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**Unpacking the European Media Freedom
Act: How Articles 4, 6, and 18 Undermine Its
Effectiveness**

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Abstract

The European Media Freedom Act (EMFA) seeks to safeguard media freedom and pluralism across the EU. Amid the rise of very large online platforms (VLOPs) and state control over the media, the Regulation responds to the spread of disinformation and the erosion of journalistic independence in all Member States. Despite the EMFA's admirable intention to preserve democracy and protect free speech, this paper argues that key provisions of the legislation undermine its own objectives. Article 4, aimed at shielding journalistic sources from unauthorized surveillance, is riddled with caveats that could render its main protections ineffectual. Article 6 encourages ownership transparency, but many of its most powerful measures are non-binding or too narrow in scope. Finally, Article 18 introduces a "media exemption" provision that restricts VLOPs' ability to remove harmful content or propaganda, potentially amplifying the reach of "fake news" that is proliferating on social media worldwide. Collectively, these shortcomings invite abuse by criminals and overreaching governments—both within the EU and beyond—thereby reinforcing the very threats that the EMFA set out to combat. Given that the EMFA is still in its early stages—with several provisions not set to take effect until May 8, 2027—its overall impact on editorial independence remains uncertain. Unless the Regulation's ambiguities are carefully interpreted and its inadequacies de-emphasized, its legacy may be defined more by its unanticipated consequences than its intended benefits.

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Part I: Introduction

The New Media Age of the twentieth and twenty-first centuries revolutionized how people communicate with each other and disseminate information, changing distribution patterns, habits of media consumption, and advertising worldwide.¹ First, online access to news soared on very large online platforms (VLOPs), and traditional media companies within the EU lost their subscribers. As declining revenues forced the more vulnerable businesses to close down,² content has become less diverse. Second, illiberal Member States tightened their control over media outlets within their borders through funding and buyouts, influencing editorial decisions and silencing dissenting opinions.³ The informality of social media, which favors populist political rhetoric, further exacerbated the subsequent proliferation of propaganda, disinformation, and misinformation. After all, the lower the quality of political content, the more “honest” it often appears.⁴ By 2022, market plurality, social inclusiveness, and political independence were all either moderately or seriously at risk across the EU.⁵

Given the above, the European Parliament and the Council of the European Union passed the European Media Freedom Act (EMFA), designed to protect the freedoms and pluralism of the media at the EU level.⁶ To accomplish its ambitious goal, the EMFA puts forth a multitude of

¹ JUDIT BAYER, DIGITAL MEDIA REGULATION WITHIN THE EUROPEAN UNION: A FRAMEWORK FOR A NEW MEDIA ORDER 107 (2024).

² Paul Tang, *How Lawmakers Abandoned Local Newspapers and Killed Media Plurality*, FOUNDATION FOR EUROPEAN PROGRESSIVE STUDIES: THE PROGRESSIVE POST (Jan. 6, 2022), <https://feps-europe.eu/how-lawmakers-abandoned-local-newspapers-and-killed-media-plurality/>.

³ Justin Spike, *How Hungary's Orbán Uses Control of the Media to Escape Scrutiny and Keep the Public in the Dark*, THE ASSOCIATED PRESS (July 31, 2024), <https://www.ap.org/news-highlights/spotlights/2024/how-hungarys-orban-uses-control-of-the-media-to-escape-scrutiny-and-keep-the-public-in-the-dark/>.

⁴ Gunn Enli & Linda Therese Rosenberg, *Trust in the Age of Social Media: Populist Politicians Seem More Authentic*, 4 SOC. MEDIA + SOC'Y 1 (2018), <https://doi.org/10.1177/2056305118764430>.

⁵ *Report by the Committee on Culture and Education on the European Media Freedom Act*, at 328 (Sept. 7, 2023) [hereinafter *CULT Report*], https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CONSIL%3AST_13104_2023_INIT&qid=1743102303221.

⁶ Regulation 1083/2024 of the European Parliament and of the Council of 11 April 2024 Establishing a Common Framework for Media Services in the Internal Market and Amending Directive 2010/13/EU (European Media

piecemeal objectives, targeting everything from the malfunctioning of public service media to unfavorable media market concentrations.⁷ Once implemented, the EMFA’s annual economic benefits would amount to EUR 2.9 billion, and its societal effects would include “growing accountability and trust in the media,” increased “media freedom and pluralism,” as well as a stronger rule of law overall.⁸ But when the original text of the Act was released, Commissioner for Values and Transparency, Věra Jourová, anticipated a mixed reaction, as she described the Regulation as neither an “Atomic bomb” nor a “cosmetic[]” half-measure.⁹ Indeed, its final version remains controversial, even after legislators reviewed statements by Committees, Member States, and individual stakeholders, painstakingly incorporating their amendments.

In this paper, we examine three of the EMFA’s Articles that have been subject to the most heated debate—both during legislation and after the Act was finalized. In Part II, we analyze Article 4 on the security of journalistic sources, focusing on the caveats nestled in paragraphs 4 and 5 that could render its main protections ineffectual.¹⁰ In Part III, we discuss Article 6 on transparent media ownership, paying particular attention to (1) how it interacts with the EMFA’s accompanying Recommendation and (2) how it could incentivize self-censorship among journalists.¹¹ In Part IV, we explain Article 18—on content moderation by VLOPs—and the detrimental consequences of the media exemption this Article proposes.¹² The EMFA certainly

Freedom Act), 2024 O.J (L) 1 [hereinafter EMFA], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401083.

