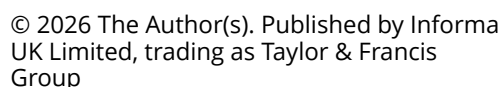


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European Media Freedom Act: can it stop the democratic backsliding?

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ABSTRACT

The introduction of the European Media Freedom Act was designed to protect media freedom across Europe at a time when it is under threat from autocratic states. Despite its introduction, however, there are a number of issues with the Act and concerns from civil society organisations that it will be unable to improve media freedom across Europe and, in some cases, it may actually weaken protections. This article examines specific Articles of the Act and emphasises how there are issues with the protections afforded to journalists/ism. In particular, the article focuses on: who is defined as a journalist; confidentiality of sources; protection of journalists against surveillance; and the role of Very Large Online Platforms (VLOPs) in the spread of mis/disinformation.

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KEYWORDS Media freedom; journalism safety; European Media Freedom Act; freedom of expression; democratic decline

Introduction

The European Union (EU) recognises the important role that media freedom plays across the region, stating that ‘true democracy is not possible without a free media scrutinising those in power’.¹ In the European Commission’s 2022 ‘Rule of Law Report’, they noted that there had been numerous challenges to the rule of law, including the COVID-19 pandemic which ‘tested the resilience of national systems in upholding the rule of law in time of crisis’ and ‘Russia’s unprovoked and unjustified military aggression against Ukraine and its people constitutes a direct challenge to EU values ... it

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¹European Union, ‘Media Freedom in the EU’ (2025) <www.consilium.europa.eu/en/policies/media-freedom-eu/>.

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grossly violates international law ...² The Council of Europe's 2024 Europe Press Freedom Report also acknowledged that media freedom across Europe was under threat, stating that in the 'Super-Year of Elections', 'electoral gains by parties known for their illiberal ideologies – and their accompanying hostility toward the press – pose a significant threat to the coalitions that have traditionally championed media freedom and pluralism within the European Union and the Council of Europe'.³ In addition to this, media capture is a prominent issue, with state and political parties controlling the media through various methods, such as via regulatory interference or ownership and financial pressure.⁴ Moreover, the 2024 Media Pluralism Monitor Report (MPM) found that the rapidly changing media landscape has made a notable impact on the working conditions and safety of journalists and media workers across the EU and its candidate countries.⁵ The MPM measures the 'risks to media pluralism in both EU Member States and in candidate countries'.⁶ The Member States and candidates are assessed on four key dimensions of media pluralism: fundamental protection; market plurality; political independence; and social inclusiveness. Amongst others, the MPM report found that the EU and candidate countries face threats of legal, political and economic natures.

Threats to media freedom across Europe are well-documented and, because of this, journalists face a wide range of attacks in their work. For example, the use of spyware and surveillance, which risks source confidentiality, has been raised as a particular concern for journalists in certain European countries.⁷ In addition to this, Strategic Lawsuits against Public Participation (SLAPPs) have been noted as another issue, alongside restrictive legislation, to try to shut down public interest reporting.⁸ On a more personal level, online harassment, which, in turn, can escalate into offline attacks, has been on the rise across Europe in a number of countries, which can result in self-censorship and, in some instances, led journalists to consider leaving the profession to protect themselves.⁹ Journalists'

²European Commission, '2022 Rule of Law Report: The Rule of Law Situation in the European Union' (13 July 2022) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0500>>.

³Council of Europe, 'Europe Press Freedom Report. 2024: Confronting Political Pressure, Disinformation, and the Erosion of Media Independence' (2025).

⁴*ibid.*

⁵Konrad Bleyer-Simon, Elda Brogi, Roberta Carlini, Danielle Da Costa Leite Borges, Jan Kermer, Iva Nenadic, Marie Palmer, Pier Luigi Parcu, Urbano Reviglio, Matteo Trevisan, Sofia Verza and Maria Žuffová, 'Monitoring Media Pluralism in the Digital Era: Application of the Media Pluralism Monitor in the European Member States and in Candidate Countries in 2023' *EUI Centre for Media Pluralism and Media Freedom* (27 June 2024) <<https://cadmus.eui.eu/server/api/core/bitstreams/6d04d9d3-89be-5cd7-b943-582b8500dc63/content>>.

⁶*ibid.*

⁷*ibid.*

⁸*ibid.*

⁹Avery E Holton, Valérie Bélair-Gagnon, Diana Bossio and Logan Molyneux, "'Not Their Fault, but Their Problem": Organizational Responses to the Online Harassment of Journalists' (2021) 17 *Journalism*

friends and families have also been on the receiving end of online threats.¹⁰ Typically, women journalists are more at risk than their male counterparts and are subject to threats pertaining to sexual assault and murder.¹¹ Additionally, journalists often find themselves without support, with it being noted in some cases that employers have told journalists to ‘toughen up’.¹² Not only do journalists face online harassment and threats to their safety, but they may also experience physical violence. For example, there are multiple cases of journalists being attacked while covering political protests across the European Union.¹³ According to a briefing by the European Parliamentary Service, journalists covering crime, corruption and human rights issues have been killed because of their work.¹⁴ The same briefing also states that 70% of environmental journalists have experienced threats or violent attacks due to their profession. This demonstrates how journalists working within the EU are increasingly at risk, and that their attackers could be fuelled by populist ideas, resenting the critical voices of independent journalism.¹⁵

Attempts have been made to try and tackle these issues, including through the adoption of the EU anti-SLAPP Directive and the adoption of the Council of Europe’s ‘Recommendation on countering the use of strategic lawsuits against public participation (SLAPPs)’.¹⁶ This has started to gain momentum across Europe, with Belgium being ‘one of the first EU-countries where a proposal of a model law has been elaborated, providing a solid basic text for an initiative by government and parliament for the transposition of the anti-SLAPP Directive’.¹⁷ Some countries have already begun implementing the Directive, for example, as is the case in Belgium:

With its model law, the Belgian anti-SLAPP working group aims first and foremost to help ensure timely transposition of the Directive, at the same time following up on the Recommendations of the Council of Europe and the European Commission, which have a broader scope of application than the Directive.¹⁸

Practice 859; Seth C Lewis, Rodrigo Zamith and Mark Coddington, ‘Online Harassment and Its Implications for the Journalist-Audience Relationship’ (2020) 8 *Digital Journalism* 1047.

¹⁰Ricki-Lee Gerbrandt, ‘Media freedom and Journalist safety in the UK Online Safety Act’ (2024) 15 *Journal of Media Law* 179.

¹¹Susana Sampaio-Dias, Maria João Silveirinha, Bibiana Garcez, Filipa Subtil, João Miranda and Carla Cerqueira, ‘“Journalists are Prepared for Critical Situations ... but We are Not Prepared for This”: Empirical and Structural Dimensions of Gendered Online Harassment’ (2023) 18 *Journalism Practice* 301.

¹²Gerbrandt (n 10) 187; Holton and others (n 9).

¹³Micaela Del Monte and Titouan Faucheux, ‘Protection of Journalists in the European Union’ *European Parliamentary Research Service* (November 2024) <[www.europarl.europa.eu/RegData/etudes/BRIE/2024/766244/EPRS_BRI\(2024\)766244_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/766244/EPRS_BRI(2024)766244_EN.pdf)>.

¹⁴*ibid.*

¹⁵*ibid.*

¹⁶Recommendation CM/Rec(2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation (SLAPPs), 5 April 2024.

¹⁷Dirk Voorhoof, ‘Belgium: A model for the Transposition of the EU anti-SLAPP Directive’ *The International Forum for Responsible Blog* (12 February 2025) <<https://inform.org/2025/02/12/belgium-a-model-for-the-transposition-of-the-eu-anti-slapp-directive-dirk-voorhoof/>>.

