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The delicate balancing between media pluralism and market freedom: Analysing the procedural safeguards for the media under Article 21 of the EMFA

Article 21 of the European Media Freedom Act aims to ensure that Member State measures potentially affecting media pluralism or EU market freedoms must be justified, proportionate and meet several procedural requirements. Article 21 lays the groundwork for the media plurality test, in Article 22 by regulating, inter-alia, limits on cross-sector media ownership to prevent market failures and protect media pluralism. This article is timely, enabling the media to appeal against state measures considered harmful to the freedom of establishment and media pluralism, which have become integral to the EU's normative identity. Years before the EMFA was conceived, these freedoms culminated in a protracted legal dispute between Vivendi SA and Mediaset. This case served as an important catalyst for the revision of Italy's anti-trust law and Article 21 of the EMFA, thereafter. This paper summarises how this landmark case unfolded while highlighting its parallels with Article 21 of the EMFA. Thereupon, it summarises the debate concerning the contestable legal basis of this article. The paper concludes by elucidating the provision's potential shortcomings, which may pose legal certainty and enforcement issues.

European Media Freedom Act, Article 21 – Media pluralism – Media ownership

Il delicato equilibrio tra pluralismo dei media e libertà di mercato: un'analisi delle tutele procedurali per i media ai sensi dell'articolo 21 dell'EMFA

L'articolo 21 dell'European Media Freedom Act mira a garantire che le misure degli Stati membri potenzialmente incidenti sulla pluralità dei media o le libertà di mercato dell'Unione europea siano giustificate, proporzionate e rispettino diversi requisiti procedurali. L'articolo 21 pone le basi per il test della pluralità dei media, specificato all'articolo 22, regolando la limitazione della proprietà dei media da parte di altri settori al fine di prevenire i fallimenti del mercato e salvaguardare il pluralismo dei media. Questo articolo è una disposizione tempestiva, in quanto i fornitori di servizi mediatici hanno ora il diritto di presentare ricorso contro le misure statali considerate minacciose per la libertà di stabilimento e il pluralismo dei media, che sono diventati parte integrante dell'identità normativa dell'Unione Europea. Anni prima della concezione dell'EMFA, queste libertà sono culminate in una lunga disputa legale tra Vivendi SA e Mediaset. Questo caso ha rappresentato un importante catalizzatore per la successiva revisione della legge antitrust italiana e dell'articolo 21 dell'EMFA. Il presente manoscritto riassume l'evoluzione di questo caso emblematico, evidenziandone i parallelismi con l'articolo 21 dell'EMFA. In seguito, fornisce una sintesi del dibattito sulle controverse basi giuridiche di questo articolo. Questo contributo si conclude illustrando le potenziali carenze della disposizione, le quali potrebbero porre problemi di certezza del diritto e di applicazione.

European Media Freedom Act, Articolo 21– Pluralismo dei media– Proprietà dei media

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Introduction

Four freedoms – namely, goods, services, people and capital – underpin the functioning of the European Union's internal market. These freedoms, however, are not inviolable, as Article 49 of the Treaty on the Functioning of the European Union (TFEU) has established, and numerous cases of the Court of Justice of the European Union (CJEU) case law have clarified. This is the underlying logic of Article 21, which sets forth the principle that media service providers (MSPs) should be able to carry out their services without interference in the internal market (see also Art. 4(1) EMFA). This economic freedom may, however, be justifiably restricted if the editorial independence of an MSP is 'likely' to be negatively impacted. Article 21 of the European Media Freedom Act (EMFA) introduces rules aimed at safeguarding media pluralism – which has become a central pillar of the normative fabric of the EU (see, for instance, Art. 11 CFR) – as well as reinforcing the freedom of establishment (Art. 49 TFEU). Article 21 of the EMFA, in essence, aims to regulate the ostensible tension between these market and non-market freedoms. Striking a balance between them has proven difficult in the past, as elucidated by the protracted legal dispute between Vivendi and Mediaset (a detailed analysis of this case is presented below). Article 21 lays the groundwork for Article 22's so-called "media plurality test" by regulating, inter-alia, the limiting of media ownership by other sectors (as stated in Recital 61). Specifically, any measure "liable" to affect an MSP's media pluralism or editorial independence must also satisfy a media market concentration test, as stipulated in Article 22. On paper, this article should help partially redress the power asymmetry between media service providers (MSPs) vis-à-vis state authorities as prospective national measures potentially disruptive to media pluralism must comply with several procedural requirements[1]. Despite representing an unprecedented step forward in EU media regulation, this provision contains several potential shortcomings, which are outlined below. Before doing so, however, it is important to contextualise how this provision came about in the first place in order to understand better its raison d'être and rationale, which are outlined in Section I. Section II provides a bitesize summary of the article's main provisions, whilst Section III examines its contestable legal ba-

1. Brogi–Borges–Carlini et al. 2023.

sis. Section IV critically examines the article's main shortcomings, and the conclusion, Section V, highlights the potential added value of this provision.

1. Vivendi vs Mediaset: An important precursor to Article 21

The main aim of Article 21 is to regulate (and mitigate) the ostensible tension between market goals (viz. the freedom of establishment, harmonisation of rules, etc.), on the one hand, and non-market values (viz. media freedom, pluralism), on the other hand. Several years before the EMFA was even contemplated, these market and non-market goals came to loggerheads in a four-year legal dispute between Vivendi and Mediaset (Case C-719/18 *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni*) (Fig. 1). This landmark case established an important precedent – there is a non-market value which should be protected (viz. media pluralism); however, such protection should be ensured in a proportionate manner. The following paragraphs outline how this legal dispute unfolded, as well as highlighting its parallels with Article 21 EMFA.