⁷ *Id.*

⁸ *Commission Staff Working Document Impact Assessment Report Accompanying the Document Proposal for the EMFA*, at 7, SWD(2022) 286 final (Sept. 16, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022SC0286>.

⁹ Molly Killeen, *Commission Releases Media Freedom Act Proposal, to Mixed Reactions*, EUROACTIV (Sept. 13, 2022), <https://www.euractiv.com/section/tech/news/commission-releases-media-freedom-act-proposal-to-mixed-reactions/>.

¹⁰ EMFA, *supra* note 6, art. 4, at 23-24.

¹¹ *Id.*, art. 6, at 25.

¹² *Id.*, art. 18, at 30-32.

represents a ground-breaking endeavor to harmonize the treatment of the media sector within Europe. However, we conclude that the Act might not succeed at helping media players fulfil their democratic obligation to keep citizens informed. Worse, its exceptions explicitly authorizing otherwise prohibited intrusions, its exposure of journalists to potential criminal liability, and its conflicts with pre-existing legislation might aggravate the very problems it set out to resolve.

Part II: Article 4

Article 4 of the EMFA spells out the right of media service providers to operate independently, without undue interference.¹³ In paragraph 1, the Article guarantees such media service providers the right to exercise their “economic activities” in the internal market without restrictions other than those allowed under Union Law.¹⁴ In paragraph 2, the Article prohibits Member States from interfering in or attempting to manipulate media service providers’ editorial policies and decisions.¹⁵ And finally, in paragraph 3, the Article forbids any activity compromising the confidentiality of journalistic sources or communication.¹⁶ More specifically, Member States shall not take any of the measures belonging to the following three categories: (a) oblige media service providers, their editorial staff, or related persons to disclose information capable of identifying journalistic sources; (b) detain, sanction, intercept, or inspect media service providers, their editorial staff, or related persons, or subject their homes or corporate premises to surveillance or search and seizure; and (c) deploy intrusive surveillance software on

¹³ *Id.*, art. 4, at 23.

¹⁴ *Id.*, ¶ 1, at 23.

¹⁵ *Id.*, ¶ 2, at 23.

¹⁶ *Id.*, ¶ 3, at 23.

any device, machine, or tool used by media service providers, their editorial staff, or related persons.¹⁷

Although some have criticized paragraph 1 for its vagueness regarding Member States’ role and its emphasis on “economic activities” (which could exclude non-profit media actors from its scope), it faced little opposition otherwise.¹⁸ Paragraph 2 similarly passed without much fanfare, and paragraph 3—though considered problematic in the EMFA’s original *Proposal*¹⁹—had been revised to address its major issues.²⁰ However, watchdogs have lambasted paragraphs 4 and 5 of the Article, which provide significant exceptions that water down the protective provisions of the immediately preceding paragraphs.²¹ More specifically, measures forbidden under paragraphs 3(a) and 3(b) are allowed if provided for by national or Union law, justified on a case-by-case basis by “an overriding reason of public interest,” and subject to prior authorization (or retrospective authorization under exceptionally urgent circumstances) by either

¹⁷ *Id.*

¹⁸ *Opinion of the Committee of the Regions on the European Freedom Act*, 2023 O.J. (C 188) 79, 104, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022IR5388>; *Study Requested by the LIBE Committee on the European Media Freedom Act: Media Freedom, Freedom of Expression and Pluralism*, at 50 (July, 2023) [hereinafter *Study*],

[https://www.europarl.europa.eu/RegData/etudes/STUD/2023/747930/IPOL_STU\(2023\)747930_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/747930/IPOL_STU(2023)747930_EN.pdf).

¹⁹ *Proposal for the European Media Freedom Act*, at 32, COM (2022) 457 final (Sept. 16, 2022) [hereinafter *Proposal*], <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0457>.

²⁰ In the original text of the EMFA, Member States were only prohibited to detain, sanction, intercept, or inspect media service providers, their editorial staff, or related person, or subject their personal or business property to surveillance or search and seizure “on the ground that they refuse to disclose information on their sources.” *Id.*, art. 4(2)(b), at 32. This provision did not protect against the following three situations: (1) when media service providers are unaware of any interception taking place; (2) when they have not refused disclosure; and (3) when they have not received a prior request for disclosure. Dirk Voorhoof, *Will the EU Media Freedom Act (EMFA) Be Able to Strengthening [sic] the Protection of Journalistic Sources?*, 28 COMM’NS L. 16, 19 (2023), https://www.bloomsburyprofessionalonline.com/view/journal_communications_law/b-0000017467616-chapter4.xml. Consequently, Article 4(2)(b) of the *Proposal* did not cover cases where Member States searched journalists’ newsrooms or confiscated journalistic material, mobile phones, computers, or other ICT-devices on journalists’ personal or business premises. *Id.* Moreover, Article 4(2)(c) of the *Proposal* only narrowly discussed “spyware,” ignoring the danger that other intrusive surveillance software poses. *Proposal*, *supra* note 19, art. 4(2)(c), at 32. In the current version of the EMFA, both issues have been fixed. EMFA, *supra* note 6, art. 4(3)(b)-(c), at 23.

