



European Media Freedom Act (EMFA)

ERGA recommendations for EMFA trilogues

The European Regulators' Group for Audiovisual Media Services (ERGA) wishes to reiterate its support for the European Media Freedom Act (EMFA) and its objectives, recognizing the importance of this legislation for the media freedom, pluralism and independence. In this regard, ERGA reiterates the importance of the independence of NRAs and the Board with a view to safeguard these core values of media regulation. ERGA is convinced that a common, principle-based, framework for the media sector in the EU, allowing to respect cultural differences, is very much relevant and needed.

As the legislative work on EMFA now enters into trilogue negotiations, ERGA would like to congratulate the European co-legislators for the steady pace and progress already made on this important file and express its strong wish to see EMFA adopted before the end of the European legislative term. Moreover, ERGA notes with satisfaction and very much supports the convergent stances taken by the co-legislators allowing to further improve this piece of legislation.

In addition, ERGA would like to present some outstanding remarks in order to draw the attention of the co-legislators to a few important topics, having the most direct relevance and importance for ERGA and its members.

1. EMFA GOVERNANCE AND REGULATORY COOPERATION

❖ National regulatory authorities (NRAs) – article 7

ERGA strongly welcomes the European Parliament's proposals reinforcing the requirements for the effective independence of NRAs as well as obligation for Member States to ensure that the NRAs' resources are proportionally increased in order for them to be able to fulfil the new missions resulting from EMFA appropriately. Moreover, strengthening the national authorities and their cooperation within an independent and separate European body is essential to ensure the appropriate balance between the harmonisation objectives and the need to preserve national well-functioning systems.

❖ European Board for Media Services – articles 8 to 11

ERGA strongly welcomes the central role given by EMFA to the future European Board for Media Services, which will succeed ERGA. ERGA members stand ready to actively and meaningfully contribute to the implementation and enforcement of this central piece of legislation. ERGA wishes to stress that the actual impact of EMFA will be guaranteed only if the Board is properly set up through adequate powers and resources, an appropriate structure and an effective independence.

In particular, the independence of the Board as enshrined in EMFA article 9 will be effective only if it is ensured that the status, the internal organisation as well as the functioning of the Board and its secretariat allow for this independence. ERGA therefore calls the co-legislators to take into account the following:

- A. *ERGA has a strong preference for the European Parliament's proposal strengthening the Board independence and setting it up as a body of the Union with legal personality, to be supported by an independent secretariat. In that sense, maintaining a Board secretariat provided by the Commission, even with the improvements proposed by the Council, would not be sufficient to ensure the full independence of the Board in line with its missions. To that end, ERGA stands ready to support the co-legislators in developing practical solutions aimed at ensuring an operational new institutional setup. Finally, in order to ensure the smooth transition to the new institutional set-up, it is important to include a provision which ensures that the current ERGA Chair, ERGA Vice-Chair and ERGA Board will stay in charge until the end of the year of entry into force of the EMFA regulation.*

- B. As regards the Expert Group proposed by the European Parliament (article 11a and recital 23a), which would be composed of representatives of the media sector beyond the audiovisual media and advise the Board, ERGA fully recognizes the relevance and added value of stakeholders' consultations on all major issues and whenever relevant, and wishes to stress that this is already the common practice among ERGA members for audiovisual media services, video-sharing platforms (VSPs), but also audio media, namely radio services. Therefore, in order to avoid additional rigid or burdensome procedures, ERGA would suggest to refer to the general principle of stakeholders' consultations, the details of which could be further defined in the Board's Rules of procedure.*

Furthermore, ERGA recognizes the peculiarity of press-related matters, namely the absence of regulation of this sector and therefore of remit for most NRAs (and ERGA) in this field, as well as the overall sensitivity related to this sector, it would indeed be relevant for the Board to be able to rely on the expertise of representatives of the press-sector. It would be therefore beneficial to refocus the Expert Group on the press sector only and introduce in EMFA the principle of its consultation by the Board, where relevant, on press-related matters, without prejudice to the Board's independence and autonomy of action. Incidentally, it would be also useful to rename the Expert Group in order to avoid any confusion with the experts' group of the European Commission.

