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Amendments for Cult Report

European Media Freedom Act

Bitkom Position Paper on the negotiations in the CULT Committee

In the following, Bitkom would like to comment on the ongoing discussion in the European Parliament's CULT Committee on the European Commission's 'Proposal for a Regulation establishing a common framework for media services in the internal market' ("European Media Freedom Act", "EMFA"). As point of reference we are using the CULT political agreement dated 17 July 2023. Please find hereafter, following each explanation for our amendment proposal, a related "red box" with concrete suggestions.

'Text' represents the Commission's proposal, whereas '*italic Text*' represents Amendments proposed by CULT. Bitkom suggestions are **marked bold for added text** and ~~**crossed-out text to be deleted**~~.

Article 2: Definitions

Media services of general interest

The European Parliament CULT Committee proposes to insert a new Recital related to the (quasi) definition of »services of general interest«. This quasi definition doesn't make sense in the context of Article 5. Firstly, the draft already provides for a definition of public media service provider sufficiently covering their public service remit. Secondly, expanding Article 5 to other media service providers than those entrusted with and fulfilling a public service remit, bears no connection with what is provided for in Article 5 (e.g. ensuring that public service provider are independent and adequately and stably financed), rather Article 15 appears to be sedes materiae.

However, we agree that the understanding of »media services of general interest« is an important aspect that should, at least in its general meaning/criteria and the procedural means for its elaboration and designation, be sketched-out (i) either by the EU legislators themselves or (ii) according to clear criteria/procedures described in the Board's guidelines.

In this regard some alignment with the description of a public service media remit in the Amsterdam Protocol appears advisable.

Suggested Amendment:

Art. 2 No. 3a (new)

'media services of general interest' are services which cater in an enhanced manner for the social, cultural, democratic needs of societies by contributing to informing, educating and entertaining the general public, particularly by spreading and making accessible information, thereby participate outstandingly in the individual and general process of information exchange and formation of opinion, and foster the preservation and promotion of media pluralism; the designation of such services shall be made following an independent, transparent procedure by the competent national regulatory authority or body on the basis of pre-established criteria; the decisions shall be communicated publicly and be subject to review by a judicial authority.

Article 2 No.12a (new): User Interface

The notion of »configuration« (formerly referred to as »default settings«, now also denoted as »settings and default layout«) in Article 19 remains unclear. Therefore, it is essential that already the definition in Article 2 No. 12a (new) is formulated more precisely.
Besides, an exemption is needed to delineate the scope of the notion 'configuration' and of 'settings and default layout' (preferably in Article 2 No. 12a itself). This latter is crucial to avoid conflicts with other legal obligations, including those under EU law. For instance, these obligations, the implementation of which is reflected in a user interface's layout and its settings, may encompass information requirements (under the eCommerce Directive, the AVMSD, and the EMFA itself, etc.), youth protection measures, and payment-related functions. It seems to be unintended by the proposed future right, conferred upon users in Article 19, to be understood as open for user amendments of each and every element of a user interface.

Suggested Amendments:

Art. 2 No. 12a (new)

»user interface« means **a feature** *that provides an overview of* **multiple** *media services* ***~~provided by individual or multiple media service providers~~*** *and* ***~~which~~*** *enables the selection of media services or applications that essentially serve to access media services* ***~~and to control or manage access to and use of media services~~****;*

Article 2 No.13: Media Market Concentration

The CULT Committee proposed to change the definition of »media market concentration« under Article 2 No.13 to »involving at least one party in the media value chain«. However, this definition is overly broad and does not serve the overall goal of the EMFA of protecting media freedom and pluralism in the EU. It would cover mergers in various fields of rather irrelevant activities for the preservation of media freedom and pluralism, such as:

- catering service at film production site; rental/lease of cars/trucks/bikes appearing in the movie or serving for staff/logistics purposes,
- energy (power) supply for TV broadcasters' studios,
- establishment of a JV company by an association/league together with a re-seller/exploiting firm in the area of sports rights,
- accommodation services (e.g. hotels) offering cable TV in guestrooms or public spaces within its premises / or the provision of WLAN or copies of newspapers at the disposal of clients in cafés.

The definition needs to be limited to a scenario of concentration that could have a significant impact on media pluralism and formation and pluralism of public opinion.