²¹ EMFA, *supra* note 6, art. 4(4)-(5), at 23.

a judicial authority or an alternative standalone and impartial authority.²² Departures from the prohibition against deploying intrusive surveillance software further require a showing that they are necessary to investigate crimes under the European Arrest Warrant Framework Decision (EAWFD), punishable in the Member State concerned for at least three years, or other serious crimes, punishable in the Member State concerned for at least five years.²³

With the Article 4(4) or 4(5) carve-outs, legislators were presumably trying to acknowledge Article 4(2) of the Treaty on European Union (TEU), which implies that national security remains the sole responsibility of the Member States.²⁴ However, there is no reason why these carve-outs should ever qualify a *nonjudicial* authority to authorize any measures contained within their scope.²⁵ After all, nonjudicial authorities often belong to the executive and thus lack the independence enjoyed by their colleagues in the judicial branches of government.²⁶ On paper, these nonjudicial authorities are required to be “independent” and function “impartial[ly],” but these terms are inherently subjective, and their meanings are sensitive to political influence.²⁷ Unfortunately, such enablement of Member States to circumvent their courts in their use of surveillance technologies could render paragraphs 1-3 ineffective.

Furthermore, the exceptions under Article 4(4) exist for situations that do *not* imperil Member States’ national security. In his Opinion on the *Proposal*, the European Data Protection

²² *Id.*, ¶ 4, at 23.

²³ *Id.*, ¶ 5, at 23-24.

²⁴ Consolidated Version of the Treaty on European Union, art. 4(2), 2012 O.J. (C326) 13, 18, https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF; see *Statements by France, Italy, Hungary, and the Commission on the Draft European Media Freedom Act*, at 2-3 (Mar. 22, 2024), <https://data.consilium.europa.eu/doc/document/ST-7962-2024-ADD-1-REV-1/en/pdf>; see also *Reasoned Opinion by the Slovenian National Assembly on the European Media Freedom Act* (Nov. 25, 2022) [hereinafter *Slovenia Opinion*], <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/sizbo> (“[I]t is not appropriate . . . and therefore seems reasonable to delete the provision defining the concept of serious crime.”).

²⁵ BAYER, *supra* note 1, at 122.

²⁶ *Id.*

²⁷ *Id.*

Supervisor (EDPS), Wojciech Wiewiórowski, warned that these exceptions were overbroad and ill-defined because they applied every time “an overriding requirement in the public interest” presented itself, which could mean anything.²⁸ For example, the public interest could be understood either narrowly—as the investigation of serious crimes or the prevention of urgent threats—or broadly, to encompass administrative investigations as well.²⁹ As such, Wiewiórowski requested that the carve-outs be brought “in line with the principles of strict necessity and proportionality.”³⁰ As the current EMFA does not restrict the Article 4(4) exception any further than the *Proposal* did, the Regulation explicitly authorizes its recurrent invocation in various undefined matters at the expense of editorial integrity. The broadness of Article 4(4) stands out in particular when juxtaposed against Article 4(5), which legislators *did* decide to restrict by referencing the EAWFD and classifying crimes as more or less serious based on their maximal sentences.³¹

Although the exceptions under Article 4(5) are narrower than those delineated in Article 4(4), they—too—lack “teeth” considering the risk that intrusive surveillance software, such as spyware, poses to our democracy. Spyware is defined as a type of malware that exploits vulnerabilities in other products with digital elements.³² It is incredibly powerful and can severely damage the privacy of individuals and businesses through a number of newly invented features. For example, the Pegasus spyware tool can grant comprehensive and unencumbered access to its target by allowing the attacker to obtain root privileges, digital credentials, and

²⁸ *Proposal*, *supra* note 19, art. 4(2)(b), at 32; *European Data Protection Supervisor Opinion 24/2022 on the European Media Freedom Act*, § 3.2, ¶ 24, at 9 (Nov. 11, 2022) [hereinafter *EDPS Opinion*], https://www.edps.europa.eu/system/files/2022-11/2022-11-11-opinion-on-european-media-freedom-act_en.pdf.

²⁹ *EDPS Opinion*, *supra* note 28, § 3.2, ¶ 24, at 9.

³⁰ *Id.*, § 3.2, ¶ 24, at 10.

³¹ EMFA, *supra* note 6, art. 4(5)(b)(i)-(ii), at 23-24.

