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The Protection of Journalists through the Proposed European Media Freedom Act

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In 2021, while addressing the European Parliament during her [State of the Union address](#), the Commission President, Ursula von der Leyen, referred to the dangers faced by journalists, concluding that “[i]nformation is a public good. We must protect those who create transparency, the journalists.” At that point, almost four years had passed since the murder of the Maltese investigative journalist [Daphne Caruana Galizia](#), and the European Union had yet to take any measures to address this issue. It would be for another year before the Commission would publish its [proposal](#) for a regulation establishing a common framework for media services in the internal market (European Media Freedom Act).

Though this proposed Regulation sounds promising, in reality, little does it mention in regard to the protection of journalists. Instead, it deals primarily with the functioning of public service media (Article 5), State advertising in media (Article 24), and transparency on media ownership (Article 15). The proposed Regulation also establishes a European Board for Media Services (Section 2) and provides guidelines for the assessment of media mergers (Article 21). While these measures could be considered as *prima facie* beneficial because they aim to improve the information received by the European audience and increase transparency in the EU’s media market, it is also undeniable that they offer little

when it comes to the protection of the market's primary actors, i.e. journalists. This is especially worrisome if one considers that, according to the recently published [Liberties Media Freedom Report](#) for 2023, free media in Europe is facing a steady decline, especially when it comes to the safety of journalists.

It is under this prism that this short piece will analyse the effectiveness of the proposed European Media Freedom Act with regard to the protection of journalists. It will then assess the amendments proposed by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) to conclude that whilst these are a move in the right direction, they fail to offer a sufficient level of protection for journalists.

Rights of Media Service Providers

The provisions focusing on the protection of journalists are concentrated in Article 4 of the proposed Media Freedom Act. Article 4(1) provides for a general right of media service providers to exercise their economic activities in the Union's market without restrictions other than those allowed under Union law. This is a fairly general provision that should have set out the direction of the Regulation. However, as mentioned earlier, the rest of the proposed Regulation makes little to no specific provisions that would substantiate this vaguely worded general right. Arguably, the sole provision that reinforces the protection of the freedom of the press is mentioned in Article 4(2)(a): it stipulates that Member States shall not interfere in or try to influence in any way, editorial decisions, and policies by media service providers. This can be considered as a useful prohibition that could limit the exposure of journalists to unwarranted political influence, thus increasing the level of independent journalism. However, it remains hard to predict how such a provision would be implemented in practice, as well as what redresses would be available for media service providers whose operations are hindered by the interference of state actors.

What are much more disturbing, are the rest of the provisions set out in Article 4(2). These are mentioned here *verbatim* as they will form the main part of the remaining analysis. Through these, Member States are forbidden from carrying out the following:

“(b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers or, if applicable, their family members, their employees or their family members, or their corporate and private premises, on the ground that they refuse to disclose information on their sources, unless this is justified by an overriding requirement in the public interest, in accordance with Article 52(1) of the Charter and in compliance with other Union law;

(c) deploy spyware in any device or machine used by media service providers or, if applicable, their family members, or their employees or their family members, unless the deployment is justified, on a case-by-case basis, on grounds of national security and is in compliance with Article 52(1) of the Charter and other Union law or the deployment occurs in serious crimes investigations of one of the aforementioned persons, it is provided for under national law and is in compliance with Article 52(1) of the Charter and other Union law, and measures adopted pursuant to sub-paragraph (b) would be inadequate and insufficient to obtain the information sought.”

One can easily see that point (b) aims at protecting journalists from being compelled to disclose their sources whilst point (c) prohibits the use of spyware against journalists or their close ones. Nonetheless, both provisions are significantly watered down, which could result in an insufficient level of protection if the proposed Regulation is adopted in its current form.