¹⁸*ibid.*

As the Council of Europe's Press Freedom Report of 2024 states, 'these measures have fostered a more favourable environment for protecting press freedom and ensuring journalists' safety; however, implementation at the national level remains inconsistent and, in many cases, has yet to commence'.¹⁹ The European Media Freedom Act, as Seipp et al. noted, was initially welcomed by journalists, academics and civil society organisations who hoped that it would defend media freedom and promote pluralism in Europe.²⁰ As Tambini also noted, the EMFA provided the chance to 'create a new set of media privileges and protections not only against manipulation by authoritarian governments, but against arbitrary treatment by tech platforms'.²¹ In their impact assessment, the European Commission noted that the EMFA could play a role in 'establishing a common framework for media services in the internal market'.²² Indeed, they focused on the important role that media services play in the internal market and how this role was under threat:

... the internal media market is not sufficiently integrated. Over the last years, Member States have adopted various national rules related to media pluralism, such as rule to examine the effect of market transactions on media pluralism. While this is a legitimate public interest, divergent approaches at the national level, tailored only to local contexts, have created fragmentation in the internal market, causing legal uncertainty and increasing compliance costs for media companies. Uncoordinated national rules and discriminatory practices make it difficult for media market players to operate and expand across borders.²³

Despite the aim of the EMFA being to improve media freedom across Europe, prior to its passing the draft Act was subject to numerous concerns, such as: not protecting journalists and their sources from spyware; having a narrow definition of who is considered a journalist or media service provider and therefore questioning if some individuals might not benefit from the protection of the EMFA; and the level of power that online platforms might have in removing content'.²⁴

¹⁹Council of Europe (n 3) 11.

²⁰Theresa Seipp, Ronan Ó Fathaigh and Max van Drunen, 'Defining the "Media" in Europe: Pitfalls of the Proposed European Media Freedom Act' (2023) 15 *Journal of Media Law* 39.

²¹Damian Tambini, 'The EU is Taking Practical Measures to Protect Media Freedom. Now We Need Theory' *Centre for Media Pluralism and Media Freedom* (9 May 2023) <<https://cmpf.eui.eu/the-eu-is-taking-practical-measures-to-protect-media-freedom-now-we-need-theory/>>.

²²European Commission, 'Commission Staff Working Document Impact Assessment Report: Proposal for a Regulation of the European Parliament and of the Council' *European Commission* (2022) <<https://digital-strategy.ec.europa.eu/en/library/european-media-freedom-act-impact-assessment>>.

²³*ibid.*

²⁴Seipp and others (n 20); MZ van Drunen, C Papaevangelou, D Buijs and R Ó Fathaigh, 'What Can a Media Privilege Look Like? Unpacking Three Versions in the EMFA' (2023) 15 *Journal of Media Law* 152; Dirk Voorhoof, 'Will the EU Media Freedom Act (EMFA) be Able to Strengthen the Protection of Journalistic Sources?' (2023) 28 *Communications Law* 16; Jan Erik Kermer, 'Article 4 of the European Media Freedom Act: A Missed Opportunity?: Assessing Its Shortcoming in Protecting Journalistic Sources' in Kaloyan Simeonov and Mariya Yurukova (eds), *Papers from the Eleventh International*

While some of these concerns were addressed during the drafting of the EMFA, there are still some areas of the Act that could be strengthened to enhance the protections offered to journalists and media freedom across Europe. The aim of the EMFA is relatively simple: it seeks to improve media freedom across Europe. However, there are Articles within the Act that may hinder it from achieving this goal and, in some cases, have the potential to negatively impact media freedom and put journalists and their sources at risk.

This article will examine particular issues, including: the protection of journalistic sources; the definition of who is considered a journalist; and the role that Very Large Online Platforms (VLOPs) might play in moderating content. It will examine the issues that were raised at the draft EMFA stage, how changes were implemented and what particular issues remain with the Act. The article will also examine these key features and consider how well they address the issues raised within this introduction, including journalists' safety, editorial independence and the threat to public interest reporting. While the Act is a necessary step towards protecting media freedom and journalists' safety across Europe, this article will shed light on how it might not be able to achieve its objective.

Defining a media service provider

Under the EMFA, the phrase 'media service provider' is used throughout the Act. However, prior to the adoption of the EMFA, there had been concerns that the definition was too narrow, as there were questions surrounding who it would actually protect.²⁵ The EMFA thus defines 'media services' as follows:

'media service' means a service as defined by Articles 56 and 57 TFEU, where the principal purpose of the service or a dissociable section thereof consists in providing programmes or press publications, under the editorial responsibility of a media service provider, to the general public, by any means, in order to inform, entertain or educate.²⁶

Media service provider is then defined as a 'natural or legal person whose professional activity is to provide a media service and who has editorial responsibility for the choice of the content of the media service and determines the manner in which it is organised'.²⁷ Initially, the Act had the potential to exclude those who may not be considered a traditional media service, such as bloggers, and it 'faced criticism for its focus on media service

Scientific Conference of the European Studies Department: The Agenda of the New EU Institutional Cycle (Wilfried Martens Centre for European Studies 2024) 197.

²⁵Seipp and others (n 20).

²⁶Article 2(1) European Media Freedom Act 2024.

²⁷Article 2(2) European Media Freedom Act 2024.

providers, which arguably only includes professional media organisations, rather than freelance journalists'.²⁸ This would have been out-of-step with the European Court of Human Rights (ECtHR), which has often ascertained that freelance journalists and bloggers warrant protection.²⁹ The European Parliament responded to these criticisms, and the Act now recognises those who work in 'non-standard forms of employment, such as freelancers',³⁰ which is in line with judgements from the ECtHR.

This is an important development as the Court has recognised the important 'public watchdog' role that journalism can play in society and how this role has changed over time.³¹ While this role might have once been played predominantly by journalists and the press, this is changing and is now being played by others, such as bloggers, vloggers and even influencers. For example, there is growing literature and research to suggest that younger generations are increasingly turning to social media sites, such as *TikTok* and *Instagram*, for their news.³² In its 2024 'Online Nation Report', the Office for Communications (Ofcom) found that 72% of 18–24-year-olds spent on average an hour per day on *TikTok* and *Snapchat*.³³ The ECtHR has even acknowledged that other actors, such as websites,³⁴ campaign groups³⁵ and blogs, should also be afforded protection under Article 10 of the European Convention on Human Rights (ECHR) as they often contribute to public interest journalism:

The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (see *Delfi AS v Estonia* [GC], no. 64569/09, § 133, ECHR 2015), the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article is concerned.³⁶

Bringing the EMFA in line with case law is, as van Drunen et al. note, 'consistent with human rights standards'.³⁷ The widening of the definition of media service provider was a welcome change during the drafting of the

²⁸van Drunen (n 24) 157–58.

²⁹*Magyar Helsinki Bizottság v Hungary* (2020) 71 EHRR 2.

³⁰Recital 19 European Media Freedom Act 2024.

³¹*Couderc and Hachette Filipacchi Associés v France* [2016] EMLR 19 [101]; *Mosley v UK* (2011) EHRR 30 [112].

³²Jonathan Hendrickx, "'Normal News is Boring': How Young Adults Encounter and Experience News on Instagram and TikTok' [2024] > New Media & Society <<https://doi.org/10.1177/14614448241255955>>; Chelsea Peterson-Salahuddin, 'News for (Me and) You: Exploring the Reporting Practices of Citizen Journalists on TikTok (2023) 25 Journalism Studies 1076.

³³Office for Communications (Ofcom), 'Online Nation 2024 Report' (28 November 2024) <www.ofcom.org.uk/siteassets/resources/documents/research-and-data/online-research/online-nation/2024/online-nation-2024-report.pdf?v=386238>.

³⁴*Cengiz and Others v Turkey* App nos 48226/10 and 14027/11 (ECHR, 1 December 2015) [51].

³⁵*Steel and Morris v UK* [2005] EMLR 314.

³⁶*Magyar Helsinki Bizottság v Hungary* (2020) 71 EHRR 2 [168].