³² *EDPS Opinion*, *supra* note 29, § 3.2, ¶ 28, at 10.

digital identity applications.³³ Further, Pegasus can also execute “zero-click” attacks—that is, attacks that do not require any actions on the part of the user to be triggered—without being detected.³⁴ Given spyware’s frightening capabilities and evidence that it has already been used against EU citizens,³⁵ Wiewiórowski recommended a ban on its deployment, “with very limited and exhaustively defined exceptions,” such as those for imminent terrorist attacks.³⁶ The current EMFA not only ignores this advice, but through Article 5(4), it also reveals a “cheat sheet” of “excuses” that authoritarian governments can legally appeal to the next time they want to spy on lawyers, opposition politicians, or (in our case) journalists. To install Pegasus on the device of a media service provider, for instance, they now only have to accuse the editor-in-chief of a crime under the EAWFD with at least a three-year sentence, like murder, or some other offense with at least a five-year sentence under national law. “As it currently stands,” laments Member of the European Parliament, Clare Daly, “the EMFA effectively legalizes the use of spyware against journalists.”³⁷

Part III: Article 6

Article 6 of the EMFA articulates the duties of media service providers, which include transparency requirements regarding their owners, their sources of funding, and conflicts of interest.³⁸ Paragraph 1 instructs media service providers to disclose the names of their direct and

³³ *European Data Protection Supervisor Preliminary Remarks on Modern Spyware*, § 2, at 3 (Feb. 15, 2022), https://www.edps.europa.eu/system/files/2022-02/22-02-15_edps_preliminary_remarks_on_modern_spyware_en_0.pdf.

³⁴ *Id.*, § 2, at 4.

³⁵ DEUTSCHE WELLE, *Hungary Admits to Using NSO Group’s Pegasus Spyware* (Apr. 11, 2021), <https://www.dw.com/en/hungary-admits-to-using-nso-groups-pegasus-spyware/a-59726217>.

³⁶ *EDPS Opinion*, *supra* note 28, § 3.2, ¶ 30, at 11.

³⁷ Alice Taylor-Braçe, *EU Parliament Passes European Media Freedom Act, Concerns over Spyware Remain*, EUROACTIV (Mar. 13, 2024), <https://www.euractiv.com/section/media/news/eu-parliament-passes-european-media-freedom-act-concerns-over-spyware-remain/>.

³⁸ EMFA, *supra* note 6, art. 6, at 25.

indirect owners with influential share, the names of their beneficial owners, and the total annual amount of public funds that they receive for state advertising, as well as the total annual amount of their advertising revenues originating from “third-country” public authorities.³⁹ To make this information accessible to recipients, paragraph 2 demands that Member States entrust national regulatory authorities (NRAs) with the development of national media ownership databases.⁴⁰ Finally, per paragraph 3, media service providers offering “news and current affairs” content must also (a) guarantee that editorial decisions can be taken freely within their established editorial line and (b) appropriately communicate conflicts of interests potentially affecting the provision of news and current affairs content.⁴¹

Although paragraphs 1 and 2 did not elicit extreme scrutiny during the legislative proceedings, critics noted that some of the most effective safeguards proposed by journalists’ rights groups were eventually relegated to a non-binding Recommendation on editorial freedom and ownership transparency.⁴² Released together with the *Proposal*, this Recommendation provides an inclusive list of editorial “best practices” and expands the scope of the data to be published as part of the national ownership databases.⁴³ For instance, it suggests additional disclosures regarding whether and to what extent media service providers are owned by government, public institutions, or state-owned enterprises; the activities and interests of their owners in other media or non-media enterprises (i.e. cross-ownership information); and any change in ownership or control.⁴⁴ Despite the importance of these voluntary measures, many

³⁹ *Id.*, ¶ 1, at 25.

⁴⁰ *Id.*, ¶ 2, at 25.

⁴¹ *Id.*, ¶ 3, at 25.

⁴² Commission Recommendation 2022/1634 of 16 September 2022 on Internal Safeguards for Editorial Independence and Ownership Transparency in the Media Sector, 2022 O.J. (L 245) 56 [hereinafter Recommendation], <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022H1634>.

⁴³ *Id.*

⁴⁴ *Id.*, § 3, ¶ 20, at 64.

believe that self-regulation is equivalent to no regulation.⁴⁵ According to the Committee on Civil Liberties, Justice, and Home Affairs, “practice has revealed that in various Member States, [] soft-law standards are not observed.”⁴⁶ Indeed, when combined with a “compulsory” Regulation like the EMFA, they could even lead to a “regulatory patchwork” undermining the integrity of the internal market.⁴⁷ As the adoption of internal codes and contribution to expanded ownership databases were each distinctly labeled optional, there is a real possibility that Articles 6(1) and 6(2) will fall short of their stated goals.

However, the attention that these paragraphs received was almost negligible compared to the words spilled on Article 6(3),⁴⁸ which seemed to have offended everyone from watchdogs and activists to publishers and autocrats. Proponents of a strong EMFA do not understand why this provision only applies to media service providers offering news and current affairs content. After all, other media outlets—such as tabloids and history channels—possess similar potential to influence public discourse.⁴⁹ Originally, *all* clauses of Article 6 applied to news and current affairs media exclusively.⁵⁰ But after some stakeholders complained,⁵¹ legislators broadened paragraphs 1 and 2 to media in general, signaling their agreement that the effectiveness of the EMFA’s transparency requirements necessitated extensive coverage.⁵² Viewed in this context, the

⁴⁵ *Reasoned Opinion by the Irish Houses of the Oireachtas on the European Media Freedom Act*, at 3 (Dec., 2022) [hereinafter *Ireland Opinion*], <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/sizbo>.

⁴⁶ *CULT Report*, *supra* note 5, at 329.

⁴⁷ *Opinion of the European Economic and Social Committee*, 2022 O.J. (C 100) 111, 115, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022AE4748>.