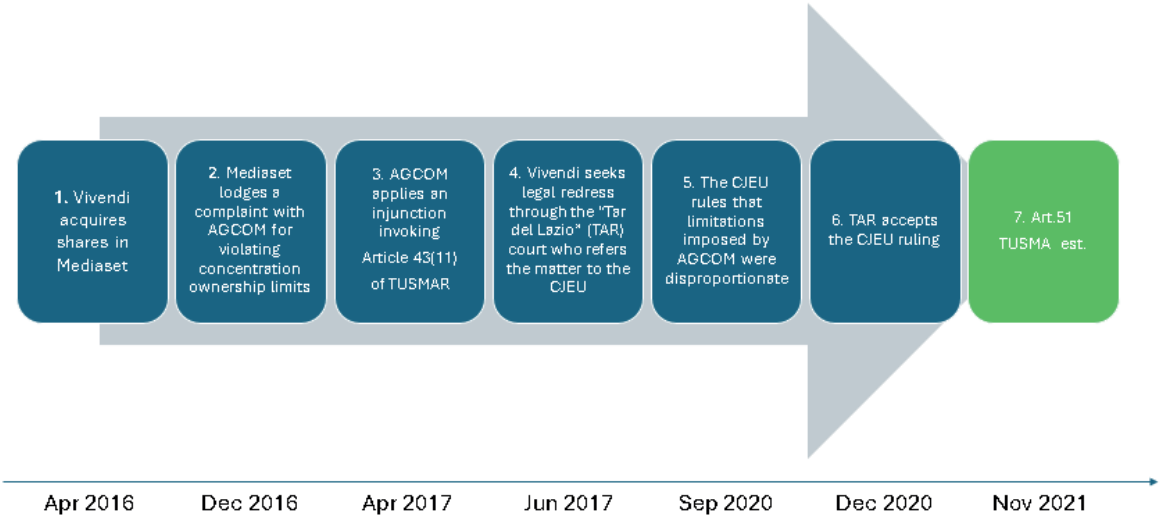

Fig. 1 — *Timeline of the Vivendi-Mediaset dispute*

In April 2016, Vivendi – a significant shareholder in the telecommunications company Telecom Italia (TIM) at the time – acquired over 20% of the shares in Mediaset. As a result of this action, a few months later, in December 2016, Mediaset filed a complaint with the Italian national media regulator, AGCOM (*Autorità per le Garanzie nelle Comunicazioni*) for allegedly breaching the thresholds[2] set out in Article 43(11) of "Testo unico della radiotelevisione" (TUSMAR[3]), which they argued would have led to Vivendi's market dominance in the Italian media and communications sector, leading to negative ramifications for media pluralism. Thereafter, AGCOM ruled in Mediaset's favour – and imposed an injunction which blocked Vivendi from buying shares in Mediaset – citing concerns that it threatened market competition and media pluralism. Vivendi then appealed to the regional Italian court, "Tar del Lazio" (TAR), which initially supported AGCOM's reasoning; however, they, nonetheless, referred the matter

2. This provision imposed two cross-sectoral ownership thresholds which prevented undertakings "from achieving turnover exceeding 40% of the overall combined revenues of the electronic communications sector in Italy while simultaneously achieving turnover exceeding 10% of the overall combined revenues of the 'Integrated System of Communications'" (Marasà 2020).
3. In effect, this provision was conceived to prevent excessive market dominance by one undertaking in the Italian media and communications sector.

to the Court of Justice of the European Union (CJEU) for further clarification[4].

The CJEU adjudged that AGCOM's injunction was disproportionate for several reasons.[5] Firstly, exceeding the absolute revenue thresholds laid down by the TUSMAR neither automatically, nor necessarily, implied control over media content. The CJEU judges sought to distinguish between content transmission and content production, which implies editorial responsibility (Case C-719/18, 2020, paras. 66-67). Indeed, the CJEU argued that TUSMAR failed to distinguish between the two, treating undertakings involved solely in transmission (in this case, Telecom Italia) as having potential influence over media content; however, for the CJEU, a sufficient justification was found wanting, arguing that, while Vivendi (a significant shareholder of Telecom Italia) may have increased its influence over the transmission of content as a result of acquiring shares in Mediaset, this did not automatically imply control over the production of content[6]. In short, AGCOM failed to consider whether exceeding the TUSMAR thresholds would have posed a genuine risk to editorial control and media pluralism in general (Case C-719/18, 2020, paras. 75-79).

As a corollary of the last point, the CJEU ruled that the fixed revenue thresholds prescribed by TUSMAR were unsuitable for detecting media pluralism risks. Under this law, the 10% threshold was effectively conceived of as an automatic risk proxy to detect threats to media pluralism. However, the Court questioned the suitability of this provision, opining that "an undertaking earn[ing] revenue equivalent to 10% of the total revenues generated in the SIC is not, in itself, an indication of the risk of influencing media pluralism" (Case C-719/18, 2020, para. 75). The Court argued that an assessment of market concentration should be more comprehensive, taking into account other contextual factors such as the impact of a given takeover on content transmission or content production, in addition to how revenues are distributed among the wide range of different markets constituting the SIC (Case C-719/18, 2020, para. 75). For example, an undertaking might have less than 10% of total revenues generated in the SIC but be heavily concentrated in one of the markets of the SIC (e.g. 40% in one market alone) which would likely constitute a plausible threat to media pluralism. Conversely, an undertaking's revenues may exceed 10% but be distributed relatively evenly (e.g. 1% across 10 different markets), which would unlikely be consequential from a media pluralism perspective (Case C-719/18, 2020, para. 75). In addition, the CJEU also questioned whether a parent company exercising 'significant influence' over an affiliate company would be consequential for media pluralism in practice (Case C-719/18, 2020, para. 77). Indeed, the bar for 'significant influence' is set relatively low – under Article 2359 of the Italian Civil Code – defined as a company being able to exercise one-fifth of the voting rights, or one-tenth, if the company has shares that are listed on the stock exchange (Case C-719/18, 2020, para. 11).

Furthermore, including revenues from both 'affiliated' and 'controlled' companies in calculating the total revenue of a given undertaking in the electronic communication sector – would, the CJEU argued, have inflated its revenue figures, thereby exaggerating its sectoral influence (Case C-719/18, 2020, paras. 75-76). Related to this last point, AGCOM's restrictive definition of the electronic communications sector (SIC) – which excluded mobile telephony and internet services – essentially had the effect of limiting the basket of different sectors comprising the "Sistema Integrato delle Comunicazioni" (SIC), which, again, would have exaggerated an undertaking's potential influence in the electronic communications sector (SIC) (Case C-719/18, 2020, paras. 71-74). In sum, the CJEU criticised Article 43 of TUSMAR's rigid thresholds for failing to assess and address the potential adverse effects on media pluralism. Instead, the Court stressed the importance of demonstrating evidence of editorial control over content rather than solely relying on rigid thresholds to assess its impact on media pluralism. Ultimately, TAR followed the CJEU's decision, highlighting that AGCOM had failed to consider various elec-

4. The decision by AGCOM, and subsequently, TAR, reflected the strict national interpretation of concentration rules which were in place at the time.
5. This is a non-exhaustive list of the CJEU's reasoning for ruling in favour of Vivendi.
6. Trevisan 2022.

tronic communications sectors, including mobile, internet-based, and satellite broadcasting services.

