



Response to the European Commission's public consultation for European Media Freedom Act

ARTICLE 19: Global Campaign for Free Expression
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Introduction

ARTICLE 19 is a global human rights organisation that works around the world to protect and promote the right to freedom of expression and information. ARTICLE 19 has also extensive expertise and experience advocating for the protection of media freedom, media pluralism and diversity as fundamental pillars of a democratic system, in accordance with international and regional standards.

We welcome the opportunity to submit our comments and inputs to the Public Consultation for the European Media Freedom Act, and we make the following recommendations.

1. Internal market focus

We acknowledge that, due to the system of allocation of competences established by the EU Treaties, the scope of action left to the European Commission with regards to a legislative proposal aimed to guarantee media freedom and media pluralism in the European Union is limited. We also acknowledge that the likely legal basis for this proposal is Article 114 of the Treaty on the Functioning of the EU (TFEU), and that therefore its focus is likely to be on the internal market policy goal. Nevertheless, we note that such a focus might lead to a number of narrow provisions, rather than to a holistic instrument, and that these provisions might be inadequate to achieve the media freedom, independence and pluralism objectives, and be difficult to coordinate. We therefore encourage the European Commission to take into utmost account not only the economic dimension of its intervention, but also the social and political ones, which are of fundamental importance with regards to media markets, due to their key role in the democratic systems. Indeed, we warn against the lack of effectiveness to protect media pluralism and diversity through economic focused legal instruments alone.

To this aim, we encourage the European Commission to refer to and to implement, to the widest extent possible, international and regional standards on media freedom, independence and pluralism. In the course of this submission, we point at these standards as appropriate. We note that this approach would make the legislative proposal also compliant with the EU Charter of Fundamental Rights, that is binding on the EU institutions in all their actions.

Finally, we flag that the upcoming legislative proposal will not land in a vacuum, but rather in a shared regulatory space already populated by other existing or in-the-making legislative instruments such as the revised Audiovisual Media Services Directive (AVMSD), the Digital Single Market (DSM) Directive, the Digital Services Act (DSA) and the Digital Markets Act (DMA). Coordination among these instruments will be key, both in the shaping of the provisions and in their enforcement. We note that the fact that all these instruments seem to focus on the internal market dimension rather than on specific media related objectives might lead to suboptimal results for media independence and pluralism, and we call the European Commission to take this aspect into account and to create, to the extent possible, additional safeguards for those objectives, for example through soft law instruments. On areas that fall beyond its competence, we recommend that the European Commission fund studies and research to ensure consistency and effectiveness of the regulatory approach across Member States.

2. Role and remit of the European Regulators Group for Audiovisual Media Services (ERGA)

ARTICLE 19 notes that a number of questions in the public consultation, and in particular in Section 3.2 and Section 5, touch upon the role and remit of ERGA. We believe that ERGA has the potential to strongly contribute to the establishment and maintenance of an independent and pluralistic media landscape in the EU. We consider that both the technical expertise ERGA can provide to the European Commission and the cooperation space it provides to national independent authorities have to be preserved and enhanced beyond the scope of the AVMSD to include the possible new EU framework for independent and pluralistic media. In particular, we flag that ERGA could play a major role in the exchange of best practices, the promotion of common approaches and standards, and the consensus building with regards to media policy key concepts and issues. We recall though that ERGA's actions and recommendations should never interfere with the content nor go in the direction of content regulation.

However, we recommend that ERGA should include a freedom of expression impact assessment in all its areas of work, based on international standards and on Article 11 of the EU Charter of Fundamental Rights. Moreover, we recommend that ERGA should

transparently and inclusively consult all relevant stakeholders. This is especially important considering that in many instances ERGA will be called to interpret and provide guidance on a number of concepts and situations under development where the perspective, contribution and evidence coming from different stakeholders will represent a true added value, be a solid way to avoid capture and produce sound and evidence-based outcomes.

