



MEDIA, STATE AND RECIPROCAL TRANSPARENCY: NORMATIVE EXPECTATIONS AND REGULATORY POSSIBILITIES IN A PROPOSAL OF THE EUROPEAN MEDIA FREEDOM ACT (EMFA)¹

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ABSTRACT

Media transparency has been seen as an important principle in media policy and regulation for a long time. Overall, this study attempts to offer three contributions. First, it provides theoretical conceptualization of transparency as a relational concept involving three collective actors – media, state and citizens. Second, it introduces the concept of “reciprocal transparency”. Third, it explores regulatory trends and possibilities concerning reciprocal transparency under the proposed draft of the European Media Freedom Act (EMFA).

Keywords: media transparency, media policy, state, reciprocal transparency

The Media and Transparency

Transparency as a general principle is usually associated with dimensions of disclosure and openness. The media, as institutions that produce, create and disseminate the news and other types of content under certain editorial conditions and normative expectations (expressed e.g. in media laws and self-regulatory charters), relate to transparency in two ways. In the first way, media can be seen as *agents*

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of transparency, providing important information and debate that holds to account other societal actors. Secondly, the media are also *subjects to transparency*, making efforts or meeting regulatory conditions to hold themselves accountable to other institutions and the general public.

In terms of the former (*media as agents of*), transparency is *externally-oriented*. In other words, the media are “looking outside” to expose activities and decisions of state, market and civil society institutions through the news production and performance. In this way, transparency is linked with basic pro-democratic media functions. The first can be seen as providing citizens with factual, relevant, accurate and timely information that is a necessary prerequisite for building a well-informed citizenship and any form of civic participation including political (Raeijmaekers, Maesele 2015; Schudson 2017). Secondly, the media are also expected to create “pluralistic fora” for the public debate (Habermas 2006; Curran 2002). Ideally, such fora can enable an exchange of diverse opinions and views, and also experiences of various groups in a society. At the same time, the process of deliberation needs a certain common ground (Habermas 2006), where openness and transparency can manifest and be exposed. Finally, the media fulfill the watchdog function. This refers to monitoring of institutional actors and their practices in societies, but most importantly state and corporate sectors for failures, wrongdoing and abuses of power (Barendt 2007, p. 418). Transparency is thus generated by every-day media performance and in this way, it reduces information asymmetries that may not only lead to failures of the market, but also democratic governance (Stiglitz 2002; Voltmer 2013).

In *internally-oriented* transparency, the media are themselves *subjects of disclosure*. By way of explanation, they are “looking inside”, while responding to the general demand and sharing information in public. Yet the important question is: to whom the media are and *are supposed to be* accountable and transparent? Transparency that takes place in a corporate or a professional media environment can be seen as *horizontal*. It is backed by an assumption that access to information can reduce the risk of erroneous managerial decisions or choices and facilitate engagement with complex media markets. Christopher Hood and David Heald observed that a key driver behind openness and predictable operations in corporate governance is the “attempt to limit information asymmetries” (Hood, Heald 2006, p. 16). From a commercial, market-based perspective, media ownership or financial transparency can help investors and advertisers make better informed decisions, whether in terms of financial expenditure or advertising strategies (Lang, Lins, Maffett 2012, p. 729). Likewise, in a professional environment, exposure of information on revenues, subscription, sales, profits and employment increases trust among stakeholders (e.g. within industry organisations such as media sector chambers, associations, Audit Bureaus of Circulation, etc.) and often helps to build a common front on policies or challenges affecting the sector.

On the other hand, *vertical* transparency is often described through “upward” or “downward” vectors. In the case of the media, “upward” – legal, administrative or regulatory – transparency involves answerability to the public bodies (such

as competition authorities, media authorities, courts) (Kolker, Kulldorff 2013; Fox, Haight 2010; Bernstein 2017). It is largely related with a disclosure of data on ownership and financing enabling relevant regulators to calculate conditions of media markets and evaluate and monitor media performance (Craufurd Smith, Klimkiewicz, Ostling 2021). “Downward” – civic transparency may be generally seen as a bottom-up process that makes the media accountable to civil society and thus, more valuable from the democratic point of view as anyone can access this information without having to rely on the public body-intermediary (Craufurd Smith, Stolte 2014).

