

The European Media Freedom Act Proposal in trilogue

Article 4/Protection of editorial freedom and journalistic sources

29 November 2023

This synopsis analyses and compares the wording proposals adopted by the three EU institutions in their respective positions in relation to Article 4 and defines our joint position for inter-institutional negotiations.

Note: Our joint position is based on the institutions' texts. Proposed changes are marked in yellow.

Rights of media service providers Article 4			
COM Proposal	EP amendments	Council mandate for negotiation	Our joint position
<u>Article 4(2)</u>	<u>Article 4(2)</u>	<u>Article 4(2)</u>	<u>Article 4(2)</u>
<p>Member States shall respect effective editorial freedom of media service providers. Member States, including their national regulatory authorities and bodies, shall not:</p> <p>(a) interfere in or try to influence in any way, directly or indirectly, editorial policies and decisions by media service providers;</p> <p>(b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers or, if applicable,</p>	<p><i>The Union, Member States and private entities</i> shall respect <i>the</i> effective editorial freedom <i>and independence</i> of media service providers. Member States, including their national regulatory authorities and bodies, <i>Union institutions, bodies, offices and agencies and private entities</i> shall not:</p> <p>(a) interfere in or try to influence in any way, directly or indirectly, editorial policies and <i>editorial</i></p>	<p>Member States shall respect effective editorial freedom of media service providers.</p> <p>Member States, including their national regulatory authorities and bodies, shall not [...] interfere in or try to influence [...] <i>editorial</i> policies and <i>editorial</i> decisions by media service providers.</p>	<p><i>The Union and</i> Member States shall respect <i>and protect</i> effective editorial freedom of media service providers.</p> <p>Member States, including their national regulatory authorities and bodies, <i>and Union institutions, bodies, offices and agencies,</i> shall not: (a) interfere in or try to influence in any way, directly or indirectly, editorial policies and <i>editorial</i> decisions by media</p>

<p>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;</p> <p>(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.</p>	<p>decisions by media service providers;</p> <p><i>(aa) oblige media services providers or their employees to disclose any information related to editorial processing, including on their sources, or to disseminate such information;</i></p> <p>(b) detain, sanction, subject to search and seizure, or inspect media service providers, <i>their employees</i> or, if applicable, their family members, or <i>any other person belonging to their professional network of relationships, including occasional contacts,</i> or their corporate and private premises, <i>where such actions might lead to a violation of their right to exercise their professional activity and, in particular, where such actions might result in access to journalistic</i> sources;</p> <p><i>(ba) access encrypted content data on any device or in any machine used by media service providers or, if applicable, their families or their employees or their family members or, if applicable, any other person belonging to their professional</i></p>		<p>service providers.</p>
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	<p><i>or private network of relationships, including occasional contacts;</i></p> <p><i>(c) deploy surveillance measures or use surveillance technology, or instruct private entities to use such measures or such technology, in any device or machine used by media service providers or, if applicable, their family members, or their employees or their family members or, if applicable, any other person belonging to their professional network, including occasional contacts.</i></p> <p><i>(ca) deploy spyware or any similar intrusive technology, or instruct private entities to use spyware or such technology, in any device or machine used by media service providers or, if applicable, their family members, or their employees or their family members or, if applicable, any other subject belonging to their professional network, including occasional contacts.</i></p> <p><i>(cb) commission a third party to carry out any of the actions referred to in points (b) to (ca).</i></p>		
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Justification

To simplify the article, we suggest keeping the focus of this paragraph to the protection of editorial independence and moving all considerations regarding the protection of sources to the next paragraph (see new 2a below).

Given the limited enforcement power of the EU, we suggest including a positive obligation on Member States to not only respect editorial freedom, but to take measures to protect it against other actors (e.g., private entities), which reflects the EP's intentions.