Suggested Amendments:

Art. 2 No.13:

»media market concentration« means a concentration as defined in Article 3 of Regulation (EC) No 139/2004 involving at least one *party* **with a significant level of activity in one or more media markets ~~*in the media value chain*~~ and potentially having a significant impact on media pluralism or the functioning of the Internal Market for media services of the EU***;***

Article 2 No.14 [Amendments] Audience measurement, No.14a (new)[Deletion]: ~~Audience measurement~~

The phrase 'for the purposes of' raises the point of a significant distinction that needs to be made but is not reflected yet, as the individual responsible for decisions regarding content and media service planning, production, and distribution, as well as regarding advertising purchases is often distinct from the person involved in or providing 'audience measurement'. This is particularly relevant considering data collection and other processing actions, where the individual responsible for the latter is typically not engaged in activities related to content or advertising expenditure.

Moreover, the term 'prices/pricing' encompasses just one facet that must be considered in conjunction with the conditions associated with the "price tag," including factors such as frequency, repetitions, prominence, size, and timing.

The proposed new definition in Article 2 No.14a is obsolete given the amendments suggested here, in particular those regarding Article 23.

Suggested Amendments:

Art. 2 No. 14

»audience measurement« means **a service as defined by Articles 56 and 57 of the Treaty that consists in making available ~~the activity of collecting, interpreting or otherwise processing~~** data about the number and characteristics of users of media services **or *~~and of users of~~*** **content on** *online platforms* for the purposes of decisions regarding advertising allocation **and conditions such as ~~or~~** prices, or **related to** the planning,~~-~~**production**-or distribution of media *services' content*;

~~Art. 2 No. 14a~~

~~»proprietary audience measurement systems« means audience measurement systems used outside the scope of industry standards agreed by self-regulatory mechanisms covering media service providers so as to collect, analyse or otherwise process data on the number and characteristics of users of media services or users of online platforms, as defined in point (i) of Article 3 of Regulation (EU) 2022/2065,~~ **~~for the purposes of decisions regarding advertising allocation or prices or~~** ***~~purchases and sales, regarding~~*** **~~the related planning, production or distribution of media~~** ***~~services content .~~***

Article 6: Duties of media service providers providing news and current affairs content

Para 1

Amendments as particularly provided for in para 1 subsection (ca), (cb), (cc), (cd) and (ce) are neither necessary nor appropriate. The level of information requested is too detailed and not relevant for the recipient/end-user. In particular, it does not make sense to request provider to make information available to the recipient in case this information can be found in a database that is to be publicly available in any case (s. Art 7 para 2b (new)).

Para 1b (new) [AM 595]

It is not clear how 'national media ownership database' interplays with AVMSD rules. At least, language needs to be in line with other EU law such as the country-of-origin principle. Thus, any national database needs to be limited to such media service providers that are established in the member state in question.

As a compromise, information requested according to amendments in para 1 are to be moved to this para 1b to be covered by the national database. However, it is not clear why certain information such as subsection 1(ce) shall be relevant for the goal concerned.

Article 7: Independent media authorities

In general, Article 7 needs to be limited to "subject to EU laws" such as country-of-origin principle; confidentiality, right not to disclose in case of, for instance trade secrets etc.

Article 16: Coordination of measures concerning media service providers established outside the Union

Changes in Art. 16 are not in line with EU laws and the goal of the EMFA. Art. 16 does seem to expand or weaken country-of-origin principle stemming from eCommerce Directive and AVMSD. It is not clear why language changed from “not established in the Union” to “provided from outside the Union”. Further, it is not clear why language is expanded to “media content (or services)” as opposed to “media services” only. DSA regulates handling of illegal content and coordination between member states/digital services coordinators. In sight of DSA as well as overall goal of EMFA, it is not clear why nor it is necessary that EMFA amendments is now trying to expand the scope.

Article 17: Content of media service providers on very large online platforms

Art. 17 (1): Declaration as an MSP

It is unclear why additional amendments around staffing shall be required. Particularly requiring human resources is not technology neutral.

VLOPs should not bear the responsibility for evaluating the declarations submitted under Article 17.1. It should be up to the media service provider and the national regulator of the applicant's country of establishment to confirm that declarations are valid. Similar to the provisions on trusted flaggers under the DSA a mechanism should be introduced enabling VLOPs to report to a regulatory authority if they believe a »declared« media service provider no longer meets the criteria outlined in Article 17.1.

