Schleswig-Holsteinischer Landtag
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Stellungnahme des NDR

im Rahmen der Anhörung
zur Beratung des Innen- und Rechtsausschusses des Schleswig-Holsteinischen Landtags
zu den Anträgen
Medienvielfalt sichern – Meinungsbildung verteidigen – Demokratie schützen
Antrag der Fraktion der SPD – Drucksache 20/3029
Medienaufsicht ist eine gemeinsame Aufgabe der Länder
Alternativantrag der Fraktionen von CDU und BÜNDNIS 90/DIE GRÜNEN Drucksache 20/3095

Der NDR dankt für die Beteiligung an der Anhörung und nimmt zu den drei Fragen wir folgt Stellung:

1. Welche medienrechtliche Einordnung und Regulierungsmöglichkeiten sehen Sie bei der Gestaltung eines neuen Rechtsrahmens zum Medienkonzentrationsrecht?
2. Welche organisatorische und finanzielle Ausstattung wird benötigt, um Medienvielfalt und Medienaufsicht in Zukunft sicherzustellen?

Der NDR als öffentlich-rechtliche Rundfunkanstalt ist nicht unmittelbar von Regelungen zur Medienkonzentrationskontrolle betroffen. Allerdings hat die Art und Weise der Regulierung privater Anbieter Rückwirkungen auch auf den öffentlich-rechtlichen Rundfunk.

Die Regulierung des Medienkonzentrationsrechts ist aus Sicht des NDR im MStV richtig verortet. Der Bedarf für eine Anpassung der §§ 59 ff. MStV wird aus Sicht des NDR zutreffend gesehen. Die schrittweise Anwendbarkeit des EMFA im Laufe des Jahres 2025 sollte im Rahmen einer Anpassung der §§ 59 ff. MStV einbezogen werden,- etwa bezogen auf Zuständigkeiten der KEK und die Bewertung von Zusammenschlüssen aus dem Blickwinkel der Sicherung der Medienvielfalt, aber auch bezogen auf Zuständigkeiten der Medienanstalten. Insgesamt wird ein Zusammenwirken der Länder bei der Medienvielfaltssicherung befürwortet, auch im Sinne einer kohärenten Aufsicht über große Medienintermediäre.

Der öffentlich-rechtliche Rundfunk selbst steht für das binnenplural Modell. Der NDR ist qua Auftrag der Sicherung von Meinungsvielfalt und der freiheitlich-demokratischen Grundordnung verpflichtet. Um diesen Auftrag auch im Internet- und Social Media-Zeitalter weiter erfüllen werden zu können, ist die entwicklungsoffene, zukunftssichernde Ausgestaltung des Auftrags essenziell. Ein wichtiger Aspekt im Kontext zu erweiterten Kooperationsanforderungen

an die öffentlich-rechtlichen Rundfunkanstalten ist eine Unterstützung einer kartellrechtlichen Bereichsausnahme seitens der Länder.

3. Welche Maßnahmen müssen im Hinblick auf den ab August 2025 geltenden European Media Freedom Act ergriffen werden?

Der EMFA sieht vor, dass Mediendiensteanbieter, die sich bei Plattformen nach bestimmten Kriterien registrieren und somit als „gut" ausweisen lassen, bestimmte Verfahrensrechte erhalten, bevor ihre Angebote negativ behandelt werden.

Dieses Verfahren ist aus Sicht des NDR kritikwürdig: Es gibt keinen Bedarf, dass sich die weitaus besser regulierten öffentlich-rechtlichen Anbieter bei großen globalen, außereuropäischen Playern, die im EU-Binnenmarkt agieren, registrieren lassen müssen, um – auch nur vielleicht - gewisse Vorteile im Verfahren zu erhalten. Mindestens muss die Selbsterklärung nutzerfreundliche ausgestaltet sein; dazu gehört etwa, dass eine einheitliche Erklärung eines Medienunternehmens ausreicht für dessen Accounts/Profile/Seiten auf einer Plattform. Dadurch ist auch ein koordinierter und konstruktiver Umgang mit Beschwerden zu gewährleisten.

Die im Zuge der Konsultation der EU-Kommission zu Art. 18 EMFA abgegebene Stellungnahme der ARD ist hier beigefügt.