COM Proposal	EP amendments	Council mandate for negotiation	Our joint position
	<u>Article 4(2a) (new)</u>	<u>Article 4(2a) (new)</u>	
	<p>2a. By way of derogation from paragraph 2, point (b), Member States, including their national regulatory authorities and bodies, Union institutions, bodies, offices and agencies and private entities may carry out an action as referred to therein, provided that other legal measures would be inadequate and insufficient to obtain the information sought and provided that the action:</p> <p>(a) is unrelated to the professional activity of a media service provider and its employees;</p> <p>(b) does not result in access to journalistic sources;</p>	<p>2a. (new) Member States shall ensure an effective protection of journalistic sources. Member States shall not, unless this is justified by an overriding requirement in the public interest and provided for in national law and is in compliance with Article 52(1) of the Charter and other Union law:</p> <p>(a) oblige media service providers or their editorial staff, or any persons who, because of their regular relationship with a media service provider or its editorial staff, may have information that could identify journalistic sources to disclose such information;</p>	<p>(1) (new) Member States and the Union shall ensure an effective protection of journalistic sources.</p> <p>(2) Unless justified under paragraph (d)(new), Member States and [where applicable] the Union shall not:</p> <p>(a) oblige media service providers or their editorial staff or any persons who, because of their regular relationship with a media service provider or its editorial staff, may have information about journalistic sources, to reveal the identity of or other information about its source;</p>

	<p>(c) is provided for under national law;</p> <p>(d) is justified on a case-by-case basis for the purpose of preventing, investigating or prosecuting a serious crime;</p> <p>(e) complies with Article 52(1) of the Charter and other relevant Union law;</p> <p>(f) is proportionate with respect to the legitimate aim pursued; and</p> <p>(g) is ordered, ex ante, by an independent and impartial judicial authority with effective, known and accessible remedial measures ensured in accordance with Article 47 of the Charter and in compliance with other relevant Union law.</p> <p>When carrying out actions as referred to in paragraph 2, point (b), the Member States, including their national regulatory authorities and bodies, Union institutions, bodies, offices and agencies and private entities shall not retrieve data related to the</p>	<p>(b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers <i>or their editorial staff or any persons who, because of their regular relationship with a media service provider or its editorial staff, may have information that could identify journalistic sources,</i> or <i>the corporate and private premises of those persons,</i> on the ground that <i>they</i> refuse to disclose <i>such</i> information [...]; or</p> <p>(c) deploy <u>intrusive surveillance software</u> in any device or machine used by media service providers <i>or their editorial staff or any persons who, because of their regular relationship with a media service provider or its editorial staff, may have information that could identify journalistic sources, for the purpose of obtaining such information,</i> unless the deployment [...] occurs in [...] investigations of one of <i>those</i> [...] persons, <i>for offences referred to in Article 2(2) of Council Framework Decision 2002/584/JHA¹⁹ and punishable in the Member State concerned</i></p>	<p>(b) detain, sanction, intercept, subject to surveillance or search and seizure, or inspect media service providers <i>or their editorial staff or any persons who, because of their regular relationship with a media service provider or its editorial staff, may have information about journalistic sources,</i> or <i>the corporate and private premises of those persons, where such actions might lead to a violation of their right to exercise their professional activity and, in particular, where such actions might result in access to journalistic sources;</i> [...]; or</p> <p>(c) deploy spyware or other surveillance technologies, or gain access to encrypted communications in any device or machine used by media service providers, their employees, and journalists or, if applicable, by any other person <i>with a regular relationship with a media service provider or its editorial staff, who may have information about journalistic sources.</i></p> <p>(d)(new) By way of derogation, Member States and [where</p>
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	<p><i>professional activity of media service providers and their employees, in particular data which offer access to journalistic sources.</i></p>	<p><i>by a custodial sentence or a detention order for a maximum period of at least three years, or other specific offences punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least five years, as determined by the law of that Member State.</i></p> <p><i>Member States shall not adopt a measure pursuant to point (c) of the first subparagraph where measures referred to point (b) of the first subparagraph are adequate and sufficient to obtain the information sought.</i></p>	<p>applicable] the Union may take measures as referred to in points (a)-(c) only if they are:</p> <ul style="list-style-type: none"> (i) unrelated to the professional activity of media service providers' journalists; (ii) necessary to prevent or prosecute a serious crime as defined in Article 2(17) of this Regulation such that the information is crucial to prevent or prosecute the crime and cannot be obtained by any other means; (iii) proportionate to the legitimate aim pursued; (iv) in accordance with national law and Article 52(1) of the Charter and in compliance with Union law; and (v) ordered, ex ante, by an independent and impartial judicial authority with effective remedial measures ensured in accordance with Article 47 of the Charter and in
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			<p style="text-align: center;">compliance with Union law.</p> <p>(3) The protections provided for in this paragraph shall extend to natural persons in non-standard forms of employment, such as freelancers exercising activities in the same field as media service providers and their employees.</p> <p>(4) Member States and the Union shall not circumvent the requirements of this Regulation, including by commissioning third parties.</p>
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Justification