The outcome of this legal dispute served as an important catalyst for the revised anti-concentration rules in the "Testo Unico dei Servizi di Media Audiovisivi" (TUSMA)[7]. Under this law, identifying a dominant position based on excessive ex-ante thresholds is no longer automatic. Instead, such an evaluation is based on an ad hoc case-by-case assessment taking into account indicators symptomatic of "significant market power" (*inter alia*, revenues, the level of static and dynamic competition, convergence between sectors and markets, vertical integration of markets, control of data etc.). Therefore, rather than relying on fixed thresholds alone, regulatory authorities now have the flexibility to adjust thresholds when deemed necessary[8], taking into account the evolving multimedia landscape and other considerations[9]. It is little coincidence that the definition of 'Integrated System of Communications' (SIC) was also updated just a few months after the resolution of the Vivendi legal dispute (November 2021). The updated 'SIC', thereafter, was extended to an even broader basket of communication activities, inter-alia, print media, electronic publishing including online platforms, radio and audiovisual media services, cinema, outdoor advertising, sponsorships, and online advertising (as defined by Article 3, Para. 1, letter z of Legislative Decree No. 208/2021).

This landmark case laid the groundwork for Article 21 of the EMFA in establishing the principle that Member State measures limiting the freedom of establishment may be permitted as long as they are proportionate to obtaining some overriding objective (e.g. safeguarding media pluralism. In this case, the actions by AGCOM were found to be disproportionate as it could not be established that Vivendi's stake in Mediaset would have adverse effects on the production of content and, by extension, editorial control[10]. The Mediaset-Vivendi case elucidated two essential points: (1) national measures could potentially disrupt and fragment the functioning of the internal market by constraining the freedom of establishment, and (2) there is an important non-market value that needs protection, but such protection should be ensured in a proportionate manner[11]. The ramifications of this case highlighted the need for the EU to intervene to create a harmonised legal framework to help navigate this delicate balancing act between fostering the freedom of establishment, on the one hand, and protecting media pluralism, on the other[12].

A subsequent case, Case C-106/22 – Xella, also provides further guidance on the conditions under which limits to freedom of establishment may be justified according to EU law[13]. To summarise the main particulars of this case, the Hungarian Ministry prevented an EU-based company, *Xella Magyarorszá*, from acquiring a Hungarian company, *Janes és Társa*, on national interest grounds, claiming that it posed a threat to raw materials supplies in the construction sector – regarded as a key strategic economic sector in Hungary. The CJEU argued that such a restriction was purely of an economic protectionist nature, and this did not constitute a fundamental societal interest. The CJEU argued that restrictions to the freedom of

7. *Ibidem*.
8. *Ibidem*.
9. For more information, see Article 51 TUSMA of AGCOM's guidelines (2024) on Article 51 TUSMA (Delibera n. 66/24/CONS).
10. Both the Vivendi-Mediaset dispute and Article 51 of TUSMA inculcated the notion that media market concentration should be assessed more broadly. Indeed, assessing positions of market dominance on revenue thresholds alone does not automatically render it a threat to media pluralism. On the contrary, such an assessment should be more comprehensive, taking into account several contextual factors symptomatic of significant market power in addition to examining whether ownership ultimately has a material adverse effect on editorial control and media pluralism. In the dispute in question, while Vivendi's stake in Mediaset posed potential implications for the distribution of content, the evidence was lacking that it would have also impacted content production and thus media pluralism (Apa 2021).
11. Bonelli 2023; Brogi–Borges–Carlini et al. 2023.
12. Brogi–Borges–Carlini et al. 2023.
13. Case C-106/22, *Xella Magyarország Építőanyagipari Kft. v Innovációs és Technológiai Miniszter* EU:C:2023:568.

establishment based on purely economic grounds did not constitute a sufficient justification (Case C-106/22, para. 66). Similarly to the Vivendi-Mediaset case, the CJEU clarified the scope conditions under which a curtailment of the freedom of establishment might be lawful, reaffirming that restrictions "may be justified on grounds of public policy, public security or public health" (ORPI)[14] (Case C106/22, para. 63). Unlike the Fussl (C-555/19)[15] and Vivendi cases which established that media pluralism constitutes an 'overriding reason relating to the public interest' (C-555/19, para. 15), the CJEU ruled that this restriction was not justified on the same grounds, claiming that "the alleged loss of supply of raw materials to the construction sector did not constitute a genuine and sufficiently serious threat to a fundamental interest of Hungary's society"[16]. In short, this case reinforced the principle that a state intervention which threatens to curtail the freedom of establishment must be able to satisfy the justification (viz. ORPI) and proportionality test (later codified in Article 21(1) of the EMFA). In sum, the aforementioned cases underscore the principle that national measures should not interfere with media service providers' (MSP) freedom of establishment unless doing so would serve an overriding public interest – one of which is the protection of media pluralism. The principles laid out in this recent case, and particularly in the aforementioned Vivendi-Mediaset dispute, can be regarded precursors to Article 21 of the EMFA.

2. An overview of Article 21's main provisions

Article 21 of the EMFA establishes several procedural requirements to regulate the longstanding tension between market goals, such as the freedom of establishment, on the one hand, and non-market goals, such as media pluralism, on the other hand. The latter, an important corollary to the fundamental right of freedom of information, is enshrined in Article 11 of the EU's Charter of Fundamental Rights[17]. This article is grounded in Article 41 of the Charter of Fundamental Rights (CFR)[18] on the right to good administration, particularly Article 21's emphasis on predefined and transparent timeframes set out in advance (see, in particular, Article 21(2) and Article 21(5)). In customary EU fashion, the article incorporates the principle of proportionality as a means of reconciling these ostensibly conflictual freedoms. Article 21 aims to safeguard MSPs from national measures considered disproportionate and thus incompatible with the freedom of establishment[19]. However, the latter is not an inviolable right – indeed, this market freedom may be circumscribed if an MSP's media pluralism or editorial independence is at risk of being compromised. For example, during the "Vivendi-Mediaset" dispute, the CJEU adjudged that AGCOM's actions – namely, imposing an injunction on Vivendi's acquisition of shares in Mediaset – violated the latter's freedom of establishment. The CJEU ruled that AGCOM's injunction was disproportionate both in terms of suitability – as it could not be established that the pluralism in terms of media content production

14. The Court further added that "reasons of an economic nature in the pursuit of an objective in the public interest or the guarantee of a service of general interest may constitute an overriding reason in the public interest capable of justifying an obstacle to one of the fundamental freedoms enshrined in the Treaties" (Case C-106/22, para. 65). As Recitals 5, 8, 41 and 83 of Directive 2010/13 and the EMFA explicate, media services entail both economic and cultural components and are crucial actors in safeguarding a pluralistic information environment (C-555/19, para.3). In a similar vein, state interventions to safeguard media pluralism can also be understood as an intervention in the market by the state to safeguard fundamental interests of society such as ensuring the diversity of opinions and a pluralistic media environment, which are understood as axiomatic to the proper functioning of democracy (Recital 5 of Directive 2010/13; Recitals 2, 14, 21, 27, 32, 64 and Article 3 of the EMFA).
15. CJEU Case C-555/19 | *Fussl Modestraße Mayr GmbH v SevenOne Media GmbH.*
16. Reyntjens–Jorna 2023. See also Case C-499/23, para. 46. A.G. Szpunar (2025, February 6), Opinion of Advocate General Szpunar delivered on Case C-499/23, *European Commission v. Hungary*.
17. Brogi–Carlini–Nenadić et al. 2021.
18. Cole–Ettendorf 2023, p. 35.
19. Brogi–Borges–Carlini et al. 2023.

