



Proposal of the Commission for a European Media Freedom Act (EMFA)

ERGA position

November 2022

❖ General remarks by ERGA on the EMFA proposal

The European Regulators' Group for Audiovisual Media Services (**ERGA**) **welcomes the proposal for a European Media Freedom Act (EMFA)** and **fully endorses its paramount objectives** to protect media freedom, pluralism and independence in the European Union (EU). Access to an independent and pluralistic media offer is crucial for European citizens to forge informed opinions and participate effectively in the democratic debate.

While the **protection of EU democratic values** goes beyond the **internal-market oriented approach** followed by the Commission, ERGA recognises that the proper functioning of the internal market goes hand in hand with fostering an environment suitable for the sustainable development of a plurality and variety of European media. ERGA's main focus – and that of its members – is consubstantially on the above-mentioned EU values.

ERGA welcomes the **flexible principle-based approach** generally retained in the proposal introducing a reasonable level of minimum harmonisation, while noting that certain definitions and provisions should be further clarified so as to enhance the legal certainty and overall robustness of the legal framework. The possibility for the Member States to adopt more detailed rules regarding a number of aspects is also welcome. Indeed, it appears key for EMFA to pursue a proper balance between principles and enforcement, harmonized and national approaches, and **not to level down existing and properly working national systems that may already incorporate more demanding rules**.

Moreover, ERGA **positively notes the Commission recommendation** as a useful contribution to fostering internal safeguards for editorial independence and ownership transparency in the media sector.

In terms of the legal framework, ERGA wishes to underline that **the interplay of EMFA**, which will require national implementation measures, **with existing EU instruments** (such as the AVMSD and the DSA, to quote only the most prominent ones) **and national transposition and/or implementation measures will require further analysis and possibly some clarifications** in order to secure the enforceability and legal certainty of the whole framework.

With regard to the **scope of EMFA**, ERGA welcomes the fact that all types of media services are covered, disseminated both offline and online, including all audiovisual media services, but also radio broadcasts and audio podcast.

Given the sensitivity of press matters, as well as national specificities (including constitutional), ERGA wishes to explicitly and unambiguously state that **it is neither its vocation nor its intention to regulate the press sector**. In this sense, it is **ERGA's understanding that EMFA does not foresee any regulation of the written press *per se* by the future European Board for Media Services** ("the Board"), as the latter has no role pursuant to Chapter II of the proposal. This should be ideally further explicitly clarified, at least in recitals.

ERGA positively notes that EMFA intends to cover two crucial issues for the integrity of media services and information in the EU, the importance of which was already clearly highlighted during the co-legislators' discussions of the DSA: the dissemination of **third country media services** and the **treatment of media content by very large online platforms (VLOPs)**. ERGA calls for the provisions on third country media services to be clarified

and strengthened in order to address in a more effective and tailored manner the different scenarios of third-country-content dissemination into the EU. Similarly, provisions regarding the treatment of media content by very large online platforms (VLOPs) should to be further improved in order to bolster their “effet utile”. Regarding both these important aspects, ERGA makes concrete proposals accordingly.

ERGA also commends the ambition of the proposal, which covers a **wide range of relevant themes**. Notably, ERGA welcomes the provisions on the rights and obligations of media service providers, the protection of journalists, the public service media, the audience measurement, and the assessment of media concentration designed as minimum standards, in regards of which Member States can adopt more detailed provisions.

ERGA welcomes the proposal to upgrade it to a European Board for Media Services with additional tasks and responsibilities under the new legal framework. Eight years after ERGA's creation, its members share the conviction that strengthened coordination and collective deliberation among national regulatory authorities (NRAs), whose independence should not be affected by this act, can bring significant added value to EU enforcement of media regulation. To this regard, the proposed institutionalisation of the Memorandum of Understanding (MoU), which ERGA has adopted on a voluntary basis, is welcome. It has the potential to strengthen the legal certainty, predictability and robustness of the cross-border structured regulatory cooperation, while its concrete modalities should be further defined by the Board itself in its Rules of Procedure.

In this context, **the relevant provisions of EMFA should provide for the maximum guarantees for the independent functioning and decision-making of the Board, as the new collective body of independent authorities** entrusted with the implementation of provisions for independent and pluralistic media. Along this line, ERGA would like to draw attention to the **weaknesses of the scheme as currently conceived** in the EMFA proposal. Its main concerns relate to the **status of the Board and its effective independence from the European Commission**.

The initial status of an expert group consulted by the Commission no longer seems appropriate and should evolve in line with the sensitivity and the range of the issues to be covered. EMFA recognises this and establishes the Board as an independent advisory body. However, the effective independence and legitimacy of the Board is all the more important with regard to the role and tasks of the Commission under EMFA. In this context, **the Board should** do more than assist the Commission: in addition to the cases in which the Commission requests its involvement, the **possibility for the Board to act on its own initiative should be explicitly recognised**. Equally important is the fact that **the Board should not have to seek the agreement of the Commission when drafting and adopting its acts and opinions**: the foreseen provisions in the Proposal should be amended accordingly, in order to be consistent with the proclaimed – and necessary – independence of the Board.