Specifically, concerning Article 4(2)(b), the protection against disclosing a journalist's sources had already been considered an essential component of the journalist's freedom of expression under Article 10 ECHR ([Goodwin v United Kingdom](#)). Yet, this would be the first time this right to be codified explicitly at an EU level. However, the provision specifies that this right could be waived if it was “justified by an overriding requirement in the public interest”. Though Recital 17 of the proposal mentions that the purpose of this provision is to cure the heterogeneity of the level of protection offered across different Member States, it is arguably done quite poorly. Such an opaque exception that relies on one's interpretation of public interest could be used in varying ways and levels of intensity,

depending on the interests of the authority relying on it. Though one could say that a uniform interpretation could be advocated by the CJEU, this can only be a *post facto* solution. Certainly, one can only speculate that when, if ever, such a case reaches the CJEU, a solution, or at least certain guidelines could be provided by the Court. Furthermore, this lack of clarity could instead increase the disparity between Member States when it comes to their treatment of journalistic sources. This is especially true for certain Member States which have adopted particularly hostile positions against free media in recent years (see for example the recent [Index](#) on media freedom by the Reporters Without Borders).

What is even more disturbing is that even though the Commission recognises through Recital 17 that in some Member States, the threshold for the protection of journalists is particularly high, this suggested provision runs the risk of lowering that level. In other words, for those Member States that provide for an absolute protection of sources, this provision would signify a weakening of the protection offered. Such a provision would go against the high standards adopted by the ECtHR and the [Council of Europe's recommendations](#), which severely restrict the cases under which journalists can be compelled to reveal their sources (see for example the judgments in [Voskuil v. the Netherlands](#) and [Sanoma Uitgevers B.V. v. the Netherlands](#)). This lowering of standards is not only damaging for the journalists themselves but potentially also to their sources who have been brave enough to come out and report a series of illegal or unwarranted behaviours to the media. Such a provision, therefore, seems to contravene the recently-adopted [Whistleblower Directive](#), which enshrines the legal protection of those making public disclosures, including to the media (Article 15). Hence, it seems that the exception provided for in Article 4(2)(b) is problematic as it could endanger not only the current level of protection offered to journalists but also the protection the EU affords to the sources of journalists. At the same time, Article 4(2)(b) makes little progress towards harmonising the level of protection offered. It is suggested that for the level of protection to be secured harmoniously and satisfactorily, this should be done in an almost absolute way, without any wide exceptions. Though this suggestion might seem extreme, given the non-absolute nature of freedom of expression, I would argue that the EU should aim toward raising the

standards of protection rather than simply regulating them. This belief is reinforced if one takes into account recent tendencies for media freedom in the EU, as explained above.

As a final note, it must be recognised that though Article 10 of the ECHR, which comes into play by virtue of Article 52(3) of the Charter, does not confer an absolute right, the level of protection that it sets for journalistic expression is particularly high. This is evidenced through a [plethora of decisions](#) by the Strasbourg Court which provide crucial guidance on the interpretation of the scope of the said Article. It is suggested that the provision discussed here allows for little room to be interpreted in a manner that is compatible with the high standards set by Article 10. This is arguably contrary to the spirit of Article 52(3) which allows for the adoption of measures that confer higher (or at least equally high) levels of protection.

Nor is it enough to rely on Article 52(1) of the Charter in order to justify the exception stipulated in the provision discussed here. It is submitted that Article 52(1) sets out the general principles under which a limitation of a certain right could be permitted. However, instead of providing for a more specific derogation through Article 4(2)(b) of the Media Freedom Act, the reasoning behind the limitation of free speech, provided for there is worded even more generally than in Article 52(1). In reality, though, the situation should have been the other way around. Article 4(2)(b) should have only allowed for very limited exceptions which of course must be compatible with the general principles of Article 52(1).

Turning now to the provision found in Article 4(2)(c), which aims to prevent the use of spyware against journalists or their affiliates and family. This provision seems to have been included in response to the [Pegasus scandal](#). Again, the aforementioned proposed Article seems to be insufficient as it restricts itself merely to the use of a single technological method (i.e. spyware). It is submitted that such a narrow provision will offer little towards the prevention of unwarranted surveillance of journalists. This provision seems to ignore other technological methods of surveillance, both digital such as interception of calls, and technical such as bugs, listening devices, video cameras, and number plate readers. Further than that though, there is also a striking lack of technological neutrality, as this provision also fails to consider any future potential developments in this field. Instead, Article 4(2)(c)

should be rephrased in a technologically neutral way so that it also covers other methods of surveillance, including those that could be developed in the future. Further, this provision should explicitly require judicial approval prior to the use of such a method, rather than merely leaving it up to the provisions of national legislation. Such safeguards are necessary to prevent particularly oppressive national governments from passing exceptionally broad legislation that would sanction the monitoring of journalists.