would be undermined – and going beyond what is necessary to achieve the purported aim of safeguarding media pluralism. As pointed out earlier, AGCOM's actions were disproportionate as the TUSMAR provision that applied rigid revenue thresholds did not adapt to evolving market conditions and changes in the competitive landscape. Additionally, the restrictive definition of 'SIC' and the skewed method for calculating total revenues (including those of both controlling and affiliated companies) were also factors taken into account by the Court. Lastly, the general presumption that holding 'significant influence' over an affiliated company would translate into material influence in a given market – thereby undermining media pluralism – could not be established (Case C-719/18, 2020, para. 77).

Summarising each paragraph in turn, Article 21(1) introduces several procedural requirements that national measures[20] must/shall adhere to. Such measures "shall be 'duly justified', 'proportionate', 'reasoned', 'transparent', 'objective' and 'non-discriminatory'" (Article 21(1))[21]. In addition, when adopting these measures, Article 21(2) – in keeping with Article 41's right to good administration CFR – stipulates that they shall adhere to timeframes set out in advance, putting MSPs on notice that a measure directly affecting them will be adopted proximately in time. In this way, MSPs are well-positioned to challenge a prospective measure deemed pernicious to media pluralism, or more specifically, the editorial independent of a media service provider (MSP). Article 21(3) states that MSPs can appeal to an independent appellate body, which may be a court[22]. As per Article 21(4), the Board and the Commission are tasked with providing opinions on such measures. Lastly, Article 21(5) grants the Board and the Commission the power to request information from the relevant national authority, as well as underlining the importance of timely and transparent communication between them[23].

The article is positive, particularly for MSPs, in so far as it provides a "sweeping constitutional protection against the future playbook of media control"[24]. Under this provision, MSPs are granted safeguards from media capture from national authorities as Member State measures must comply with several criteria that respect MSPs' media pluralism or editorial independence. Under the regulation, national regulatory bodies shall guarantee that any measures are 'reasoned, transparent, objective and non-discriminatory' – setting the normative standard at the same level as the general principles of EU law (Article 20(1)). In addition, Article 21 imposes upon Member State bodies – albeit hitherto unprescribed – timeframes and transparency requirements upon Member State bodies – a welcome development. Lastly, involving multiple bodies such as the Board and the Commission (inc. MSPs themselves) adds a further layer of accountability and oversight. Additionally, MSPs can appeal to an independent appellate body, representing an alternative/additional judicial channel in addition

20. In particular, measure "liabl" to affect the media pluralism or editorial independence of MSPs operating in the internal market.

21. In essence, the proportionality test imposes a further set of criteria that national measures must meet for them to be EMFA-compliant. It is important to stress that member states have not been handed a blank cheque; they cannot merely limit the freedom of establishment invoking media pluralism as an overriding interest. Instead, prospective measures should be 'justified', 'objective' and 'proportionate'. The latter's meaning, which is not immediately self-evident, is essentially shorthand for "…appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective", as stated in the *Polbud – Wykonawstwo* case (C-106/16, EU:C:2017:804, para. 52). See also *Sky Österreich* (C-283/11).

22. Article 21(3) is the most significant provision as it grants MSPs the right to appeal national measures.

23. Para. 1 of Article 21 lays out a general principle, namely, that Member State measures should not undermine media and market freedoms unless it is justified and proportionate. Para. 2-5 contain the nitty gritty of the provision, with Para. 2 containing an ex-ante protection for MSPs by imposing transparency obligations upon Member States measures captured by Article 21. Conversely, Para. 3-5 contain ex post safeguards for MSPs in so far as several bodies including the Board, Commission, and, crucially, MSPs themselves, have oversight powers. Brogi–Borges–Carlini et al. 2023.

24. Tambini 2023.

to national courts whose political independence may have been compromised. However, this situation raises two important questions: Firstly, will there be a designated body to handle appeals or a state of affairs wherein different bodies are assigned on an ad-hoc basis? Secondly, will these bodies have the legal expertise and apply the same level of rigour as national 'courts of *law*' – a term that is notably absent in the final adopted text[25]. Although extending the scope of bodies permitted to enforce Article 21 might be desirable from a practical perspective, it risks fragmenting the levels of scrutiny and legal standards applied across Member States, thus ultimately undermining legal certainty.

3. Assessing the legal basis of Article 21

Article 114 TFEU is invoked as the legal basis for the EMFA in general and Article 21 in particular[26]. Loosely speaking, the main aim of Article 114 TFEU is to prevent regulatory fragmentation, and thus, an uneven playing for businesses, which is disruptive to the functioning of the internal market. The Vivendi-Mediaset case illustrates how disruptive national measures can be for media service providers operating in the internal market. In this respect, and as per the principle of conferral laid out in Article 5 TEU, the EU can only act within the competences stipulated in the EU treaties. The CJEU, through its jurisprudence, has a purely interpretative function, and does not have the power to grant the EU new, explicit competences to act (see also Art. 267 TFEU). Notwithstanding these considerations, Article 114 TFEU's measures for approximation serve as a plausible legal basis for Article 21, which introduces measures to facilitate the harmonisation of Member State laws, regulations or administrative actions pertaining to the functioning of the internal market. Article 21 of the EMFA is, after all, an attempt to provide a minimum set of requirements that all member states must adhere to when implementing national measures. However, Article 21 goes one step further by regulating measures 'liable' or 'likely' (the terminology employed in the article) to affect media pluralism. This might appear to be a contentious element of the provision as Article 114 TFEU is about establishing the internal market, which may, prima facie, only seem tangentially related to a pluralistic media environment.