The effective independence of the Board will also very much depend on the **organisational set-up** agreed. ERGA calls for the setting-up of a **secretariat operating separately from the Commission** (similarly to existing set-ups), which, by far, appears to be the most secure arrangement in this respect. The Board should also be in a position **to manage its own internal affairs**, such as drawing up its rules of procedure, work programme and main deliverables or deciding on invitations to its meetings, independently.

Correlatively, while the EMFA already calls for **adequate resources and effective autonomy for independent NRAs at national level**, ERGA considers that these provisions should be further strengthened in order to ensure that these resources be proportionate to the missions and the tasks, which are new to many NRAs. This is a necessary precondition to enable the NRAs to exercise their role within the Board and to be able to keep up with both the Board's and their own extended responsibilities. Indeed, pursuant to the extended competences of the new Board and the new structured cooperation procedures under EMFA, the number of requests for information and cooperation addressed to NRAs will certainly increase. Therefore, proportionally increased financial, human and technical resources are necessary for the NRAs, especially for smaller or less resourced ones, to be able to deal with all of requests on time and bring their full contribution to the successful implementation of EMFA. In addition, as NRAs have a crucial role in ensuring media independence, which is at the heart of the EMFA, it is of vital importance to ensure that they are fully independent and effectively autonomous to play their role as guardians of the values of media regulation.

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In the following, ERGA sets out more precise considerations and proposals aimed at consolidating the EMFA's robustness, proportionality and enforceability. ERGA intends to proceed with its detailed analysis of the proposed provisions and stands ready to further contribute to the upcoming debates with a view to the adoption of the proposal.

❖ The EMFA proposal –specific remarks by ERGA

CHAPTER I - GENERAL PROVISIONS

Article 2 - DEFINITIONS

In order to reflect the ambition aimed by and required for EMFA as well as to foster legal certainty, ERGA would like to make several suggestions to the definitions covered in EMFA:

- A. *The definition of “media services” makes reference to articles 56 and 57 of the Treaty on the Functioning of the European Union and the idea that the service is “normally provided for remuneration”. It would be desirable to extend this definition in order to ensure that non-commercial media services, which should be subject to the EMFA provisions as they compete with commercial media, also fall in the scope of this definition and this Regulation.*
- B. *Regarding the definition of “video-sharing platform service” (article 2 (11)), in light of recital 8 and in particular the last sentence of the recital (“Therefore, such an entity could be qualified both as a video-sharing platform provider or a very large online platform provider and as a media service provider”), it should be clarified (at least in a recital) that, where a provider of a video-sharing platform (VSP) or a very large online platform (VLOP) exercises editorial control over one or several sections of its service, the qualification of “media service provider” would only apply to this activity and not to the entire service provision activity. ERGA also suggests that the assessment on the qualification of “media service providers” of one or several sections of a VSP/VLOP should not be left to its providers’ discretion. Such an assessment should be based on objective criteria referring to the definitions provided by the AVMS Directive.*
- C. *The category of very large online search engines as defined in the DSA should be part of the definitions alongside that of very large online platforms (article 2 (10)). It appears necessary to encompass these services, which play an important role in giving access to media content online and which therefore should be subject to the same, or at least similar, obligations as very large online platforms pursuant to EMFA articles 17 and 18.*
- D. *The definition of ‘state advertising’ (article 2 (15)) by state-owned enterprises or other state-controlled entities should ideally be narrowed down to entities, where the state is involved in the everyday business and has an influence or control over advertising strategies regarding spending and placement. This would help limit the extent of the reporting and monitoring activities provided for under article 24 to what is strictly necessary and proportionate for reaching the pursued goal. Conversely, it should be considered to further clarify that the threshold of 1 million inhabitants only applies to local governments, in order for the provision to be effectively applicable to Member States with less than this number of inhabitants.*
- E. *The following terms and expressions should be further clarified in corresponding recitals (and/or, where relevant, in the definitions’ list of Article 2), in order to ensure more clarity and a harmonised application of EMFA:*
 - *“News and current affairs content” (article 6)*
 - *“Media pluralism” and “Significant impact on media pluralism and editorial independence” (article 21)*
 - *“Disinformation¹, foreign information manipulation and interference”² (article 18 & 25)*
 - *“Trustworthy information” (recitals 11, 13 & 31) & “trustworthy media content” (recital 16).*
 - *“Substantial influence on the formation of public opinion” (recital 39);*

¹ A reference in EMFA could be made to the 2022 Strengthened Code of Practice on Disinformation relying on the definition of disinformation from the European Democracy Action Plan: “Disinformation is false or misleading content that is spread with an intention to deceive or secure economic or political gain and which may cause public harm”.

² A reference in EMFA could be made to EU’s toolbox on Foreign Information Manipulation and Interference prepared by the EEAS, according to which foreign information manipulation and interference is “a mostly non-illegal pattern of behaviour that threatens or has the potential to negatively impact values, procedures and political processes. Such activity is manipulative in character, conducted in an intentional and coordinated manner. Actors of such activity can be state or non-state actors, including their proxies inside and outside of their own territory”.