⁴⁸ *Study*, *supra* note 18, at 56.

⁴⁹ *BAYER*, *supra* note 1, at 127.

⁵⁰ *Proposal*, *supra* note 19, art. 6, at 33.

⁵¹ *Slovenia Opinion*, *supra* note 24 (“[C]onsideration should be given as to how to acknowledge and define the media services which do not fall within the scope of news and current affairs, but which also have a certain influence on public opinion.”)

⁵² EMFA, *supra* note 6, art. 6, at 25.

preservation of the news and current affairs qualification in paragraph 3 seems even more arbitrarily intentional.⁵³

Additionally, multiple Member States raised concerns regarding Article 6(3)’s enforceability and nebulous phrasing. In a letter to the Commission, for example, the Dutch Senate demanded an explanation for who or how the EU planned to monitor whether media service providers “guarantee[d] the independence of [] editorial decisions” in a neutral manner.⁵⁴ Meanwhile, the Italian Chamber of Deputies insisted on a clearer definition of “editorial,” as the Italians distinguish between the “editor-in-chief,” legally liable for their publication, and the “editorial director,” who is in charge of its general editorial line.⁵⁵ This would clarify the scope of Article 6(3)(a), under which editors maintain exclusive control over all editorial decisions.⁵⁶

Those wary of excessive media regulation at the EU level also took issue with Article 6(3)(a). Under Article 10 of the European Convention on Human Rights, the broad power granted to editors might dispossess publishers of their right to propagate their own worldview through the media outlets they own.⁵⁷ More importantly, however, editors now risk criminal liability for their writings, which could restrict their capacity for initiative, encourage self-censorship, or pit them against their publishers.⁵⁸ As such, the Committee on the Internal Market and Consumer Protection advocated for an unambiguous acknowledgement of publishing

⁵³ *Id.*, ¶ 3, at 25.

⁵⁴ *Reasoned Opinion by the Dutch Senate on the European Media Freedom Act*, at 2 (Apr. 18, 2023), <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/nleer>.

⁵⁵ *Reasoned Opinion by the Italian Chamber of Deputies on the European Media Freedom Act*, at 7 (July 26, 2023) [hereinafter *Italy Chamber Opinion*], <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/itcam>.

⁵⁶ *CULT Report*, *supra* note 5, at 203.

⁵⁷ *See* BAYER, *supra* note 1, at 126.

⁵⁸ *CULT Report*, *supra* note 5, at 203; The Tech Brief, *The European Media Freedom Act*, EUROACTIV, at 12:40 (Sept. 23, 2022), <https://www.euractiv.com/section/tech/podcast/the-european-media-freedom-act/>.

directors' responsibilities in the EMFA.⁵⁹ Unfortunately, their amendment did not make it into the Act's final text.⁶⁰

Like any policy with transparency requirements, Article 6 implicates citizens' privacy and their personal data protection. Given that media service providers must expose the names and contact details of their owners, EDPS Wiewiórowski urged legislators to horizontally clarify that the Regulation does not affect existing EU data protection and privacy law—in particular, the General Data Protection Regulation (GDPR), the ePrivacy Directive, and the Law Enforcement Directive.⁶¹ After all, Article 85 of the GDPR explicitly requires Member States to reconcile their citizens' "right to freedom of expression and information, *including processing for journalistic purposes*" with their "right to the protection of personal data."⁶² Throughout the EMFA (both the *Proposal* and the current version), however, data protection and privacy laws were referred to precisely once, in Article 24(2), which belies the true extent of the interactions between the Regulation (Article 6 in particular) and these laws.⁶³

Finally, it is possible that the EMFA would struggle to achieve its over-arching goals of media freedom and pluralism *even if* all Member States and their media service providers meticulously conformed with the transparency requirements in Article 6. First, transparency can only hold media outlets accountable in an environment that would actually discipline them for the "dirty laundry" they must air. Unfortunately, this is unlikely to be the case absent a democratic oversight framework, in a state where media has been "captured."⁶⁴ In Bulgaria, for

⁵⁹ *CULT Report*, *supra* note 5, at 268.

⁶⁰ EMFA, *supra* note 6, art. 6, at 25.

⁶¹ *EDPS Opinion*, *supra* note 28, § 3.1, ¶ 19, at 8.

⁶² Regulation 679/2016 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 85, 2016 O.J. (L 119) 1, 83 (emphasis added), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>.

⁶³ EMFA, *supra* note 6, art. 24(2), at 34; *EDPS Opinion*, *supra* note 28, § 3.1, ¶ 18, at 8.

⁶⁴ BAYER, *supra* note 1, at 154.

example, a secretive politician named Delyan Peevski controlled more than 70% of the media market.⁶⁵ Yet, despite the later sale of his media empire (and the subsequent revelation of his previous ventures), he retained sizeable influence in the Bulgarian media landscape.⁶⁶ Second, transparency would also be of little use if citizens do not possess the media literacy skills to rigorously and efficiently analyze the exposed content. As such, Article 6 would have proved more compelling in conjunction with a provision equipping citizens with the technical education and critical thinking abilities required to exercise judgment. As the predominance of VLOPs compounds the challenges to the right to impart and receive information, the Irish Houses of the Oireachtas supported the imposition of a “levy” on “tech giants” established within the EU.⁶⁷ This “levy” could then source the establishment and strengthening of media literacy initiatives across Member States.⁶⁸ It is unclear what Article 6 ownership transparency will accomplish when countries lack a robust rule of law, and citizens lack digital literacy.