However, as Article 114(3) TFEU elucidates, non-market objectives such as "public health, safety, environmental protection and consumer protection" may be sought as measures of approximation[27]. Indeed, it is typical for internal market pieces of legislation to pursue (besides market liberalisation) further legitimate public interests, for example, by setting out common standards to regulate the sector and imposing common minimum rules to protect legitimate public interests such as media pluralism and independence[28]. Media service providers and recipients can, as a result, provide and receive such services within a properly functioning internal market in which cross-border regulatory cooperation is enhanced, and the principles of media pluralism and independence are respected, in line with Article 11 of the Charter of Fundamental Rights[29]. Indeed, CJEU case law[30] (e.g., CJEU judgment in Case C-283/11 *Sky*

25. The term "court of law" was included in the draft text proposed by the European Parliament. Brogi–Borges–Carlini et al. 2023.
26. Brogi–Borges–Carlini et al. 2023.
27. Before the TFEU was introduced, CJEU jurisprudence established the principle that obstacles to the free movement of goods could be justified if they pursued legitimate objectives such as public health, and consumer protection but they had to be proportionate to the objective pursued (most notably the "Cassis de Dijon" (1979) case which set a precedent for justifying restrictions on the free movement of goods for the protection of public health; see also: *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (1979).
28. Malferrari 2025.
29. *Ibidem*. See, for instance, recitals 8, 21, 28, 34 and 46 of the EMFA Regulation.
30. See also C-260/89, *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* (1991). In this case, the CJEU highlighted that a monopoly is "unacceptable not only in the context of the freedom to provide services but also to ensure a range of voices are available to the public" (European Parliament 2015).

Österreich GmbH v Österreichischer Rundfunk[31]) reaffirms that the EU can pursue non-market objectives through Article 114 TFEU[32]. As alluded to above, in the "Vivendi-Mediaset" case, it was recognised that pursuing pluralism within democratic societies may represent an objective of general interest that may justify the restriction of freedom of establishment. In this case, Advocate General Sánchez-Bordona opined that protecting information pluralism (stated in Article 11 of the Charter of Fundamental Rights of the European Union) constituted an overriding reason in the public interest[33]. This position also chimes with the views of several scholars who argue that legislation can favour non-market objectives even if it curtails the four freedoms[34]. Indeed, the implicit objective of Article 21 of the EMFA is to ensure national regulatory frameworks are harmonised to support enterprises' freedom of establishment across the whole EU. However, in doing so, national rules should take into account specific non-market objectives, such as media pluralism. Several scholars also argue that fundamental rights may fall within the remit of Article 114[35]. This is confirmed in CJEU jurisprudence (see for ex. Sky Oesterreich and PL v. EP and Council "copyright Directive")[36]. As the freedom of expression, and its corollary, media pluralism, are considered one of the fundamental rights of the EU, as per Article 11 CFR, a further argument can be made that Article 114 TFEU provides a legal basis for Article 21[37]. The legal basis for the EMFA in Article 114 TFEU is also endorsed by the legal service of the Council of the EU (that is, the legal advisor to the organ comprising the Member States of the EU). According to the same, the crux of the matter is whether a provision has the capacity to "obstruct fundamental freedoms and thus have a direct effect on the functioning of the internal market or to cause significant distortions of competition" (Council, 2022/0277 (COD)). In this regard, Article 21 clearly satisfies these conditions. National differences in rules on media mergers, and the lack of legal certainty it engenders, clearly threaten MSPs' freedom of establishment, as evidenced by the drawn-out "Vivendi-Mediaset" dispute. Had this happened in another Member State, it is reasonable to argue that matters would have unfolded quite differently, and Vivendi would have been allowed to acquire shares in Mediaset. Indeed, Article 21 precisely aims to avoid situations of this kind – namely, regulatory fragmentation of the internal market and legal uncertainty for MSPs' cross-border operations.

Several observers have also identified Article 36 TFEU as providing a possible legal basis for this provision. Article 36 TFEU allows Member States to derogate from the internal market principles in certain circumstances, such as protecting public health, life, and the environment. The fact that there is no explicit mention of fundamental rights such as freedom of information, and its corollary, media pluralism therein, should not be interpreted as an impediment as the protection of fundamental rights is a general objective of public interest[38]. (see Schmidberger v. Austria, Case C-112/00, 2003, and Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, 2004). However, the EMFA is about services and not goods (which is the object of Article 36 TFEU)[39].

A somewhat more tenuous argument has been put forward that Article 167 TFEU might provide a legal basis for Article 21 of the EMFA in so far as it strengthens the EU's commitment to promoting

31. Without indulging into the particulars of the case, the CJEU essentially held that the freedom of establishment could justifiably be curtailed if media pluralism, deemed an overriding public interest, was under threat.
32. See also Wållgren 2016.
33. Court of Justice of the European Union (2019, December 18), Advocate General's Opinion in Case C-719/18, *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni*, 18 December 2019.
34. de Witte 2012; Kosta 2015; Wållgren 2016, p. 29.
35. E.g.w Kosta 2013, p. 25, found in Wållgren 2016, p. 30.
36. Malferrari 2025.
37. Brogi–Carlini–Nenadić et al. 2021.
38. Malferrari 2025.
39. *Ibidem*.

cultural diversity and supporting the cultural and creative sectors (e.g. the audiovisual sector). Article 167 TFEU, in effect, grants the EU a limited competence to intervene in the field of culture only in order to bring the "common cultural heritage to the fore" (viz. European identity and culture). However, there are several reasons why Article 167 TFEU can be ruled out as a legitimate legal basis for Article 21 of the EMFA. Firstly, Article 167 is merely a supporting competence of the EU, as stipulated by Article 6 TFEU, which means that the EU can only support, coordinate or supplement Member States' actions, but they cannot impose the harmonisation of Member States' national laws. Indeed, this is explicated in Article 167(5), which states that the EU "shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States". Moreover, as Article 167(5) makes plain, the EU's intervention is limited to so-called 'incentive measures' – which can be understood as non-binding instruments to motivate or encourage Member States to undertake particular policy actions[40]. Lastly, the scope of Article 167 TFEU is limited to the audiovisual sector; therefore, the EU would not have the competence to legislate in other media sectors, regardless.

Several observers have raised legitimate concerns about the potential incongruence of EMFA with existent EU legislation, such as the AVMS Directive 2010/13/EU, which encourages Member States to pursue cultural policy measures while respecting cultural diversity[41]. However, Article 21's procedural requirements, arguably, make it harder for Member States to adopt these measures as they must comply with both legislative regimes. There is also a potential incompatibility issue between this regulation and the AVMS Directive, leaving some room for Member States to prioritise cultural matters (inc. local ones) over purely internal market considerations. In particular, Article 13(1) – which relates to the promotion of European works – grants Member States limited discretion on how best to encourage the distribution of European content whilst respecting local cultural diversity[42]. However, under the EMFA, there is a risk that pursuing national cultural policies to support local media production could be deemed 'discriminatory' or 'non-objective', potentially falling foul of Article 21(1). Notwithstanding these concerns, there is, on balance, a clear market-oriented logic to the article, namely, facilitating MSPs' freedom of establishment and freedom to provide services by means of harmonisation of national measures. As a result, the legal basis for Article 21 may be justifiably anchored to Article 114 TFEU. In addition, there is a clear precedent deriving from existing EU legislation (e.g., Directive 2010/13/EU) and CJEU case law (e.g., Vivendi-Mediaset) indicating that the EU may legislate on matters related to media pluralism[43].