CHAPTER II - RIGHTS AND DUTIES OF MEDIA SERVICE PROVIDERS AND RECIPIENTS

Article 4 – RIGHTS OF MEDIA SERVICE PROVIDERS

ERGA wholeheartedly supports the objectives of this article, as the protection of media service providers and, in particular, journalists and their sources against any threat to their independence and security is one of the cornerstones of free and independent media.

- F. *It is important to avoid any doubt as to the object and the effect of the provision on the absence of any interference from NRAs on editorial policies and decisions by media service providers (article 4.2(a)). ERGA therefore suggests to clarify, potentially in a recital, that the normal exercise of their remit by NRAs on the basis of legal provisions pursuing general interest objectives (e.g. requesting the broadcast of public interest messages on general health issues, discussing voluntary charters with television and/or radio service providers aimed at raising awareness among the general public, etc.) shall not fall under this prohibition.*
- G. *In the same spirit of clarification, while noting the reference to “non-standard forms of employment, such as freelancers” in Recital 16, ERGA suggests to refer explicitly to “journalists, including free-lance journalists” not only in the recital part but also in article 4, 2(b) and (c) when mentioning protections applicable to media service providers’ employees.*

Article 5 - PUBLIC SERVICE MEDIA PROVIDERS

Pursuant to Protocol 29 on the system of public broadcasting in the Member States to the TEU and TFEU (the ‘Amsterdam Protocol’), the organisation and definition of the public service remit and the financing of public service media lie within the competence of the MS. The regulation of public service media therefore varies greatly from one Member State to another and is generally a sensitive issue.

- H. *Against this background, ERGA welcomes the principle-based approach proposed in EMFA for public service media providers as it introduces reasonable and proportionate requirements for these very special media service providers given their public mission and their impact on the formation of European citizens’ opinions. As EMFA should not be dealing or interfering with the missions of the public service media, ERGA considers these provisions to be adequate.*

Article 6 - DUTIES OF MEDIA SERVICE PROVIDERS PROVIDING NEWS AND CURRENT AFFAIRS CONTENT

While noting that it would not have any role to play, under EMFA, for the enforcement of this article, ERGA wishes to stress that journalistic and editorial independence is a fundamental principle, which should be pursued and preserved in all times and cases, and as such it is fully relevant to be covered in EMFA. It is indeed of utmost importance that journalists be protected from any undue pressure regarding the editorial content they propose.

- I. *ERGA strongly welcomes the provision protecting editorial independence. However, further clarification beyond Recitals 20 and 21 would be welcome concerning the distinction between “individual editorial decisions” - which shall be preserved from any influence and be taken freely - and the overall “editorial line”, which might be agreed between owners of media services and editors.*

CHAPTER III - FRAMEWORK FOR REGULATORY COOPERATION AND A WELL-FUNCTIONING INTERNAL MARKET FOR MEDIA SERVICES

SECTION 1 - INDEPENDENT MEDIA AUTHORITIES

Article 7 - NATIONAL REGULATORY AUTHORITIES OR BODIES

ERGA welcomes that the EMFA proposal relies on the network of European regulators for the implementation of some parts of EMFA (Chapter III). ERGA takes note that EMFA builds on Article 30 of the AVMSD, including when it comes to the independence requirements, which the media regulators should be subject to, such as the necessary independence from public and private influence. ERGA welcomes the fact that EMFA provides for NRAs to have appropriate powers of investigation and notably to request information.

- J. *ERGA also notes that EMFA reiterates the AVMSD requirement for adequate financial, human and technical resources. However, following the (almost) finalized AVMSD transposition across the EU, it appears that this requirement pursuant to article 30 AVMSD has not necessarily led to increased and sufficient resources for all NRAs despite a clear increase in competences, tasks and workload. Given the extensive number of new missions and tasks for the European Board for Media Services, and therefore for the NRAs, it is crucial that EMFA provides for a stronger and more binding language for Member States to ensure an effectively appropriate level of resources enabling NRAs to carry out these new missions. Furthermore, in this sense, a recital could give examples of possible sources of funding for NRAs (e.g. auctioning of the spectrum or of the digital dividend, levy on regulated entities, etc.).*

EMFA should also further strengthen the safeguards of Article 30 AVMSD (in both article 7 of EMFA and corresponding recitals) on the necessary requirements for NRAs to ensure their effective independence, including regarding the full operational autonomy to manage their financial and human resources.

SECTION 2 - EUROPEAN BOARD FOR MEDIA SERVICES

Article 9 – INDEPENDENCE OF THE BOARD

ERGA welcomes the central role foreseen by the Commission for the Board in EMFA in view of the functioning of the internal market, the reinforcement of EU fundamental rights through the media sector and the promotion of effective media freedom and pluralism.

In its response to the EMFA public consultation, ERGA emphasised the crucial importance of several preconditions:

- Ensuring ERGA's effective independence from all bodies and institutions, including the European Commission, by establishing it under an appropriate new statute and by ensuring its staff does not report to the Commission nor is directly hired by it;
- Reinforcing ERGA's proper resources, both financial and human;
- Strengthening the guarantees that sufficient resources be provided for at national level for NRAs in order to enable them to exercise their role within ERGA and be able to keep up with the extended responsibilities of ERGA (although the AVMSD already sets out the rule, it is necessary to better ensure its effectiveness – see above regarding article 7);
- Adapting ERGA's governance to its new status and missions. Here again, the EU text should only set the ground rules and leave ERGA the flexibility to adopt its own detailed rules of procedures, within the general framework set by EMFA.