Part IV: Article 18

Article 18 of the EMFA governs the content of media service providers on VLOPs.⁶⁹ Given the length of this Article, we focus on paragraphs 1, 4, 6, and 7, which put forth its most important provisions. Under paragraph 1, VLOPs must furnish a functionality that would allow the recipients of their services to self-declare that they are (a) media service providers; (b) compliant with the transparency requirements of Article 6; (c) editorially independent from Member States, political parties, and third countries or the entities they control/finance; and (d)

⁶⁵ *How Member States’ Consultation Might Impact the European Media Freedom Act*, EUROACTIV (Nov. 16, 2023), <https://www.euractiv.com/section/media/news/how-member-states-consultation-might-impact-the-european-media-freedom-act/>.

⁶⁶ *Id.*

⁶⁷ *Ireland Opinion*, *supra* note 45, at 3.

⁶⁸ *Id.*

⁶⁹ EMFA, *supra* note 6, art. 18, at 30-32.

either subject to regulatory conditions in at least one Member State and to oversight by a competent NRA, or compliant with a co-regulatory/self-regulatory mechanism that is widely accepted in at least one Member State.⁷⁰ Per Article 18(1)(e), media service providers must be able to further declare that they do not provide content generated by artificial intelligence systems without subjecting it to human review or editorial control.⁷¹ When a VLOP intends to suspend the content of a self-declared media service provider or otherwise restrict its visibility, paragraph 4 requires this VLOP to first (a) supply a “statement of reasons” explaining why suspension or restriction is necessary and (b) give the affected media service provider 24 hours to respond.⁷² Under paragraph 6, a self-declared media service provider whose content has been repeatedly suspended or restricted without sufficient grounds can request a “dialogue,” during which this media service provider and the VLOP at issue search for an “amicable solution” together.⁷³ If the dialogue fails to facilitate an agreement (or if the VLOP repudiates or invalidates a media service provider’s declaration), the affected media service provider may resort to mediation or dispute settlement out of court.⁷⁴

Although the “functionality” of the current Article 18(1) subjects media service providers to more careful review than did the *Proposal*,⁷⁵ an identification process based on self-declaration can open the door to rogue actors wishing to distort the public debate.⁷⁶ In Poland and Hungary, for example, public service media serve as instruments of propaganda for the ruling political parties, but VLOPs are obliged to extend them the same privileged treatment that

⁷⁰ *Id.*, ¶ 1, at 30.

⁷¹ *Id.*

⁷² *Id.*, ¶ 4, at 31.

⁷³ *Id.*, ¶ 6, at 31.

⁷⁴ *Id.*, ¶ 7, at 31.

⁷⁵ Originally, this functionality did not allow media service providers to mark themselves compliant with the Article 6 transparency requirements or attest to their handling of artificially generated content. *Proposal*, *supra* note 19, art. 17(1), at 39.

⁷⁶ BAYER, *supra* note 1, at 159.

Article 18 intended for good-faith journalism, as long as such media properly “self-declare” under paragraph 1.⁷⁷ To combat such rogue actors, the Italian Chamber of Deputies suggested that Member States appoint NRAs to oversee the self-declaration process.⁷⁸ If regulators were worried about abuses of power by a single institutional decisionmaker tasked with upholding and rejecting declarations, they could also have established a multistakeholder independent supervisory mechanism.⁷⁹ This, for example, could have taken the form of a framework of self-regulatory communities, where each member—journalist or fact-checker—is accountable for the content of every other member.⁸⁰ However, none of these oversight measures were implemented in the current EMFA, leaving VLOPs vulnerable to disinformation campaigns that can easily drown out their quality content.

Paragraph 4 of Article 18 has attracted even more criticism than paragraph 1. To be sure, some think that the paragraph 4 safeguards of notice, in the form of a statement of reasons, and the opportunity to answer within 24 hours constitute nothing more than fair procedure.⁸¹ But many more consider the provision a devious pretext for reproposing the so-called “media exemption.”⁸² This exemption originally appeared as Amendment 511 to the Digital Services Act

⁷⁷ AccessNow et al., *Policy Statement on Article 17 of the Proposed European Media Freedom Act*, EU DISINFO LAB (Jan. 25, 2023), https://www.disinfo.eu/wp-content/uploads/2023/01/EMFA_policystatement_V3_25012023.pdf.

⁷⁸ *Italy Chamber Opinion*, *supra* note 55, at 8.

⁷⁹ *Study*, *supra* note 18, at 62.

⁸⁰ Martin Husovec, *Trusted Content Creators*, 52 LSE L. POL’Y BRIEFING PAPERS 1, 3 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4290917#.

