C4C's recommendations - The need to delete Articles 17 & 18 from the European Media Freedom Act (EMFA)

INTRODUCTION

C4C is a broad-based coalition that seeks an informed debate on how copyright can more effectively promote innovation, access, and creativity. C4C brings together libraries, scientific and research institutions, digital rights groups, technology businesses, and educational and cultural heritage institutions that share a common view on copyright. See our members here: https://coalition4creativity.org/about-us/.

In this position paper, we express our believe that **Articles 17 and 18** of the European Media Freedom Act (**EMFA**) **cannot be salvaged or improved and should hence be deleted** for the following reasons:

1. **The DSA and the P2B Regulation suffice** and there is no need for a specific media content moderation privilege: the DSA ink is barely dry, yet another unnecessary layer of complexity could get added with Article 17 of the EMFA and creating a narrower right applicable to less platforms than the P2B Regulation makes no sense.
2. **Articles 17 and 18 of the EMFA raise multiple questions to solve a non-existent problem**. There should be no privilege: (1) for certain actors, as making some actors more important means the speech of others is automatically of less value; (2) for media, as this creates an easily exploitable loophole in the fight against disinformation; (3) for media on VLOPs as this creates a provision resting on the wrong scope at both ends; and (4) as such a privilege is extremely difficult to combine with the multiple other obligations platforms have.
3. The introduction of these articles in the EMFA brings us back on the **slippery slope from media privilege to media exemption**/must-carry, a path that has already been clearly condemned by EU legislators.

Similar views have been expressed by a group of civil society organisations.

THE DSA & THE P2B REGULATION: NO NEED FOR A SPECIFIC MEDIA CONTENT MODERATION PRIVILEGE

The DSA ink is barely dry, yet another layer of complexity could get added

Content moderation mechanisms have been adopted in the Digital Services Act (DSA) and should be given the opportunity to be rolled out rather than adding sector specific rules on top of barely adopted horizontal legislation. Presupposing flaws in the content moderation policies adopted in the DSA does not seem like evidence-based policy making but rather a way to ignore the fact that a media exemption was rejected in the discussions leading to the adoption of the DSA.

Creating a narrower right applicable to less platforms than the P2B Regulation makes no sense

As regards the P2B Regulation, to quote professor Lorna Woods:

> "It is unclear what the obligations on VLOPs add to the the obligations in the Platform to Business Regulation ('P2B Regulation') – which could apply to VLOPs anyway – indeed, may apply much more broadly than to VLOPs or how the relationship between the two measures might be managed."

ARTICLES 17 & 18 OF THE EMFA: PROVISIONS THAT RAISE MULTIPLE QUESTIONS TO SOLVE A NON-EXISTENT PROBLEM

No privilege for certain actors: making some actors more important means the speech of others is automatically of less value

We are not contesting that there may be wrongful takedowns of media content. We have actually on multiple occasions highlighted in other files that for example copyright can be instrumentalised for censorship purposes and that the obligations imposed on platforms which imply the use of automated content moderation tools such as filters are detrimental to freedom of speech.

But this is not more prevalent for media content than it is for 'other' content (whatever the definitions may be). Moreover, giving a priority status to content moderation involving media providers regardless of the inherent quality of the content at stake (is it a piece of investigative journalism or the recipe section of a newspaper?) just means that the speech of others is automatically of less value. The concept of freedom of speech looks at speech itself, not at the who the speech comes from: any specific considerations required from platforms should apply to content, not a pre-set list of 'privileged actors', and content moderation principles applied by platforms should be based on the content, irrespective of who the entity that produced or shared it is.

As pointed out by Professor Joan Barata:

> "Is it reasonable to accept, for example, that a social media post by a commercial or a public broadcaster may receive a more cautious treatment, when it comes to possible restrictions or suspensions, than the content posted by a big human rights organization reporting about possible crimes against humanity?"

No privilege for media: no easily exploitable loopholes in the fight against disinformation

It has been demonstrated time and time again that disinformation often stems from so-called media. Media capture and editorial independence are at the heart of the discussions around the EMFA indicating that the trustworthiness of media is not necessarily evenly distributed across the EU. In an open letter sent to the European Parliament in November 2021, the EU DisinfoLab noted that:

> "Research has consistently identified malicious or simply unreliable actors presenting their content as credible journalism whilst sharing false, hateful or misleading information, either intentionally or unintentionally. This includes yellow press and boulevard papers that are regularly reprimanded by national press councils and other media watchdogs. It also includes disinformation operations which routinely rely on media accounts to spread content. Last year, EU DisinfoLab uncovered more than 750 media outlets in 116 countries operating as part of a major Indian disinformation operation. Facebook and Twitter also took action last year against a media outlet that

was hiring legitimate American freelance journalists after discovering it was part of a Russian disinformation operation. Our experience as journalists and disinformation researchers tells us it is virtually impossible to meaningfully define who or what is a legitimate 'press publication' in the online environment."

No privilege for media on VLOPs: the scope is wrong at both ends

On the one hand, the media privilege bestowed under Article 17 seems to focus on traditional media outlets, although the self-declared nature makes the concept quite vague. Moreover, it adds criteria that further cast doubt on the scope of the media entities that would be able to benefit from this privilege, with concepts such as "editorial independence from Member States and third countries" as well as the existence of "a co-regulatory or self-regulatory mechanism governing editorial standards, widely recognised and accepted in the relevant media sector in one or more Member States." Faced with such vague parameters, one can only imagine VLOPs will have to take all self-declarations at face value as the compliance assessment with those criteria can hardly be done by them.

On the other hand, Article 17 applies to VLOPs, a category that potentially encompasses a variety of platforms, not all of whom would typically be considered as carrying a lot of media content, let alone blocking any of it, such as travel booking, e-commerce, and transportation platforms.

How to combine this privilege with the multiple other obligations platforms have

During the DSA discussions, multiple policy makers already raised the Matrix dimension of current EU legislation applying to platforms when it comes to combining the rights and obligations stemming from the DSA itself, the DMA, TERREG, the Copyright Directive, AVMSD, the P2B Regulation, to quote only a few. The *lex specialis* vs *lex generalis* approach is not a 'solve-all' principle here, as different fundamental rights are at stake and even the case law of the CJEU does not necessarily clarify what the ranking of these rights should be outside of specific contexts.

THE SLIPPERY SLOPE FROM MEDIA PRIVILEGE TO MEDIA EXEMPTION / MUST-CARRY

Article 17 and 18 read like a 'media exemption lite' and one cannot stop but feel that this proposal paves the way, yet again, for further intense lobbying toward a total media exemption throughout the legislative process, even though this option was very clearly rejected only a few months ago. To quote Alexandre Alaphilippe, EU DisinfoLab Executive Director: "We still don't understand why we spend so much time discussing the same measures that were rejected in the Plenary and ruled out by the Member States while there are more meaningful and urgent things that could be done to protect the media and the public from disinformation".

Moreover, if VLOPs cannot apply the normal content moderation procedures to the content posted by certain entities, this would amount to a must-carry obligation. If one takes into consideration the obligations imposed by Article 15 of the Copyright Directive relating to the press publishers' right, this would create a legal framework that combines a must carry with a 'must pay' obligations in those Member States that do not recognize the right to waive compensation under Article 15, thereby violating the freedom to conduct a business.