- C. Moreover, ERGA broadly welcomes the amendments brought forward by the legislators, especially regarding: 1) the creation of the Steering group of the Board (European Parliament), which would be very useful in order to support the Board Chair in its missions; 2) the limitation of the duration of the Chair's mandate to 1 year renewable once (Council), as it would allow smaller regulators to get involved in the Board and hold this key position, while ensuring a real diversity of representation within the Board.*

❖ **Tasks of the Board – article 12**

ERGA welcomes the Council's approach to focus the Board's missions on the implementation of the Audiovisual Media Services Directive (AVMSD) instead of national transpositions of this directive. Moreover, it is paramount to strengthen the Board independence also by allowing it to act on its own initiative and not only at the Commission's request or with the Commission's agreement. ERGA therefore warmly supports the European Parliament's suggestions in this direction. In the light of the importance of the numerous new missions granted to the Board and in order to foster transparency, ERGA considers it is relevant for the Board to publish an activity report to be presented to the European Parliament (EP) and to inform the AVMSD Contact committee about its deliverables (Council). More generally, ERGA welcomes in principle the new missions, which the European Parliament proposes to confer to the Board, provided that corresponding resources are foreseen both at European level for the Board and at national level for the NRAs.

❖ **Structured cooperation, obligations of VSPs and regulatory guidance – articles 13-15**

ERGA strongly supports the Council's and European Parliament's proposals such as the possibility to define the details of the procedures and the timelines in the Board's Rules of procedure, the extension of the scope to mutual assistance, the possibility to refuse a request if unjustified or disproportionate, and the fact that the Board shall consult (and not seek agreement of) the Commission for the opinions it may issue.

❖ **Media service providers related to a non-EU state – article 16**

ERGA welcomes the improvements proposed by the Council and EP to these crucial and very much needed new provisions. In particular, ERGA notes with satisfaction the following amendments: covering all means of distribution and access, as well as both the target and reach activities (Council and European Parliament); providing that the obligation for NRAs to do their utmost to take into account the opinions of the Board is without prejudice to their powers under national law (Council) and that NRAs shall provide reasons for a refusal to take into account the opinions of the Board (European Parliament); introducing a legal basis for the NRAs to act (European Parliament). Moreover, ERGA notes with satisfaction that both the Council and the European Parliament consider it useful for the Board to propose a common approach regarding the non-EU originating media, ideally through a set of basic principle-based criteria that NRAs may take into consideration (Council).

This being noted, ERGA would still like to reiterate that:

- D. It is crucial that the scope be extended in clear terms to the broad category of media service providers "originating from outside of the EU" (as proposed by the Council) as opposed to just media service providers "established outside of the EU". This is a key issue to be addressed as it would allow to unambiguously cover all types of media with links to foreign states, namely : a) those established outside*

of the EU (available online for instance), b) those established outside of the EU falling under the competence of an EU Member States (for instance through satellite criteria pursuant to AVMSD article 2.4), as well as c) those established in an EU Member State but linked to foreign states, for which a cooperation between NRAs may be relevant and useful in a number of cases (with this final category being captured only by the “originating from outside of the EU” approach).

- E. When it comes to requests from an authority of destination to the competent authority (EP art.16.2c), it would be highly relevant to include an opinion of the Board (which as a minimum should be informed of the request and its outcome). This would allow to ensure a proportionate approach to measures that could be taken by the competent authority at the request of an authority of destination and which might have an impact on several Member States or even the whole EU. This would also ensure that this paragraph brings real added value, on top of the bilateral coordination already foreseen in EMFA article 13 and AVMSD article 3.*

2. ERGA PRIORITY THEMES

❖ Treatment of media content in the online environment – article 17

While acknowledging the complexity and sensitivity of the matter, ERGA welcomes the support of both the Council and European Parliament to these provisions, which confirm the shared understanding of the relevance of a special treatment for trustworthy media in order to ensure and strengthen media pluralism also in the online environment on very large online platforms (VLOPs).