4. A critical examination of Article 21

Notwithstanding the clear added value of this provision, which represents an unprecedented step forward in the EU's media regulatory framework,

40. A paradigmatic example is the Creative Europe Programme which provides EU funding (e.g. grants, co-financing) and networking opportunities to encourage cross-border collaboration between Member States in cultural and creative sectors.

41. SAA et al. 2023; *Open letter to European institutions regarding the impact of EMFA regulation proposal on cultural audiovisual policies*, Brussels, 2023, June 9). In a nutshell, this directive encourages member states to pursue cultural policy measures whilst respecting cultural diversity. For instance, Recital 69 of the directive states that member states "should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity". See also Recital 19 which states that "this Directive does not affect the responsibility of the Member States and their authorities with regard to the organisation – including the systems of licensing, administrative authorisation or taxation – the financing and the content of programmes. The independence of cultural developments in the Member States and the preservation of cultural diversity in the Union therefore remain unaffected." This affords member states some flexibility when organising their audiovisual systems taking into account their variegated local, socio-cultural and economic settings.

42. AVMS Directive – Recital 5; *Open letter to European institutions...*, cit.; SAA et al. 2023.

43. It is difficult to disentangle economic from non-economic considerations particularly given the nature of media service providers which are "as much cultural services as they are economic services" (Recital 5 of the AVMS Directive).

several potential pitfalls threaten to undermine its legal effectiveness and enforceability. Firstly, the circumstances under which the Commission should communicate an opinion are unclear[44] . Unlike the Board, whose intervention appears non-negotiable (Article 20(4) stipulates that the Board '*shall*' issue an opinion), the Commission's role is ostensibly discretionary as evinced by the phrase "the Commission *may* [or not] issue its own opinion on the matter"[45]. The former is more affirmative language than the latter, imposing a clear obligation to act. The wide degree of discretion granted to the Commission, instead, enhances the provision's legal uncertainty as it is unclear under what conditions the Commission would or should intervene. The Commission could, however, bind its own discretion by setting out guidelines delineating the criteria for deciding whether to intervene or not. It is also unclear what happens in instances of disagreement between the Board and the Commission and which of the two 'opinions' carry more weight. This uncertainty also applies to disagreements between national courts and the hitherto unspecified appellate body[46]. In other words, there is a risk of cascading and conflicting opinions from various organs, which might create uncertainty regarding which opinion should be followed. In addition, enhanced clarity regarding the specific roles and responsibilities of the national bodies, MSPs, the Board, the Commission, and 'other regulatory authorities' would improve the provision's effective implementation and enforcement[47]. Clarification will, presumably, be provided by the CJEU as well as published EU guidelines on Article 21. It is, furthermore, unclear which governing body is ultimately responsible for monitoring (non-) compliance of this provision: the appellate body, Board, Commission or courts? That said, based on the reading of Art. 267 TFEU, it can be reasonably assumed that the competent national court (if a court of last instance) may refer a question to the CJEU to give a ruling thereon. Moreover, it is also still not clear what the repercussions are (if any) in case the Board fails to lodge an opinion, which itself, lacks legal enforceability. Crucially, there appear to be no sanctioning regimes in place for instances of non-compliance[48].

The consistency of language employed in Article 21 could also be improved. In Article 20(1), for example, the term '*liable* to affect' is used, whereas in Article 20(4) and 20(5), the term '*likely* to affect' is preferred (italics added). The former carries a more objective legal connotation, whereas '*likely* to affect' leaves room for more subjectivity. This begs the question: Does the decision on 'liability' or 'likelihood' lie with the regulatory authority of a Member State, appellate body, Board, European Commission or national and/or supranational court?[49] The wording and the order in which the Article is composed implies that Member States would initially be responsible for determining whether a proposed measure is 'liable to affect' media pluralism of media service providers operating within the internal market whereas Article 20(4) Article 20(5) implies that both the Board and European Commission would be co-responsible in deciding its likely 'impact'[50]. As a corollary to the previous point, the scope of this provision is potentially overreaching as it is not entirely clear when a national measure would be deemed liable (Article 20(1)) or likely to impact the functioning of the internal market for media services (Article 20(5)). Indeed, the threshold for impact is set rather low as, arguably, all national measures have some impact

44. Brogi–Borges–Carlini et al. 2023. This paper builds on many of the points that were raised in the Centre of Media Pluralism and Media Freedom's study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) titled: "The European Media Freedom Act: media freedom, freedom of expression and pluralism" (Brogi–Borges–Carlini et al. 2023).

45. Brogi–Borges–Carlini et al. 2023, italics added.

46. *Ibidem*. Although it can be reasonably expected that the competent national court's judgments will be binding on the appellate body and judgments stemming from the CJEU will hold the most weight.

47. Cole–Ettendorf 2023, p. 7; Brogi–Borges–Carlini et al. 2023.

48. *Ibidem.*

49. Brogi–Borges–Carlini et al. 2023.

50. *Ibidem.*

on MSPs operating in the internal market, even to a minimum extent[51]. In addition, it is worth noting that Article 21(1) includes measures 'liable to affect media pluralism or the editorial independence' of MSPs (italics added), which, arguably, extends the scope even further, as editorial independence is just one facet of a broader phenomenon[52]. While the scope of this provision is potentially far-reaching, it should be noted that there are additional criteria that need to be satisfied – a given measure must be necessary, justified, and proportionate. The forthcoming guidelines on this article and the other articles of the EMFA will likely be crucial in delineating the provision's scope.

The following section dissects and critically examines each paragraph of Article 21, beginning with the first paragraph. In essence, Para. 1 of Article 21 subjects national measures to three conditions. These measures shall not negatively impact: (1) media pluralism (2) the internal market, and (3) they must be 'proportional', 'duly justified', 'reasoned', 'transparent', 'objective' and 'non-discriminatory'. It is interesting to note that the original European Commission (EC) text was wider in scope. Initially, 'any measure liable to affect the internal market' would have triggered Article 21(1). However, in the finally adopted text, its scope was limited to measures liable to affect 'media pluralism or editorial independence of media service providers operating in the internal market'. The objective of this article is now explicitly stated, helping to clarify its scope. The EP's proposed amendments were the most potentially far-reaching, including the "provision" of media services within its remit, which implies the more content-oriented aspects of media services. Limiting the scope to the operating arm of MSPs is welcome as it is evidently not the intention of this article, which is more about setting out rules related to the ownership structure of MSPs, falling under the more operational aspects of media service providers (see Recital 60 for more)[53].