The protection of journalistic sources is one of the cornerstones of the freedom of the media/press that allows journalists to perform their vital public watchdog role, as protected by Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the EU’s Charter of Fundamental Rights. In order to live up to its objectives, the EMFA should therefor contain a positively worded obligation that requires “*Member States to ensure an effective protection of journalistic sources*”.

In line with settled case-law of the European Court of Human Rights¹, and duly considering necessary adaptations justified by developing practices and contemporary challenges, an interference with the protection of journalistic sources can only be permitted in exceptional circumstances and under specific cumulative conditions that should be interpreted strictly. Hence, Member States should only be allowed to take certain measures, expressly listed in points 4(2a)(2)(a)-(c) with the view to prevent or prosecute certain ‘serious crimes’ (i.e., those listed in Article 2(17)) and under specific conditions outlined in new point 4(2a)(2)(d). These reflect those that the EP introduces in new paragraphs 4(2b)-(2d), albeit using more complex language, introducing slight variations in respect to different measures.

¹ ECtHR cases Goodwin v. the United Kingdom, no. 17488/90, 1 December 1997; Roemen and Schmit v. Luxembourg, no. 51772/99, 25 February 2003; Voskuil v. the Netherlands, no. 64752/01, 22 November 2007; Sanoma Uitgevers B.V. v. the Netherlands, no. 38224/03, 14 September 2010; Big Brother Watch a.o. v. UK, nos. 58170/13, 62322/14 and 24960/15, 25 May 2021.

Notably, we consider that these conditions cover all legitimate interferences with the protection of journalistic sources in the name of national security. National security encompasses a wide range of information gathering activities by authorities, not all of which would constitute legitimate interferences with media freedom and the protection of journalistic sources. In other words, there should be no blanket exception to media freedom on national security grounds. To guarantee media freedom, national security exceptions must be narrowly circumscribed. The prevention or prosecution of the national security threats listed in Art. 2(17) (including terrorism, illicit trafficking in weapons, munitions and explosives, murder, grievous bodily injury, kidnapping, illegal restraint and hostage-taking, organised or armed robbery, crimes within the jurisdiction of the International Criminal Court) cover the relevant exceptions that might justify an interference with the protection of journalistic sources, and media freedom and the freedom of expression more generally.

Article 10 of the ECHR allows interferences in the interest of national security provided that they satisfy the conditions of necessity, proportionality and legality. We believe that only national security measures that are tied to the prevention or prosecution of the serious crimes listed in Art. 2(17) would satisfy the proportionality requirement. The exhaustive list of Art. 2(17) ensures legal certainty. Adding an explicit national security exception as the Council suggests in new paragraph 4 might risk suggesting that the national security risks covered in the definition of serious crimes are not enough and, thus, inviting abuse or arbitrary applications, without the safeguards based on Article 10 ECHR, as provided in the new Article 4(2a)(2)(d).