³⁷van Drunen (n 24) 158.

EMFA. However, there are still aspects of the Act that remain unclear. As Tambini has stated, there are concerns with granting the media special privilege, particularly with the definition that has been provided under Article 2(2). As acknowledged above, a media service provider is defined as ‘a natural or legal person whose professional activity is to provide a media service *and* who has editorial responsibility’. However, as Tambini has stated, the meaning of the word ‘professional’ is ambiguous:

It may be the case that ‘professional’ is intended to mean subject to an ethics code, but on the face of it professional is likely to be understood to mean those working for payment, particularly as these definitions will be interpreted in the first instance by platforms, who will look for a simple and easily automatable definition.³⁸

A particular issue with this could be that there are individuals who blog and are not paid for the work that they do. For example, Kaufhold et al’s definition of citizen journalism is

Citizen journalism is defined by a number of attributes which make it distinct from professional journalism, including unpaid work, absence of professional training, and often unedited publication of content, and may feature plain language, distinct story selection and news judgment, especially hyper-local issues, free accessibility, and interactivity.³⁹

Nonetheless, this would arguably be out-of-step with judgments from the ECtHR.⁴⁰ The role that citizen journalists play in society has increased and, in some cases, has become ‘professionalised’ and contributes to the public sphere, and in these instances, there have been debates surrounding if these individuals should be considered media.⁴¹

Alongside payment being a particular issue, another issue that could arise surrounds the notion that professional journalists have received professional training in many cases, while citizen journalists may not have received such training. This can be exclusionary towards those producing local media content, traditionally known as community journalism.⁴² Community journalists may not have formal journalistic education, but their work is still produced in an editorial space, with a close connection to the community that they produce news for. For example, in 2023, the Norwegian Union for Journalists’ trade magazine *Journalisten* stated that only 12% of editors in Norwegian local newspapers think it is important for their staff to have studied

³⁸Tambini (n 21).

³⁹Kelly Kaufhold, Sebastian Valenzuela and Homero Gil de Zúñiga, ‘Citizen Journalism and Democracy: How User-Generated News Use Relates to Political Knowledge and Participation’ (2010) 87 *Journalism & Mass Communication Quarterly* 515, 517.

⁴⁰Joanna Szegda and Grzegorz Tylec, ‘The Level of Legal Security of Citizen Journalists and Social Media Users Participating in Public Debate. Standards Developed in the Jurisprudence of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ)’ (2022) 47 *Computer Law & Security Review* 47; Cengiz and Others (n 21) [52].

⁴¹Peter Coe, *Media Freedom in the Age of Citizen Journalism* (Edward Elgar 2021).

⁴²Bill Reader and John A Hatcher (eds), *Foundations of Community Journalism* (Sage 2012).

journalism at school or university.⁴³ Still, a person receiving payment for working in community journalism could be classified as a professional through the criteria for income, but may not be counted as a professional if the criteria for education and training are prioritised.

The word 'professional' itself raises complex issues. It could be argued that the training someone has had and whether or not they are paid for their work should be considered irrelevant. For example, values, standards and ethics should be the basis of what is considered 'professional'. Someone could be a paid journalist with journalistic training, but they may engage in sub-standard, unethical journalism, whereas another individual might not be paid, but is considered 'professional' in their conduct. For example, while Coe discusses this in relation to the Online Safety Act 2023 in the United Kingdom, the fact remains that this is a pertinent issue in Europe too:

The fact that 'trusted' mainstream media publish what may be false information serves to justify and support the false information, thereby creating a self-fulfilling and insidious cycle. This situation has not been helped in recent years by the state of the press industry, which has led to an almost perma-state of 'hyperactivity'. This 'faster and shallower corporate journalism', which necessitates the need for newspapers to provide news 24 hours-a-day across multiple platforms, combined with fewer journalists, and an increasing reliance on clickbait and sensationalist headlines to generate clicks and advertising revenue, has encouraged churnalism, which leads, in some cases, to 'fast and loose' journalism that sees professional values in more mistakes, including the inadvertent dissemination of false information.⁴⁴

As will be acknowledged in the following section, in many cases, editorial independence is challenged, and journalists are often used by the state to publish information they want published. In these cases, can one argue that this is professional journalism? Certainly, there are numerous issues with the word 'professional' in the EMFA, and this is something that needs exploring and discussing in further detail before clarification is offered.

Editorial independence

The principal aim of the EMFA is to protect media freedom, and one way of doing this is by trying to ensure editorial independence, particularly so in an era when certain governments are attempting to use the media to broadcast state propaganda, as we have seen happen in Poland and Hungary.⁴⁵ As the European Commission noted in its impact assessment, 'journalists cannot

⁴³Morgane Fauconnier, 'LLA: – Å jobbe i lokalavis skal ikke føles som et steg tilbake i karrieren' *Journalisten* (25 April 2023) <www.journalisten.no/a-jobbe-i-lokalavis-skal-ikke-foles-som-et-steg-tilbake-i-karrieren/569547>.

⁴⁴Peter Coe, 'Tackling Online False Information in the United Kingdom: The Online Safety Act 2023' (2023) 15 *Journal of Media Law* 213, 217.

⁴⁵Leonor Tavares, 'European Media Freedom Act' *Institute for European Policy* (12 December 2022) <www.europeum.org/en/articles-and-publications/blog-european-media-freedom-act/>.

work freely in the internal market when they face political or undue commercial pressure concerning the media content they produce'.⁴⁶ Editorial independence can be influenced by commercial pressures. In some states, governments fund the media, but allow them to maintain their independence. As van Drunen et al. have stated, *Euronews*' channel is labelled by *YouTube* as being 'funded in whole or in part by the European Union'.⁴⁷ Additionally, 'in Malta, the two main political parties have their own television stations; while in Germany, some political parties are shareholders of newspapers, but prohibited from holding broadcast licences'.⁴⁸

The EMFA does recognise that funding may come from the state, but this does not necessarily have to jeopardise editorial independence. For example, in Norway, press subsidies have been used to fund the press⁴⁹ and Norway's press freedom is consistently ranked as being the best in the world.⁵⁰ Indeed, Article 5 focuses on the safeguards for the independent functioning of public service media providers.⁵¹ It states that these media shall still be given protections so long as their funding procedures 'are based on transparency and objective criteria laid down in advance'.⁵² Additionally, appointments of board members of public service media 'shall be appointed on the basis of transparency, open, effective and non-discriminatory procedures and transparent, objective, non-discriminatory and proportionate criteria laid down in advance at the national level'.⁵³ Despite this, however, these requirements cannot be enforced, and therefore, the impact of the EMFA in protecting media freedom is unlikely to be achieved.

For example, if Hungary is used as a case study, Barrett has noted: 'While the EMFA seeks transparency in appointment processes, it does not carry any mechanism for fully ensuring nonpartisan government-appointees in regulatory bodies – nor could it, given appointees are determined at the Member State level'.⁵⁴ Nearly 90% of all Hungarian media was already 'directly or indirectly controlled' by the Fidesz Party, and the appointments of the editorial boards are 'entirely transparent and outlined in Hungarian law', but the appointees are nearly always from a pro-Fidesz background.⁵⁵

⁴⁶European Commission (n 22).

⁴⁷van Drunen (n 24) 159.

⁴⁸*ibid.*

⁴⁹Mikko Grönlund, Mikko Villi and Marko Ala-Fossi, 'Press Subsidies and Business Performance of Newspaper Publishing in Three Nordic Media Welfare State' (2024) 12 *Media and Communication* Article 7570.

⁵⁰United Nations, 'Nordic countries top the Press Freedom Index' *United Nations* (2024) <<https://unric.org/en/nordic-countries-top-the-press-freedom-index-2/#:~:text=Three%20Nordic%20countries%20%E2%80%94%20Norway%2C%20Sweden,dominate%20the%20first%20ten%20seats>>.