- K. *Those basic but fundamental preconditions are unfortunately not met in the EMFA proposal. While EMFA strengthens the role of ERGA in the form of the Board and reinforces its secretariat, the independence of the Board formulated in article 9 is contradicted in practice by several provisions contained in the following articles on the internal functioning of the Board, the secretariat and the Board's tasks. The effective independence of the Board, which is constituted by national media regulators - who are indeed independent from private and public influences at national level - is essential to ensure the proper application of this Regulation. ERGA therefore urges the co-legislators to ensure that the wording of article 9 fully reflects the independence both of the Board and the national regulatory authorities which it sets out to guarantee, and preserves this independence from any institution, including from the European Commission (see below, articles 11 and 12).*

Article 10 – STRUCTURE OF THE BOARD

This provision should be coherent with article 9 on the independence of the Board. Several amendments should therefore be introduced:

- L. *The Board should be able to decide autonomously on its internal functioning, without agreement or coordination with the Commission (rules of procedure, work programme, main deliverables, invitation of experts to meetings).*
- M. *The 2-year period for the Chair's term duration, while providing stability and supporting mid-term planning, may be too long and resource-intensive. This could in particular impede smaller regulators from accessing the Chairmanship. ERGA suggests that the duration of the Chair's term should, rather than being set in the regulation, be adopted by the Board in its rules of procedure.*

Article 11 – SECRETARIAT OF THE BOARD

When comparing the current resources of the ERGA secretariat with the EMFA proposal for the Board secretariat, ERGA notes positively the increase in resources which will be dedicated to the administrative support as well as the contribution to the tasks of the Board.

However, ERGA wishes to stress the following crucial points regarding the Board's secretariat:

- N. It is difficult to achieve a real independence of the Board with a secretariat that is provided by and reports to the Commission and not to the Board itself. To this effect, the most effective solution, by far, would be to create a fully and effectively independent structure relying on the network of national media regulators, and supply it with adequate resources (e.g. such as the BEREC office for the telecom sector).*
- O. Given the extensive new mission of the Board compared to ERGA (in terms of topics covered and missions, including drafting opinions on those new topics), it is essential for the Board to be relying on a strong secretariat, which shall be able to support not only the activity of the Board itself, but also to provide mutualised support for the NRAs. However, the set-up proposed in EMFA does not seem to be sufficient in this regard. Hence the importance of significantly higher resources for the Board and also at national level for NRAs in order to allow them to carry out their new tasks and contribute effectively to the missions of the Board.*

Article 12 – TASKS OF THE BOARD

ERGA welcomes the extensive new missions and tasks as proposed by the European Commission and the central place the newly established European Board for Media Services will play in the governance and supervision of EMFA. ERGA stands ready to transform into the Media Board and carry out these new important tasks for the promotion of effective media freedom and pluralism in the EU.

- P. However, as stated in article 9 of the EMFA proposal, the Board is supposed to be an independent body and therefore should have the ability to carry out its diverse missions with the necessary autonomy. It is therefore inappropriate that the EMFA only or mainly provides for tasks of the Board to be executed either "in agreement with" or "at the request of the Commission". It cannot be acceptable for a group of national media regulators, who at national level act in full independence from any public or private influence, to be functioning only in reaction to the Commission or with its agreement.*

It is therefore of utmost importance that the European Board for Media Services, as a truly independent body, shall always have the possibility to act at its own initiative as well, and to adopt documents without having to seek any external agreement. Hence ERGA proposes to amend article 12 as follows:

- Mentions of "at the request of the Commission" should be replaced with "on its own initiative or at the request of the Commission";*
- references to "in agreement with the Commission" should be deleted.*

SECTION 3 - REGULATORY COOPERATION AND CONVERGENCE

Article 13 - STRUCTURED COOPERATION

In 2020, ERGA adopted a [Memorandum of Understanding](#) (MoU) stipulating common principles on how to ensure the cross-border enforcement of media rules on audiovisual media services and video-sharing platforms, which go beyond the stipulations of the AVMSD. In practice, the MoU creates a common framework under which ERGA members provide each other with mutual assistance and exchange of information for the sake of a more effective enforcement of AVMSD rules and fundamental values, especially in cross-border cases.

- Q. The present EMFA provision institutionalizes the ERGA MoU and allows for the broadening of the reach of the MoU by securing the involvement of all ERGA members. It also presents the advantage of providing more legal certainty, predictability and robustness by making the cooperation more substantive.*

However, ERGA advocates for EMFA to only inscribe the principles and broad objectives of the MoU, and leave the definition of details and modalities to the future Board and its members, in order for the scheme to be better suited to operational needs and more future-proof. ERGA therefore considers that it would be more appropriate to provide the details of the new cooperation scheme (such as, e.g., number of calendar days for addressing requests) in the Media Board's Rules of Procedures for instance, to be decided and adopted by the Board.