The Role of the State

The role of the state in its relation to the media is complex, dynamic and highly ambivalent. On the one hand, a strong state intervention may lead to restriction of freedom of expression and free operations of the media. On the other hand, states are expected to actively guarantee freedom of expression and the media through constitutional, legal arrangements and other complementing policy measures in conditions of functioning democracies. Also, the states or supranational institutions like the EU are expected to meet communication needs of their citizens, correct market failures and ensure functioning of market mechanisms. Thus, both a dominant state as well as a weak state pose threats to the development of a pluralistic media system (Voltmer 2013) that should remain open but at the same time immune to the abuse of state as well as corporate power.

The state as an analytical concept has often been referred as a monolith, yet obviously it interacts with media and communication environment through specific actions, roles and institutions, such as government, public administration, parliament and others. For the purpose of this study, the state will mainly be analysed through the role of a media regulatory authority, state as an advertiser and media owner.

Transparency, when applied to the state, is about enabling citizens to scrutinise information upon which decisions are made and concrete policies implemented (see Kelbel, Marx, Navarro 2021; Iusmen, Boswell 2017; Schmidt 2013). Obviously, transparency is linked to legitimacy: an institutional openness is an important prerequisite for citizens’ acceptance of the state authority. Correspondingly, legitimacy of the state resides with a system of rules and procedures that generate sound policies and correct errors, satisfying people’s needs and which are widely accepted (Johansen 2017; Tannenberg 2023).

Yet in their every-day operations state organisations

- sometimes inadvertently, sometimes willfully; sometimes with good intent, sometimes with unethical or illegal intent create institutional impediments that obstruct external observation. These obstructions must be removed in order for the institutions to be visible and, ultimately, transparent (Fenster 2010, pp. 619–620).

More specifically, the state addressing communication needs and developing media-related policies, may strengthen its legitimacy with *internally-oriented* transparency, through which state institutions and actions are *subjects* of information disclosure to the citizens, but also other actors that are, at the same time, regulated by the state. Simultaneously, legitimacy of the state is grounded in the ability to regulate the media based on common democratic values such as preserving order and promoting general welfare. In this case, the state acts as the agent of *externally oriented* transparency monitoring various media actors, in order to collect evidence for relevant media regulation, including operation of media markets or simply improving contextual knowledge of users on such issues as who is speaking through the media and producing content, what interests these actors represent and how relevant content choices are made (Picard, Pickard 2017, p. 28).

Relational and Reciprocal Transparency

In recent years, calls for expanded media transparency or accountability have increased in various fields, including media policy, new regulatory initiatives at the national and European levels as well as among media providers themselves. This move, as observed by David E. Pozen and Michael Schudson has been part of a larger trend:

Transparency is a value in the ascendance. Across the globe, the past several decades have witnessed a spectacular explosion of legislative reforms and judicial decisions calling for greater disclosure about the workings of public institutions (Pozen, Schudson 2018, p. 1).

An increased interest and calls for transparency of state, market and civil society institutions, including the media, have brought new and more complex contexts to the forefront of public debates. Transparency as a legal concept and practice has evolved towards increased demands and exchange of information, responsiveness, checks and balances all of which distill through a growing set of relations. In this sense, transparency is a relational concept involving collective actors who form particular kind of relationship. Usually one of these actors is subjected to disclosure and opening of relevant information to another actor who may not be (although in some cases the actor is) a final recipient, but intercedes in this process with the ultimate addressee – the citizens or general public.

An important aspect of this relationality is its reciprocal character – the state in order to legitimately request transparency from media or platform actors should expose its own record whether in terms of procedural clarity or relevant policy intentions and justifications or choices. Similarly, the media when scrutinising the state under investigative reporting, they do so often under certain standards of journalistic production and accountability, be that accuracy and respect for privacy or policy on corrections.

Table 1. State, media and reciprocal transparency

	Externally-oriented transparency	Internally-oriented transparency
Media	Media as agents of transparency	Media as subjects to transparency
	<i>Example: media outlet scrutinises MRA on issue of conflict of interests</i>	<i>Example: media outlet discloses information about its ownership on a website</i>
State	State institutions as agents of transparency	State institutions as subjects to transparency
	<i>Example: MRA requires from media outlets relevant information on their location or ownership</i>	<i>Example: a state institution discloses information on advertising expenditures allocated to a particular media outlet</i>

Source: Author’s elaboration.

