



November 8, 2022

Submission to the Danish government's public hearing re. the Media Freedom Act

Danske Medier cannot support the proposed regulation in its current form. The Association recognizes the EU Commission's intention to improve the conditions for press freedom in Europe through the Media Freedom Act, but media policy, which largely concerns national cultural affairs is not and should not be subject to EU rules. In addition, media business only have a cross-border character to a very limited extent, and there is therefore no internal market. As a result, the Member States should not give up their power to regulate the framework conditions of the media in favour of EU rules, which, among other things, introduce a supranational European Board for Media Services. The Commission neither documents nor makes it likely that the MFA will strengthen press freedom in Europe; on the contrary, the proposal risks impairing the possibilities of running editorial media in the EU.

Danske Medier calls on the government to work to ensure that EU regulation is limited to rules, which protect media and do not further regulate them. Furthermore, the Association urges the government to make the Council Legal Service clarify whether the EU has the necessary authority to introduce such far-reaching legislation in the media area.

Legal basis for MFA

It is a hallmark of democratic societies based on the rule of law that there is an absence – or an absolute minimum – of state regulation of the editorial media. Only then are media truly free and independent and thus able to fulfill their essential role as the control and information organs of democratic societies (public watchdog function). In other words, the media constitute a vital infrastructure for democratic societies.

In certain – especially Eastern European – EU countries, freedom of the press is under severe pressure from the state authorities. Danske Medier therefore sympathizes with the Commission's desire for common rules, which can improve the conditions for the media in these countries. However, the Association is strongly concerned that such common rules will have a negative effect on the framework conditions for running media businesses in the well-established and well-functioning media markets found in the majority of EU countries. This applies not least in Denmark and the other Scandinavian countries, where there is a strong tradition of a free and pluralistic press, which ensures citizens' access to reliable information as an essential prerequisite for an informed public debate.

Danske Medier is therefore extremely critical of the Commission's reasons for the MFA and, as a result, of the stated legal basis, namely Article 114 of the Treaty on the Functioning of the European Union regarding the establishment and functioning of the internal market.

In the proposal, the Commission refers to the cross-border nature of media services and to the existence of an internal media market, which is precisely a prerequisite for being able to adopt EU rules in the media area based on Article 114. Reference is made to "cross-border matters", "cross-border activity and investment", "cross-border coordination tools and EU-level opinions and guidelines", "cross-border production, distribution and consumption of media content", "cross-border media market transactions" etc.

But the Commission fails to take account of the fact that a vast majority of European media only have a local, regional or national reach and thus do not cross borders at all. This is due to a wide range of factors, including not least the linguistic and cultural differences, which are otherwise normally perceived as a strength of the European community and as a significant reason why the media area is and should continue to be subject to national regulatory competence.

It must of course be recognized that not only audiovisual media, but also press publications *can* be consumed across borders. But in practice this applies to such a limited extent that, in Danske Medier's assessment, it does not make sense to refer to the existence of an internal media market with the severe consequences this has in the form of the EU's sudden competence to introduce common rules for all media - including the main part, which only address and are used by a national audience. In this relation it is also thought-provoking that the Commission explicitly states as a specific objective of the MFA to "foster cross-border activity and investment in media services", which seems to emphasize that the cross-border element is not prevalent today.

In other words, it is an attempt to deprive Member States of competence and instead regulate at EU level in order to promote the cross-border nature of the media. But that turns things upside down; only when there is actual cross-border nature the EU can legislate in a specific area.

Finally, it is noted that the Commission's independent Regulatory Scrutiny Board also initially found that the Commission's justification for EU regulation was insufficient. Only when the Commission had inserted additional references to "cross-border" elements in the proposal, this assessment was adjusted.

Danske Medier therefore encourages the Ministry of Culture to ask the Council Legal Service to carefully assess the MFA's legal basis and its scope to avoid that the legislative instrument risk being rejected by the European Court of Justice at a later stage or will create an unfortunate practice of expanding the interpretation of the Treaty's statutory provisions.

In any case, any future EU legislation should be limited to what is absolutely necessary to achieve the crucial goal of protecting all European media from direct or indirect interference in their editorial activities. Common rules on the protection of the media, on the other hand, must not be used as a reason for an intrusive and potentially harmful EU regulation of the media. However, in Danske

Medier's view, the Commission's comments on the principle of subsidiarity and the principle of proportionality are characterized by the fact that it has been decided in advance that regulation must take place. The reasoning regarding the observance of these principles is by no means convincing.

For the sake of completeness, it should be noted that Danish media are covered by the Media Liability Act, including the requirement in Section 34 that the content and conduct of the media shall be in accordance with sound press ethics. Based on the self-regulation of the media industry – the Press Ethical Rules – the Press Council decides on whether publication has been made contrary to sound press ethics.

Rights and duties of the media and their users

If the proposal is brought forward, Danske Medier is positive re. Chapter II on the rights and duties of media service providers and recipients, which should be the main element of the MFA. However, the Association wishes to make a few comments about the chapter:

Rights of recipients of media services (Article 3)

The citizens' right to receive a plurality of freely and independently produced news and current affairs content in Article 3 is an excellent manifesto, which, however, can hardly be perceived as a legal claim for the individual.

Recital 6 of the preamble states that media users should be able to receive "free" media services. At a time when many media's finances are extremely fragile, there is a need for this to be nuanced.

