Proposal for a European Media Freedom Act

Statement

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in general: lack of EU`s competence

- Admittedly: legal issues of legislative competence are often difficult, article 114 TFEU is far-reaching in favour of the EU`s competence
- But: in the case of EMFA remarkably unanimous position in Germany of scholars, stakeholders, parliament and Länder – **and me** –: this **proposal intrudes too far into the domain of media regulation of Member States**!
- Political background, explicit goals of the proposal and content of most provisions show: The **main purpose of EMFA is to ensure independence and plurality of media**; removal of obstacles in the internal market is not in the main focus
- Undoubtedly: EMFA means a **revolutionary extension of EU`s competence** to the area of core media regulation
- Problems for the cross-border economy in the internal market are not substantiated and if at all only convincing with regard to a few provisions
- Therefore: The **internal-market argument** to justify competence seems **pretextual**
- Particularly problematic: **Articles 3, 4, 5, 6, 21, 22** EMFA-Proposal

→ **Please consider rejecting the Proposal in total, at least: need for adjustment of most provisions**

in particular: Article 5 – public service media providers

- Public service regulation is clearly **not within the scope of internal market competence**
- Entrustment of public service media providers is a **matter for the member states**, bound under EU law only to the conditions of **state aid law** (article 107, 106 para. 2 TFEU)
- By virtue of their function and legitimation, **public service** media providers **do not operate in cross-border competition in the internal market**
- The function, independent organization and financing of public broadcasting are subject to requirements of fundamental rights (esp.: Art. 10 ECHR, see the ECtHR cases Centro Europa and Manole); however, **fundamental rights do not establish legislative competence of the EU** (Article 51 Charter of Fundamental Rights)
- Article 5 provides for **detailed organizational rules** that even go beyond the very sophisticated German institutional framework for public broadcasters (esp. para. 4)

in particular: Article 6 para. 2 – independence of individual editorial decisions

- The **relationship between journalists and owners** (or editors-in-chief) is a **classic and since ever disputed matter for Member State press and media law** to reconcile the fundamental rights positions of both sides ("innere Pressefreiheit"): it has **little, if any, relation to the internal market**
- → **no legislative competence of the EU**

- The meaning of article 6 para. 2 lit a) is **unclear** (and is not clarified in a legally binding way by the Recommendation 2022/1634) :

➢ what does "freedom" of editors exactly mean and what remains of the **right of the owners to determine the publicistic profile of the service** ("Tendenzschutz") which enjoys protection under German constitutional law?

in particular: Article 21 – concentration control

- specific and additional **media concentration control regimes of the german type** (formerly § 26 *Rundfunkstaatsvertrag*, now § 60 *Medienstaatsvertrag 2020*) are, according to their ratio, precisely not regulations to ensure fair conditions of competition, as Antitrust law is
- By following this type and explicitly aligning the evaluation of concentrations not with the economic standards of antitrust law, but with the **goals of media pluralism and editorial independence**, Article 21 is, according to its purpose, a **media law regulation par excellence**, **not economic law**
- → **no legislative competence of the EU!**
- Whether specific media concentration control beyond antitrust law is necessary is **highly controversial**, even in Germany with its intensive broadcasting regulation; this **question should not be decided by binding EU requirements**

in particular: the provisions on regulatory authorities (Chapter III, sect. 1-3)

- A dubious approach: **comprehensive administrative control** of the media **to counteract excessive state influence** in some member states
- One of the hallmarks of freedom of the press: **the press** has long **been free from regulatory control**, this should not be abandoned now (but see Article 7 para. 4)!
- In particular, the Commission's control powers are **incompatible with German constitutional requirements** (guaranted **independence of the media from State or EU authorities**)

Directive instead of regulation?

- Question of the type of legislation (directive or regulation) seems sometimes **overestimated**
- A simple switch to the type of a directive **does not solve any competence problem**!
- Subsidiarity: A Directive spares member state competences only if it is **not aimed at full harmonization**, but is associated with **room for maneuver in implementation**
- Being a **regulation of the "mixed or hybrid" style** (with directive-like provisions) EMFA produces **unfavourable uncertainties** (what provision is self executing, how far complementary regulation of Member states is allowed?)
- Either way: secondary legislation results in the application of EU fundamental rights (Art. 51 Charter) and the **jurisdiction of the European Court of Justice** in key areas of media law → Is this politically desired?

Conclusion

- Frankly spoken: **The EU should refrain from this legal act** for reasons of (lacking) competence and substance
- In any case: **Fundamental revision of proposed regulation required** due to (at least) partial exceeding of competence
- Revision of at least the following rules:
  - Art. 3, 4 EMFA-D
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  - Art. 6 EMFA-D
  - Chapter III Section 1-3 EMFA-D
  - Art. 21, 22 EMFA-D

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