Limits of Transparency

Yet, obviously media-related transparency as well as reciprocal transparency have their limits. Media transparency, for example, might not always be desirable, particularly in contexts where this would deter public interest reporting and expose journalists to the risk of physical injury or retaliation. Anonymity, and the accompanying lack of accountability, may sometimes be essential (Craufurd Smith, Klimkiewicz, Ostling 2021; CoE 2018, Appendix, Guideline 4(3)). Transparency obligations may also be used as a weapon against media outlets in autocratic regimes or by regulatory bodies lacking legitimacy or independence in order to suppress critical media and eventually create more favourable conditions for friendly media outlets.

Growing focus on media transparency and self-regulation can also lead to replacement of concrete regulations by soft monitoring measures. Shoshana Zuboff referring to the works of a historian Karl Polanyi in her groundbreaking book “The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power”, notes that the operations of a self-regulating market “are profoundly destructive when allowed to run free of countervailing laws and policies” (Zuboff 2019, p. 33). In this sense, voluntary and self-regulatory transparency needs some balance in relevant policy frameworks. Following on this, transparency obligations may also lead to altering regulatory action or policy – as long as media companies disclose relevant data, policy can be avoided because it is seen as unnecessary (Meier, Trappel 2022, p. 255).

In a similar vein when attributing transparency to the state, Pozen and Schudson (2018, p. 5) point out that “an archetype of the Transparency-as-Leverage Paradigm” may empower “opponents of regulation” and contribute to “a culture of contempt surrounding the domestic policy bureaucracy”. Transparency is also in some instances and configurations blamed for slowing the decision-making process and even for hampering its success (Kelbel, Marx, Navarro 2021, p. 222). This proves particularly difficult in policy-development processes involving negotiations. Here,

transparency can eventually lead to inflexibility or unwillingness to coming into line with a “winning” side (Kelbel, Marx, Navarro 2021).

In terms of reciprocal transparency, legacy media have been criticised, particularly by conspiracy podcasters, YouTubers and news sites for masking their real premises with “standards on transparency” in order to collaborate with the state on creating the dominant public discourse. In this way, Russell Brand, defending himself against accusation of sexual abuse revealed by the legacy media, called Trusted News Initiative a coalition collaborating “in constructing narratives whether that’s around the war or the pandemic” and “censoring «misinformation»” (Brand 2023). Indeed, transparency is not and should not be seen as a panacea for maintaining high standards of free speech and the media. Yet reducing it merely to a masking exercise could be particularly harmful in a communication environment where an abundance of false, non-corroborated information and individual judgements highly outnumber a fact-checked content.

Reciprocal Transparency in European Media Policy

Transparency has long been on a media policy agenda of the Council of Europe. Already in 1994, media ownership transparency was recognised in the Recommendation No. R (94) 13 on Measures to Promote Media Transparency, as an important factor enabling “the public to form an opinion on the value which they should give to the information, ideas and opinions disseminated by the media” (CoE 1994). The 2007 recommendation on media pluralism and diversity of media content (CM/Rec(2007)2) called on Member States to adopt the regulatory and financial measures necessary “to guarantee media transparency and structural pluralism as well as diversity of the content distributed” (CoE 2007, preamble, para 14 and Recommended Measures III.1–2). The recommendation CM(2018)1 on media pluralism and transparency of media ownership (CoE 2018) went few steps further not only in recognising transparency in its title, but also explicitly referring to the positive obligation of Member States to ensure the “transparency of media ownership, organization and financing” (Ibid. CoE, 2018, Appendix, para 1.7).

CoE’s recommendations on media transparency have certainly evolved towards greater inclusion of the role of digital platforms, algorithms, content management, but principally they referred to transparency (mainly understood as media ownership transparency) as an obligation of media outlets or platform players. This logic is also visible in the EU’s most prominent media-related regulation – Directive 2018/1808. Recital 15 to the Directive exposes a link between freedom of expression, democracy and media ownership transparency and the importance of users having access to information relating to the “ownership structure” of media service providers, notably those interests that can exert a significant influence or control over the content provided (Craufurd Smith, Klimkiewicz, Ostling 2021).

This shows that in these key European media policy documents transparency has mostly been conceptualised as a quality that can be generated through disclosure

of information on ownership and that is attributed mainly to the media as subjects to transparency. This perspective on transparency is also reflected in the Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector (European Commission 2022b). Internally and externally-oriented transparency – involving both media actors and state institutions are rarely recognised as principles with fundamental importance and linked together. Few exceptions include national media laws in which media regulatory agencies are bound by accountability measures and are also responsible for oversight of media actors.