Allgemein ist im Rahmen von Zentralisierungsüberlegungen aus Sicht des NDR von Bedeutung, dass keine weiteren Kompetenzverschiebungen hin zur EU im Bereich Medienregulierung erfolgen. Mit Blick auf die Umsetzung des EMFA wäre zu begrüßen, die Wechselverhältnisse zu anderen Regulierungen wie DSA, DMA und AVMD klarzustellen.

Mit freundlichen Grüßen

Dr. Michael Kühn
Justitiar

Anlage
ARD input into EC targeted consultation on the implementation of art 18 EMFA

ARD input into EC targeted consultation on the implementation of the self-declaration functionality for media service providers pursuant to Article 18(9) EMFA

General Remarks

Though the Digital Services Act (DSA) is now fully in effect, very large online platforms (VLOPs) still remove or otherwise restrict the availability and discoverability of editorial content on their services. This leaves editorial media with a poorly suited instrument that makes it difficult to react to and rectify such content moderation decisions. For public service media (PSM), Article 18 EMFA thus may represent – subject to future proof - a certain improvement on the DSA's standard notice and action mechanism and complaint procedures. However, it does not at all offer full or absolute protection against arbitrary content moderation decisions by Big Tech due to the narrow scope of the provision, the absence of clear deadlines, and the uncertainty surrounding actions in the event of non-compliance.

In a way Article 18 EMFA constitutes a new allocation of tasks, meaning that VLOPs are tasked with the design of a self-declaration process of MSP. The out-sourcing of a function to private companies which better should rest with the state and its regulatory authorities could be seen as a privatization of regulation. This is a more than questionable development asking for critical re-consideration in view of legitimacy, due conduct in serving the public good, transparency, (democratic) accountability and effectiveness. It is all the more important to clarify the requirements for the self-declaration in the guidelines, give clear instruction to VLOPs and limit any decision-making scope of VLOPs to a necessary minimum in order to create a process which is truly an effective protection against arbitrary content moderation decisions by VLOPs.

Concerning public service media, the EMFA as such recognizes the crucial role of editorial media, including PSM, within a digital ecosystem largely dominated by VLOPs and adapted to their business models, algorithms, and recommender systems. In particular, it intends to establish media-specific safeguards against arbitrary content moderation decisions by these platforms against media services providers, including PSM. Rightfully, editorial content produced by professional media organisations should not be treated like any other user-generated content that can easily be uploaded to VLOPs. This is because it has undergone a rigorous editorial process prior to publication and adheres to pre-defined regulatory requirements, such as those stemming from the Audiovisual Media Services Directive (AVMSD) and its national implementations. It is also subject to independent regulatory oversight. This is particularly true of PSM providers, who are subject to stricter regulation and closer oversight than other MSPs. This must be recognised in Article 18 of the EMFA and its accompanying guidelines.

We shall emphasize in this context that the intermediation of PSM services via VLOPs is – under today's realities of media consumption – an essential means of fulfilling the public service mission and thus of a societal function that PSM have been vested with by democratic process and decision-making in the societies they serve. It can thus not be left to private companies alone to decide on the conditions of certain Information/content/services in the

communication process, nor is it a sign of good government to promote any such privatisation tendencies.

As things stand now, ARD sees some welcome approaches but is convinced that the provisions of Article 18 EMFA offering some *procedural* rights to media services providers vis à`vis VLOPs are yet *too unsubstantiated and too weak to be considered sufficient safeguards against arbitrary content moderation measures* and need further shaping.

In light of the above, we urge the European Commission – in form of a minimum requirement - to draw up clear, precise, and actionable guidelines to ensure that VLOPs adhere fully to the established rules, rather than ignoring them or executing them in an all too lax manner. Timely and effective implementation and enforcement of Article 18 EMFA are critical to uphold media freedom and pluralism, ensure that citizens have access to reliable information, and ultimately to protect the integrity of democratic discourse within the digital environment. The European Commission should be ready to revisit the issue in due course and come up, if necessary, with stricter rules.