Suggested Amendments:

Article 17 (1) new

Media service providers shall reach out to the national authority or body or the relevant co- or self-regulatory body of their establishment for confirmation that they meet the requirements set out in .... and provide this to the very large online platform. In case of reasonable doubts concerning the media service provider's compliance with point (c), the provider of a very large online platform may seek confirmation on the matter from the relevant national regulatory authority or body or the relevant co- or self-regulatory body. In the event that the provider of the very large online platform and the relevant national regulatory authority or relevant co- or self-regulatory body disagree on an applicant's declaration, the provider of a very large online platform may request input from the Board. To assist with the declarations submitted pursuant to paragraph 1, the national regulatory authority shall make available in a public and machine-readable database the relevant information on their regulatory requirements for the exercise of editorial responsibility and any information on widely recognized relevant self- and co-regulatory mechanisms governing editorial standards. The provider of the very large online platform shall retain the possibility not to accept such self-declarations where they consider that the conditions set out in paragraph 1 are not met.

Art. 17 (2): Content Moderation of MSPs

On a general note, it is essential to highlight that the moderation and restriction of certain providers can serve as a very useful tool for platforms to ensure the safety on their platforms. The concept of restricting service provider used for Article 17 is a broad term that could unintentionally encompass various actions taken by a platform to safeguard minors' safety. Therefore, any measures undertaken by a VLOP concerning MSP content under Article 17 should not interfere with the mitigating actions outlined in the DSA or the responsibilities of VSPs to ensure the safety and protection of minors as stated in other EU-laws, such as AVMSD.

There is no justification to request the very large online platform to also reach out to the national regulatory authority or self-regulatory body every time when considering actions. Reference to such additional steps is to be deleted. There are sufficient safeguards in existing laws as well as in para 3 and 4 of EMFA for the service provider concerned.

Para 7 needs to cater for right to effective judicial protection for all sides concerned.

Suggested Amendments:

Article 17 (2)

Where a provider of a very large online platform decides to suspend ~~***or restrict***~~ the provision of its online intermediation services in relation to *media services* provided by *a recognised media service provider because that media service* ~~*media service provider that submitted a declaration pursuant to paragraph 1 of this Article, on the grounds that such content or service*~~ is incompatible with its terms and conditions **of the online intermediation services, without prejudice to the mitigating measures in relation**, without *prejudice to the mitigating measures in relation* ~~*that content contributing*~~ to a systemic risk referred to in Article *34* **and 35** of Regulation (EU) ~~*2022/XXX Digital Services Act]*~~ *2022/2065, and without prejudice to its obligations under regulations listed in Article 1(2) or under European Code of Conducts* **and without prejudice to its obligations under regulations listed in Article 1 (2) or under European Code of Conducts or other EU laws or local laws compliant with EU laws** *it shall* ~~*take all possible measures, to the extent consistent with their obligations under Union law, including Regulation (EU) 2022/XXX [Digital Services Act] 2022/2065, to communicate to the media service provider concerned the statement of*~~ *communicate to that recognised media service provider* reasons accompanying that decision, **and to provide the media service provider with an opportunity to reply to the statement of reasons within an appropriate period, if possible, prior of time in relation to content provided by a media service provider** ~~***referring to the specific provisions of the terms and conditions with which the media service was incompatible*, as required by Article 4 (1) of Regulation (EU) 2019/1150 *Article 17(3) of Regulation (EU) 2022/2065*, and no later than 24 hours, prior to the restriction or suspension taking effect.***~~

The provider of the very large online platform shall give the recognised media service provider the opportunity to respond to the statement of reasons within the 24 hours prior to the suspension or restriction taking effect.

Article 19: Right of customisation of audiovisual media offer

Art. 19: Relation to prominence rules

The second sentence of the first paragraph makes a reference to Article 7a of Directive 2010/13/EU. This exemption seems to indicate that prominence rules for specific public value content, as we know them for example in Germany in Sect. 84 par. 3-5 of the Interstate Treaty on the Media (*Medienstaatsvertrag*, MStV), could even withstand / override the active decision of a user for another order for the presentation of the media services' offer on the interface of his/her choice. Such proactive attempts to steer the free media choice of the end user have to stop, when the user actively decides not to want this by individually changing the appearance / order of media services on the user interface. Any rule that would prohibit the user from such changes and force the user to continuously be exposed to certain media offerings, although she/he decided not to be strongly of primary interested in them, would be a too paternalistic approach and incompatible with the user's media freedom. The approach suggested here instead is the same approach that the German regulation, as one of the very few Member States that have used the opportunity to introduce regulation based on Art. 7a of Directive 2010/13/EU as amended in 2018, took, when it clearly stated in Sect. 84 par. 6 that – notwithstanding the prior rules on "public-value prominence" – any pre-installed order of media services needs to be amendable for the end-user according to his/her choice. This option to change clearly includes any positive discrimination of specific media offerings by regulation, which the user must be able to actively override. **To this end, the reference in sentence 2 of par. 1 should be deleted.**

Art. 19 (1): Scope of customization

With regards to the customisation of the audiovisual media offer, it is of importance to define precisely what elements of the user interface and device/remote control its users shall be entitled to adapt according to her/his individual interests, in particular be clearly focused on a user interface's function to select services and individual content. A regulation requiring that any element of the user interface or hardware (such as pure control elements of the remote control or the basic structure of the UI) must be freely customizable would not serve the regulatory goal to ensure media pluralism and would therefore impose an unjustifiable burden on the providers of such functions. Such an obligation would also in many cases technically not be feasible.