Another such example is the recent Council of Europe’s Recommendation CM/Rec(2022)11 on principles for media and communication governance adopted by the Committee of Ministers on 6 April 2022 (CoE 2022). The Recommendation in its Appendix lists principles for media and communication governance which refer both to the role of state and media actors. Notably, the first procedural principle states that media and communication governance should be “transparent, and accountable to enable public scrutiny of State and private sector decision making and activity as well as to guarantee that it is accessible and understandable” (CoE 2022, p. 11). At the same time, one of the substantive principles regarding production, proclaims that media and communication governance should ensure transparency of content production, including information on editorial standards and on the ownership and funding “in an easily accessible and regularly updated manner that is made available to the public by independent media regulatory authorities or other designated bodies” (CoE 2022, pp. 12–13).

The explanatory report balances states’ obligations concerning transparency of the governance process with similar obligations of other actors. In addition to basing their decisions on transparent procedures, states for example, have obligations to publicise, and “actively promote public understanding of any legislation, policies, and regulation applicable to the media, platforms, and communication in the public sphere” (CoE 2022, p. 24). Media and platform actors on the other hand, are:

to ensure that codes of conduct, policies, terms of service agreements specifying standards, practices, and rights of users as well as information about algorithmic systems are publicly available and easy to be found in accessible formats and outlined in clear, plain language” (CoE 2022, p. 24).

Reciprocal Transparency in the EMFA Proposal

The European Commission’s proposal of the European Media Freedom Act (EMFA) in 2022 has indicated a new and decisive shift in European media policy from an economically-centred approach to a more complex perspective supporting media freedom and protection against authoritarian influences (Tambini 2022;

Holtz-Bacha 2023). Reciprocal transparency stands for an important theme which is interwoven in different parts of the document.

To start with, transparency and fair allocation of economic resources have been recognized as one of the four specific objectives around which the proposal is articulated (European Commission 2022a, p. 3). Specification of this objective suggests two main pillars of transparency provisions – audience measurement methodologies and allocation of state advertising (European Commission 2022a, p. 3).

Externally-oriented transparency in which states play the role of agents, includes setting obligations for providers of audience measurement systems to disclose detailed information on audience measurement methodologies (Recital 46, Article 23). As regards transparency of state advertising, the states are positioned both in the role of agents and subjects to transparency. In this case, media regulatory agencies (MRA) representing the state will have an obligation to disclose information on state advertising to the general public (Article 24(3)). At the same time, state institutions with advertising expenditures will have to disclose relevant information to MRA (Article 24(2)). Externally-oriented transparency embraces also various monitoring and assessment roles of MRA, such as monitoring resilience of the internal media market and alerting about vulnerabilities around media pluralism and editorial independence (Recital 50, Article 25), assessing media market concentrations in a transparent way (Article 21(1)) and monitoring how very large platforms inform about restrictions of content provided by media service providers (Article 17(5)). Externally-oriented transparency when referred to the media is reflected in the Recital 1, where media are recognised as institutions fulfilling “the general interest function of «public watchdog»” (European Commission 2022a, p. 15).

Internally-oriented transparency where the media are subjects to disclosure, manifests mainly in a “classic” obligation of relevant media providers to make publicly available information on media ownership on their websites or other medium that is easily and directly accessible (Recital 18, Article 6). The Article 6 that targets exclusively media service providers providing news and current affairs content specifies what kind of information is subject to disclosure. This includes, among others, names of beneficial owners (Article 6(1)c) and any actual or potential conflict of interest “by any party having a stake in media service providers that may affect the provision of news and current affairs content” (Article 6(2)).

Internally-oriented transparency where states are subjects to openness, embraces several areas as states are obviously represented by multiple actors. In most cases, these specific actors are not mentioned explicitly in EMFA, but may be inferred from described roles and obligations. Thus, Recital 38 and Article 20(1) call for transparency of different legislative, regulatory or administrative measures affecting the operation of media service providers in the internal market. One of such measures is assessment of media concentrations which is an area where relevant regulators (competition and media regulatory authorities) are asked to exercise both externally and internally-oriented transparency. While externally-oriented transparency refers to monitoring of media concentrations (Article 21(1)), internally-oriented transparency means that in this assessment the relevant regulatory body

is transparent itself (Recital 40, Article 21(1)). Also, requirements on transparency of state advertising refer to the states in two ways: first as subjects allocating advertising expenditures to the media, thus being required to disclose this information (Recital 48, Article 24(2)). Secondly, the states are referred to as regulators, called to establish transparent procedures in the allocation of state advertising and of state resources to media service providers (Recital 49, Article 24(1)). Finally, the states are subjects to transparency in implementing a transparent, open and non-discriminatory procedure and transparent criteria of appointment of the head of management and the members of the governing board of public service media (Article 5(2)).