- ***Design and operation of the self-declaration functionality***

In order to benefit from the procedural safeguards, set out in Article 18 EMFA, MSPs must confirm that they fulfil the conditions specified in Article 18(1)(a)-(g) using a dedicated functionality. VLOPs should design this self-declaration process in a simple and clear manner. We welcome the Commission's overall objective of ensuring "simplification and legal certainty". More concretely, we agree that the relevant functionality should be "prominent, user-friendly and easily accessible" for MSPs (e.g., via a standardized ribbon/bar in the main settings of the MSPs accounts). It will be important to ensure that this does not fall behind the "adequate degree of flexibility for providers of VLOPs" that is granted at the same time. Due to the variety of platform designs, the guidelines should require VLOPs to actively raise awareness of and promote understanding of the existence and functioning of this mechanism, both when it is first implemented and in the event of any subsequent changes.

While Article 18(1) states that self-declarations should be made per MSP, it is important to recognise that MSPs often manage a variety of apps, accounts, profiles, and pages on VLOPs to cater to diverse user needs and interests. For instance, on social networks, MSPs typically maintain accounts at the organisational level, accounts for different channels, specific programmes, and specific (niche) interests. This is particularly relevant for PSM providers, whose mission is to reach all citizens with their programmes and services. The guidelines should therefore clarify that when MSPs operate multiple accounts, VLOPs must extend the registered MSP status to all accounts operated under their editorial responsibility. VLOPs should not engage in a cherry-picking exercise. The entire offering of an MSP, which is available on a VLOP, must enjoy the procedural safeguards under Article 18. Ideally in case of ARD this would encompass the entire offerings of all ARD broadcasters, i.e. all accounts of the nine PSM belonging to ARD, at least all accounts for each ARD-broadcaster.

The guidelines should provide concrete solutions for how VLOPs can put this into practice:

Where an MSP has registered apps, accounts, profiles, and pages under the same name or provided the same email address for their management, VLOPs must ensure that all of them are automatically attributed to the MSP and do not need to be individually declared. This should also apply for new accounts of the same MSP which should be added automatically. Such attribution should be easy for VLOPs to implement in practice, as it appears to involve a simple comparison with the data provided by MSPs under Article 18(1) subparagraph (f).

Where an MSP has registered accounts under different names or has opted for pseudonyms (for example to enhance data security and prevent abuse), it could be useful for VLOPs to allow the MSP to inform them of all its apps/accounts/pages/profiles. This could be facilitated through a dedicated field in the self-declaration functionality or by allowing the upload of a comprehensive list of all the apps/accounts/pages/profiles, belonging to that MSP. VLOPs could then tag these entities accordingly for the purposes of Article 18 EMFA.

The guidelines could also promote existing business practices and approaches that recognise the value and uniqueness of professionally produced editorial content such as the programmes and services provided by MSPs and which provide MSPs with a kind of “privileged space”. Certain VLOPs offer certain media partners (in the widest sense) a “one-stop place” to manage their accounts and to facilitate contact-making and the swift resolution of issues. YouTube’s Partner Program, for example, allow certain recognised organisations to link all the accounts they operate to a central account, making them much easier to manage. It seems that, there are eligibility criteria that recognised organisations have to meet, which are checked by the platform operators before access is granted. YouTube and TikTok also provide partner manager as contacts for ARD. These existing practices could serve as a model, allowing MSPs to declare their compliance once and ensuring all their accounts benefit from the Article 18 safeguards. Though we would like to stress that human points of contacts in the form of partner manager for MSP are indispensable and only contact forms are not sufficient in such time-critical decisions as content-moderation decisions.

It can also be imagined that VLOPs provide the MSPs with the possibility to designate a central account (e.g., the admin account or “super-user”) to which all the other apps/accounts/pages/profiles that are operated under their editorial responsibility can be linked. Such solutions would also help to avoid imposter/doppelgänger accounts. These are accounts that are not managed by an MSP, but which falsely use its branding and visual identity.

More generally, the creation of a “one-stop-shop" where VLOPs have one interlocutor per MSP would minimise the risk of granting the status to fraudulent MSPs, while making the self-declaration an easy to use and efficient tool. In this context, we stress the need for VLOPs to provide a dedicated human point of contact for every MSP. This contact must go beyond a generic email address or automated system (see also below). We also consider it necessary that the guidelines set out clear deadlines for VLOPs to process the self-declarations submitted by MSPs. Without defined timeframes, there is a risk that VLOPs may delay the validation process, undermining the effectiveness of the self-declaration mechanism and the procedural safeguards it aims to deliver.