Moreover, omitting the word "provision" from the final text could help to reduce the risk of a potential conflict between Article 21 of the EMFA and preexisting EU legislation, in particular, Article 167 TFEU, which is about supporting the creation of content (e.g. artistic and literary creation, including in the audiovisual sector, to promote cultural diversity). Indeed, several observers in the audiovisual sector had voiced concerns that the original EC proposal text might create an incongruence between Member States measures aimed at safeguarding cultural diversity, including at the local and national level, in fulfilment of Article 167 TFEU, and Member States measures in compliance with Article 21 EMFA[54]. Compared to the final text, Recital 38 of the European Parliamentary amendments was more explicit in this regard, stating that "the requirement to communicate such measures does not aim to affect national measures implementing Directive 2010/13/EU insofar as they do not affect media pluralism and editorial independence, national measures taken pursuant to Article 167 TFEU, national measures taken for the purpose of promoting European works or national measures which are otherwise governed by State aid rules". At the very least, Recital 61 of the finally agreed text clarifies that Article 21 should not undermine the implementation of State-aid measures[55]. Nonetheless, it remains to be seen how the interplay of these laws would play out in

51. *Ibidem.*

52. Brogi–Borges–Carlini et al. 2023.

53. Recital 60 helps clarify what are the intended types of measures that Art. 21 will help to regulate: (i) Limiting ownership of media by other sectors (e.g., Vivendi-Mediaset); (ii) decisions on licensing, including revoking or making renewal difficult for MSPs, and (iii) decisions related to the authorization or prior notification of MSPs.

54. "The implementation of a number of cultural policies stemming from national legislations adopted in procedural fairness and fully consistent with Article 167 TFEU could potentially be disputed by media service providers' unilateral interpretation of their disproportionality or unjustifiability…protecting media pluralism and media independence must not, inadvertently or otherwise, lead to undermining cultural diversity" (*Open letter to European institutions...*, cit.).

55. In the final text, Recital 61 and Recital 73 include a positive commitment. Recital 61 states that "Without prejudice to the application of the Union's competition and State aid rules […]" and Recital 73 states that "this Regulation should not affect the application of the Union's public procurement and State aid rules".

practice. If, for example, Member States wish to implement measures in the audiovisual sector in order to preserve and promote national identity – which is a "right" of Member States enshrined in Article 4(2) TEU and compliant with Article 167 TFEU – this may inadvertently fall foul of Article 21 EMFA as such measures might, arguably, threaten media pluralism by favouring national content or narratives, via, for example, higher quotas, which, in turn, might marginalise local or minority voices. However, as a counterargument to this, measures to protect or promote national customs, culture and identity can, perhaps, be justified as an overriding reason in the public interest[56] provided that such measures are proportionate and carefully balanced against other EU values such as safeguarding media pluralism or market freedom, which must themselves be carefully balanced, and vice versa (internal market rules are expected to take cultural diversity into account). Indeed, this is made explicit in para. 4 of Article 167 TFEU, which states that "[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures."

While the narrowing in scope of Article 21 in the final text is also a positive step, it is arguably too broad. Article 20(1) refers to 'media service providers operating in the internal market' and not just the service arm of their operations[57]. The phrase 'Media service providers *operating* in the internal market' (italics added) entails a far-reaching scope, encompassing a broader scope of activities beyond the mere provision of media services, including the administration, management, finance, corporate structure, etc. As Cole and Etteldorf aptly point out[58], the question of scope is especially important given that Article 20(3) establishes a direct appeals process involving an 'appellate body'[59].

Article 21(2) stipulates that media regulators must adopt clear timeframes in adopting these measures. While not explicitly referencing Article 41 of the Charter of Fundamental Rights (CFR), which concerns the right to efficient administration and timely decision-making processes, Article 21(2) is clearly conceived with Article 41 CFR in mind. Notably, the text 'preparatory phases' has been omitted from the final text, which poses the risk of not providing MSPs – and other relevant parties directly affected by a national measure – with sufficient time to examine a prospective measure in detail. Moreover, the lack of clarity on what constitutes a 'sufficient timeframe' poses a potential issue in terms of legal certainty. The European Parliament's (EP) proposed amendments are more explicit in this regard, stipulating that "such timeframes shall be of sufficient length to ensure that such measures and their consequences can be properly considered and that media service providers directly affected can provide feedback on them"[60] (formerly Article 20(2) of the EP's proposed amendments). Interestingly, this detail moved to Recital 60 in the adopted text. However, as EU legal scholars have pointed out, recitals are non-binding, which might give Member States more wriggle room to hastily adopt measures to bypass scrutiny.

Article 21(3) establishes a new complaint mechanism granting MSPs the right to appeal to an independent 'appellate body', which represents an additional, or alternative recourse to national courts whose political independence might be in disrepute[61]. However, this inter-institutional arrangement raises two important questions: Firstly, will there be a designated body consistently assigned to handle complaints or

56. E.g. Council of the City of Stoke-on-Trent and Norwich City Council v B&Q plc, C-169/91, EU:C:1992:519, para. 11; See also Fachverband der Buch – und Medienwirtschaft v LIBRO Handelsgesellschaft mbH, C-531/07, EU:C:2009:276, paras. 32-34.

57. Brogi–Borges–Carlini et al. 2023.

58. Cole–Ettendorf 2023.

59. Cole–Ettendorf 2023, p. 35; Brogi–Borges–Carlini et al. 2023.

60. In addition, Recital 38 of the European Parliament (EP) text states that "national measures…should be communicated to media service providers well in advance of their adoption in order to prevent possible disruptions and allow media service providers enough time to assess the impact of such measures on media pluralism and editorial freedom".

61. Brogi–Borges–Carlini et al. 2023.

an ad-hoc arrangement where different bodies are allocated on a case-by-case basis? Secondly, will these hitherto undesignated bodies match the rigour and legal expertise of national courts (of *law*) (italics added) – a word notably absent from the final provision?[62]. Indeed, this article risks diluting the standards expected of the legal authority summoned to enforce Article 21 EMFA. In this respect, The EP's proposed amendments were more comprehensive, explicitly stating that the body must be a "court of *law*". However, the latter has been omitted from the finally agreed text, posing the risk that these bodies will not meet the expected legal standards. Article 41 on the right to good administration (CFR), as well as Article 47 on guaranteeing the right to an effective remedy and to a fair trial by an independent and impartial tribunal (CFR), should, however, help to quell these concerns. The same applies to Article 19 TEU, which states that bodies (e.g. 'courts' or 'tribunals') adjudicating matters within the scope of Union law should meet the requirements of effective judicial protection (viz. judicial independence and impartiality) (*Associação Sindical dos Juízes Portugueses v Tribunal de Contas* – Case C-64/16, 2018, para. 36). However, these general principles of EU law cannot compensate for the fact that the article still lacks important details regarding the appeals process, such as time limits for filing appeals, and the standard of review to be applied by the appellate body. This lack of procedural clarity could result in delays, uncertainty, and inconsistency in the resolution of appeals. The EP's focus on guaranteeing "sufficient funding" for these bodies, originally in the Article, has been moved to Recital 60. This modification poses the risk of diluting the standard and quality of appellate bodies expected to oversee such complex matters. Moreover, in the final text, the authority of the Board has been diluted slightly. In contrast, in the EP's proposed amendments, the Board was conferred an augmented role, with their opinions taken into consideration by the appellate body when handling appeals. As a corollary of the last point, the final text now grants the Board the right of initiative to issue opinions, which was not included in the original proposal. However, crucially, it does not state explicitly whether these opinions should be considered by the appellate body.