⁵¹Article 5 European Media Freedom Act 2024.

⁵²Article 5(3) European Media Freedom Act 2024.

⁵³Article 5(2) European Media Freedom Act 2024.

⁵⁴Henry Barrett, 'Evading the European Media Freedom Act: Examining Public and Private Control of Media Organs in Hungary and Italy' *European Law Blog* (19 July 2024) <www.europeanlawblog.eu/pub/h2panrr8/release/1>.

⁵⁵*ibid.*

As a result of this, Hungary has become a prime example of a non-compliant Member State and, according to the European Parliament, has become a hybrid autocratic regime.⁵⁶ The introduction of the EMFA is unlikely to reverse this trend. While the introduction of the European Board for Media Services aims to oversee the implementation of the EMFA, this is futile according to Barrett, as ‘the Board, however, would be composed of respective Member State national regulatory authorities, effectively legitimizing the Hungarian media’.⁵⁷

Article 5(1) also requires private media to publicly disclose their ownership and structure, but in the case of Hungary, the Prime Minister’s allies have a monopoly over the private media, and this is known by the citizenry, yet ‘their outsized power over private media will not change with simple audience knowledge of the ownership of these companies’.⁵⁸ This is then used to the government’s advantage as they are given favourable publicity. For example, in 2022 Orbán delivered a 30-minute speech criticising his opposition.⁵⁹ This speech was broadcast a total of nine times in the span of 24-hours on the TV channel M1, whereas the opposition leader, Péter Márki-Zay, received just five minutes of screen time.⁶⁰ Indeed, the European Commission noted that the investment environment in Hungary has become increasingly hostile, with foreign companies leaving, and now there is a heavy consolidation of pro-government media.⁶¹ However, these known problems are unlikely to change because ‘the legal framework [in Hungary] suggests adherence to EMFA standards, [but] the execution of these laws demonstrates a departure from their core principles, reflecting a broader trend of governmental control over media regulation’.⁶² And the main worry is that it is not just Hungary where this is found to be an issue; however, as other countries, including Romania,⁶³ Slovakia⁶⁴ and

⁵⁶News European Parliament, ‘MEPs: Hungary Can No Longer be Considered a Full Democracy’ *News European Parliament* (15 September 2022). <www.europarl.europa.eu/news/en/press-room/20220909IPR40137/meps-hungary-can-no-longer-be-considered-a-full-democracy>.

⁵⁷Barrett (n 54).

⁵⁸*ibid.*

⁵⁹Jennifer Rankin and Flora Garamvolyi, ‘Hungary: Where Editors Tell Reporters to Disregard Fact Before Their Eyes’ *The Guardian* (2 April 2022) <www.theguardian.com/world/2022/apr/02/hungary-independent-media-editors-reporters-orban>.

⁶⁰*ibid.*

⁶¹European Commission (n 22).

⁶²Robert Nemeth, ‘Media Capture Monitoring Report: Hungary. Measuring Compliance with the European Media Freedom Act’ *International Press Institute and Media & Journalism Research Center* (November 2024) <<https://ipi.media/wp-content/uploads/2024/11/Hungary-Media-Capture-Monitoring-Report-Final-1.pdf>>.

⁶³Liana Ganea and Razvan Martin, ‘Media Capture Monitoring Report: Romania. Measuring Compliance with the European Media Freedom Act’ *International Press Institute and Media & Journalism Research Center* (October 2024) <<https://ipi.media/wp-content/uploads/2024/10/Romania-Media-Capture-Monitoring-Report.pdf>>.

⁶⁴Peter Hanák, ‘Media Capture Monitoring Report: Slovakia. Measuring Compliance with the European Media Freedom Act’ *International Press Institute and Media & Journalism Research Center* (November 2024) <<https://ipi.media/wp-content/uploads/2024/11/Slovakia-Media-Capture-Monitoring-Report-2.pdf>>.

Greece,⁶⁵ all legally comply with the EMFA, but their news outlets suffer from a lack of editorial independence. In Poland, Orbán's playbook is also being replicated, with the Law and Justice (PiS) voted into government in 2015 and passing a new law allowing for more control over state-run media outlets and subsidising pro-government media through overly generous financial support.⁶⁶

Editorial independence is often cited as being of the utmost importance, but 'complete' editorial independence is neither possible nor desirable. The media have always had to rely on others to fund journalism, access information, and implement technology.⁶⁷ There is a vast body of scholarship discussing the importance of editorial independence and how this can be threatened by numerous factors, such as the relationship between the media and the state, which can impact legislation that protects journalism or funding opportunities.⁶⁸ Nonetheless, Article 10 ECHR imposes a positive obligation on states to protect editorial independence.⁶⁹ However, the EMFA will struggle to achieve this in countries where editorial independence and journalistic autonomy have already been severely eroded, such as in Hungary. The European Commission knows that this is an issue, and the passing of the EMFA was designed to try to counter this by facilitating free provision of quality media services in the internal market. In particular, they stated that:

The objective is to ensure that consumers and businesses benefit from trustworthy content provided by independent media in an increasingly digital and inherently cross-border market for media services. In order to foster provision of quality media services in the internal market, the initiative will aim to mitigate the trend of undue public and private interference in editorial freedom. It will enhance media-specific ownership transparency, with a view of strengthening media accountability and independence.⁷⁰

However, as we have already acknowledged above, the public knowing about who owns the media is unlikely to change the power that they have. Making

⁶⁵Danai Maragoudaki, 'Media Capture Monitoring Report: Greece. Measuring Compliance with the European Media Freedom Act' *International Press Institute and Media & Journalism Research Center* (November 2024) <<https://ipi.media/wp-content/uploads/2024/11/Greece-Media-Capture-Monitoring-Report-1.pdf>>.

⁶⁶Alex Spence, 'Orbán's Media Playbook, Now Coming to Poland' *Politico* (8 January 2016) <www.politico.eu/article/orban-media-playbook-coming-to-poland-media-law-human-rights-european-values/> accessed 26 August 2025; Jan Cienski, 'New Media Law Gives Polish Government Fuller Control' *Politico* (30 December 2015) <www.politico.eu/article/poland-crisis-constitution-kaczynski-duda/>; Civil Liberties Union for Europe, 'Liberties Media Freedom Report 2023' (April 2023) <www.liberties.eu/f/lurkq7>.

⁶⁷MZ van Drunen and D Fechner, 'Safeguarding Editorial Independence in an Automate Media System: The Relationship Between Law and Journalistic Perspectives' (2023) 11 *Digital Journalism* 1723, 1725.

⁶⁸Zvi Reich and Thomas Hanitzsch, 'Determinants of Journalists' Professional Autonomy: Individual and National Level Factors Matter More Than Organizational Ones' (2013) 16 *Mass Communication & Society* 133; Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge University Press 2004).

⁶⁹*ibid*; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015)

⁷⁰European Media Commission (n 22).

such information public is not going to have an impact on changing the monopoly that these companies have over the media landscape. Nor does ownership transparency necessarily improve the quality of the media. The EMFA does not have the power to do this, and because of this, it is unlikely to achieve its objective of improving media freedom across the EU, as these countries are unlikely to change their media landscape just because ownership becomes public knowledge.

Another specific area of concern surrounding editorial independence is Article 18, which focuses on the content of media service providers on VLOPs.⁷¹ Concerns had been raised prior to the passing of the EMFA that this Article had the potential to create a two-tier system. Furthermore, Article 18 makes reference to media service providers having ‘editorial independence’, which can be considered particularly problematic for numerous reasons, as discussed above and as will be explored in the following section with regard to the role that VLOPs play under the EMFA.