While we take note of the political intention to give the end user the possibility to adapt content offerings according to his/her individual preferences when sorting or accessing them, we are not convinced that such a comprehensive regulatory intervention is actually necessary at all.

Please also refer to comments on Art. 2 No. 12a (new) for relevant arguments on legal information obligation requirements that remain to be fulfilled by the user inface settings etc. as made by the respective provider, and which cannot be made subject to user change.

Accordingly, we consider it necessary to at least clarify that the obligation is limited, if at all, to those control elements that grant direct access to content, such as channel lists or the assignment of buttons on the remote control that lead directly to VoD providers. We therefore welcome the amendment to Recital 37, as proposed by the IMCO committee, and strongly advise to add the clarification in this direction to the CULT Report. The same reasoning applies to the proposed Amendments of IMCO to Article 19.

Besides, it remains unclear why the rule is extended to audio. This is not at all covered by any impact assessment.

Furthermore, it is still not clear what this section shall cater for in sight of the EMFA goal to achieve media pluralism in terms of having different independent media service providers:

- With regard to a singular media service provider, it is the editorial freedom of the respective providers to structure their offer as they think it fits best. Editorial independency is to be respected by legislators and authorities.
- It is neither clear how the obligation for media service provider shall interplay with the obligation of device manufacturers. For manufacturers, they have no way to influence the interface and/or the app of the media service provider.
- It remains unclear how the obligation can be complied with anyway. For instance, how shall a recipient of a linear offer customize such offer, i.e. change the order of programmes in the schedule of the provider of the linear audiovisual media service?
- The language provided also infringes general principles of EU law, such as the country-of-origin principle and the free movement of devices within the EU.
- The provision is neither proportionate nor appropriate, and it is lacking safeguards for providers/manufacturers concerned.

Suggested Amendment, as also proposed by IMCO (M 38 and 159)

Recital 37

User interface elements or hardware elements that are unrelated to controlling or accessing audiovisual media services as such should not be subject to the requirement for changing settings. For instance, user interface elements primarily serving the operation of the device such as menu guides or buttons dedicated to regulating volume or brightness should not be subject to this obligation.

Art. 19 (1) 1a new

Device, hardware or user interface elements that are not directly linked to controlling or managing access to audiovisual media services as such shall not be subject to this provision.

Art. 19 (1) 2nd sentence new

This provision shall not affect **the application of Articles 6 and 19 para. 2a (new) of this Regulation, of national measures implementing information requirements established by Directive (EU) 2019/882, Articles 5 and 6 of Directive 2000/31/EC,** Art. **6a para. 3, 7 para. 5,** 7a *and 7b*, **9 to 11, 19, 24 and 28b of Directive 2010/13/EU, or of similar requirements under national law, in compliance with Union law.**

Art. 19 (3) new: Proportionality Clause

A right to rearrange or rank differently the media services' offer on user interfaces should apply insofar as its implementation would be technically feasible and could be realised with proportionate effort and in respect of editorial freedom. In its current wording, Article 19 paragraph 2 does not meet the principle of proportionality because it does not consider (i) whether the user interface is technically apt to offer such a functionality and (ii) whether such a functionality's implementation would be disproportional to the economic and operational capabilities of the provider.

Suggested Amendments:

Art. 19 (3) (new)

The right to customization in paragraphs 1 to 2a (new), and the respective obligations laid down for persons placing devices or user interfaces on the market, shall apply when and to the extent that the implementation of such functionalities is technically feasible and feasible under proportionate efforts and when the implementation of such functionalities is proportional to the economic and operational capabilities of the provider, marketer, manufacturer or developer.