It is submitted that all of the above guarantees are deemed necessary to secure that the proposed Media Freedom Act offers substantive protection to media service providers whilst also ensuring that it aligns with international standards, including the ECtHR's case law. Should the regulation be adopted in its current form, it is arguable that more harm than good would be done. This has also been recognised by the Parliament's LIBE committee responsible for reviewing Article 4, which will be discussed further below.

The Amendments Proposed by the European Parliament's LIBE Committee

On 16 April 2023, the rapporteur from the Committee on Civil Liberties, Justice and Home Affairs assigned for this legislative piece, MEP Ramona Strugariu, issued her [draft opinion](#) which suggests a series of changes to Article 4.

Particularly noticeable are two new suggested clauses to be inserted under Article 4(2). The first clause would forbid Member States from obliging media service providers from disclosing any information about their sources, "unless this is justified by an overriding requirement in the public interest, provided for in national law". The positive aspect of this suggested insertion is that it offers wider protection than the wording of Article 4(2)(b) as proposed by the Commission. It thus has the potential to complement it in protecting journalistic sources. On the flipside though, the Parliament's wording allows for another quite vaguely defined exception which could be subject to abuse under certain conditions. Again, the range of pretexts that could fall within the scope of what can be viewed as an overriding requirement in the public interest provided for in national law is quite broad and should therefore at least be narrowed down through further qualifications, or preferably it should be abandoned completely. In addition, the draft opinion remains silent

on the already existing loophole, inserted by the reference to the public interest, that will be established under the current Article 4(2)(b).

Additionally, the draft opinion suggests another clause that would forbid access to any encrypted communications on the grounds of a refusal to disclose information about a source. This suggestion can only be assessed positively as it does not make room for any exception. Furthermore, by covering a wider array of methods, it offers greater protection than the existing Article 4(2)(c) which limits itself to the deployment of spyware and could be used alongside it to secure some effective protection to communications between journalists.

This is especially true if one considers that the rapporteur has also suggested the amendment of article 4(2)(c) by removing the exception currently included in it, hence making the prohibition on the use of spyware, essentially absolute. This development can only be welcomed as it would make the surveillance of communications among media service providers or their close ones forbidden, therefore ensuring the minimisation of any oppression that could occur due to such practices.

These amendments – if adopted – have the potential of increasing, at least minimally, the protection of journalists and their sources through the Media Freedom Act. However, gaps persist even in the amended text as Member States would still be allowed to rely on wide exceptions that could endanger the work, or even the lives, of media service providers and their sources. This in turn bares a negative impact on the quality of media freedom in the EU, thus hindering the work of one of the essential pillars of our democracies. Though one must recognise that the European Media Freedom Act strives towards the harmonization of journalistic protection standards, it must be also acknowledged that achieving this aim by setting low thresholds will inevitably kill the purpose of this suggested legislation.

Moving Forward

As of 16 October 2023, six years will have passed since the death of Maltese journalist, Daphne Caruana Galizia. This critical event has highlighted the need to take further action in ensuring safe journalism, which remains an essential component of our democracies.

Yet the EU has not done much about it so far. It is [expected](#) that the Media Freedom Act will reach the plenary of the European Parliament in October 2023, thus allowing for the start of trilogue negotiations by November. The EU has set the [target](#) to adopt the Media Freedom Act prior to the European elections in May 2024.

Nonetheless, the main target for the Commission should not be a speedy adoption of the proposed Regulation, but instead, it should focus on securing greater protection for journalists and their sources. Currently, as the Commission's proposal stands, it can be said with some certainty that the protections offered are inadequate. Its vague wording allows for exceptions that could significantly undermine the spirit of the Act. The amendments suggested by the LIBE Committee are a welcomed step in the right direction. Yet we must ensure that the maximum possible protection is offered whilst minimising the room for abuse by national governments.