- R. *Here again, the provision of appropriate resources and clear legal mandates for regulators at both EU and national level is crucial to allow them to properly and meaningfully participate and contribute to this regulatory cooperation, especially when it comes to smaller and less resourced regulators.*

Article 14 - ENFORCEMENT OF OBLIGATIONS BY VIDEO-SHARING PLATFORMS

This provision also builds to a certain extent on the current ERGA MoU. Its institutionalisation in EMFA is welcome: VSPs are by nature cross-border in most of the cases, and therefore strengthened cross-border regulatory cooperation is very much relevant and needed. Moreover, such a procedure is appropriate insofar as it allows to address concerns by the country of destination while not undermining the country-of-origin principle, and to strengthen the effectiveness of the obligations specifically applicable to video-sharing platforms arising from Article 28b of the AVMS Directive.

- S. *However, here again, ERGA considers that it would be more appropriate for EMFA to only inscribe the principles and broad objectives, and leave the definition of details and modalities to the future Board. ERGA therefore suggests to provide the details of the new cooperation scheme in the Media Board's Rules of Procedures for instance, to be decided and adopted by the Board.*

While the procedure introduces a useful mechanism of referral to the Board for mediation in case of disagreement between the requesting national authority or body and the requested authority or body, the impact of the provision might be limited in practice if the requested authority only informs about the actions foreseen (and not taken).as the possibility to refer the matter to the Board for mediation, according to article14(3) is only available in cases of disagreements on actions taken.

- T. *Without prejudice to the country-of-origin principle and NRAs' independence, ERGA would suggest to amend article 14(3) in order to go beyond just planning actions and make it binding for the requested authority to take action and report on it. or justify the reasons for which action was not taken.*

Article 16 - MEDIA SERVICES FROM OUTSIDE OF THE EU

As stated in ERGA's response to the EMFA public consultation, the question of cross border cooperation in the area of channels and media services under the influence or control of third countries, which has repeatedly raised consistency and coordination issues, should be considered to the extent that such media may cause severe damage in terms of disinformation, state propaganda, incitement to hatred and violence and destabilization of European democracies. The crucial importance of these issues is even more acute in times characterised by growing geopolitical international tensions and conflicts, including with EU neighbouring countries.

Regarding such non-European channels and media services, ERGA therefore advocates for the EMFA to provide for a more systematic exchange of information and to explore the possibility to introduce a mechanism of mutual recognition of decisions (subject to their compatibility with EU and national law) as well as mutual help for monitoring of those media services. In the past months, ERGA has explored the different challenges EU media regulators face in light of concrete disinformation campaigns carried out by media services from outside of the EU and in the context of limited legal tools to take action individually and in coordination with other NRAs.

ERGA therefore welcomes the EMFA proposal, which does include specific provisions to tackle these challenges. In light of recent ERGA discussions on this very matter, ERGA believes article 16 should be improved, clarified and strengthened in order to provide effective solutions to the problems faced:

- U. *This article (starting from its very title) only applies to media services providers that are accessible in the EU without having an establishment in any of the EU Member States. This case presents clear challenges in terms of jurisdiction and therefore in terms of means at disposal of media regulators to tackle them. However, this provision should cover a wider range of problematic media service providers which are effectively under the influence or control of third countries state authorities, and notably those with an EU establishment following the different criteria stipulated in AVMSD article 2.*
- V. *The formulation "control that may be exercised by third countries over them" should be further clarified in order have more legal certainty around the concrete scope of the provision.*
- W. *The coordination by the Board of national measures should be better circumscribed in order to limit the Board's involvement in any national measure against media providers under influence or control of 3rd countries. While noting that the opinion of the Board on the coordination would require in any case a two-thirds majority of its members, it could therefore be envisaged that the Board only gets involved in coordination when the issue is raised by a certain number of national regulatory authorities (more than*

one - to be defined by the Board in its Rules of Procedure). This would help to avoid the Board being referred to in cases with limited or no cross-border nature.