VLOPs and media service providers

Article 18 of the EMFA seeks to provide the media with special provisions with regard to content moderation. It does this by ensuring that reasons are given to the media as to why content will be taken down before it is removed and providing the media service provider with 24 hours to reply.⁷² Media service providers are also provided with an expedited route of appeal, with their complaints prioritised⁷³ and they are also allowed to engage in discussion with the provider of the VLOP.⁷⁴ Article 18 relies on a self-declaration system which media service providers can use to access these privileges. They must complete a self-declaration that states they are compliant with specific criteria, such as adherence to editorial standards and regulatory oversight. As things currently stand, the European Commission is drafting implementation guidelines to facilitate this process.⁷⁵ The reason as to why Article 18 provides these special provisions is to ‘re-establish a space for traditional media in the online world by providing specific guarantees for media content on digital platforms ... In a nutshell, Article 18 EMFA sets a special regime for media in content procedures’.⁷⁶ It provides media with specific privileges and is similar to other legislation that

⁷¹Article 18 European Media Freedom Act 2024.

⁷²Article 18(4)(a-b) European Media Freedom Act 2024.

⁷³Article 18(5) European Media Freedom Act 2024.

⁷⁴Article 18(6) European Media Freedom Act 2024.

⁷⁵European Broadcasting Union, ‘EBU Stresses that New EMFA Obligations are Non-Negotiable’ (18 July 2025) <www.ebu.ch/news/2025/07/ebu-contributes-to-commission-consultation-on-article-18-emfa-guidelines-meta-co-new-obligations-are-non-negotiable>.

⁷⁶Matteo Monti, ‘Why Online Public Discourse Needs a Media Privilege: In Defence of Article 18 of the EMFA’ *Centre for Media Pluralism and Media Freedom* (11 January 2024) <<https://cmpf.eui.eu/in-defence-of-article-18-of-the-emfa/>>.

has been enacted across Europe in an attempt to regulate the digital sphere.⁷⁷ Nonetheless, Article 18 also has the potential to provide a space for mis/dis-information to flourish and create a ‘two-tier’ system of protection, as shall be explored below.

Despite these privileges for media service providers, there are particular concerns surrounding Article 18. For example, Article 18(1) (c) and (d) highlights that media service providers must have editorial independence⁷⁸ and they must also have regulatory or co-regulatory authorities that they are overseen by.⁷⁹ The fact that they must have regulatory oversight has the potential to exclude ‘the new watchdogs of democracy’, such as citizen journalists who might not be signed up to any type of legislation.⁸⁰ Additionally, even in countries where organisations are subject to regulation, this might be influenced or controlled by states and ‘requiring compliance with multiple regulatory conditions could unjustly exclude reputable media actors’.⁸¹ In Poland and Hungary, ‘public service media serve as instruments of propaganda for the ruling political parties’.⁸² It seems unfair that those who may not be subject to regulation, but have editorial independence and engage with ethical standards, are not afforded protections under Article 18, yet those who lack editorial independence but have regulatory oversight are granted protections.

As things currently stand, the framework in the short term discriminates against those without oversight, such as citizen journalists. The aim of the EMFA in the long term is to encourage a better media environment and incentivise media service providers to produce ethical journalism. Therefore, it currently grants protection in favour of traditional media rather than citizen journalism. However, this cautious approach towards not ‘casting the net too wide’ is justified according to Nenadić and Brogi, who note that ‘media organisations still provide the key infrastructure for journalism to operate professionally’⁸³ and, therefore, the ‘EU’s approach is thus cautious, aiming to restrict this privilege to entities that surely adhere to professional journalism standards’.⁸⁴ That is not to say that the need for regulatory oversight has not been criticised. For example, the European

⁷⁷Irini Katsirea, *Press Freedom and Regulation in a Digital Era* (Oxford University Press 2024) 72.

⁷⁸Article 18(1)(c) European Media Freedom Act 2024.

⁷⁹Article 18(1)(d) European Media Freedom Act 2024.

⁸⁰Monti (n 76).

⁸¹European Centre for Press & Media Freedom, ‘Input to the European Commission Targeted Consultation on the Implementation of the Self-Declaration Functionality for Media Service Providers Pursuant to Article 18(9) EMFA’ *European Centre for Press & Media Freedom* (23 July 2025) <[www.ecpmf.eu/wp-content/uploads/2025/07/ECPMF-contribution-to-Article-18-EMFA-24-July-2025.pdf](https://ecpmf.eu/wp-content/uploads/2025/07/ECPMF-contribution-to-Article-18-EMFA-24-July-2025.pdf)>.

⁸²Yingtong Guo, ‘Unpacking the European Media Freedom Act: How Articles 4, 6 and 18 Undermine Its Effectiveness’ *Stanford-Vienna Transatlantic Technology Law Forum European Union Law Working Papers* (2025) <<https://law.stanford.edu/wp-content/uploads/2025/05/EU-Law-WP-114-Guo.pdf>>.

⁸³Iva Nenadić and Elda Brogi, ‘Why News Media Need Article 17 of the European Media Freedom Act’ *Centre for Media Pluralism and Media Freedom* (16 November 2023) <<https://cmpf.eui.eu/why-newsmedia-need-article-17-of-the-european-media-freedom-act/>>.

⁸⁴Monti (n 76).

Centre for Press and Media Freedom stated the regulatory mechanisms should be strengthened and not imposed,⁸⁵ and the European Federation of Journalists noted that:

If the declaration functionality is made contingent on the exercise of formal regulatory structures, this may indeed disadvantage media outlets operating in contexts where frameworks may have been deliberately eroded through government interference or never properly instituted.⁸⁶

While there may be merit to this cautious approach and logical reasoning around insisting on regulation, such as by not providing protections to accounts concerning mis/disinformation online,⁸⁷ the fact remains that some mainstream media are, in fact, guilty of pushing mis/disinformation, and they are overseen by regulatory bodies.⁸⁸ As Katsirea has noted, ‘there are numerous, well-documented instances in which the media have published outrageously inaccurate information to attract traffic or to pander to the prejudices of their readership’.⁸⁹ For example, *FranceSoir* and *Fox News* have been accused of engaging in such practices.⁹⁰

Indeed, this concern is also shared with Monti, who has stated that ‘relying on national regulatory authorities could risk protecting media entities that have abandoned journalistic standards ... [T]he oversight of national regulatory authorities alone could result in giving privileged status to media acting as propaganda tools for authoritarian governments in certain EU member states’.⁹¹ This could have the potential to create a worse situation for press freedom if such media service providers are given privileges and protections, particularly if they are engaged in the spreading of mis/disinformation. This has the potential to impact marginalised groups⁹² who often find themselves on the receiving end of disinformation and hate speech.⁹³ Mis/disinformation also has the potential to impact civic discourse,⁹⁴ such as through the

⁸⁵European Centre for Press & Media Freedom (n 81).

⁸⁶European Federation of Journalists, ‘EFJ Input into EC Targeted Consultation on the Implementation of the Self-Declaration Functionality for Media Service Providers Pursuant to Article 18(9) EMFA’ (23 July 2025) <<https://europeanjournalists.org/wp-content/uploads/2025/07/EMFA-public-consultation-Art-18-1.pdf>>.

⁸⁷Nenadić and Brogi (n 87).

⁸⁸Paolo Cesarini, Giovanni De Gregorio and Oreste Pollicino, ‘The European Media Privilege in the European Media Freedom Act’ *Media Laws* (4 September 2023) <www.medialaws.eu/wp-content/uploads/2023/09/EMFA_Rev-1.pdf>.

⁸⁹Katsirea (n 77) 125.

⁹⁰Monti (n 76).

⁹¹Monti (n 76).

⁹²*ibid.*

⁹³Judit Szakács and Éva Bognár, ‘The Impact of Disinformation Campaigns about Migrants and Minority Groups in the EU’ *European Parliament* (June 2021) <[www.europarl.europa.eu/RegData/etudes/IDAN/2021/653641/EXPO_IDA\(2021\)653641_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2021/653641/EXPO_IDA(2021)653641_EN.pdf)>.

