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Safeguards for the independent functioning of public service media providers. The legal position of domestic legislation that is not in compliance with Article 5 EMFA

The aim of this article is to comment on Article 5 of the European Media Freedom Act (EMFA), about safeguards for the independent functioning of public service media providers, and shaping the legal position of domestic legislation in this field, which will not be in compliance with that article from the date (8 August 2025) when Article 5 EMFA begins to apply.

*EMFA – Public Service Media Provider – Independence – Procedures for the appointment and the dismissal
Funding procedures*

Garanzie per il funzionamento indipendente dei fornitori di media di servizio pubblico. La situazione giuridica della legislazione interna non conforme all'art. 5 EMFA

Scopo del presente articolo è svolgere un commento sull'art. 5 del Regolamento europeo sulla libertà dei media (EMFA) sulle garanzie per il funzionamento indipendente dei fornitori di media di servizio pubblico, delineandosi quindi la situazione giuridica della legislazione interna agli Stati membri che, alla data (8 agosto 2025) di applicazione dell'articolo stesso, non sia conforme all'art. 5 stesso.

*EMFA – Fornitore di media di servizio pubblico – Indipendenza – Procedure di nomina e licenziamento
Procedure di finanziamento*

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SUMMARY: 1. Introduction. – 2. Comment on Article 5 EMFA: a) the notion of public service media. – 3. (continuation): b) obligations of Member States (also in the light of the Recitals of EMFA and the Recommendations of the Committee of Ministers of the Council of Europe). – 4. The legal position of domestic legislation, that is not in compliance with Article 5 EMFA in this field.

1. Introduction

The European Parliament and the Council of the European Union have recently passed Regulation (EU) 2024/1083 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 Freedom Act).

The aim of this article is commenting Article 5 of the European Media Freedom Act (EMFA), about safeguards for the independent functioning of public service media providers, and shaping the legal position of domestic legislation, that is not in compliance with that article, in this field.

EMFA was published in the *Official Gazette of the European Union* on 17 April 2024. Most of its articles (including Article 5) shall apply from 8 August 2025. However, it is useful to start analysing immediately those provisions under Article 5 EMFA and shape the legal position of domestic legislation in this field in light of that article. In less than one year, Member States shall change

their legislation, if needed, to comply with it. Not surprisingly, this has recently been stressed by the European Commission in its *2024 Rule of Law Report*¹.

The hypothesis that will be demonstrated here is that domestic legislation that is not in compliance with Article 5 EMFA shall be modified as soon as possible, before that article begins to be applicable from 8 August 2025. The legal consequences of such an infringement from that date will also be analysed².

The article will proceed as follows.

First, commenting Article 5 EMFA, it will be demonstrated that the notion of public service media adopted in that article is referred to a subject (and not to activities carried out by subjects) (Section 2). Some reflections will be carried out on the obligations of Member States under Article 5 EMFA (Section 3).

Secondly, some reflections will be carried out on the legal position of domestic legislation, that is not in compliance with that article, in this field,

1. «Given the relevance of [the provisions under Article 5 EMFA] in fostering media freedom and media pluralism, it is important that Member States start putting them into practice as soon as possible, including by addressing the relevant rule of law reports' recommendations, especially in cases where concerns on the matters covered by the EMFA signalled in the rule of law reports have persisted for several years of where deterioration of the situation has been reported». See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2024 Rule of Law Report. The rule of law situation in the European Union*, COM(2024) 800, p. 25.

2. I have already published an article (in Italian) commenting Article 5 EMFA. See ALBANESI 2024. However, that article specifically focused on the Italian legislation in light of Article 5 EMFA, whereas in the present article I will state that in general domestic legislation of EU Member States, if not in compliance with article 5 EMFA, shall be modified as soon as possible, before that article begins to be applicable from 8 August 2025. I will also analyse the legal consequences of such an infringement from that date.

analysing the legal consequences of such an infringement from the date when Article 5 EMFA begins to be applicable (Section 4).

2. Comment on Article 5 EMFA: a) the notion of public service media

The first issue is to identify the notion of public service media³ adopted by EMFA: is the notion of public service media within EMFA referred to a subject or to activities carried out by subjects⁴?

EMFA adopts a notion of “public service media” that is referred to a subject⁵ (and not to activities carried out by subjects⁶). This conclusion can be drawn from the following arguments.

First, Article 2 EMFA gives the following definition of “public service media provider”: «a media service provider which is entrusted with a public service remit under national law and receives national public funding for the fulfilment of such a remit»⁷. Therefore, such a definition explicitly refers to a subject, the public service media provider.