⁸¹ BAYER, *supra* note 1, at 159. Indeed, some Member States wanted these safeguards to be strengthened. See *Reasoned Opinion by the French National Assembly on the European Media Freedom Act*, at 7 (Jan. 17, 2023) [hereinafter *France Opinion*], <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/frass> (“The National Assembly . . . calls for the provisions of Article [18] applicable to [VLOPs] to be strengthened, so as to oblige such platforms to make public the reasons for the removal of content and to prohibit content posted online from being blocked without prior verification by a human being.”); see also *Reasoned Opinion by the German Bundestag on the European Media Freedom Act*, at 3 (Dec. 1, 2022), <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/debta> (“The German Bundestag also calls on the Federal Government . . . to place more stringent obligations on online platforms, by means of concrete procedural requirements, to consider media freedom and pluralism when taking moderation decisions.”).

⁸² *Study*, *supra* note 18, at 61.

(DSA) and was meant to shield media outlets from certain content moderation rules under a “free press” justification.⁸³ It was discussed during the European Parliament’s DSA debate, but was discarded thereafter due to the risk of disinformation and VLOPs’ need to remove harmful and illegal content.⁸⁴ Although stakeholders later admonished legislators for the exemption’s drawbacks during the debate on the EMFA,⁸⁵ Article 18(4) passed anyway—to the horror of online truth warriors and digital safety advocates. This resulted in a conflict between the two Regulations—the DSA mandating platforms to moderate *all* content, including content published by media service providers, and the EMFA preventing them from doing so.⁸⁶ Until the Court of Justice determines which of the two laws takes precedence, VLOPs will likely cease to moderate anything that remotely resembles “media” content to avoid litigation costs.⁸⁷

To illustrate how paragraph 4 could bolster propaganda efforts (and why the European Parliament disallowed the DSA’s original media exemption provision), consider the following example. Suppose a self-declared media service provider publishes the headline “European Parliament Partners with Bill Gates and George Soros to Insert 5G Surveillance Chips into

⁸³ The Association of European Radios, *The Digital Services Act Must Safeguard Freedom of Expression Online*, AER (Jan. 18, 2022), https://www.aereurope.org/the-digital-services-act-must-safeguard-freedom-of-expression-online/?utm_source=chatgpt.com.

⁸⁴ *Study*, *supra* note 18, at 61.

⁸⁵ *See Reasoned Opinion by the Italian Senate on the European Media Freedom Act*, at 4 (Feb 1, 2023) [hereinafter *Italy Senate Opinion*], <https://secure.ipex.eu/IPEXL-WEB/document/COM-2022-457/itsen> (“[I]t is important to avoid” media exemption because this could have “distorting effects on the entire digital ecosystem, with potential risks . . . of disinformation and information manipulation.”); *see also Chamber Opinion*, *supra* note 55, at 5 (“[T]he mechanism described in Article [18] . . . cannot be allowed to be used by the same platforms to evade their obligation to remove harmful or illegal content.”); *see also* The Tech Brief, *supra* note 58, at 26:40. Finally, in 2022, Nobel Peace Prize-winning journalists Maria Ressa and Dmitry Muratov called on the EU to ensure that no media exemption be included in any tech or media legislation in their ten-point plan to address our information crisis, which was supported by more than a hundred civil society organizations. Maria Ressa & Dmitry Muratov, *Presentation of a 10-Point Plan to Address Our Information Crisis at the Freedom of Expression Conference at the Nobel Peace Center* (Sept. 2, 2022).

⁸⁶ Diana Wallis, *European Media Freedom Act: No to Any Media Exemption*, EUROACTIV (May 15, 2023), <https://www.euractiv.com/section/digital/opinion/european-media-freedom-act-no-to-any-media-exemption/>; *see France Opinion*, *supra* note 81, at 6 (“The National Assembly . . . calls on the European institutions to pay particular attention to the linkage of the proposed legislation on media freedom with the . . . [DSA], so as not to weaken the pre-existing arrangements.”).

⁸⁷ Wallis, *supra* note 86.

Vaccines” on X.⁸⁸ If X wants to restrict access to this falsehood, they must contact the source first. Then, they have to wait 24 hours before possibly adding a fact-check or taking the article down. However, this back-and-forth communication could only benefit the spread of disinformation, which can be further amplified by algorithms and become almost unstoppable.⁸⁹ “As the old adage goes, ‘a lie gets halfway around the world before the truth puts on its boots.’”⁹⁰

Paragraph 4 does have a silver lining. Its procedural safeguards do not apply to media service providers who deliver content that is illegal under Union law,⁹¹ which the DSA defines as “any information that . . . is not in compliance with Union law or the law of any Member State.”⁹² However, this still leaves citizens unprotected from harmful content that is *not* illegal. After all, few categories of information fail to “compl[y] with Union law” besides content infringing upon intellectual property rights,⁹³ terrorist content,⁹⁴ hate speech,⁹⁵ and child porn.⁹⁶ For protection against other types of content, netizens must consequently depend on the national law of the Member State in which they reside. But national law is often obsolete or deficient. In

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ EMFA, *supra* note 6, art. 18(4), at 31.

⁹² Regulation 2065/2022 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), art. 3(h), 2022 O.J. (L 277) 1, 42, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065>.

⁹³ Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, art. 3, 2001 O.J. (L 167) 10, 16, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029>.

⁹⁴ Regulation 784/2021 of the European Parliament and of the Council of 29 April 2021 on Addressing the Dissemination of Terrorist Content Online, art. 3, 2021 O.J. (L 172) 79, 90, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0784>.