ERGA agrees that the declaration system by which media service providers will get access to this privileged treatment needs to be strengthened as much as possible in order to reduce the access of non-trustworthy or non-ethical actors. ERGA therefore welcomes the additional requirements to be fulfilled by media service providers such as: a) the compliance with ownership transparency requirements from article 6.1 (Council and European Parliament); b) the involvement of the NRAs and self-/co-regulatory bodies in the confirmation of the declarations (Council and European Parliament); c) the obligation for the Commission to develop guidelines on the declarations (Council and European Parliament), in consultation with the Board (European Parliament); d) the possibility to invalidate a declaration in case of frequent breaches of the platforms’ terms and conditions (European Parliament, article 17.1e).

However, ERGA would like to suggest additional amendments to further strengthen the robustness of this provision:

- F. ERGA supports a systematic confirmation of the declarations with the involvement of the NRAs or self-/co-regulatory bodies, however it would suggest not involving them again in the appeal processes regarding the declarations, as this appears both complex and redundant with the previous steps of the procedure (European Parliament article 17.1d).*
- G. When it comes to the response period for the media service providers before a suspension/restriction decision is applied, it would be preferable to increase the legal security both for media service providers and VLOPs by setting an explicit deadline, as proposed by the European Parliament.*
- H. As for the proposal to involve the NRAs in the process of confirmation of the compatibility of the VLOPs decisions with their terms and conditions as well as fundamental freedoms concerning individual pieces of content (European Parliament, article 17.2a), ERGA would like to draw the attention of the co-legislators to the fact that applying private companies’ terms and conditions would be outside of the remit of numerous individual NRAs. While welcoming the involvement of the NRAs for the protection of media service providers from unjustified content moderation decisions by platforms, ERGA would advise the co-legislators to keep the process in line with the systemic approach under the DSA and consider practical implications of this scheme that might prove burdensome and challenging from a principle and procedural perspective for a number of individual NRAs.*

❖ Right of customization of the media offer – article 19

ERGA welcomes the extension of the scope to cover also audio media (Council and European Parliament), as well as the inclusion of remote controls (Council) and the mission of the Board to foster harmonised standards (Council and European Parliament). ERGA also believes it is in the interest of the audiences to be able to recognize the service responsible for the media content and therefore supports the European Parliament’s proposal obliging the providers of interfaces and devices to ensure that the identity of the media service providers editorially responsible for the content is visible and identifiable.

❖ National measures – article 20

ERGA welcomes the proposals put forward by both the Council and European Parliament to: a) limit the scope to those measures “liable to affect media pluralism or editorial independence”; b) clarify that a court of law can act as the appellate body; c) open the possibility for the Board to issue opinions at its own initiative. Moreover, ERGA notes with satisfaction the clarification of the European Parliament (recital 38) that this provision is not meant to undermine the national transpositions of the AVMSD, state-aid related measures or those related to the promotion of culture and creativity, such as measures concerning European works.

This being noted, ERGA would like to stress that:

- I. *If the European Parliament’s proposal granting an individual media service provider directly affected by a measure the right to request an opinion of the Board (article 20.5) were to be retained, ERGA would strongly advocate for circumscribing this right only to measures clearly likely to seriously violate the fundamental principles enshrined in EMFA, and giving the possibility to the Board to easily discard abusive requests. Otherwise, the risk would arise to face systematic requests (in parallel to appeals to national courts) that could overflow the Board and impair its ability to consider legitimate requests.*

❖ Media market concentration operations – articles 21-22

ERGA reiterates its support to a common basic framework for the assessment of media market concentrations from the pluralism perspective. Furthermore:

- J. *In order to create a proportionate obligation and ensure legal security for all stakeholders involved, ERGA would suggest to further clarify the scope by keeping the focus on operations of media market concentrations with a potential ‘significant’ impact on media pluralism and editorial independence (Council).*
- K. *In order not to excessively impact well-functioning systems, including by complexifying and prolonging these (already challenging) processes, ERGA would suggest to keep the approach as simple and flexible as possible (such as proposed by the Council), which would also allow to respect national specificities.*
- L. *It would be crucial to ensure the Board can issue an opinion also on its own initiative (European Parliament) and not only upon request of the Commission.*

❖ Audience measurement – article 23

ERGA welcomes the very aligned approach proposed by the Council and European Parliament in order to improve this provision, especially when it comes to: a) a better definition not limited to advertising-related audience measurement, b) the clarification of the concept of “providers of proprietary audience measurement systems”, c) the emphasis on the importance of comparability of audience measurement approaches, d) the specific reference to online platforms. ERGA would also be glad to contribute to the development of guidelines by the COM (European Parliament).