Articles 21, 22: Media market concentrations

Media market concentrations which cannot reasonably be expected to have a significant effect on media markets, editorial independence, media pluralism, or the functioning of the Internal Market for media services, should be kept outside the scope of procedures and measures envisaged by the provisions of Articles 21 and 22. Otherwise, and in particular when a broad scope is chosen for »media market concentration«, national regulators will not be able to act efficiently given the burden of an overwhelming number of notifications to be expected and which need handling at national as well as European levels. Therefore, it is essential to specific that Articles 21, 22 apply to »media market concentrations« that could have a **significant** »impact on media pluralism and editorial independence«, as proposed by the Commission. Yet, we very much welcome the proposed points (da) and (db). It is essential for companies to be given a decision in a timely manner. Below only minor adjustments to these new points.

Suggested Amendments:

CULT amendments to Article 21 (1), points (da) and (db) (new)

(da) specify in advance a reasonably **short** *period of time by which the authority or body conducting the assessment is to complete the assessment* **and issue a decision**, *taking into account the period of time required for the involvement of the Board, the Commission, or both, in accordance with paragraphs 4 and 5,* **1st sentence.**

(db) specify the consequence of not completing the assessment, **or not issuing a decision**, *by the end of the period referred to in point (da).*

Articles 23: Audience Measurement

Today, measurement frameworks exist in many Member States (though not in every Member State). These are widely used and often based on self-regulatory frameworks between media service providers, advertising representatives and audience measurement providers. We, however, note that there is neither the single European standard, nor a unified self-regulation. We thus call to be cautious in introducing

measures that would affect existing practices and innovation – also when it comes to possible future independent audits.

In the first sentence of CULT amendments the term "comparability" is added. Yet, it remains unclear, what this refers to. In addition, it is hard to see that such aim can be reached anyhow given that different methodologies are applied by different providers/services. With regards to the second sentence, the meaning of "self-regulatory mechanisms" is yet unclear, especially in contrast (?) to "codes of conduct" as foreseen by para. 3. It is furthermore necessary to specify by whom such mechanisms should be agreed upon jointly, e.g. stakeholders as mentioned in para. 3.

Suggested Amendments:

Art. 23 (1)

Providers of audience measurement ~~**systems**~~ **services shall ensure that their systems** and methodologies shall comply with **the** principles of transparency, impartiality, inclusiveness, proportionality, non-discrimination, ~~***comparability***~~ and verifiability. [...]

We propose a de-minimis threshold to encompass providers whose services impact media markets and to exempt smaller providers whose services might still be in a rather innovative/ experimental phase. Such a graduated threshold could be set by referring to the (i) market penetration (readership, audience, users) of each of the relevant media services using the audience measurement service in question for decisions on advertising/ content, and (ii) the relevance of the online platforms where programmes or press publications as well as advertising etc. are placed using the same approach as set in the Digital Markets Act. (ca. 1/10 of the EU population after Brexit).

The allocation of costs for producing and making-available the information to be delivered to the entitled persons should be a matter for the relevant parties to agree upon. Nevertheless, it could be foreseen to require the application of FRAND terms, where costs are to be incurred by the recipient of the service. Current (TV/VoD) audience measurement services are also financed by those interested in obtaining the relevant information, and/or those persons themselves invest significantly (moneys/ resources) in the establishment of the systems' methodologies.

In cases where no contractual relationship exists or is being prepared between parties, there is no overriding interest to mandate that the service's main assets be made available to anyone.

Suggested Amendments:

Art. 23 (2)

2. Without prejudice to the protection of undertakings' ~~business~~ *trade* secrets *as defined in Article 2, point (1), of Directive (EU) 2016/943,* providers of ~~**proprietary**~~ audience measurement systems **whose services are relevant for at least**

a) 15 million monthly readers, listeners or viewers of media services, or

b) 40 million monthly end users of online platforms containing commercial communications for products and services from all sectors,

in the European Union on average over the preceding financial year, and which are developed outside relevant self-regulatory organisations or whose methodologies do not comply with standards and best practices agreed by the industry, shall provide, without undue delay ~~**and free of costs**~~, to media service providers, and advertisers**, with whom the provider of the audience measurement service has (pre-)contractual relations on advertising allocation,** as well as to third parties authorised by media service providers and advertisers, accurate, detailed, comprehensive, intelligible and up-to-date information on the methodology used by their audience measurement systems. ~~***They shall provide free of charge to each media service provider the audience measurements relating to its content and services.***~~ *An independent body shall ~~regularly~~ audit once a year the methodology and the application thereof.* ~~**This provision shall not affect the Union's data protection and privacy rules.**~~

Art. 23 (5a)

The obligations set out in this Article are without prejudice to the right of ~~***audiences***~~ **individuals** *to the protection of personal data concerning them as provided for in Article 8 of the Charta of Fundamental Rights of the European Union and Regulation (EU) 2016/679.*

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

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