Secondly, under that definition, that subject is entrusted with a public service remit under national law *and* receives national public funding for the fulfilment of such a remit. It is significant that, when mentioning these two characteristics of that subject, Article 5 EMFA uses the subjunctive conjunctive “and”; whereas the original proposal

of the Regulation used the disjunctive conjunction “or”⁸, as if national public funding was enough to qualify the *activity* of a subject as public service. On the contrary, article 5 EMFA requires a remit to a *subject*.

Thirdly, Article 2 uses the word “remit”, whereas the original version of the Regulation used the word “mission”⁹. The word “remit” is in line with Protocol No. 29 of the *Consolidated version of the Treaty on the functioning of the European Union* and with the public service remit given to a subject¹⁰; whereas the word “mission” reads as much more generic and potentially concerning any activities of a subject.

Finally, it is also important to mention Recital (10) EMFA, under which the notion of public service should not cover «private media undertakings that have agreed to carry out, as a limited part of their activities, *certain specific tasks* of general interest in return for payment» (emphasis added).

At the end of the day, in light of such an interpretation, Article 5 EMFA is applicable to subjects such as *RAI-Radiotelevisione italiana S.p.A.* in Italy, *France Télévisions* in France or *Corporación de Radio y Televisión Española* in Spain.

Under the aforementioned Protocol No. 29, public service remit is conferred, defined and organised by each Member State^{11,12}. However, un-

3. On public service media in a digitalised and international media market, see DONDERS 2021.

4. Actually, such a legal issue is mainly relevant within the Italian legal scholarly debate. In general, on public services, see GALLARATI 2023, p. 250 ff.

5. According to the position of VIGEVANI 2018, p. 241 ff.

6. According to the view of SANDULLI 1978, p. 15.

7. Under Article 2 EMFA, “media service provider” is «a natural or legal person whose professional activity is to provide a media service and who has editorial responsibility for the choice of the content of the media service and determines the manner in which it is organised». “Media service”, under Article 2 EMFA, is «a service as defined by Articles 56 and 57 TFUE, where the principal purpose of the service or a dissociable section thereof consists in providing programmes or press publications, under the editorial responsibility of a media service provider, to the general public».

8. See *Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU COM(2022) 457*, Article 2.

9. *Ibidem*.

10. Protocol No. 29 refers to «broadcasting organizations» that are provided with «the funding of public service» «for the fulfilment of the public service remit».

11. On the various types of European media models, see HALLIN-MANCINI 2004, and TERZIS 2007.

12. «[I]n so far as [...] funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account». However, «public service broadcasting can have its State funding declared to be compliant with

der the Explanatory memorandum of the proposal for the regulation, the initiative takes due account also of Article 4(2) TEU¹³. In other words, the regulation will not interfere with «national identities or regulatory traditions in the media field»¹⁴.

From this perspective, it is interesting to note that national identity does not allow Member States to jeopardise the common values of the European Union under Article 2 TEU¹⁵. If Member States were allowed to undermine such common values, this would mean¹⁶ undermining the substantive constitution of the European Union¹⁷.

Public service media are essential to strengthen freedom of expression and information¹⁸, thus to implement the principle of the rule of law, that is part of the common values of the European Union under Article 2 TEU. Therefore, Member States could not be allowed to jeopardise (in the name of their national identities) such values, when regulating public service media.

Such an issue is not just of a theoretical nature: one should bear in mind that Member States, such as Hungary (that voted against the EMFA proposal within the Council of the European Union¹⁹),

have always used the “national identity” clause as a shield to legitimize their domestic legislation that was not in compliance with the common values under Article 2 TEU²⁰.

This might not be acceptable from the perspective of the European Union, when it comes to public service media.

3. (continuation): b) obligations of Member States (also in the light of the Recitals of EMFA and the Recommendations of the Committee of Ministers of the Council of Europe)

Some specific obligations of Member States are set out by EMFA.

From this perspective, the wording of EMFA is much more precise than the original proposal. In the proposal, «[p]ublic service media providers shall provide in an impartial manner a plurality of information and opinions to their audience», and «[t]he head of management and the members of the governing board of public service media providers shall be appointed through a transparent, open and non-discriminatory procedure and on the basis

the provisions of the Treaty on State aid only inasmuch as the qualitative requirements set out in the public service remit are complied with». See Court of First Instance (Fifth Chamber), Judgment, 16 June 2008, T-422/03, *SIC – Sociedade Independente de Comunicação, SA v. Commission*, paragraph 211.

13. Under Article 4(2) TEU, «[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State».

14. See *Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act)*, cit., p. 9.

15. Under Article 2 TEU, «[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail».

16. See VON BOGDANDY–SCHILL 2011, p. 1430 and MANGIAMELI 2012, p. 35.

17. According to the European Court of Justice, the legal structure of the European Union «is based on the fundamental premises that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU». See European Court of Justice (Full Court), *Opinion 2/13*, 18 December 2014, paragraph 168.