- M. *Furthermore, in order to ensure that this provision effectively fills the current gaps, ERGA believes that, as proposed by the European Parliament, media service providers should be able to receive, from providers of proprietary audience measurement systems, not only the methodologies but also the audience measurement data related to their content and services (if applicable, against remuneration), and that the alternative own methodologies should be subject to an annual independent audit.*

❖ State advertising – article 24

ERGA welcomes the Council’s proposal to extend the type of authorities eligible to monitoring the allocation of state advertising. Besides, in case the European Parliament’s proposal to develop criteria for the allocation of state advertising would be retained, the Board could be in charge of developing a set of general and principle-based criteria to be followed at national level in order to ensure a consistent approach within the EU.

3. GENERAL and FINAL PROVISIONS:

❖ Subject matter and scope – article 1

ERGA supports the clarification regarding the possibility for Member States to adopt not only more detailed but also stricter rules related to media freedom and pluralism (Council and European Parliament).

❖ Rights of media service providers – article 4

ERGA considers that quality and trustworthy media rely heavily on the work of their journalists, who deserve a proper level of protection. ERGA therefore supports a strong protection of journalists and their sources and is particularly supportive of the European Parliament's approach in that matter.

❖ Public Service Media – article 5

ERGA supports the clarification by both Council and European Parliament that it is the Member States' responsibility to ensure that their national legal frameworks guarantee the adequate independence and financial resources for the fulfilment of the public service media (PSM) remit. More generally, ERGA reiterates the need to fully respect the Amsterdam Protocol and suggest a general approach on public service media in EMFA, such as the proposals put forward by the Council. However, given the importance of the missions of public service media providers for democracy, ERGA believes it is relevant to enshrine in EMFA the general principle that PSM should be able to rely on appropriate, sustainable and predictable resources, ideally on a multiannual basis (European Parliament).

❖ Duties of media service providers – article 6

ERGA welcomes the extension of the scope to all media, therefore beyond news and current affairs, as well as the inclusion of micro enterprises (Council and European Parliament), and believes that media ownership transparency is a fundamental prerequisite for a healthy media market and the rights of the public. ERGA notes with interest the European Parliament's suggestion to set up national and European databases in order to allow the general public and all stakeholders to easily access this information.

In this regard, in order to keep the information collected relevant and consistent, it could be considered for the Board to develop a standardised form for the collection and update of the information required (European Parliament article 6.1 and article 6.3a) to be fed into the national and European media ownership databases. Moreover, as this task is very likely to be resource-intensive, it would be all the more crucial to ensure NRAs are properly resourced as proposed by the European Parliament (article 7).

❖ Entry into application – article 28

ERGA believes EMFA should be adopted and enter into application as soon as possible, but at the same time Member States should have sufficient time, when needed, to adapt their national frameworks to allow for a smooth direct application of the new regulation. Furthermore, the Board will also need some time to set up its new structure and be operational in order to fulfil its numerous new missions. As a compromise between the Council and EP proposals, ERGA would therefore suggest a 6-months period for articles 7-12 and a 12-months period from the entry into application for the rest of the regulation (except for article 19).

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ERGA and its members are committed to actively contribute to the promotion of media freedom and pluralism in the European Union, and therefore stand ready to further engage in constructive discussions and exchanges with co-legislators and the European Commission in order to ensure that EMFA will be the relevant, ambitious and impactful piece of legislation it is meant to be.

For reference: [ERGA position on the European Commission's proposal for a European Media Freedom Act](#) (November 2022); ERGA proposals for amendments to EMFA [art.7-16](#) (February 2023), [art.17-18](#) (April 2023) and [art.23](#) (May 2023); [ERGA statement on EMFA](#) (June 2023).