We finally note that it is of utmost importance that ERGA is composed of truly independent and accountable national regulatory authorities. In particular, we strongly recommend that the European Commission in its further legislative proposals reaffirms the requirements established in Article 30 of the AVMSD and provides adequate ways for the enforcement of this key provision.

3. EU-level actions

The European Commission is looking for feedback about the possibility to introduce an EU level intervention in a number of actions (see, for instance: 2.1.6; 2.2.4; 2.2.5; 3.3.4; 4.1.4; 4.2.7; 5.3).

ARTICLE 19 believes that on a number of occasions actions at EU-level or a centralised enforcement could help to establish a harmonised enforcement and to guarantee certain standards across EU Member States. A good example is transparency of media ownership: we support the setting of an EU-registry containing the information on who owns or controls media companies (2.1.6). We stress on the one hand, that the notion of control should be interpreted widely, and include the ultimate owner/beneficial owner; on the other hand, that the concept of media companies should also be interpreted widely: to this aim, we recommend the European Commission to look at the recommendations made by the Council of Europe (CoE) on a new notion of media¹, as well as at the suggestions made by Ofcom with regards to the category of ‘news creators’². Moreover, ARTICLE 19 supports the establishment of a pan-European registry to increase the transparency of media market transactions (2.2.4) as well as the establishment of an EU-wide monitoring of state advertising allocated by Member States (4.2.7). Finally, we suggest that independent media regulators should maintain an easy to access and easy to consult registry on their website, which contains the widest possible information about media ownership and media transactions in the Member State. As

¹ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on 21 September 2011.

² Ofcom, The future of media plurality in the UK, Statement of November 2021.

independent media regulators are financed with public money, we believe they should perform this task to the benefit of economic actors and citizens alike.

ARTICLE 19 believes that an EU-level intervention with regards to transparency measures could not only favour the internal market objective, helping actors to obtain the same level of information with regards to each national market, but also guarantee basic levels of transparency across countries, possibly overtaking resistances or shortfalls at national level. Such enhanced and widespread transparency would also benefit citizens, and increase their trust in the sector.

Apart from transparency/monitoring measures, the European Commission is looking for feedback on a variety of other harmonisation measures. We note that at current there are, at national level, wide divergences in the regulatory frameworks that are supposed to guarantee media independence and media pluralism, both from a substantial and an enforcement perspective. These divergences can well lead to diverse standards for media freedom, independence and pluralism across Member States, undermining the internal market objective. ARTICLE 19 considers that in various instances a more harmonised approach, for example through the establishment of harmonised procedures, common standards or guidelines, could be helpful.

However, we make two recommendations. First, we recommend the European Commission to take into utmost account international standards on media freedom, independence and pluralism when setting those harmonised procedures, standards, guidelines and alike. Second, we flag that a higher level of harmonisation might not adequately fit the specificities of certain national or local markets. Therefore, we recommend the European Commission to allow a degree of flexibility for these specificities to be considered, and for the procedures, standards etc. to be adapted to specific needs, and to avoid abuse and capture.

In particular, ARTICLE 19 supports the adoption of harmonised procedures with regards to, at minimum:

- The assessment of the impact of media market transactions on media pluralism (2.2.4), including an obligation on Member States to systematically review the effects on media pluralism of transactions involving at least one media company. In particular, we recommend that the assessment of media mergers include a public interest test to protect media pluralism, and that the criteria of this test are harmonised across Member States. We also note that proper enforcement of the test rules is a fundamental component, and that therefore guarantees should be provided to this aim.

We refer to the Orlen/Polska Press merger as a clear example of the substantial negative impact on media pluralism that could come from the wrong/lack of enforcement of merger rules³ and we call on the European Commission to include in the new EU framework clear mechanisms to minimise these risks, including through the creation of channels for civil society organisations to be heard during the merger assessment.

- Ownership and authorisation requirements and procedures (2.2.5). To this aim, we encourage the European Commission to take into utmost account the 2018 Recommendation of the Committee of Ministers to Member States on media pluralism and transparency of media ownership⁴.