18. See Recital (27) EMFA.

19. See Document ST_8553_2024_INIT, Voting result Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act). Adoption of legislative act, 4016th meeting of the Council of the European Union (Agriculture and Fisheries), 26 March 2024, Brussels.

20. See ALBANESI 2021, pp. 115–116.

of transparent, objective, non-discriminatory and proportionate criteria laid down in advance by national law»²¹. EMFA now reads as follows: «*Member States shall ensure that public service media providers are editorially and functionally independent and provide in an impartial manner a plurality of information and opinions to their audience*» (Article 5(1) EMFA); «*Member States shall ensure that the procedures for the appointment and the dismissal of the head of management or the members of the management board of public service media providers aim to guarantee the independence of public service media providers*» (Article 5(2) EMFA) (emphasis added). Therefore, a set of obligations of Member States is now clearly explicit.

Obligations of Member States are those as follows.

(i) Firstly, Member States shall ensure that public service media providers are editorially and functionally independent and provide in an impartial manner a plurality of information and opinions to their audience, in accordance with their public service remit as defined at national level in line with Protocol No. 29 (Article 5(1) EMFA)²².

Editorial and functional independence can be assured by procedures for the appointment and the dismissal of the head of management or the members of the management board of public service media providers that aim to guarantee the independence of public service media providers (as Article 5(2) EMFA reads); by financial resources that safeguard the editorial independence of public service media providers (as Article 5(3) reads); by the monitoring carried out by one or more independent authorities or bodies, or mechanisms free from political influence by government (as Article 5(4) reads).

(ii) Second, Member States shall ensure that the procedures for the appointment and the dismissal of the head of management or the members of the management board of public service media providers aim to guarantee the independence of public service media providers (Article 5(2) EMFA).

In particular, the head of management or the members of the management board of public service media providers shall be appointed on the basis of transparent, open, effective and non-discriminatory procedures and transparent, objective, non-discriminatory and proportionate criteria laid down in advance at national level. The duration of their term of office shall be sufficient for the effective independence of public service media providers.

Moreover, decisions on dismissal of the head of management or the members of the management board of public service media providers before the end of their term of office shall be duly justified, may be taken only exceptionally where they no longer fulfil the conditions required for the performance of their duties according to criteria laid down in advance at national level, shall be subject to prior notification to the persons concerned and shall include the possibility of judicial review.

(iii) Third, Member States shall ensure that funding procedures for public service media providers are based on transparent and objective criteria laid down in advance. Those funding procedures shall guarantee that public service media providers have adequate, sustainable and predictable financial resources corresponding to the fulfilment of and the capacity to develop within their public service remit. Those financial resources shall be such that the editorial independence of public service media providers is safeguarded (art. 5(3) EMFA)²³.

Therefore, principles concerning those procedures under Article 5(3) EMFA are rather generic.

However, some interpretative tips can be taken from Recital (31) EMFA, under which public service media providers benefit from transparent and objective funding procedures which guarantee adequate and stable financial resources for the fulfilment of their public service remit, enable predictability in their planning processes and allow them to develop within their public service remit. Such funding should be preferably decided and appropriated on a multi-year basis, in line with the public service remit of public service media providers,

21. See *Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market*, cit., Article 5.

22. On independence as one of the necessary conditions required to transform a democracy- and citizenship-centric notion of public service media into reality, see DONDERS 2021, pp. 87-89.

23. On adequate funding as one of the necessary conditions required to transform a democracy- and citizenship-centric notion of Public Service Media into reality, see DONDERS 2021, pp. 89-92.

in order to avoid the risk of undue influence from yearly budget negotiations²⁴.

‘Donations’ by the Executive to the public service media providers, as those done within the yearly Budget Act, do not comply with such requirements because they rely on yearly political negotiations on the budget and undermine the independence of the public service media provider: public service media providers cannot rely on funding that does not allow them to plan their activities on a multi-year basis.

(iv) Finally, Member States shall designate one or more independent authorities or bodies, or put in place mechanisms free from political influence by government, to monitor the application of paragraph 1, 2 and 3 (Article 5(4) EMFA).

At the end of the day, the whole principles set out under Art. 5(1), (2), (3) and (4) are rather generic.

However, once again, some interpretative tips can be taken from Recital (31) EMFA, under which Member States shall put in place effective legal safeguards for the independent functioning of public service media providers, «building on the international standards developed by the Council of Europe in that regard»²⁵. From this perspective, it is important to note the relevance of the guidelines that can be found within the 1996 and 2012 Recommendations of the Committee of Ministers of the Council of Europe²⁶.