- X. According to the Charter of fundamental rights and other international legal texts, freedom of expression is a core value in democratic societies. Therefore, the ban of media outlets must be a measure of last resort, be subject to a proper legal procedure and be duly justified and necessary. This provision is supposed to be triggered only in cases of “serious and grave risk of prejudice to public security and defence”. As the interpretation of “public security” could be subject to divergent, sometimes narrow interpretations, it should be considered to clarify it (e.g. in a recital) and/or extend the triggering conditions of the provision also to exceptional circumstances related to grave risk to public health (so as to align it with the DSA crisis response mechanism), as well as potentially to other risks mentioned in the AVMSD, such as incitement to hatred and intention/call to commit a terrorist attack.
- Y. A one-size-fits-all solution for cooperation among regulators might not be an appropriate approach as the issues are very different depending on the problem faced and the nature of the third country media service provider which is considered as problematic. Therefore, and without prejudice to the Member States’ and NRAs’ competences and ability to regulate media service providers, concrete and specific solutions and clear legal mandates and procedures should be proposed / further elaborated for the following aspects in the framework of a regulatory cooperation at EU level:
- Third country media having establishment in one of the EU Member States (irrespective of the means of distribution);
 - Third country media broadcast by satellite (and for which an EU jurisdiction is either established on the basis of the uplink location or the nationality of the satellite capacity), taking into account the difficulties regarding the implementation of the technical criteria for the identification of the competent Member State;
 - Online distribution (websites and social media) of the problematic media content, irrespective of the establishment of the media provider;
 - Third country channels broadcast towards or accessible from the EU but which do not fall under the jurisdiction of any Member State (extra-UE satellites and uplinks, online distribution...).
- Z. When it comes to media providers established in the EU (pursuant to AVMSD article 2), the following approach could be foreseen in EMFA in order to mobilise the NRA of the country of establishment: when a Member State or an NRA identifies a severe violation by a foreign media service provider (pursuant to AVMSD articles 3(2), 3(3) or 6(1)), it may request the territorially competent authority to take appropriate actions, provided that this request is supported by a certain number of national regulatory authorities (more than one - to be defined by the Board in its Rules of Procedure).
- AA. In order to solve or prevent issues related to third country media, the issue of jurisdiction and satellite criteria should also be addressed as one of the main challenges, notably due to the volatile nature of the uplink localisation and the difficulty to identify the location of uplinks. The relevant provisions of the AVMSD should therefore be amended in the future in order to tackle these issues, which severely impair efficiency of the EU framework in relation to third country media service providers.
- BB. In order to guarantee the effective enforceability of this provision, it should include a call for Member States to reflect it in the national law in order to ensure that NRAs are provided with a capacity to take action based on other NRAs’ measures and the opinion of the Board.
- CC. This provision should be further developed as regards some basic, common criteria for the assessment of problematic services (content, ownership, lack of editorial independence from the state etc.) including regarding the entry on the EU market. This would facilitate mutual recognition of decisions (subject to their compatibility with EU and national law) and enhanced cooperation where justified.

SECTION 4 - PROVISION OF MEDIA SERVICES IN A DIGITAL ENVIRONMENT

Articles 17 and 18 - MEDIA CONTENT ON VLOPs AND STRUCTURED DIALOGUE

ERGA welcomes the inclusion of media-specific obligations for the online environment, complementing the DSA. This is a crucial issue, which needs to be addressed in order to preserve and foster media pluralism by ensuring that media service providers are not treated like any other content provider on the services provided by very large online platforms. ERGA already highlighted this crucial aspect in its position paper on DSA and therefore is keen to see that the EMFA, as a *lex specialis* for media-related matters, addresses this important issue.

ERGA also strongly welcomes the setting up of a structured dialogue between online platform providers and media services providers under the auspices of the Board. While positively noting that all media services providers publishing content online (audiovisual and/or audio media service providers as well as press publishers) will be invited to this structured dialogue and potentially benefit from it, ERGA wishes to stress that this provision implies no regulatory role from the Board vis-à-vis press publishers, but a facilitator role for a constructive dialogue between medias and online platforms, with a view to reaching a more suitable balance to the benefit of media service providers.

In the following, ERGA sets out a number of considerations and proposals aimed at making this provision as effective as possible.

DD. A number of limitations to this provision may be reconsidered, based on the following questions and/or concerns:

- *The actual impact of article 17(2) might be rather limited as it will be triggered only in cases, which are not related to systemic risks (which the DSA defines in a very broad way);*
- *Recital 33 specifies that VLOPs will have the power to not accept self-declarations made by media service providers on their capacity of meeting certain requirements, where they consider that these conditions are not met. While ERGA recognises the need to prevent potential abuses of a system of self-declarations (which could contribute to the spread of disinformation) and welcomes the intention of the Commission to issue a set of guidelines in this area, this practically means that VLOPs will have a discretionary power in regard to the assessment of the integrity and reliability of media service providers. Therefore, the question might be raised whether there is a sufficient guarantee that media outlets will effectively benefit from the protection proposed here.*

EE. The scope of this provision should be extended: (i) to very large online search engines in order to encompass other relevant players (ex. role of Google News for media content provision in article 17; (ii) potentially, to other platforms beyond VLOPs, for instance by setting a threshold at the Member State level (e.g. number of active users of a platform or search engines corresponding to 10% of a Member State population; players to be identified on this basis by the NRA) in order to identify other platforms which play an important role in a given Member State.

FF. Furthermore, some provisions could be strengthened including in order to improve the supervision of this obligation and increase the VLOPs' accountability:

- *Article 17(2) refers to the "suspension" of services whereas article 17(4) mentions "restrictions or suspensions", which seems inconsistent. ERGA therefore suggests article 17(2) to be broadened in order to cover also restrictions of services;*
- *It is crucial to ensure consistency and the non-arbitrary treatment of media outlets by different VLOPs, especially when it comes to the acceptance of the declarations by media service outlets;*
- *The possibility to introduce an external complaint system for rejection of status should be considered;*
- *=The cooperation and transparency of the VLOPs (and any other platforms under scope) should be further secured by the provisions. To this end, it could be considered to introduce an obligation for these players to provide the Board, upon its reasoned request, with information and data relevant to the monitoring of Articles 17 and 18;*
- *The text could also specify what happens if an amicable solution is not found. This would help further reducing the discretionary power of VLOPs (and any other platforms under scope), which seem to have a rather extensive autonomy in deciding whether to restrict or suspend the provision of their services. In the same vein, the possibility may be studied to impose sanctions in case VLOPs (or any other platforms under scope) do not comply with this provision, especially to treat with priority the complaints by the "recognized media outlets";*
- *This new policy should be reflected by the VLOPs (and any other platforms under scope as suggested by ERGA under point EE) in their Terms and Conditions;*
- *The Commission should have to take into account the Board's report from the structured dialogue for its assessment of DSA-related risks.*