It is moreover useful to clarify, as the EP does in new paragraph 4(2a)(2)(d) that the protections afforded by the principle of confidentiality of journalistic sources extend to persons in non-standard forms of employment. Also, it should be ensured, as the EP suggests, that Member States do not circumvent the EMFA's requirements, including, for example, by commissioning third parties to carry out actions that interfere with the principle of source protection. We make a wording suggestion in the last sentence.

Finally, we'd like to stress once again that the EMFA harmonises the standard of protection provided to journalistic sources and communications by introducing minimum rules at Union level, inter alia expressed in paragraph 4(2a). This should be without prejudice to further protection at national level (see below our amendments to Recital 17 and Article 1(3)).

COM Proposal	EP amendments	Council mandate for negotiation	Our joint position
		<u>Article 4(4) new</u>	
		4. (new) This Article is without	Delete

prejudice to the Member States' responsibility for safeguarding national security.

Justification

The new paragraph that the Council introduces could seriously intrude into media service providers' right to freedom of expression (including the confidentiality of journalistic sources) and should be deleted. The fact that this provision is listed separately from the public interest exception might be interpreted to imply that Member States may take measures on grounds of national security disregarding the requirements and conditions outlined in the provision.

On the broadest possible interpretation as a blanket exemption for national security measures, this provision would contradict the very purpose and objective of the provision and constitute a major loophole that ill-intentioned governments could use to seriously undermine the protection of journalists. While concerns for national security may be legitimate, national security remains a vague and broad concept that is susceptible to change and fear-mongering. That is why fundamental rights are necessary to limit what governments can do in the name of national security, not the other way around.

Also, from the CJEU's² and ECtHR's³ case law, it emerges that although it is for Member States to define their essential security interests and adopt appropriate measures accordingly, they are obliged to do so in compliance with EU law, in particular the EU Charter of Fundamental Rights (Articles 11 and 51(1) CFR). We consider that this new paragraph is formulated excessively widely and that it falls short of the requirements laid down by the EU courts on the proper balance Member States have to conduct when imposing measures on grounds of national security.

COM Proposal	EP amendments	Council mandate for negotiation	Our joint position
<u>Article 4(1)</u>	<u>Article 4(1)</u>	<u>Article 4(1)</u>	<u>Article 4(1)</u>
Media service providers shall have the right to exercise their economic	Media service providers shall have the right to exercise their economic	Media service providers shall have the right to exercise their economic	Media service providers shall have the right to exercise their economic

² Joined cases C-511, 512 and 520/18, La Quadrature du Net and Others v Premier ministre and Others, Judgment of 6.10.2020, ECLI:EU:C:2020:791, para. 99; C-300/11, ZZ, Judgment of 4.6.2013, EU:C:2013:363, para. 38; C-187/16, Commission v Austria, Judgment of 20.3.2018, EU:C:2018:194, paras. 75 and 76; C-715/17, C-718/17 and C-719/17, Commission v Poland, Hungary and Czech Republic, Judgment of 2.4.2020, EU:C:2020:257, paras. 143 and 170.

³ Big Brother Watch and Others v. the United Kingdom, Applications nos. 58170/13, 62322/14 and 24960/15, Judgment of 25 May 2021 [GC].