As per Article 21(4), MSPs can request an opinion from the Board and the Commission can also lodge an opinion. However, this poses the risk of 'opening the floodgates' to vexatious requests overburdening the Board (e.g., MSPs might request opinions from the Board for matters unrelated to media pluralism concerns). This right should have been circumscribed so that only the most serious violations are considered[63]. Recital 61 in the final text helps mitigate this risk slightly, specifying that all national remedies must be exhausted before seeking the Board's opinion. Under Article 21(5), the Board and EC may request relevant information from a national authority that has an obligation to provide it without undue delay. The proposed amendments by the European Parliament would have provided greater legal certainty by specifying the information that should be disclosed by national authorities. The language in these amendments is clearer, opting for "shall" instead of "may", indicating a requirement for the Board to issue an opinion. While the final text includes the obligation to provide information without "undue delay," which is welcome, it remains somewhat vague. This information should also have been made publicly available to enhance scrutiny and oversight from other interested parties.

5. Conclusion: A counterfactual highlighting the added value of Article 21 EMFA

To conclude, Article 21(1) EMFA codifies the principle that was already becoming crystallised in CJEU case law – namely, that measures taken by Member States cannot undermine the functioning of the internal market (e.g. freedom of establishment) unless such measures are justified (i.e. it is an "overriding reason in the public interest" e.g. media pluralism) and proportionate (e.g. such measures are suitable for achieving the purported aim of protecting editorial independence or media pluralism, more generally). On top of this, such measures satisfying the scope condition of Article 21(1) must also meet several procedural requirements (e.g. transparency obligations). The rationale for this is to allow various stakeholders to scruti-

62. *Ibidem*.

63. ERGA 2023.

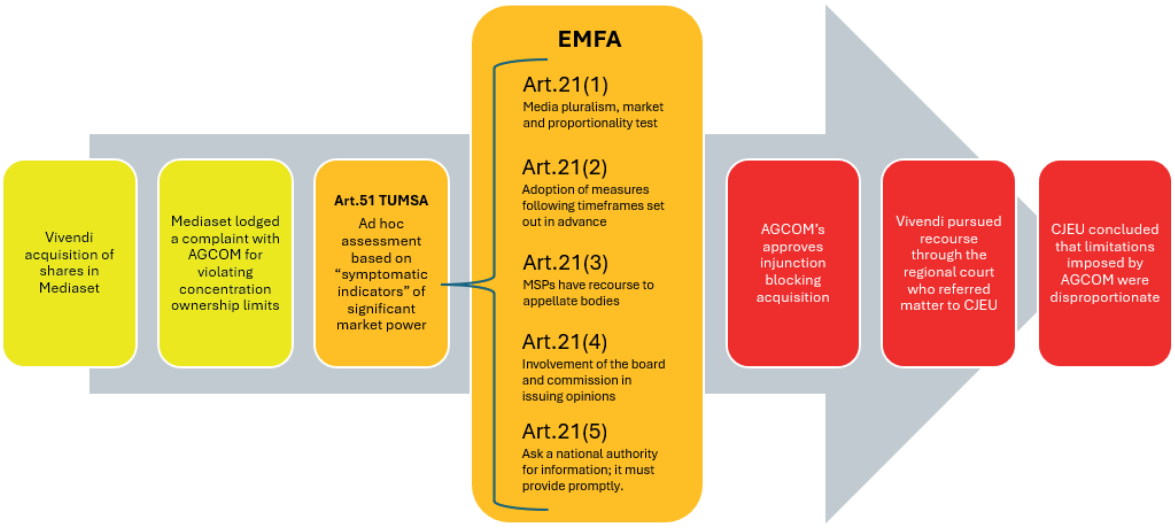

Fig. 2 — *A counterfactual of the Vivendi-Mediaset case in a post-EMFA scenario*

nise prospective measures and appeal to those they regard as deleterious to their market freedoms or media pluralism. The powers of scrutiny and oversight also extend to the Board, Commission, the appellate bodies, national courts, and needless to say, the CJEU. However, it is not yet clear what are the precise roles and responsibilities of these different organs, and nor is it clear what is the interplay between them. Indeed, eventual guidelines on this article and the EMFA, in general, will likely be crucial in determining its effectiveness.

To demonstrate the provision's added value, a counterfactual example of the Vivendi-Mediaset legal dispute is presented below to illustrate how the case might have panned out in a post-EMFA scenario (Fig. 2). Firstly, as per Article 21(1), AGCOM's decision to enforce an injunction would have been subject to a media pluralism test taking into account market considerations and a proportionality test. As per 21(2), AGCOM would have been obliged to set out a pre-established time frame without undue delay before any measure (e.g. an injunction) was introduced, thus allowing affected parties, in this case, Vivendi, to scrutinise the action proposed by AGCOM. Under Article 21(3), both Vivendi and Mediaset would have the right to appeal before an independent appellate body in addition to their right to seek legal redress from a court, which might help to prevent these legal disputes from escalating to the judiciary and the CJEU as a last resort (thereby avoiding the stages highlighted in red below). Under Article 21(4), both Vivendi and Mediaset would have been able to request an opinion from the Board (which has its own right of initiative) and the European Commission. Lastly, under Article 21(5), the Board and the Commission may request relevant information from a national authority which is obliged to provide it without "undue delay". The purpose of the European Media Freedom Act is, therefore, to avoid media-related enterprises, in this case, Vivendi, from being exposed to disproportionate State measures in so far that they fail the market and media pluralism test. AGCOM's action failed both tests for violating Vivendi's freedom to conduct business freely within the internal market and there was insufficient evidence that Vivendi's acquisition of shares in Mediaset would have influenced the production of media content, which implies editorial control. Notwithstanding, however, the article's added value in terms of granting media service providers several powers of foresight, oversight and enhanced legal certainty by means of harmonisation, legal certainty remains an issue that could undermine its legal effectiveness and enforceability.

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