GG. Last but not least, some clarifications would be welcome:

- *Does the suspension or restriction by the platform involve the suspension or restriction of an individual content, the whole account of the media service provider or all services provided by the intermediary for a given content (and therefore potentially leading to demotion, demonetisation, deactivation of access or content removal)?*
- *What should be considered as a "frequent" restriction to media content?*
- *For the sake of legal certainty, the concept of "regulatory requirements", to which media outlets should be subject to be able to benefit from this provision, should be more precisely defined.*

Article 19 - CUSTOMIZATION OF THE AUDIOVISUAL MEDIA OFFER

ERGA welcomes the EMFA proposal to empower users by providing them with the possibility to easily change the default settings of devices giving access to the audiovisual media offer. ERGA notes that this measure might in practice constitute an even stronger incentive for media outlets to apply for the general interest service status (pursuant to AVMSD article 7a) in the cases of Member States who decided to implement this AVMSD provision.

This being said, ERGA would like to note that this new provision could potentially entail amending national legislations, which were recently or are currently changed due to the AVMSD transposition. While EMFA states that *“this provision shall not affect national measures implementing Article 7a of Directive 2010/13/EU”*, which is welcome, it will be key to avoid creating any confusion and reducing legal certainty for manufacturers of devices and media service providers.

In the same spirit, consistency should be ensured with the relevant DSA provisions and in particular with regard to Article 25 on Online interface design and organisation and Article 27 on Recommender system transparency which could be taken as reference.

HH. Finally, in order to reap the full benefits of this provision, ERGA would like to suggest for the concept of “default setting” to be further clarified in the text or, if not, in a recital.

SECTION 5 – MARKET MEASURES AND OPERATIONS

Article 20 - NATIONAL MEASURES

In its response to the EMFA public consultation, ERGA has stated that in general, common basic procedural criteria for administrative decisions which affect media outlets (e.g. non-discrimination, proportionality, transparency) could present an added value. Member States could possibly be invited to communicate on those measures and explain them. ERGA also expressed its readiness to issue non-binding opinions on national measures and procedures which may result in restrictions to the entry or operation of media on the market, when those measures present a clear and justified cross-border aspect or challenge.

In light of the current EMFA proposal, ERGA would like to express its support for this provision and the principle-based approach that was chosen.

At the same time, ERGA would like to note that, according to the proposed provision, the Board could be, in some cases, considering also national measures potentially involving press publishers. This may potentially be problematic in some Member States as the national media regulators rarely have the competence and expertise over this sector. In any case, ERGA wishes to make clear that ERGA and its members are not calling for new specific regulatory powers vis-à-vis the press sector, which is subject to its own, very specific, rules.

In order to further enhance the proposed provision, ERGA would like to make the following proposal:

- II. For the sake of legal certainty, and in order to avoid potentially divergent interpretations of the scope of this provision as well as an excessive burden for NRAs and/the Board, EMFA should be more specific as to which types of measures are covered, as well as in which cases the relating provisions shall apply, taking into account the principle of proportionality. For instance, a (non-exhaustive) list of examples could be provided in recitals in order to illustrate the type of measures in scope of this provision.*
- JJ. When it comes to national measures potentially having an impact on the internal market for media, the Board should have the possibility to issue an opinion on a national measure also on its own initiative and not only at the request of the Commission.*

Article 21 - MEDIA MARKET CONCENTRATIONS

In its response to the EMFA public consultation, ERGA has expressed its support for basic common standards (structural rules and general principles) in EMFA regarding transactions on the media market. ERGA pointed out that these provisions should be principle-based and cover minimum procedural standards for the assessment by Member States of the effects of media market transactions on media pluralism. ERGA stressed that ideally, only the principles of such a review should be enshrined in EMFA, as Member States should remain free to choose the appropriate and proportionate modalities. One of these principles could include the obligation for the competition authority to ask the competent media authority (where applicable) for an opinion on the effects of the foreseen

transaction on media pluralism and possible remedies, as such a procedure is already in place in a number of Member States.

Against this background, ERGA welcomes the principles proposed in EMFA for the assessment of media market concentrations. ERGA also supports the involvement of national media regulators in the assessment of media market operations from the perspective of the impact on media pluralism and will gladly contribute to any eventual guidelines the Commission might issue on this matter.

At the same time, ERGA would like to note that, according to the proposed provision, the Board could be, in some cases, considering also media market concentrations potentially involving press publishers. This might potentially raise challenges in some Member States as the national media regulators rarely have the competence over this sector. In any case, ERGA wishes to make clear that ERGA and its members are not calling for new specific regulatory powers vis-à-vis the press sector, which is subject to its own, very specific, rules.

