – even worse – one bad apple can put the whole barrel in danger”²⁹. The potential of these risks are corroborated by the results of the Media Pluralism Monitor (MPM)³⁰, evidencing how politically-compromised procedures for the governance and funding of NRAs can have a clear effect on the impartiality and effectiveness of their action. While the MPM indicator called “Independence and effectiveness of the national regulatory authorities” signals a low level of risk Europe wide, the 2024 MPM implementation outlined that one more country, Greece, enters the high-risk band for NRA’s independence, along with Hungary, Poland, and Turkey. Moreover, the most recent implementations of the MPM detected a deteriorating trend with specific regards to the independence of governance structures and procedures of the national media authorities.

In this context, it is essential to recall the process that led to the provisions for independence defined in Art. 30 of the AVMSD and, subsequently, in Art. 7 of the EMFA. As anticipated, the very first output of ERGA was a 2015 report on NRAs’ independence, based on a questionnaire answered by the same regulators. The report certified significant fragmentation across national systems on several dimensions related to NRAs’ independence (i.e., appointment procedures, the mandate of the Head of the Board, and incompatibility rules), and delineated some essential recommendations and

principles in light of the revision of the AVMSD³¹. However, the report also notably underscored the impossibility, at that time, to come up with an agreement on more specific safeguards for the 2018 AVMSD, implying that “the notion of independence is understood very differently among Member States”³². Moreover, Member States have proved, over the years, rather reluctant in further fine tuning the provisions for independence of the NRAs, recurring to their cultural competence³³. Hence, albeit the final text of the revised AVMSD has ultimately integrated some essential and innovative provisions, in these terms³⁴, more detailed and comprehensive considerations on incompatibility and procedures for appointments and dismissals were not included. Least of all, no reference to that is found in the Rules of Procedures that have been adopted in 2019 by ERGA in the aftermath of the revised Directive³⁵.

The point is relevant because EMFA, which formally updates the AVMSD, does not intervene as well in the internal governance of the NRAs. As a matter of fact, the provisions on conflict of interests that are to be defined in the forthcoming EBMS’ Rules of Procedure will shape the governance of the Board, but not the internal governance of national regulators, again granting to Member States a certain degree of discretion. Especially in national contexts where blatant regulatory capture has emerged, this might prove detrimental,

29. See BAYER 2024, p. 135.

30. The MPM is a risk-based assessment tool aimed at identifying the risks to media pluralism and media freedom in the 27 Member States of the European Union and the candidate countries.

31. Besides a generic reference that NRAs’ mandate should be free from conflict of interest, the final recommendations of the report clearly suggested that the institutional frameworks of Member States “shall” guarantee independence notably by “open and transparent nomination and appointment procedures; ensuring that the dismissal of the NRA’s Chair or Board Members is based on transparent and objective grounds as prescribed in the relevant law/regulation; introducing incompatibility and conflict of interest rules in their national laws”. See ERGA 2015, p. 62.

32. Notably, the report underlined that, “at least at [that] moment”, an agreement on the fact that appointment procedures should be open and transparent, was the highest level of harmonisation that could be achieved. Moreover, the answers to the questionnaire significantly highlighted that “a large majority of NRAs consider[ed] their procedures as “open and transparent”, even though in some cases political parties [were] clearly represented within the Board”. *Ibidem*.

33. See CAPPELLO 2019.

34. See preamble in recital 53 of the 2018 AVMSD, introducing the requirement of “functional independence”, complementing that of “formal independence”. However, no interpretation on what constitutes “functional independence” has been provided by the CJEU, so far. See also paragraph 5 of Art. 30 of the 2018 AVMSD.

35. See Rules of Procedure of the European Regulators Group for Audiovisual Media Services, ver. 10.12.2019.

as generic criteria could be easily circumvented by creating only formally compliant governance structures. Moreover, while it is expected that the requirements on financial support to NRAs as instated in Article 7 of the EMFA will support the NRAs' ability to deal with the increased competences and tasks, there might still be a chance for Member States to condition the activity of regulators based on the financial input that will be provided to them.

Therefore, an argument remains on whether an opportunity has been missed to update the AVSMD criteria in a way that would have ensured substantial independence, especially in light of the increased responsibilities entrusted to the NRAs. An extensive study on the NRAs' independence, similar to that compiled in the process of revision of the AVMSD, would certainly have been beneficial to re-evaluate the state of affairs for the media authorities at the EU level, while further exploring innovative solutions aimed at ensuring autonomy and independence.

5. Considerations on the Board and the national authorities' action under EMFA Art. 22

When it specifically comes to the ability of the Board and the NRAs to carry out the tasks entrusted to them by EMFA, one could consider the potential outcomes of the assessment of media market concentrations provided for by Article 22 EMFA, that requires a specific evaluation of the impact of media concentrations on media pluralism and editorial independence (the so-called "media plurality test").

