

Position of The Broadband Association ANGA (Germany) on the proposal of the European Commission for a regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU – EMFA

I. Introduction and Summary

The European Commission published on 16 September 2022 a proposal for a regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU – hereinafter referred to as ‘EMFA’. The regulation aims at protecting media pluralism and independence in the EU. It introduces rules on several issues, i.a. safeguards against political interference in editorial decisions and against surveillance. ANGA supports the Commission’s objective to underline the fundamental role and tasks of independent, diverse media for furthering democratic debate and hence supporting accountability of State and societal actors.

Whether an EU regulation is the best way forward in achieving the set targets, has already been discussed controversially. The upcoming legislative debates in the Parliament and the Council will show if the Commission’s approach will be followed through on the way to strengthen fundamental rights’ protection, particularly in the areas of freedom of expression and information, of freedom to conduct a business, as well as to promote fundamental freedoms and fair, open competition in the Single Market.

Operators of media platforms, i.e. (network) operators offering TV services and other audiovisual media services over user interfaces to their customers, are not the primary focus of the proposed regulation. Nevertheless, since ANGA members’ activities in these regards are covered by some of the proposed rules and will be impacted in more indirect ways by others, we are grateful for being able to seize the opportunity to comment on some of the points dealt with by the initiative.

The EMFA introduces the concept of guidelines by the Commission on the appropriate prominence of audiovisual media services of general interest according to article 7a of Directive 2010/13/EU (hereinafter referred to as ‘AVMSD’). Furthermore, it proposes a right for customers to customize the media offer. For ANGA members these provisions are of special relevance.

ANGA members roll out and operate broadband networks. They traditionally also offer their customers TV services. Increasingly, the portfolio of services also includes online services such as live TV streaming, app TV and video on-demand. **In this regard, provisions that mandate operators to design their platform or user interface in a certain way (e.g. make content easily findable) affect these operators’ rights.** This is even more the case, when such rules are overly detailed and regulating, as currently seen in Germany.

ANGA sees such restrictive regulation critically. The aim of European media regulation should be to create conditions which allow national, cross-border and pan-European providers to create competitive offerings in an increasingly globalized competitive environment. Bearing this in mind, ANGA advocates for the following points to be considered in the upcoming legislative process:

1. **A right for end users to customise any device or user interface granting access to audiovisual media services (i.e. re-design the platform or user interface) is unproportionate and should be deleted from the EMFA. At least, such provision should be narrowed down and clarified to prevent unwanted practical outcomes.**
2. **The current rule on prominence of audiovisual media services of general interest in the AVMSD should be amended by general principles as to how member states should approach the concept of prominence in their national legislation. Mere – non-binding – guidelines by the Commission will not solve the problem of legal uncertainty and diverging levels of regulation across member states.**

II. In greater detail

1. Proposed Right to customisation of the media offer (Article 19 EMFA) should be deleted

Article 19(1) introduces a new right for users to customise media offers on devices and interfaces such as connected TVs, to ensure that users can customise, according to their interests or preferences, the default settings of any device or user interface controlling or managing the access to and use of audiovisual media services. This right is accompanied, in Article 19(2), by an obligation on manufacturers and developers to ensure that they include a functionality which enables users to change the default settings controlling or managing the access to, and use of, the audiovisual media services offered. These rules may impact any device that includes a user interface.

The proposed right of customization is unproportionate.

- (i) It shows no direct or indirect causal link to the EMFA's objectives, namely freedom and pluralism of the media and the citizens' right to information, including a diverse overall media offering.
- (ii) To the contrary, it restricts the freedom of expression, freedom to provide services and the free movement of goods, as applicable, of user interface service providers and product manufacturers. We do not see how these interferences with fundamental rights can be justified and see them as unproportionate.
- (iii) This is especially the case as
 - the draft proposal does not entail any definition as to what functionalities should be open to adaptation by the user – we strongly assume, that e.g. age verification systems or payment options are not considered to be in scope of individualization as regards their placement and presentation on the user interface (changing of app-specific settings as intended by the manufacturer or provider stays possible);
 - the draft proposal does not entail an exception for cases of technical unfeasibility in legacy devices;
 - the draft proposal is not restricted to a single act of customization.

With regard to Article 19(2), the principle of proportionality is not met because the provision does not take into account

- (i) whether the newly marketed device/user interface is technically apt to offer such functionality, and
- (ii) whether the implementation of this functionality would be disproportional to the economic and operational capabilities of the provider. Furthermore,
- (iii) while it provides for an appropriate timespan for implementation on the side of providers (Article 28(2) 2nd sentence, 48 months after entry into force), taking into account the necessary delays in developing, producing or having produced, and bringing to the market of

related equipment/software, it apparently does not reconcile this with the proposed right of users which is to become effective 6 months after the entry into force of the future regulation.