⁹⁴Marlene Mauk and Max Grömping, ‘Online Disinformation Predicts Inaccurate Beliefs about Election Fairness Among Both Winners and Losers’ (2023) 57 *Comparative Political Studies* 965; W Lance Bennett and Steven Livingston, ‘The Disinformation Order: Disruptive Communication and the Decline of Democratic Institutions’ (2018) 33(2) *European Journal of Communication* 122; Fabian

interference with elections.⁹⁵ For example, the Romanian government accused Russia of interfering with the 2025 election through disinformation campaigns.⁹⁶ At a time when trust in journalism across Europe is a concern,⁹⁷ the spread of mis/disinformation poses a particular issue, especially when those in power and those with influence can use the media as a tool to spread it.⁹⁸ Arguably, if the EMFA is seeking to create a better media environment, then protecting outlets engaged in spreading falsehoods will not help to achieve this.

Prior to its passing, Article 18 did not have any specific requirement that it should be checked that the media service provider has been entirely honest when submitting information, i.e. that they are subject to regulatory oversight and that they are editorially independent.⁹⁹ However, in the final version of the EMFA, Article 18 states:

Where there is reasonable doubt concerning the media service provider's compliance with point (d) on the first subparagraph, the provider of a very large online platform shall seek confirmation on the matter from the relevant national regulatory authority or body of the relevant co-regulatory or self-regulatory mechanism.¹⁰⁰

Point (d) refers to the fact that media service providers should be subject to regulatory requirements. There are certain questions raised with this prerequisite placed on VLOPs. While they do have to check if a media service provider is subject to regulation, this is only if there is a reasonable doubt. Could a VLOP, if having not checked, simply claim that they did not have a reasonable doubt to check in the first place? Recital 53 states that VLOPs should provide the ability for media services to self-declare, 'while at the same time retaining the possibility to reject such self-declarations where they consider that those considerations are not met'.¹⁰¹ Additionally, recognised civil society organisations and other relevant professional bodies can also

Zimmermann and Matthias Kohring, 'Mistrust, Disinforming News, and Vote Choice: A Panel Survey on the Origins and Consequences of Believing Disinformation in the 2017 German Parliamentary Election' (2020) 37 Political Communication 215.

⁹⁵ Philip Howard, *Lie Machine: How to Save Democracy from Troll Armies, Deceitful Robots, Junk News Operations, and Political Operatives* (Yale University Press 2020)

⁹⁶ Eliza Gkritsi, 'Romanian Government Accused of Online Censorship Ahead of Election Rerun' *Politico* (16 May 2025) <www.politico.eu/article/romania-online-censorship-presidential-election-social-media-russian-interference/>.

⁹⁷ Asimina Michailidou, Elisabeth Eike and Hans-Jörg Trenz, 'Journalism, Truth and the Restoration of Trust' in Maximilian Conrad, Guðmundur Hálfðanarson, Asimina Michailidou, Charlotte Galpin and Niko Pyrhönen (eds), *Europe in the Age of Post-Truth Politics*, (Palgrave Macmillan 2023) 53; Arjen van Dalen, 'Journalism, Trust, and Credibility' in Karin Wahl-Jorgensen and Thomas Hanitzsch (eds), *The Handbook of Journalism Studies* (Routledge 2019)

⁹⁸ Judit Szakács and Éva Bognár, 'Hungary' in Reuters Institute Digital News Report 2024 (Reuters Institute for the Study of Journalism 2024) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2024-06/RISJ_DNR_2024_Digital_v10%20lr.pdf>.

⁹⁹ Seipp and others (n 20).

¹⁰⁰ Article 18(1) European Media Freedom Act 2024.

¹⁰¹ Recital 53 European Media Freedom Act 2024.

corroborate the integrity of media sources and flag any potential issues. However, as Seipp et al. conclude, ‘nowhere does the EMFA give binding, concrete guidance on how, by whom, or according to what criteria a media organisation can be judged to be sufficiently independent and responsible’.¹⁰²

Before the removal of any content by a self-declared media service provider, the VLOP needs to communicate with the provider, who has an opportunity to reply and, if an amicable solution cannot be reached, the media service provider can escalate the decision to the European Board for Media Services,¹⁰³ which shall issue an opinion on the outcome. Article 18 does provide an expedited route of appeal for any content that faces moderation, but in an attempt not to stifle freedom of expression, it might actually promote the speech of groups that could cause mis/disinformation by allowing it to remain visible.¹⁰⁴ This could create a ‘vicious circle between the speaker planting false information on social media, the media platform spreading the false speech thanks to amplifying algorithms or human-simulating bots, and the recipients who view the claims and spread them’.¹⁰⁵

A VLOP can also moderate content under Article 18 ‘on the ground that such content is incompatible with its terms and conditions’.¹⁰⁶ This approach may not be in line with the Digital Services Act (DSA) that was introduced to try to establish a safer and fairer online world. Article 34 of the DSA focuses on systemic risks and has different categories, including negatively impacting civic discourse and electoral processes and contributing to gender-based violence and endangering the protection of public health and minors.¹⁰⁷ These are not mentioned as reasons why content should be moderated in the EMFA.

Understandably, content moderation is a difficult area as VLOPs do not want to be overzealous in their approach towards removing content, as this could have a negative impact on freedom of expression. Nonetheless, the current approach has the potential to be misused by ‘malicious actors, including state-controlled or propagandistic outlets, to more effectively spread disinformation and propaganda’.¹⁰⁸

¹⁰²Seipp and others (n 20) 48.

¹⁰³The Media Board ... is an independent advisory body at the European Union level composed of national regulatory authorities and bodies’.

¹⁰⁴Iva Nendać, ‘The Power Remains with Platforms?’ Centre for Media Pluralism and Media Freedom (18 October 2024) <<https://cmpf.eu/digital-services-act-and-european-media-freedom-act/>>.

¹⁰⁵Samira Asmaa Alloui, ‘EU Media Freedom Act: The Convolutions of the New Legislation’ *EU Law Analysis* (6 June 2024) <<https://eulawanalysis.blogspot.com/2024/06/eu-media-freedom-act-convolutions-of.html>>.

¹⁰⁶Article 18(4) European Media Freedom Act 2024.

¹⁰⁷Article 34 Digital Services Act – Risk Assessment.

¹⁰⁸Nendać (n 104).

Protection of journalists' sources and surveillance

Article 4 focuses on the protection of sources; however, as this section shall explore, there are fears that the Article might actually lower standards of protection and could risk journalistic sources. Article 4(3) states that: 'Member States shall ensure that journalistic sources and confidential communications are effectively protected'.¹⁰⁹ Member States shall not 'oblige media service providers or their editorial staff to disclose information related to or capable of identifying journalistic sources or confidential communications or oblige any persons who, because of their regular or professional relationship with a media service provider or its editorial staff, might have such information to disclose it'.¹¹⁰ Article 4(3)(b) goes further to state that Member States should not:

detain, sanction, intercept or inspect media service providers or their editorial staff or subject them or their corporate or private premises to surveillance or search and seizure for the purpose of obtaining information related to or capable of identifying journalistic sources or confidential communications or detain, sanction, intercept or inspect any persons who, because of their regular or professional relationship with a media service provider or its editorial staff, might have such information or subject them or their corporate or private premises to surveillance or search and seizure for the purpose of obtaining such information.¹¹¹

Article 4(3)(c) states that Member States should not deploy intrusive surveillance software on any media service provider, editorial staff or person with a relationship to them, who might have information that could reveal a journalist's source.¹¹² Nonetheless, Article 4(4) does state that surveillance may be allowed under certain circumstances and is justified on a case-by-case basis and 'is subject to prior authorisation by a judicial authority or an independent and impartial decision-making authority or, in duly justified and exceptional and urgent cases, is subsequently authorised by such an authority without undue delay'.¹¹³ Surveillance may also be deployed for offences listed in Article 2(2) of Framework Decision 2002/584/JHA or for serious crimes in Member States.¹¹⁴

A concern here is that 'undue delay' is not given a specific time requirement. While Kermer noted that the ECtHR has ruled on what should be considered prompt in the case of *Ekimdzhiev and Others v Bulgaria*,¹¹⁵ with twenty-four hours being the specified time frame, a time frame is not

¹⁰⁹Article 4 (3) European Media Freedom Act 2024.