In terms of institutional competences, the provision entrusts the assessment to the "independent media authorities" or "independent national bodies" "to which the Member States have already entrusted the function of 'National Regulatory Authority' (NRA) for the implemen-

tation of the (EU) Audiovisual Media Services Directive (AVMSD)"³⁶. This suggests that the bodies to be designated for such assessment will mainly be audiovisual regulators, although it is not excluded that Member States could assign the media plurality test to a National Competition Authority – especially in national cases where media regulatory bodies do not exist (i.e., Spain), or where Member States have already embedded the evaluation of media concentrations within the competition procedure. One should also not overlook the possibility that more than one media authority could be designated as responsible for carrying out such an assessment.

Albeit relevant research has underlined that NCAs have been "historically rather reluctant to take media plurality into account as per the *"unquantifiable metric of plurality"*³⁷, with EMFA the fact that a NCA, instead than a media authority, would be entrusted with such a task does not actually appear problematic, as far as the NCA in question proves its independence from external influences, and is able to execute the parallel procedures foreseen by Art. 22 EMFA, the national competition law, and Art. 21(4) of Regulation EC 139/2004³⁸. As to the possibility that more than one media authority would be entrusted with the media plurality assessment, this seems a rather unlikely case, given the well-established European audiovisual regulatory situation, and also if considering the national bodies already involved in the ERGA framework. Nonetheless, it has been highlighted as a potential contingency in the case of Poland, where the creation of the National Media Council has made unclear the attribution of competences vis-à-vis the National Broadcasting Council, also raising "possible structural conflict"³⁹.

With specific regard to the procedural design, it is worth analysing in detail how the media pluralism test relates to competition mechanisms. Based on EMFA Art. 22, it proves considerably

36. MANGANELLI-MARINIELLO 2024, p. 166.

37. PARCU-BROGI-VERZA et al. 2022, p. 241.

38. "Plurality of the media" was already part of the national legitimate interests that Member States could safeguard according to Art. 21(4) of Regulation EC 139/2004), although optionally. See PARCU-BROGI-VERZA et al. 2022. The combined reading of Art. 22 EMFA, Recital 66, and Art. 21(4) of Regulation EC 139/2004) suggests that the formerly optional clause for competition authority to consider plurality of the media, becomes binding. See COLE-ETTELDORF 2024.

39. See SZNAJDER 2023.

laborious to foresee the outcomes of a media market concentration in the case of conflicting results between the parallel media and economic assessments envisioned by the Regulation. It can be argued with certainty that a merger negatively affecting both media pluralism and competition will be prohibited by respective authorities, while a merger with positive effects in terms of pluralism, and not impacting competition rules, will be approved. Similarly, it can be safely assumed that a concentration that is approved by the media plurality test, but disapproved by the competition assessment, will be blocked – or subjected to conditions – by the competition authority. This has been, for example, the case of the takeover of Métropole Télévision (M6) by the Bouygues group, which ultimately withdrew the acquisition plan after the *Autorité de la Concurrence*, regardless of the positive assessment from the media regulator Arcom, imposed further conditions⁴⁰.

However, it is not straightforward what the outcome could be when a media concentration negatively affects media pluralism, and not competition⁴¹. While it is foreseen that the EBMS' peer review system will be activated⁴², the opinion to be deliberated by the Board remains non-binding, raising not only the question “on which procedure would ultimately prevail”, but also some reservation on the resolute power of the EBMS vis-à-vis such potential elements of conflictuality. Considering such a situation, Sznajder has argued that the whole process would likely result “in a return to status quo, where competition law and its economic assessment take precedence, no matter

what”, ultimately questioning the rationale behind the media pluralism test.

On a different line, Cole and Etteldorf have underlined that, in the case of divergent assessments, “it must be assumed that a merger can be prohibited independently of each procedure or made subject to conditions (without the EMFA itself specifying possible legal consequences)”. This would imply that media pluralism-related considerations will play a somewhat binding effect, as per the coactive role of Art. 22(1) subpara. 1 EMFA and Recital 66, and Art. 21(4) of the Merger Regulation.

In the final instance, the combined reading of such provisions suggests that media pluralism-related considerations could in any case block a merger affecting pluralism, regardless of a different outcome from the national competition procedure. Otherwise said, for a media market transaction to be approved, both the media plurality test and the competition assessment must be cleared. In such a context, one should also consider that authorities are requested to cooperate so as to ensure the objectives of the Regulation⁴³, while the EBMS is expected to play a major role in guiding any potential procedural conflictuality towards a positive resolution.

More certainty is instead detected when considering the specific national cases where the intervention of the Ministry is needed for the NRAs' decisions to take effect. As a matter of fact, EMFA Art. 22 will abolish the possibility of governmental intervention and ministerial override in media concentration and pluralism-related assessments, reserving it only to independent national authorities⁴⁴.

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40. See ARCOM 2022.

41. See SZNAJDER 2023.

42. The national regulators involved shall then take “utmost account” of the opinion of the Board, and provide a justification in case the opinion is not followed.

43. See by analogy European Court of Justice, *Judgment of the Court (Grand Chamber) of 4 July 2023, Meta Platforms Inc and Others v Bundeskartellamt*.

44. MANGANELLI-MARINIELLO 2024.

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