An important issue related to user customization of user interfaces/devices is the enormous amount of individual “profiles” (settings) that would have to be stored and conveyed (back and forth) over networks, requesting significant additional resources (storing capacity, energy), which raises the question of consistency with the Green (Digital) Deal ambitions.

We recommend that the right to customisation of the media offer in Article 19 be removed from the Regulation, in order to ensure the legislation is targeted to its stated objectives, and that disproportionate measures be avoided.

At least, articles 19 and 28 should be amended in a way addressing the above mentioned proportionality concerns. ANGA suggests the following wording:

Article 19 Right of customisation of audiovisual media offer

1. Users shall have a right to easily change the default settings of any device or user interface controlling or managing access to and use of audiovisual media services **once** in order to customise the audiovisual media offer according to their interests or preferences in compliance with the law. This provision shall not affect national measures implementing Article 7a of Directive 2010/13/EU. EN 41 EN. **In particular, functionalities such as protection of minors’ settings (age-verification tools), in-service payment procedures, information on and order of upcoming individual content element, criteria for recommendations shall not be considered default settings.**

2. When placing the devices and user interfaces referred to in paragraph 1 on the market, manufacturers and developers shall ensure that they include a functionality enabling users to freely and easily change the **main** default settings controlling or managing access to and use of the audiovisual media services offered.

3. The right to customization in paragraphs 1 and 2 does apply to devices or user interfaces only to the extent that the implementation of such functionalities is technically feasible and feasible under proportionate efforts and if the implementation of such functionalities is proportional to the economic and operational capabilities of the provider, manufacturer or developer.

Article 28 Entry into force and application

[...]

2. This Regulation shall apply from [6 months after the entry into force]. However, Articles 7 to 12 and 27 shall apply from [3 months after the entry into force] and Article 19~~(2)~~ shall apply from [48 months after the entry into force].

[...]

2. Clearer guard-rails on prominence rules should be laid down in legislation (i.e. AVMSD)

Prominence of ‘audiovisual media services of general interest’ is referenced in Article 15 (2)(a) of the proposal. Article 15(2) gives the Commission the right to issue guidelines on the appropriate prominence of audiovisual media services of general interest under Article 7a of the AVMSD.

The Commission guidelines foreseen in this clause however are not sufficient to address the current lack in legal certainty. Contrary to other instances in the AVMSD, such as Video-Sharing Platforms’ designation or European works, the fundamental criteria and procedures for attributing the status of

“service of general interest” have not been laid out in Article 7a AVMSD. This leads to divergent national transposition and implementation measures – if Member States at all decide to act in this field.

By way of example, the German media authorities recently published a “Public Value List” and a related non-binding listing (“ranking”) recommendation for hundreds of broadcasting services, consisting of TV and radio channels, and on-demand services that will receive prioritised placement on smart TVs and user interfaces for easy discovery. The “Public Value” designations include public service and commercial broadcasters, their and other providers’ catch-up services and apps, local and regional offerings as well as BBC World News (as the only non-domestic TV service).

In Germany, media regulatory authorities have laid down a principle of “no-overriding” a user’s preferential settings through updates which leads to the issue that new services and content cannot be brought to the attention of users. This is aggravated by the overloaded lists of TV channels, catch-up services and apps that have been assigned public-value status and hence have to be featured prominently, putting at risk pluralism, diversity and innovation.

To address the issue of differing levels of regulation on national level, we urge the Co-legislators to implement binding guidance for member states on the fundamental parameters for national rules on prominence. This cannot happen in de facto non-binding guidelines – it needs a proper evaluation and adjustment in the AVMSD.

3. Relationship between right to customisation and prominence rules

The proposed provision of Article 19 poses a problem of consistency with existing EU law, namely it leads to an unclear relationship between public value services’ regulation and the users’ right to customisation. Where, at Member State level, no clear-cut decision of the relationship (e.g. in case of conflict, prevalence of user customisation) has been taken, there is no upfront legal certainty for equipment manufacturers/providers of user interfaces; this brings about the risk of (again) amending the user interface should a media authority in an individual case decide otherwise on this point than the appraisal made by the manufacturer/provider.

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The German Broadband Association ANGA e.V. represents the interests of more than 200 undertakings from the German broadband industry. Among its members are network operators like Vodafone Germany, Telekom Deutschland, Tele Columbus (PYUR), EWE TEL, NetCologne, M-net, wilhelm.tel and several technology suppliers. They offer more than 20 million customers TV and broadband services.