⁹⁵ Council Framework Decision 2008/913 of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, art. 1(b), 2008 O.J. (L 328) 55, 56, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0913>.

⁹⁶ Directive 2011/92 of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, art. 5(4), 2011 O.J. (L 335) 1, 8, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0093>.

Poland, for example, the current media law dates from 1984 and permits the online and offline publication of medical disinformation about vaccines.⁹⁷ As a result, the EMFA would not allow Facebook to show Polish users who see anti-vaxxer falsehoods a fact-check stating that COVID-19 vaccines are generally safe.⁹⁸ If content by self-declared media can only be effectively moderated online if it is illegal, the EMFA's media exemption will be a boon for false narrative promoters and criminals alike.

Some think that the effects of the paragraph 4 privilege can be mitigated through paragraphs 6 and 7, which mandate a dialogue between VLOPs and media service providers whose posts are repeatedly suspended. Since these dialogues are structured to help the parties come to an “amicable solution,” they could theoretically help VLOPs teach media service providers to abide by their terms and conditions.⁹⁹ However, disinformation and illegal content are rarely spread accidentally. Thus, it is unlikely that informal exchanges, which VLOPs cannot even initiate, can promote truthful and healthy behavior online. To hold media service providers accountable, the Italian Senate suggested that the EMFA allow VLOPs to launch a complaint procedure against habitual offenders by themselves.¹⁰⁰ Unfortunately, the Regulation did not incorporate the Senate's proposal.¹⁰¹

Part IV: Conclusion

Despite its grand ambitions, the EMFA might not achieve its objective of defending media freedom and pluralism. In some cases, authoritarian governments that wish to “capture”

⁹⁷ Clara Jiménez Cruz, *Possible Risks if EU Does Not Change Course of Media Freedom Act*, EUROACTIV (June 30, 2023), <https://www.euractiv.com/section/media/opinion/possible-risks-if-eu-does-not-change-course-of-media-freedom-act/>.

⁹⁸ *Id.*

⁹⁹ See EMFA, *supra* note 6, art. 18(6), at 31.

¹⁰⁰ *Italy Senate Opinion*, *supra* note 85, at 5.

¹⁰¹ EMFA, *supra* note 6, art. 18(6)-(7), at 31.

media outlets might even be able to weaponize the Regulation—for example, in their deployment of intrusive surveillance mechanisms under Article 4, their persecution of allegedly criminal journalists under Article 6, and their online propaganda efforts under Article 18. The EMFA certainly does not endorse any of these abuses. However, its attempt to balance the interests of various stakeholders while acknowledging Member States competences has riddled its final draft with carve-outs and loopholes.

Article 4 aims to protect journalistic sources from spyware and other forms of surveillance, but Member States’ exclusive authority in national security matters prompted regulators to grant them broad exceptions.¹⁰² Not only might this fail to end the surveillance of journalists, it could be interpreted as establishing such surveillance as a government’s legal right.¹⁰³ Article 6 aims to boost transparency among media service providers, recognizing that they often represent entangled financial and political interests rather than the genuine opinions of their editorial teams.¹⁰⁴ As we have shown in Part III, however, such transparency could carry “side effects” for journalists—incentivizing self-censorship—or just be ineffective.¹⁰⁵ The Article’s main goal of guaranteeing editorial independence could easily have been accomplished by directly *banning* individuals/enterprises with political affiliation or economic influence from owning media service providers. But regulators wanted to balance citizens’ right to media freedom/pluralism against media service providers’ right to free speech.¹⁰⁶ Hence, they chose to impose relatively impotent transparency requirements, deferential toward publishers’ rights, over an effective, but extreme ban on “interested” ownership. Finally, Article 18 aims to protect media

¹⁰² *See supra* Part II.

¹⁰³ *Id.*

¹⁰⁴ *See supra* Part III.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

service providers from arbitrary censorship by VLOPs, but in doing so, it inadvertently limited VLOPs' ability to remove disinformation and illegal content.¹⁰⁷ Instead of correcting the power imbalance between relatively small media service providers and the VLOPs on which they rely for intermediation, Article 18 could thus be perverted to serve information autocracies like Hungary instead.¹⁰⁸

The EU has 27 Member States whose citizens collectively speak 24 languages. To some extent, any EU Regulation necessarily features exceptions and loopholes if it wishes to respect the multitude of cultures that the Union contains while accommodating the (sometimes diametrically opposed) interests of its citizens, its businesses, and its governments. A law replete with caveats is a tax we pay on democracy—one that attests to the admirable aspiration of a heterogeneous community to not only coexist, but also flourish. Nevertheless, such a law unequivocally fails when it *aggravates* the very problems it set out to resolve. The EMFA is still young, and some of its provisions will not be applicable until May 8, 2027.¹⁰⁹ Thus, it remains to be seen whether the Regulation increases media freedom and pluralism, does not influence it, or decreases it. Given the foregoing discussion, however, we fear that in the long term, the EMFA might do more harm than good.

¹⁰⁷ See *supra* Part IV.

¹⁰⁸ *Id.*

¹⁰⁹ EMFA, *supra* note 6, art. 29(d), at 37.