- ***Presumption of compliance with the Article 18(1) criteria for Public Service Media providers***

Whether they provide audiovisual and/or radio/audio media services, PSM serve a special role in society as set out in their public service remit. They adhere to the strictest regulatory framework within the media sector. As the general interest is at stake, there are also strict mechanisms in place for the supervision of PSM providers. This is reflected in national legal frameworks for PSM providers, which are now supplemented by Article 5 EMFA, which establishes safeguards for the editorial and functional independence of PSM providers.

Given this comprehensive and detailed legal framework that governs PSM providers and their activities, their self-declarations should be accepted *ex officio*. PSM providers should simply have to tick the boxes declaring compliance / adherence to the different criteria mentioned under Article 18(1). If at all, an extract of the legal act entrusting a PSM provider with a public

service remit may be provided. Furthermore, as compliance with the criteria can be presumed, the Article 18 procedure should be applicable immediately in the case of PSM providers, without the need for an assessment of their self-declarations by VLOPs as this could delay its application.

- ***Declaration of compliance with the Article 18(1) criteria for MSPs***

We agree with the European Commission that the self-declaration should be based on a standardised questionnaire, which is accessible through the account(s) operated by the MSPs. The questionnaire should allow MSPs to tick the boxes declaring compliance / adherence to the different criteria mentioned under Article 18(1), supplemented by a functionality offering MSPs the possibility to upload information / documentation relevant to support their declarations. We support the Commission's view that it should be left to the discretion of MSPs to provide further supporting information. The mere lack of such information should not lead to a rejection of a declaration by VLOPs, as long as the self-declarations have been completed correctly (i.e. where all the relevant fields of the questionnaire have been filled in).

To this end, the guidelines could outline what kind of information MSPs could provide to support their self-declarations. We agree that information from reliable and publicly available EU-wide or national databases could be used, especially references or links to publicly available sources like national laws, e.g. the Interstate Media Treaty in Germany, should be considered sufficient. In a similar vein, MSPs could provide an extract from the list of (audiovisual) media service providers that Member States are obliged to establish and keep up to date under Article 2(5b) AVMSD. This information should, at the very least, support compliance with subparagraphs (a), (d) and (e). With regard to the latter, we submit that the EMFA's definitions of 'media service provider', 'editorial responsibility' and 'editorial decision' are based on the understanding that the selection and organization of content is made by a natural or legal person and cannot be carried out by purely algorithmic means or generated by Artificial Intelligence.

- ***Assessment and approval of the self-declarations***

We agree with the European Commission that VLOPs should accept, as a matter of principle, the declarations of all MSPs that filled in the relevant fields of the questionnaire correctly. As mentioned above, the declarations of PSM providers should be accepted *ex officio*.

Once accepted, VLOPs should make the declarations publicly available in order to allow interested and competent third parties to verify the declarations of MSPs (see below). Given their own business interests and the fact that they often compete directly with MSPs, at least for user attention and advertising revenues, VLOPs should not be responsible for judging the veracity of the declarations made by MSPs.

The only exception that allows for a discretion of judgment for VLOPs, namely "reasonable doubt", should be interpreted narrowly and specified accordingly. Only "where there is reasonable doubt" about the compliance of an MSP with Article 18(1)(d), VLOPs may delay the procedure and actively seek confirmation from the relevant national regulatory authority or body or the relevant co-regulatory or self-regulatory mechanism. It is important to emphasise that the 'reasonable doubt' test cannot be applied to PSM providers, as PSMs are presumed to comply with the criteria set out in Article 18(1) (see above). This should be specified in the guidelines when the concept of 'reasonable doubt' is clarified. This is necessary to prevent VLOPs from using this concept as an excuse for unnecessary delays or selective enforcement.

The Commission should also set a clear timeframe by which VLOPs must reach a decision in cases where they have reasonable doubts about an MSP's compliance with Article 18(1)(d). Setting a specific deadline would ensure that VLOPs do not use the review process to stall or avoid fulfilling their obligations.