activities in the internal market without restrictions other than those allowed under Union law.	activities in the internal market without restrictions other than those allowed <i>pursuant to</i> Union law.	activities in the internal market without restrictions other than those <i>that are in compliance with</i> Union law.	activities in the internal market without restrictions other than those <i>that are in compliance with</i> Union law.
<u>Justification</u>			
The formulation proposed by the Commission might be read to require that restrictions on the right of media service providers to exercise their economic activity in the EU's internal market are expressly provided by EU law. This would go too far and could moreover be contrary to the distribution of competencies between the EU and the Member States. In order to enhance legal certainty, it should be clarified that restrictions can be imposed provided that they are in compliance with EU law.			
<u>COM Proposal</u>	<u>EP amendments</u>	<u>Council mandate for negotiation</u>	Our joint position
<u>Article 4(3)</u>	<u>Article 4(3)</u>	<u>Article 4(3)</u>	<u>Article 4(3)</u>
Without prejudice and in addition to the right to effective judicial protection guaranteed to each natural and legal person, Member States shall designate an independent authority or body to handle complaints lodged by media service providers or, if applicable, their family members, their employees or their family members, regarding breaches of paragraph 2, points (b) and (c). Media service providers shall have the right to request that authority or body to issue, within three months of the request, an opinion	Without prejudice and in addition to the right to effective judicial protection guaranteed to each natural and legal person, Member States shall designate a structurally and functionally independent authority or body, such as an ombudsperson , to handle complaints lodged by media service providers or their family members, the employees of media service providers or their family members, or any other person professionally or privately associated with them , regarding breaches of paragraph 2, points (aa), (b), (ba), (c), (ca)	[...] Member States shall ensure that media service providers or their editorial staff, or any persons who, because of their regular relationship with a media service provider or its editorial staff, may have information that could identify journalistic sources have a right to an effective judicial protection in cases regarding breaches of paragraph 2a. Member States shall entrust an independent authority or body with relevant expertise to provide assistance to those persons with regard to the exercise of such right where	[...] Member States shall ensure that media service providers or their editorial staff, or any persons who, because of their regular relationship with a media service provider or its editorial staff, may have information about journalistic sources, have a right to effective judicial protection in cases regarding breaches of paragraph 2a. In addition , Member States shall designate an independent authority or body with relevant expertise to handle complaints

regarding compliance with paragraph 2, points (b) and (c).	and (cb) . Media service providers shall have the right to request that authority or body to issue, within three months of the request, an opinion regarding compliance with paragraph 2, points (aa), (b), (ba), (c), (ca) and (cb) .	no self-regulatory bodies or mechanisms are in place to provide such assistance.	lodged by these persons , regarding breaches of paragraph 2 a . Media service providers or other persons concerned shall have the right to request that authority or body to issue, within three months of the request, an opinion regarding compliance with paragraph 2 a .
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Justification

To effectively enforce this article, it should be expressly mandated that Member States must ensure effective judicial protection of media service providers, their employees, etc. This also derives from Article 47 of the EU's Charter of Fundamental Rights.

Given the difficult situation affected persons may find themselves in, it would be helpful if Member States established an independent authority or body that would handle complaints lodged by media service providers in relation to unjustified interferences or breaches of the principle of journalistic protection.

Relevant Recitals			
Recital 17			
COM Proposal	EP amendments	Council mandate for negotiation	Our joint position
<u>Recital 17</u>	<u>Recital 17</u>	<u>Recital 17</u>	<u>Recital 17</u>