Furthermore, ARTICLE 19 encourages the adoption of harmonised standards with regards to, at a minimum:

- Audience measurement (2.3.2). Audience measurement methodologies are essential for the assessment of both qualitative and quantitative aspects of media plurality. Divergent methodologies might lead to not comparable data, which creates the risk of distorted perception, especially across-countries. This is why harmonised standards for audience measurement are essential. In addition, we note that in the current media ecosystem, where the consumption of news has shifted, in vast percentages, to online channels including social media, video-sharing platforms and alike, measuring audience might be particularly challenging with regards to cross-media consumptions. We also note that, due to asymmetry of information in the market and to the role played by recommendation algorithms in news consumptions, regulators are facing challenges in the measurement. This being the context, we believe that cooperation and exchanges among regulators, as well as enhanced transparency and further research to be necessary, and we encourage the European Commission to support it, including through the development of appropriate and effective concepts and indicators through consultative processes with researchers and media stakeholders. Finally, we recommend the European Commission to ensure independent auditing for audience measurement.

³ ARTICLE 19 submitted an amicus curiae in the appeal, filed by the Polish Ombudsman, against the Polish Competition Authority's decision that authorised the acquisition by PKN Orlen of Polska Press. For more information about the case see: <https://www.article19.org/resources/pkn-orlen-media-purchase-violates-eu-merger-rules/>. The amicus curiae is available at: https://www.article19.org/wp-content/uploads/2021/06/ARTICLE-19-Orlen-amicus_EN.pdf

⁴ Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on media pluralism and transparency of media ownership.

- Independence of the public service media (PSM) from political or commercial interference within a framework of accountability to the public. These include explicit legislative guarantees of political, operational and financial independence and institutional autonomy of the regulator, a participatory and transparent appointment process for its governance and managerial structures, the ability to employ its own qualified staff, and sufficient mandate and power of the regulator, as well as its public accountability and adequate funding.

Finally, ARTICLE 19 supports the adoption of appropriate and effective common criteria with regards to:

- Justified restrictions of ownership/control of media outlets by Member States;
- Administrative decisions affecting media outlets, among others non-discrimination, proportionality;
- The interpretation of concepts relevant for media pluralism, including 'content of general public interest', 'promotion of content', 'diversity of exposure', 'content curation', etc.

We call on the European Commission to support the development of those criteria taking into utmost account international and regional standards, and through consultative processes with researchers and media stakeholders.

4. Diversity of exposure

In Sections 1 and 3, the European Commission tackles the issue of diversity of views in media offers, and of 'balanced and impartial media coverage'. ARTICLE 19 makes the following recommendations.

With regards to diversity of views we flag that, as noted extensively by regulators, scholars and civil society, the way online intermediaries serve news via their algorithms is not transparent. This impacts not only the supply side, but also the demand, and in particular the diversity of exposure of each user. As explained by Ofcom, online intermediaries and their algorithms control the prominence given to different news sources and stories. This issue presents a potential concern about the level of influence any one intermediary might be able to exercise over the range of viewpoints that citizens can access and consume, including

where these might restrict the variety of viewpoints that citizens might be exposed to, and over the political agenda and political process⁵.

Against this background, diversity of exposure is difficult to measure and to guarantee, and people cannot be properly informed or be aware about their consumption choices. Underexposure to diversity on social media markets is a market failure that needs to be adequately tackled by the European Commission. ARTICLE 19 believes that an adequate solution to this market failure is to impose, on large social media platforms, the unbundling of hosting and content curation activities together with the obligation to provide access to third party content curation providers on a fair and non-discriminatory basis. For users, unbundling will mean there are finally concrete and viable alternatives to switch to, based on their preferences, without needing to leave the platform. For providers, there will be easier access to users, and incentives to compete with one another to provide content curation services that best safeguard users' privacy and free expression, among others.