This being noted, it is important for ERGA to raise the following questions and proposals:

KK. Further clarity should be sought, as much as possible, on which thresholds are foreseen for triggering this provision, and on how to define an operation “which is likely to affect the functioning of the internal market”, in order to ensure legal certainty especially for the national regulatory authority or body which will have to consult the Board.

LL. This is all the more important that the additional steps introduced by this provision to the current merger assessment national procedures (notification to the Board as well as opinion by the Board and/or the Commission) might slow down the existing national procedures. This might in certain cases have a negative impact on the media players involved. It would therefore be relevant to better circumscribe the cases where this procedure should be followed in order to limit it to a low number of cases where there is a real need and added-value.

MM. The respective national rules following the adoption of EMFA should also specify the nature of the pluralism-related assessment by the media regulator in order to avoid the risk for it to be purely formal, but not substantially taken into account. Ideally, the national competition authority in charge of the merger and requesting the assessment of the media regulator should have to follow it, or at least justify why it does not intend to follow it.

Article 22 – OPINIONS ON MEDIA MARKET CONCENTRATIONS

In its response to the EMFA public consultation, ERGA stated that it was keen to provide opinions on the impact on pluralism of certain significant media market operations. ERGA therefore welcomes the EMFA proposal granting the Media Board this new mission.

NN. In cases where the Board is not consulted by the national media regulator, it should have the possibility to draw such opinions not only at the request of the Commission, but also at its own initiative.

OO. Conversely, the fact to grant the Commission with the possibility to provide its own, additional opinion (pursuant to Article 22, 2.) may raise questions since the assessment of the risk of a given concentration operation for pluralism or independence should in principle be carried out by independent regulatory bodies.

SECTION 6 – ALLOCATION OF ECONOMIC RESOURCES

Article 23 - AUDIENCE MEASUREMENT

ERGA members are well aware of the current challenges regarding audience measurement, such as the diversity of methodologies, opacity in some cases as well as the asymmetry when it comes to availability of data. This is especially true regarding online platforms, but also certain on-demand audiovisual media services.

ERGA thus welcomes the EMFA proposal on audience measurement based on the principles of transparency, impartiality, inclusiveness, proportionality, non-discrimination and verifiability. Also, ERGA stands ready to contribute to better audience measurement by fostering exchange of best practices and to foster the development of audience measurement related codes of conduct.

ERGA furthermore considers that some amendments should be made to this provision in order to enhance its “effet utile”:

PP. *Although the ‘audience measurement’ definition is broad and encompasses also online players, it is not explicitly clarified that online platforms or on-demand services are meant to be covered by the proposal. The provision should be amended accordingly, by mentioning explicitly online platforms and on-demand services as being covered under article 23(2).*

QQ. *This article, complementing the rules in the DMA, introduces an obligation to share methodologies, not actual data, which might be considered as not ambitious and impactful enough. It may therefore be considered to go further and make it clear, in the article itself, that relevant players are granted access to both audience measurement methodologies and relevant data.*

RR. *The list of actors entitled to access audience measurement methodologies (media service providers, advertisers as well as 3rd parties authorised by media services providers) should be extended to media regulators, who may also, as suggested above, be granted access to audience measurement data.*

SS. *As suggested by ERGA in its response to the EMFA public consultation, a general obligation of regular audience measurement audit or certification by an independent (private or public) body should be introduced as well, along with the obligation for this body to publish its reports/audits/certifications.*

Article 24 - STATE ADVERTISING

In its response to the EMFA public consultation, ERGA stated that the concern could be twofold: (i) state advertising allocated unfairly could have a negative impact on the competition in the media market by fostering investment in selected media outlets to the discrimination and detriment of others; (ii) it could also potentially negatively impact the editorial independence of those media companies.

Hence, ERGA supports the proposal of introducing reporting obligations for Member States with regard to the allocation of state advertising in EMFA, provided that these would be proportionate and not be excessively burdensome.

While fully subscribing to the objective of fostering transparency of state advertising, ERGA would like to note that such a task to monitor information about state advertising from any public or state entity (put on NRAs by the current proposal) today falls on very few NRAs, and may be considered as potentially sensitive.

TT. *Because the definition of ‘state advertising’ proposed in EMFA is rather extensive, especially when it comes to companies controlled or owned by the state, this new mission for NRAs is also potentially far reaching. It would thus be appropriate to consider narrowing down the definition to state-owned companies, where the state is effectively involved in the everyday business and has an influence or control over advertising strategies regarding advertising spending and placement, as far as that proper justification is provided as to the actual level of influence/control.*

UU. *Conversely, it should be considered to further clarify that the threshold of 1 million inhabitants only applies to local governments, in order for the provision to be effectively applicable to Member States with less than this number of inhabitants.*

VV. *Finally, regarding the task to “monitor the allocation of state advertising” (article 24(3)), depending on what this would really entail, the NRAs’ work would be potentially very heavy and also complex if the idea would be to analyse the allocation of advertising by public entities. The EMFA provision should therefore be clarified what exactly is expected of NRAs: a high-level monitoring or an in-depth analysis. If the latter would be confirmed, then proper increased resources should be guaranteed to NRAs.*