<p>The protection of journalistic sources is currently regulated heterogeneously in the Member States. Some Member States provide an absolute protection against coercing journalists to disclose information that identify their source in criminal and administrative proceedings. Other Member States provide a qualified protection confined to judicial proceedings based on certain criminal charges, while others provide protection in the form of a general principle. This leads to fragmentation in the internal media market. As a result, journalists, which work increasingly on cross-border projects and provide their services to cross-border audiences, and by extension providers of media services, are likely to face barriers, legal uncertainty and uneven conditions of competition. Therefore, the protection of journalistic sources and communications needs harmonisation and further strengthening at Union level.</p>	<p>The protection of journalistic sources and communications is currently regulated heterogeneously in the Member States. Some Member States provide an absolute protection against coercing journalists to disclose information that identify their source in criminal and administrative proceedings. Other Member States provide a qualified protection confined to judicial proceedings based on certain criminal charges, while others provide protection in the form of a general principle. <i>In spite of existing standards codified by the Council of Europe and of established case law by the European Court of Human Rights, practical examples from several Member States have revealed that there are very different approaches to the matter and that journalistic sources are not protected in some situations.</i> This leads to fragmentation in the internal media market. As a result, journalists, which work increasingly on cross-border projects and provide their services to cross-border audiences, and by extension providers of media services, are likely to face</p>	<p>The protection of journalistic sources is currently regulated heterogeneously in the Member States. Some Member States provide an absolute protection against coercing journalists to disclose information that identify their source in criminal and administrative proceedings. Other Member States provide a qualified protection confined to judicial proceedings based on certain criminal charges, while others provide protection in the form of a general principle. This leads to fragmentation in the internal media market. <i>Moreover, media professionals, in particular journalists and other media professionals involved in editorial activities,</i> work increasingly on cross-border projects and provide their services to cross-border audiences, and by extension providers of media services. As a result, <i>media service providers</i> are likely to face barriers, legal uncertainty and uneven conditions of competition. Therefore, the protection of journalistic sources [...] needs harmonisation and further strengthening at Union level. <i>This should be without prejudice to</i></p>	<p>The protection of journalistic sources and communications is currently regulated heterogeneously in the Member States. Some Member States provide an absolute protection against coercing journalists to disclose information about their sources in criminal and administrative proceedings. Other Member States provide a qualified protection confined to judicial proceedings based on certain criminal charges, while others provide protection in the form of a general principle. <i>In spite of existing standards codified by the Council of Europe and of established case law by the European Court of Human Rights, practical examples from several Member States have revealed that there are very different approaches to the matter and that journalistic sources are not or not sufficiently protected in some situations.</i> This leads to fragmentation in the internal media market. <i>Moreover, media professionals, in particular journalists and other media professionals involved in editorial activities,</i> work increasingly on cross-border</p>
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	<p>barriers, legal uncertainty and uneven conditions of competition. Therefore, the protection of journalistic sources and communications needs to be strengthened as comprehensively and as extensively as possible. To that end, this Regulation harmonises the standard of protection provided to journalistic sources and communications by introducing minimum rules at Union level. An interference with journalistic sources always needs to be balanced against the harm to the freedom of expression and information. Any measures which interfere with journalistic sources should be subject to appeal to a court. Journalists working on cross-border projects should benefit from the highest standards of protection of the Member States involved. At Union level, the protection of journalistic sources and communications should correspond, as minimum, to the protection provided in accordance with international and European standards and should be in accordance with the case law of the Court of</p>	<p>further or absolute protection at national level.</p>	<p>projects and provide their services to cross-border audiences. As a result, media service providers, are likely to face barriers, legal uncertainty and uneven conditions of competition. Therefore, the protection of journalistic sources and communications needs to be strengthened as comprehensively and as extensively as possible, in accordance with the protection of journalistic sources as guaranteed under Article 10 ECHR and applied in the case law of the European Court of Human Rights. This should include the protection from any unjustified interferences by public authorities or bodies, including at Union level, third parties or private actors acting in their own initiative. To that end, this Regulation harmonises the standard of protection provided to journalistic sources and communications by introducing minimum rules at Union level. This should be without prejudice to further protection at national level.</p>
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	<i>Justice of the European Union and the European Court of Human Rights.</i>		
COM Proposal	EP amendments	Council mandate for negotiation	Our joint position
	<u>Recital 17a (new)</u>	<u>Recital 17a (new)</u>	
	<p><i>(17a) Digital safety and the confidentiality of electronic communications have become a major concern for journalists and media workers. In light of that fact, the promotion and protection of anonymisation tools and end-to-end encrypted services used by media service providers and their employees needs to be encouraged at Union level in order to ensure an equal level of access to such equipment across all Member States.</i></p> <p><i>Those tools have become vital for them to freely exercise their work and their rights to privacy, to data protection and to the freedom of expression, including by securing their communications and protecting the confidentiality of their sources.</i></p>	<p><i>(17a) Intrusive surveillance software, commonly referred to as ‘spyware’, represents a particularly invasive form of surveillance over media professionals and their sources. It can be deployed to secretly record calls or otherwise use the microphone of an end-user device, film or photograph natural persons, machines or their surroundings, copy messages, track browsing activity, track geolocation or collect other sensor data or track activities across multiple end-user devices, without the natural or legal person concerned being made aware in a specific manner and having given their express specific consent in that regard. It has dissuasive effects on the free exercise of the economic activities in the media sector. It jeopardises, in particular, the trusted relationship of</i></p>	<p><i>(17a) Intrusive surveillance software, commonly referred to as ‘spyware’, represents a particularly invasive form of surveillance over media professionals and their sources. It has dissuasive effects on the free exercise of the economic activities in the media sector. It jeopardises, in particular, the trusted relationship of journalists with their sources, which is the core of the journalistic profession. Given the digital and intrusive nature of spyware and the use of devices across borders, it has a particularly detrimental impact on the exercise of the economic activities of media service providers in the internal market. Therefore, there should be a presumption that the deployment of such tools against journalists and other media professions does not</i></p>