Rights of media service providers (Article 4)

Danske Medier notes with satisfaction the recognition of the media's editorial freedom, including the protection of sources, as a basic prerequisite for running a media business in the EU. Consequently, the Association therefore finds it unambitious that Member States, according to Article 4(2) must simply "respect" editorial freedom. This should of course be "guaranteed" if the MFA is to provide European media with real protection against interference from the Member States.

Safeguards for the independent functioning of public service media providers (Article 5)

Danske Medier recognizes the need for independent public service media that operate according to the arm's length principle. However, the Association believes that the exact scope of the requirement in Article 5(3) that such media "have adequate and stable financial resources" must be clarified, so that this cannot be misused by Member States to place private media providers in an unfair competitive situation in relation to state-owned media.

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

Danske Medier finds that article 6(2) on securing editorial independence express a fundamental and invariable principle, which in Denmark is expressed in the Media Liability Act's provisions re. the editor being the person authorised to make the final decisions concerning the content of the media. The publisher determines the editorial line of the media, but the editor operates freely within this framework.

Danske Medier is aware that the proposed provision is perceived in some countries with a strong publisher tradition as a prohibition against the publisher contributing to decide on the content of the publisher's own media. This is not the Association's understanding of the provision and recitals 20-21 of the preamble but it shows the importance of clarifying what is a healthy division of roles between publisher and editor, which ensures the independence of editorial decisions.

Supervisory authorities nationally and at EU level

The current directive on Audiovisual Media Services, which has *not* been adopted based on the internal market provision, contains references to national "competent authorities" as well as a "contact committee" under the auspices of the Commission, namely the European Regulators Group for Audiovisual Media Services (ERGA).

With Chapter III of the proposed regulation, the Commission wants to increase regulatory cooperation to include regulation of all editorial media, including printed and digital media. This must be done partly through national regulatory authorities or bodies and partly – at EU level – through the "European Board for Media Services".

Danske Medier strongly distances itself from this chapter, which in the association's assessment can be harmful to the freedom and independence of the media in well-functioning media markets.

The Association fears that the proposed provisions can be used as an excuse for more national regulation of the media and thus potentially further worsen conditions in the countries where the proposal is intended to help free and independent media.

National authorities such as the Danish Radio and Television Board carry out necessary tasks such as issuing broadcasting licenses etc. in a media area where there are certain technical limitations to the supply. There is no need for corresponding exercise of authority in relation to media, which are not covered by the AVMS directive.

Danske Medier therefore rejects the need for an all-encompassing European Board for Media Services. A board which, according to Article 9 of the proposed regulation, is intended to carry out its tasks in complete independence, but which is nevertheless closely intertwined with the Commission, which must not only handle the board's secretariat but must also be heard by the board and involved in a wide range of the procedures described in more detail in Chapter III. If the proposal is brought

forward in the legislative process, and it is maintained to establish a new board to replace ERGA, it should be ensured that the board becomes truly independent of the Commission both organizationally and functionally.

Finally, Danske Medier has a few general comments on specific provisions in Chapter III of the draft regulation:

The media's relationship with tech giants (Article 17)

Danske Medier recognizes the intent of Article 17, which concerns the relationship between editorial media and tech giants, the so-called "very large online platforms". The proposal gives the media better opportunities to deal with problems re. the tech giants' removal of lawful editorial content on the platforms and thus builds on already adopted rules in the Digital Services Act. However, it is essential to ensure that the media's enforcement options against the VLOPs become powerful enough to have a real effect.

Danske Medier therefore calls for securing the right of editorial media to collective bargaining vis-à-vis the tech giants.

Media concentration (Article 21)

Danske Medier does not believe that the EU should be given additional competence to issue guidelines for or assess mergers in the media market in addition to the general competition rules that apply horizontally. As stated above, media markets are largely characterized by national differences, especially linguistic and cultural. Therefore, the transactions of the media companies must also be judged against these national conditions in terms of their impact on media pluralism, editorial independence and economic sustainability.

Media concentration can amount to a socially undesirable collection of media in a few hands to the detriment of citizens' access to a diverse range of media. However, media concentration can also be healthy in the sense that media, which are about to fold, can be continued and developed as part of a larger media company with more financial resources and thus contribute to maintaining media pluralism and preventing the so-called "news deserts" - not least in local areas. This opportunity has secured several local publications in Denmark. The assessment of the impact of media concentrations on a diverse media market should therefore, as far as possible, be done nationally and not by a European media board composed of representatives from all EU countries without necessarily having sufficient insight into the basic media structures of the individual countries.

Audience measurement (Article 2, para. 14 and Article 23)

Danske Medier states that independent measurements of the media's users, listeners, readers and viewers play a significant role in ensuring reliable and transparent information. Independent data

and insights companies such as Kantar, Gemius and Nielsen, which carry out these measurements, help ensure reliable information on the advertising market. This should be maintained, and therefore Danske Medier believes that Article 2, para. 14, as well as Article 23 should be expanded so that the provision's scope also covers VLOPs to ensure full transparency, fair competition and to avoid imposing unreasonable burdens on independent actors.

Danske Medier is of course available if the Ministry would like the above comments to be elaborated. Inquiries about this can be addressed to Head of Legal Department Holger Rosendal or the undersigned.

Yours sincerely,
Danske Medier

Mads Brandstrup
CEO