We are convinced that this pro-competitive measure would lead to a diversified and decentralised environment for content curation where no single entity holds massive power on the information flow in society, nor on the diversity of exposure of individual users. We recommend the unbundling of services to be shaped as a form of functional separation. In other words, our proposal does not mean that a large platform needs to dismiss assets. The large platform that provides the hosting should remain free to offer content curation, too, so that users can freely choose which company provides them with this service. To guarantee a real choice, the option to select the large platform has to be presented to the user as an opt-in. We also recommend that independent regulatory authorities should ensure the unbundling rules are implemented effectively. More information and details about our proposal are available in our 2021 Policy Brief 'Taming Big Tech: Protecting freedom of expression through the unbundling of services, open markets, competition and users' empowerment'.⁶ We finally note that a similar provision was suggested by the LIBE Committee in its opinion on the DSA and an amendment incorporating this unbundling was also tabled by the Greens Party for the DSA vote at the plenary in January 2022. We therefore urge the European Commission to take this second chance to impose the unbundling remedy in its new media framework.

In addition, we flag that the reference to 'balanced and impartial media coverage' is misleading. It is not clear what 'balanced' means nor how it is supposed to be assessed or

⁵ Ofcom, cit.

⁶ ARTICLE 19 Policy Brief is available at this link: https://www.article19.org/wp-content/uploads/2021/12/Taming-big-tech_FINAL_8-Dec-1.pdf

measured. We recommend the European Commission to rather focus on fair, impartial and diverse media coverage, according to international standards.

Finally, we believe that with regards to prominence of content of general interest further guidance is needed on a number of elements. First, on a future-proof concept of 'content of general interest' and on the criteria needed to identify it. Second, on the concept of 'prominence' and on the variety of ways it can be attributed. On this, we remind that there is a big information gap with regards to how intermediaries take decisions about the content to be given prominence, as well on how concretely the prominence is given, and we encourage the European Commission to act to remedy this gap, which impedes both measurement and effective decision-making for independent regulators, as well as awareness from the users' side (which, in turn, strongly and very often illegally limits their capacity to make autonomous choices). Furthermore, we note that a variety of useful elements can be found in the recently issued Council of Europe guidance note on public interest content prioritisation online⁷. To conclude, we repeat our call for the European Commission to support the development of appropriate and effective concepts and indicators through consultative processes with researchers and media stakeholders.

5. Functional independence and independence of editorial decision

In response to question 1.7 ARTICLE 19 suggests the European Commission to focus not only on the independence of editorial decisions, but also to the functional independence, to be interpreted as the independence in financial, operational and administrative matters as well as in the policy and regulations overall. IWe also stress that independence should be not just political, but also from other powerful interests in society.

With regards to examples of safeguards existing in a variety of EU Member States that could be considered best practices to guarantee independence of editorial decisions, we highlight the following.

A number of EU Member States have entrusted the Ombudsman with the task of guaranteeing constitutional freedoms of expression and media freedom, independence and pluralism.

In the Netherlands, in order to receive public subsidies, press and media outlets are required to establish an ethical board, as a guarantee of compliance with journalistic ethical standards.

⁷ Council of Europe, Guidance Note on the Prioritisation of Public Interest Content Online adopted by the Steering Committee for Media and Information Society (CDMSI) at its 20th plenary meeting, 1-3 December 2021, CDMSI(2021)009.

ARTICLE 19 recalls that in the case of PSM, a key guarantee of independence is to be found in the system to appoint the governing board. ARTICLE 19 has repeatedly called for the requirement of diversity with regards to the individuals covering high level positions in the management of the PSM as a safeguard not only for the independence but also for the inclusiveness in editorial decision⁸.

6. Media sustainability

ARTICLE 19 notes that Section 3.4 of the public consultation focuses on 'enabling environment for innovative media' and explains that a healthy ecosystem should provide an enabling environment for innovative media players to grow. While recognising that innovation is extremely important in the media sector, we also flag that a healthy ecosystem cannot exist if sustainability is not guaranteed and we remind that an enabling environment should exist for all media actors, not only for innovation. Ensuring the financial sustainability of media, and in particular of quality journalism, is fundamental to securing a favourable environment for freedom of expression, which States are required to guarantee in law and in practice. This is especially so at a time when the business models and circumstances that have traditionally supported quality journalism are being radically transformed by new economic realities and the digital evolution. Therefore, we strongly recommend the European Commission to focus on an enabling environment for 'independent, free and pluralistic media'.