		<p><i>journalists with their sources, which is the core of the journalistic profession. Given the digital and intrusive nature of spyware and the use of devices across borders, it has a particularly detrimental impact on the exercise of the economic activities of media service providers in the internal market. It is therefore necessary to ensure that media service providers, including journalists, operating in the internal media market rely on a robust harmonised protection in relation to the deployment of spyware in the Union. In particular, the deployment of spyware should only take place if it is justified by an overriding requirement in the public interest and provided for in national law and is in compliance with Article 52(1) of the Charter as interpreted by the Court of Justice and other Union law and occurs in investigations of offences referred to in Article 2(2) of the Council Framework Decision 2002/584/JHA⁷, and punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least</i></p>	<p>meet the proportionality requirement.</p>
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		<i>three years or other specific offences punishable in the Member State concerned by a custodial sentence or a detention order for a maximum period of at least five years, as determined by the law of that Member State.</i>	
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Justification

The use of intrusive surveillance technology can have far-reaching implications and constitutes a serious intrusion into the professional and personal life of those concerned, posing a serious threat to the fundamental rights to freedom of expression and privacy as enshrined in Articles 11 and 7 of the EU's Charter of Fundamental Rights and protected by Articles 10 and 8 of the ECHR.

It is therefore necessary to clarify that the use of such surveillance measures should be presumed to be disproportionate and thus an unjustified interference in media service providers'/journalists' (and other persons concerned) right to freedom of expression in the newly introduced Recital 17a of the EP mandate.

Consequential amendments

Article 1

COM Proposal	EP amendments	Council mandate for negotiation	Our joint position
<u>Article 1(3)</u>	<u>Article 1(3)</u>	<u>Article 1(3)</u>	<u>Article 1(3)</u>
This Regulation shall not affect the possibility for Member States to	This Regulation shall not affect the possibility for Member States to	This Regulation shall not affect the possibility for Member States to	This Regulation shall not affect the possibility for Member States to

adopt more detailed rules in the fields covered by Chapter II and Section 5 of Chapter III, provided that those rules comply with Union law.	adopt more detailed or stricter rules in the fields covered by Chapter II, Section 5 of Chapter III and Article 24 , provided that those rules comply with Union law.	adopt more detailed or stricter rules in the fields covered by Chapter II [...], Section 5 and Article 24 [...] of Chapter III, provided that those rules comply with Union law.	adopt more detailed or stricter rules in the fields covered by Chapter II [...], Section 5 and Article 24 [...] of Chapter III, provided that those rules comply with Union law.
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Justification

To clarify that the EMFA merely introduces minimum rules at Union level for the standard of protection provided to journalistic sources and communications it is also necessary to amend Article 1(3). Member States must retain the possibility to introduce not only more detailed but also stricter rules. Without these amendments, the EMFA would only allow Member States to further specify the proposed standards of protection, while preventing Member States from introducing or retaining a higher level of protection.