For example, when it comes to the procedures for the appointment and dismissal of the head of management or the members of the management board of public service media providers, the Committee of Ministers recommends that: there is clear criteria for the appointments that are limited, and directly related, to the role and remit of the public service media; the appointments are not used to exert political or other influence over the operation of the public service media; the appointments are made for a specified term that can only be shortened in limited and legally defined circumstances – which should not include differences

over editorial positions or decisions. As for the funding, the recommendations are as follows: the public service media are consulted over the level of funding required to meet their mission and purposes, and their views are taken into account when setting the level of funding; the funding provided is adequate to meet the agreed role and remit of the public service media, including offering sufficient security for the future as to allow reasonable future planning; the process for deciding the level of funding should not be able to interfere with the public service media’s editorial autonomy.

It is also important to mention the case-law of the European Court of Human Rights (ECtHR). In 2009, the ECtHR stated that the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe provide guidance as to the approach which should be taken to interpreting Article 10 of the European Convention on Human Rights (ECHR) on freedom of expression in this field²⁷.

At the end of the day, the aforementioned Recitals of the EMFA and the Recommendations of the Committee of Ministers of the Council of Europe, can provide a guidance to Member States in setting out procedures and criteria required by Article 5 EMFA.

4. The legal position of domestic legislation, that is not in compliance with Article 5 EMFA in this field

As already mentioned, EMFA, published in the *Official Gazette of the European Union* on 17 April 2024, shall apply from 8 August 2025, as for most of its articles, included Article 5.

It is now time to focus on the legal position of domestic legislation that will not be in compliance to Article 5 EMFA and the legal consequences of such an infringement from that date.

(i) Domestic legislation that will not be in compliance with Article 5 EMFA will constitute an in-

24. See Recital (31) EMFA.

25. *Ibidem*.

26. See Council of Europe, Committee of Ministers, *Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting*, and Council of Europe, Committee of Ministers, *Recommendation CM/Rec (2012) 1 on public service media governance*.

27. See European Court on Human Rights (Fourth Section), *Manole and others v. Moldova*, 17 September 2009, application No. 13936/02, paragraph 107.

fringement of EU law from 8 August 2025. Therefore, Member States, with such domestic legislation, could be subject to infringement proceedings initiated by the European Commission. In parallel, any domestic court could ask the European Court of Justice to issue a preliminary ruling, in order to have Article 5 EMFA interpreted in the sense that it does not permit such domestic legislation.

From the perspective of domestic legislation, domestic Courts are not allowed to disapply domestic legislation that is not in compliance with Article 5 EMFA. Although EMFA is a Regulation (thus, it is directly applicable in Member States under Article 288 TFEU), Article 5 EMFA does not contain provisions that can be immediately applied: therefore, it is not possible to disapply any domestic provision that is not in compliance with it. As already mentioned in the previous Sections, under Article 5 EMFA Member States shall pass some domestic legislation to follow up the obligations under Article 5 EMFA, such as establishing some procedures to appoint/dismiss the head of management or the members of the management board of public service media providers, in order to guarantee the independence of public service media providers; and some funding procedures for public service media providers based on transparent and objective criteria laid down in advance.

However, a case of constitutionality can be brought before domestic constitutional courts, when under the domestic system of constitutional review, such a kind of antinomy between non-immediately-applicable EU provisions and domestic legislation is the task of constitutional courts²⁸.

(ii) One might also wonder what the status of the head of management or the members of the management board, that were elected after 8 August 2025 on the basis of domestic legislation that is not in compliance with Article 5 EMFA, would be.

From the perspective of EU law, such an action of a Member State would constitute an infringement to EU law, as well. Administrative praxis (that implements EU law) that is not in compliance to EU law can also pose an infringement²⁹. However, such a praxis shall be «to some degree, of a consistent and general nature»³⁰.

From the perspective of domestic legislation, should the constitutional court declare void domestic legislation that is not in compliance with Article 5 EMFA, the appointment of the head of management or the members of the management board elected under such a legislation, would not be legitimate as well.

(iii) Some final reflections should be made from a different perspective, that is of the European Court of Human Rights.

One should bear in mind the aforementioned guidelines that can be found within the 1996 and 2012 Recommendations of the Committee of Ministers of the Council of Europe. Should domestic legislation violate those guidelines, a case-law could be brought before the European Court of Human Rights, in light of violation of Article 10 ECHR on freedom of expression in this field. As mentioned, that was the tool chosen by some journalists of the public service media provider that led the ECtHR to declare a violation of Article 10 ECHR by Moldova in 2009³¹.

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