¹¹⁰Article 4 (3)(a) European Media Freedom Act 2024.

¹¹¹Article 4 (3)(b) European Media Freedom Act 2024.

¹¹²Article 4(3)(c) European Media Freedom Act 2024.

¹¹³Article 4(4)(a)-(d) European Media Freedom Act 2024.

¹¹⁴Article 4(5)(b)(i)-(ii) European Media Freedom Act 2024.

¹¹⁵Kermer (n 24); *Ekimdzhiev and Others v Bulgaria* App no 70078/12 (ECHR, 11 January 2022) [285]: 'Surveillance was subject to prior judicial authorisation except in urgent cases – an exception to which the

explicitly referenced in the EMFA. Even if twenty-four hours was given as the time frame, this still provides states with the opportunity to force the disclosure of information and reveal confidential sources.

During the drafting of Article 4(4), there were concerns that it might weaken the protection afforded to journalists.¹¹⁶ Nonetheless, while some of these concerns were addressed, i.e. by acknowledging that there should be a proportionality test and that any interference needs to be ex-ante and prescribed by a judge or other independent and impartial decision-making authority, there are still causes for worry.

For example, while ex-ante judicial authorisation is important, Article 4(4)(d) states that this does not need to be the case and it can be ex-post authorised if provided for by national law or Union law and ‘in duly justified and exceptional and urgent cases’ that can be justified on a case-by-case basis ‘by an overriding reason of public interest and is proportionate’.¹¹⁷ This leaves the door open for nation-states to abuse their position in authorising state surveillance. Furthermore, while ex-ante judicial review is required in the majority of cases, Kermer notes that this could be an issue, particularly if there is no independent and impartial decision-making authority to deliver this, because then, presumably, judgment comes back to the national prosecutor, which is potentially problematic in countries whose judicial systems have been contaminated by ruling parties’.¹¹⁸

We can see this in countries, such as Georgia, where the European Parliament has noted violations of media freedom and journalists, where the judiciary is suffering from a lack of independence and impartiality.¹¹⁹ Georgia has been granted EU candidate status, but has not been made an official member because the passing of authoritarian laws has amounted to ‘backsliding’.¹²⁰ Research has revealed that surveillance is, unfortunately, a common occurrence in other countries across Europe, such as Hungary,¹²¹ Romania¹²² and Greece,¹²³ to name but a few. The ‘Pegasus Project’ shone

authorities resorted sparingly. Even in those cases, surveillance had to be validated retrospectively within twenty-four hours’.

¹¹⁶Voorhoof (n 24).

¹¹⁷Article 4(4) (d) European Media Freedom Act 2024.

¹¹⁸Kermer (n 24) 198.

¹¹⁹European Parliament, ‘Violations of Media Freedom and Safety of Journalists in Georgia’ *European Parliament* (9 June 2022) <www.europarl.europa.eu/doceo/document/TA-9-2022-0239_EN.html>.

¹²⁰BBC News, ‘Georgia Country Profile’ (31 December 2024) <www.bbc.co.uk/news/world-europe-17301647>.

¹²¹Paul Tap, *Citizens and State Surveillance in Hungary and Romania* (Springer 2025); Agnieszka Bién-Kacała, ‘Pegasus Contra Democratic Process: Experience from Europe’ in Michał Balcerzak and Julia Kapelańska-Pręgowska (eds), *Artificial and International Human Rights Law: Developing Standards for a Changing World* (Edward Elgar 2024).

¹²²Daniela Inacu, ‘Press Freedom in Romania: Regulation, Realities, and Expectations in the Context of Adopting New European Regulations’ (2024) 10 *Athens Journal of Law* 685.

¹²³Eva Cossé, ‘Victory for Greek Journalists in Surveillance Case’ *Human Rights Watch* (16 October 2024) <www.hrw.org/news/2024/10/16/victory-greek-journalists-surveillance-case>.

a light on the threat that spyware poses to journalists.¹²⁴ Despite some of these countries fighting back against the polarisation of courts,¹²⁵ unfortunately, there are still worries that journalists cannot rely on the judiciary to protect them due to the fact that they are not independent.¹²⁶

Furthermore, Article 4(5) states that intrusive surveillance can be deployed if it is being used to carry out investigations into someone who may have committed an offence that is ‘punishable in the Member State concerned by a custodial sentence or a detention order of a maximum period of at least five years, as determined by the law of that Member State’.¹²⁷ This could cause issues as varying offences will have varying custodial sentences across different states. For example, there have been numerous concerns raised surrounding the law being weaponised against journalists, not just in Europe, but across the world.¹²⁸ Instead of harmonising the protection of media freedom across Europe, this has the potential to continue allowing countries with harsher custodial sentences to deploy spyware for, potentially, weak reasons. Spyware may also be deployed if it is being used to investigate ‘offences listed in Article 2(2) of Framework Decision 2002/584/JHA punishable in the Member State concerned by a custodial sentence or a detention order of a maximum period of at least three years’.¹²⁹ Crimes included in this list are wide-ranging, featuring more serious crimes, such as trafficking, terrorism and corruption, but also crimes such as swindling, extortion, and forgery. Echoing Kermer, while these are all crimes, ‘without downplaying their seriousness, [they] are disproportionate when weighed against the fundamental rights at stake’.¹³⁰

With it being apparent that surveillance is a particular issue in a number of countries across Europe, alongside the independence of the judiciary, this could have the potential to cause issues and still permit surveillance to take place via the back door. It has been suggested that the EMFA permitted these ‘carve outs’ based on Article 4(2) of the Treaty on the European Union (TEU), ‘which implies that national security remains the sole responsibility of the Member States’.¹³¹ A non-judicial authority could authorise

¹²⁴Philip Di Salvo, ‘“We Have to Act Like Our Devices are Already Infected”: Investigative Journalists and Internet Surveillance’ (2021) 16 Journalism Practice 1849.

¹²⁵Leonardo Puleo and Ramona Coman, ‘Explaining Judges’ Opposition When Judicial Independence is Undermined: Insights from Poland, Romania, and Hungary’ (2023) 31 Democratization 47.

¹²⁶European Parliament, ‘Parliament Sounds the Alarm Over Hungary’s Deepening Rule of Law Crisis’ *European Parliament* (25 November 2025) <www.europarl.europa.eu/news/ro/press-room/20251120IPR31492/parliament-sounds-the-alarm-over-hungary-s-deepening-rule-of-law-crisis>.

¹²⁷Article 4(5)(b)(ii) European Media Freedom Act 2024.

¹²⁸Joel Simon, Carlos Lauría and Ona Flores, ‘Weaponizing the Law: Attacks on Media Freedom’ *Thomson Reuters Foundation and Tow Center for Digital Journalism* (April 2023) <www.trust.org/wp-content/uploads/legacy/weaponizing-law-attacks-media-freedom-report-2023.pdf>; Geoffrey Robertson KC, *Lawfare: How Russians, The Rich and the Government Try to Prevent Free Speech and How to Stop Them* (Harper Collins 2023).

¹²⁹Article 4(5)(i) European Media Freedom Act 2024.

¹³⁰Kermer (n 24) 202.

¹³¹Guo (n 82).

surveillance, as per Article 4(4), in countries where the judiciary is not impartial or independent.