- ***Guardrails against the misuse of Article 18***

As mentioned above, VLOPs can set themselves certain guardrails through the concrete design and practical implementation of the self-declaration mechanism, especially to prevent imposter / Doppelgänger accounts, which are not managed by an MSP but falsely use its branding and visual identity, to benefit from the procedural safeguards of Article 18.

Furthermore, Article 18(1) has several other built-in safeguards which guard against abuse of the Article 18 safeguards. First, recognised civil society organisations, fact-checking organisations and other relevant professional organisations could help identify bad actors who "engage systematically in disinformation, information manipulation and interference" and flag them to VLOPs (Recital 53). We would like to underline that MSPs themselves should also be considered eligible to make such notifications, for instance when they have been made aware of imposter / Doppelgänger accounts. The notion 'fact-checking organization' should be understood in the broadest possible sense, encompassing professional media outlets and their newsrooms, which routinely engage in fact-checking activities.

Second, VLOPs can, in the case of "reasonable doubts" apply to the relevant national regulatory authority or body or the relevant co-regulatory or self-regulatory mechanism to verify the adherence of MSPs with regulatory standards, as already mentioned above. National regulatory authorities and bodies possess a nuanced understanding of local media markets, positioning them exceptionally well to confirm compliance with Article 18(1)(d) and more broadly assist in the verification of self-declarations when necessary. It should, therefore, be feasible for these authorities to actively verify self-declarations and notify VLOPs of any bad actors granted the status under Article 18(1).

- ***Enforcement of Article 18***

We generally welcome the involvement of relevant third parties, such as civil society organisations, in reviewing MSPs' self-declarations, in order to prevent the abuse or misuse of the privileges attributed to professional media by Article 18. However, such involvement should be clearly defined (for example, by limiting it explicitly to an ex-post review) and include transparent procedures to ensure the fair and objective treatment of self-declarations. For example, the MSP should be informed and have the right to respond to any allegations of non-compliance. Alternatively, the national regulatory authority or body could be consulted.

We would also like to underline that there is growing concern in the media sector about the apparent lack of compliance by VLOPs with EU legislation, as evidenced by numerous cases and investigations conducted by the European Commission under the DSA, but also the Digital Markets Act (DMA). For instance, ongoing investigations have highlighted failures in adequately addressing illegal content and lack of transparency in advertisement practices, reflecting a broader trend of non-compliance. These investigations also reveal that the current procedures under Article 18 EMFA may lack clarity and effectiveness, creating loopholes that VLOPs may exploit to their advantage. The European Commission should learn from these experiences when designing the Article 18 guidelines.

Alarmingly, the EMFA does not stipulate direct legal consequences, such as penalties, for non-compliance. This absence of enforceable repercussions is particularly problematic as it could undermine the effectiveness of the EMFA (which is referred to on several occasions, for example in Recital 53, or in Article 18(9)), allowing VLOPs to sidestep responsibilities with little fear of substantial sanction. This gap must be addressed to ensure that VLOPs are held accountable and that the principles of the EMFA are effectively upheld, fostering a fair and transparent media environment across the EU.

- ***Other relevant issues in relation to the application of Article 18***

For Article 18 to truly have a tangible and positive impact, it is crucial that VLOPs furnish their contact details as required by Article 18(3), including a direct email address, through which MSPs can promptly and efficiently communicate with them. MSPs must have access to interlocutors within VLOPs who possess a comprehensive understanding of the media sector, the nature of editorial content production, and the regulatory framework governing MSPs activities. This level of expertise is essential for resolving any issues arising from arbitrary content moderation practices effectively and promptly. It would go against the objective of the EMFA, if VLOPs provided mere standard or generic email addresses or a chat bot that fail to facilitate meaningful dialogue. Instead, they must ensure that their contact points are humans who are capable of engaging constructively with MSPs.

Finally, we urge the European Commission to provide more clarity and legal certainty regarding the procedural steps following the self-declaration. Above all, Article 18(4) states that VLOPs must “inform the [MSP] concerned without undue delay” when their content is suspended or visibility is restricted. The guidelines should clarify that VLOPs must provide MSPs with an explanation of their reasons (in a statement reviewed by a human and not generated entirely by algorithmic means) when making the final decision, and set out a precise timeframe for doing so. MSPs need this essential information if they want to initiate legal proceedings against a VLOP’s decision.