Moreover, we note that to ensure media sustainability a holistic approach is needed, which takes into due account a variety of EU legal instruments that, in different ways, are or will have an impact on the media value chain and on the monetisation channels available to media actors. We therefore recommend that when designing the new EU framework, the European Commission takes into utmost account its interplay with the DMS Directive, the DSA, the DMA, as well as current Data Protection Authorities and National Competition Authorities' interventions with regards to the online advertising sector.

7. Fair allocation of state resources in the media markets

I. Public subsidies

Under international human rights law, States have both the negative obligation to refrain from restricting the right to freedom of expression beyond permissible restricting and a positive duty to create an enabling legal and regulatory environment that promotes the development of a

⁸ ARTICLE 19, A Model Public Service Broadcasting Law, International Standards Series, 2005, available at: <https://www.article19.org/data/files/pdfs/standards/modelpsblaw.pdf>

free, diverse, pluralistic and independent media landscape. Media policy – including legal and regulatory measures such as subsidies and other forms of state aid - should aim to promote a vibrant media sector that will share the broadest possible diversity of information and ideas, particularly about matters of public interest.

Financial support by public authorities to private media companies can contribute to maintaining or increasing pluralism and diversity in the media landscape. For these reasons, public support to private media should never be used to attempt to assert control over media operators. The Human Rights Committee in its General Comment No. 34, which provides authoritative guidance on the interpretation of scope of the right to freedom of expression under Article 19 ICCPR, highlighted that:

The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.

The regional human rights bodies have also made similar recommendations. The European Court of Human Rights has repeatedly stressed that Article 10 (which guarantees the right to freedom of expression) of the European Convention on Human Rights creates a positive obligation for States to enact a legal and regulatory framework that safeguards pluralism and allows every person to exercise their right to freedom of expression. Article 11 of the EU Charter of Fundamental Rights explicitly provides that the ‘freedom and pluralism of the media shall be respected.’ In its 2018 Guidelines on media pluralism and transparency of media ownership, the Council of Europe recalls that:

‘For the purpose of enhancing media pluralism, States should develop, in consultation with representatives of the media and civil society organisations, strategies and mechanisms to support professional news media and quality independent and investigative journalism, including news production capable of addressing diverse needs and interests of groups that may not be sufficiently represented in the media. They should explore a wide range of measures, which should be available to different media types and platforms, including those of online media. In addition to non-financial support, States are encouraged to provide various forms of financial support such as advertising and subsidies. States are also encouraged to support projects relating to journalism education, media research, investigative journalism and innovative approaches to strengthen media pluralism and freedom of expression.’⁹

⁹ Recommendation CM/Rec(2018)11, cit.

However, public subsidies carry a risk of political interference, especially when combined with a lack of transparency about their allocation. In addition, depending on the kind of support and on the criteria used for the allocation, they might have an impact on the economic sustainability of the media in the medium and long term.

The Council of Europe, in its recently adopted Recommendations on quality journalism in the digital age¹⁰, takes the above challenges into account and sets important guidance for States to tackle them. We therefore call on the European Commission to refer to this body of work, and in particular to its sections 1.1. on general principles for a sustainable environment and 1.2 on institutional and fiscal measures when acting in the field.

ARTICLE 19 notes that in the EU the rules for the direct and indirect state support to the media sector are mainly set at national level, and present strong variations across Member States. This fragmentation can undermine the efficiency of the European internal media market without effectively sustaining the media at national level. Therefore, we call on the European Commission to establish guidance for these national rules with the view to guarantee that all forms of public support to private media comply with the following conditions¹¹:

- There needs to be a clear legal basis for every form of state/public support to the media;
- The relevant legislation must make clear that public support pursues one or various objectives of general interest, such as, but not limited to, the promotion of pluralism and diversity, support to professional ethics, support to accurate and reliable journalism, promotion of equality, innovative journalistic practices, adaptation to the digital age, or media literacy;
- The legislation must include all applicable criteria that will preside over the allocation of public support, as well as clear information and guidelines on the applicable procedures and deadlines.
- Time limits on the duration of state aid should be clearly set out. These limits should be sufficient to provide beneficiaries with reasonable foreseeability of resources and plan their businesses accordingly, while also allowing for a periodical verification that public aid serves its purposes;
- The legislation must explicitly state that the allocation of public support will take place on the basis of fair and neutral criteria, that it will never be used to promote official

¹⁰ Recommendation CM/Rec(2022)4 of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age, March 2022.

¹¹ For a broader overview of these conditions see ARTICLE 19, Freedom of Expression and State Aid to Media (update), September 2017.

figures, that it will be non-discriminatory and will never be based on political content or viewpoints expressed by media actors;

- The legislation should also include a formal statement that public support shall never be used to undermine the editorial independence of media actors, as well as provide for sanctions for public officials who would violate this principle;
- The legislation must provide for an independent body to be responsible for the allocation and oversight of direct subsidies to individual media actors;
- Individual decisions on the allocation of public subsidies must be amenable to judicial review;
- There must be transparency on the definition of public policy on state support to private media as well as on the allocation of public funds to media actors. Media stakeholders and civil society organisations need to be consulted during the elaboration of public policy on state aid. Public authorities, including independent bodies in charge of allocating direct subsidies, must publish annual reports on the use of public funds to support media actors;
- Media outlets that receive state subsidies should be audited annually and make their audited accounts public;
- Programs should be designed to include content-producers themselves, such as associations and consortia of journalists, among the beneficiaries.

In addition to setting guidance for State subsidies, ARTICLE 19 recommends the European Commission to establish an EU fund for media pluralism to finance original and independent journalistic programs and initiatives, develop innovation in the production and dissemination of public-interest news, and sustain start-ups created by journalists. We believe that an EU fund could strongly minimise the risk of undermining media or journalists' independence, and further contribute to the sustainability of the sector. We suggest the EU fund to be established either as a longer term and expanded version of the journalism partnerships funded under the Media Action Plan or as an integration of the Creative Europe programme. To be effective, an EU Fund for media pluralism across the EU should be guaranteed a sufficient budget, and definitely a greater amount than the one currently available through the existing funds.

II. State advertising

State advertising in the media is not a form of state aid to the media but an important source of income for the media. States, in particular those which maintain large, state-owned corporations, often spend considerable sums on advertising through the media. Because many media outlets depend for a large share of their income on advertising, the State's decision on where to spend its money can have a significant impact on the viability of a

publication or broadcasting network. Inescapably, there is a risk of political considerations coming into play in this decision.

Human rights bodies therefore expressed their concern over discriminatory advertising policies and a number of international instruments in the area of freedom of expression explicitly oblige governments to avoid or even prohibit discrimination on the basis of political orientation in public bodies' decisions where to advertise¹².

ARTICLE 19 notes that most EU Member States lack specific rules on state advertising and that, when those exist, there are still significant variations in their content and effectiveness. The absence of consistent and adequate rules to guarantee that state advertising is distributed fairly and not used as a tool of political pressure is a risk not only to the internal market objective but also to media independence and sustainability.

For this reason, we recommend the European Commission include the following in the new EU framework standards for the use of state advertising by Member States:

- Clear, objective and non-discriminatory requirements for the allocation of state advertising;
- Wide transparency with regards to the amount, scope and criteria for the allocation;
- A monitoring system for the granting and implementation of state advertising by independent bodies;
- Transparency and reporting obligations for the receivers of state advertising.

¹² See, e.g. HR Committee, Concluding Observations: Lesotho, 8 April 1999, UN Doc. No. CCPR/C/79/

Add.106, para 23; or the African Declaration of Principles on Freedom of Expression, adopted at the 32nd Session, October 2002, Principle XIV; or Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Principles on the Regulation of Government Advertising and Freedom of Expression, 2012.