However, questions remain as to how these bodies will be identified and if they are based in the countries where the surveillance is taking place and belong to the executive branch then they may lack independence and therefore they are ‘inherently subjective, and their meanings are sensitive to political influence’¹³² and countries can ‘cherry-pick adjudicating bodies whom – while proclaiming to be ‘independent’ and ‘impartial’ – might still be more favourable to their cause’.¹³³ If this is the case, then the EMFA is instantly weakened, and the protection of journalists from surveillance could be ineffective. As we have seen, countries have been willing to use surveillance techniques on journalists in the past, and if the EMFA lacks teeth to prevent them from doing this, then there are concerns that this might still be an issue that rears its head in the future.

Consideration also needs to be given towards *who* is deploying the spyware. Prior to the passing of the EMFA, Article 4 extended to ‘Union institutions, bodies, offices and agencies and private entities’. As things currently stand, the EMFA does not examine what happens if a state delegates to a non-state actor to deploy spyware. Again, this leaves a way for states to deploy spyware and other surveillance techniques if they hire a non-state actor.

Prior to the passing of the EMFA, Article 4 had stated that surveillance could be deployed if it was for national security reasons and other serious crimes.¹³⁴ The national security derogation was removed from the final draft, and numerous civil society organisations argued that this had to be the case because spyware was often installed onto journalists’ devices under national security laws. As a Hungarian journalist, Szabolcs Panyi, told civil society organisations in an open letter:

In increasingly repressive political environments, like in Hungary, where media is under government control and pressure, whistleblowers and leaks are the only way left for investigative journalists to uncover the truth. This is exactly why, under the pretext of vague and bogus national security reasoning, surveillance is used against journalists in Hungary. It has an enormous chilling effect, and could make our work impossible.¹³⁵

While the national security requirement may have been removed from the finalised EMFA, it could still be introduced through the back door because

¹³²ibid 5.

¹³³Kermer (n 24) 200.

¹³⁴Voorhoof (n 24).

¹³⁵European Centre for Press & Media Freedom, ‘Civil Society and Journalists Associations Urge the Council to Protect Journalists Against Spyware and Surveillance in the EMFA’ (19 June 2023) <www.ecpmf.eu/civil-society-and-journalists-associations-urge-the-council-to-protect-journalists-against-spyware-and-surveillance-in-the-emfa/>.

surveillance can be deployed ‘by an overriding reason of public interest’.¹³⁶ This may very well include national security as a reason of public interest. Directive 2006/123/EC also refer to defining ‘overriding reasons relating to the public interest’ and includes grounds including: public policy; public safety; and public health.¹³⁷ Clearly, national security has the potential to be tied to public security under the EU’s own Directive.¹³⁸ If this is the case, then there is clearly the potential for states to continue deploying spyware on journalists as they can state that it is ‘by an overriding reason of public interest’ as it ‘could be used in varying ways and levels of intensity, depending on the interests of the authority relying on it’.¹³⁹

Alongside the use of spyware and surveillance being a potential issue within Article 4 of the EMFA, there are also concerns that it might also impact journalists’ sources, as in Article 4(3)(c) it refers to the fact that states should not:

deploy intrusive surveillance software on any material, digital device, machine or tool used by media service providers, their editorial staff or any persons who, because of their regular or professional relationship with a media service provider or its editorial staff, might have information related to or capable of identifying journalistic sources or confidential communications.¹⁴⁰

It has been well documented within case law from both the ECtHR and the Court of Justice of the European Union (CJEU) that the protection of sources is important. The case of *Goodwin v United Kingdom* emphasises this with the ECtHR stating that the ‘protection of journalistic sources is one of the most basic conditions for press freedom... without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest’.¹⁴¹ This has been re-emphasised in subsequent judgments.¹⁴² As noted above, there are concerns surrounding the public interest and its definition under the EMFA. Nonetheless, if protection surrounding the confidentiality of sources is weakened, then this would clearly go against what is argued in Recital 18, where it is acknowledged that states have differing approaches towards the protection of media and that it is necessary to put in place effective safeguards enabling the exercise of editorial freedom across the Union’.¹⁴³ As Paphitis acknowledges:

¹³⁶Article 4(4)(c) European Media Freedom Act 2024.

¹³⁷There are other reasons included in Directive 2006/123/EC as per Article 4(8).

¹³⁸Kermer (n 24).

¹³⁹Sotiris Paphitis, ‘The Protection of Journalists Through the Proposed European Media Freedom Act’ *European Law Blog* (24 July 2024) <www.europeanlawblog.eu/pub/the-protection-of-journalists-through-the-proposed-european-media-freedom-act/release/1>.

¹⁴⁰Article 4(3)(c) European Media Freedom Act 2024.

¹⁴¹*Goodwin v United Kingdom* (1996) EHRR 123 [39].

¹⁴²*Voskuil v Netherlands* App no.64752/01 (ECHR, 22 November 2007); *Sanoma Uitgevers B.V. v the Netherlands* [2010] ECHR 1284.

¹⁴³Recital 18 European Media Freedom Act 2024.

What is even more disturbing is that even though the Commission recognises through Recital 17 [now 18] that in some Member States, the threshold for the protection of journalists is particularly high, this suggested provision runs the risk of lowering that level. In other words, for those Member States that provide for an absolute protection of sources, this provision would signify a weakening of the protection offered.¹⁴⁴

Conclusion

The introduction of the EMFA has the potential to strengthen media freedom across Europe. This would be most welcome at a time when journalists find themselves under threat from numerous parties, including their own governments in certain states. On the one hand, some changes that have been implemented to the EMFA through the drafting stage have been beneficial. For example, the widening of who is considered a media service provider to include bloggers, freelancers, and those who write not-for-profit websites is in line with ECtHR judgments and Article 10 ECHR. The removal of the national security derogation was also welcome with regard to justifications for deploying spyware against journalists. While it is clear that there has been some progress in the final version of the EMFA towards enhancing protections, it does not, arguably, go far enough.

In particular, this article has stated that there are places where clarification is required, such as surrounding the word ‘professional’ for who is considered to be a media service provider, particularly for those who might write for free and contribute unpaid journalism to outlets. This can certainly be the case for those who are citizen journalists or who might be unpaid interns. Furthermore, with regard to the deployment of spyware, it would be beneficial to have further clarification surrounding what is considered to be an ‘undue delay’ and also some further guidance surrounding the public interest and how this can be differentiated from national security, considering this derogation was removed from the final draft. Alongside clarifications, additional protections should also be offered, including the fact that non-state actors employed by the state should not be permitted to deploy spyware or engage in other means of surveillance. While attempting to promote media freedom, the EMFA is not watertight, and there are numerous concerns that mis/disinformation can still spread and remain visible on a VLOP, and that spyware can still be deployed by the backdoor.

However, the question that this article concludes with: is it all too late? As documented, across Europe, journalists face threats from the legislature, which in certain countries, is not independent or impartial. Furthermore, editorial independence in particular countries seems to be nonexistent and with no sign of changing. As acknowledged, while certain countries’ legal

¹⁴⁴Paphitis (n 139).

framework adheres to the EMFA, ‘the execution of these laws demonstrates a departure from their core principles’.¹⁴⁵ Stopping democratic backsliding is difficult, and once editorial independence and journalistic autonomy have been decimated, it is tricky to reverse this. Indeed, as Holtz-Bacha noted:

The intention of the Commission to introduce EMFA as a regulation and not as a directive that gives the individual member states leeway in its transposition into national law could indicate that it wants to be bolder this time. However, the Commission must also juggle between journalists on the one hand, many of whom welcome the initiative and would even like to see tighter and more precise regulations in support of media freedom and independence, and media companies on the other hand, who fear supranational intervention.¹⁴⁶

Balancing these two competing interests will prove to be difficult, and it remains to be seen how the EMFA will be implemented and whether or not certain states will adhere to it, and, if not, how the Commission will stand up to those states.

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¹⁴⁵Nemeth (n 62).

¹⁴⁶Christina Holtz-Bacha, ‘Freedom of the Media, Pluralism, and Transparency. European Media Policy on New Paths?’ (2023) 39 *European Journal of Communication* 37, 50.