Table 2. Reciprocal transparency in EMFA

Externally-oriented transparency: agents of transparency		Internally-oriented transparency: subjects to transparency
Media	Recital 1 (media recognised as institutions fulfilling the general interest function of “public watchdog”)	Recital 18 (disclosure of media ownership by the relevant providers on their websites or other directly accessible medium)
		Article 6(1) (disclosure of media owners and beneficial owners by media service providers providing news and current affairs)
		Article 6(2) (disclosure of any actual or potential conflict of interest by media service providers providing news and current affairs content)
State	Recital 46, Article 23 (transparency obligations of providers of audience measurement systems concerning audience measurement and relevant methodologies)	Recital 38, Article 20(1) (transparency of legislative, regulatory or administrative measures affecting the operation of media service providers in the internal market)
	Recital 50, Article 25 (monitoring resilience of the internal media market, including risks and vulnerabilities around media pluralism and editorial independence)	Recital 40, Article 21(1) (transparent rules on assessment of media market concentrations having impact on pluralism and editorial independence)
	Article 21(1) (transparent procedures and rules on assessment of media market concentrations)	Recital 48, Article 24(2) (disclosure of information on state advertising)
	Article 17(5) (disclosure by very large platforms of restrictions imposed on the content provided by media service providers)	Recital 49, Article 24(1) (establishing transparent criteria for allocation of state advertising)
	Article 24(3) (obligation of MRA to disclose information on state advertising)	Article 5(2) (transparent appointment procedures of the head of management and the members of the governing board of public service media)

Source: Author’s elaboration.

Conclusions

To conclude the discussion and analysis presented in this paper one could pose a question at the end: why should anyone at all be preoccupied with reciprocal or relational transparency? Is there any sense in elaborating on transparency in this way? Wouldn't it be enough to accept that transparency in itself contributes to better informed media users and citizens? Meaningful transparency requires both authenticity and a certain kind of balance concerning control. Even though media (as some may do) voluntarily offer disclosure of data on ownership, financing or editorial standards in order to generate increased credibility among their users, the state steps eventually into this process using the shared data for development of relevant policies and regulations, be that on ownership concentrations or vulnerabilities of media markets. In other words, keeping the relationship between the media and states in balance is not only about rendering the media answerable for their services but also making state and public institutions answerable for their policies and decisions affecting the media. The concept of reciprocal transparency offers a possibility to study transparency in relevant policies as a relational concept.

The analysis of selected policy and regulatory instruments at the European level, has shown that media ownership transparency has been most frequently framed as an obligation of media outlets in much of Council of Europe's standard-setting and EU regulatory instruments. These include in particular CoE's Committee of Ministers (CM) Recommendations Rec (2007)2, Rec CM(2018)1, the EC Resolution 2022/1634 and Directive 2018/1808. Yet, very recently there has been a visible shift in CoE's Rec CM (2022)11 and EMFA (2022/0277) towards addressing transparency not only in reference to media ownership, but more broadly as a complex and reciprocal quality involving both state and media actors.

Ultimately, reciprocal media transparency resides with a set of principles and procedures that potentially balance the checking roles of both actors. Without that balancing power, transparency may be reduced to a superficial exercise where unjustified regulatory actions by the state or non-action, may lead to false legitimization of regulatory abuses, such as unfair distribution of resources allocated to the media or prioritising digital platforms.

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STRESZCZENIE

Media, państwo i przejrzystość obustronna: oczekiwania normatywne i możliwości regulacyjne w projekcie Europejskiego Aktu o Wolności Mediów (EMFA)

Przejrzystość mediów jest od wielu lat postrzegana jako ważna zasada w polityce medialnej i regulacji mediów. Niniejsze badania podejmują trzy próby. Po pierwsze, artykuł oferuje teoretyczną konceptualizację przejrzystości jako zagadnienia relacyjnego angażującego trzech aktorów zbiorowych: media, państwo oraz obywateli. Po drugie, artykuł wprowadza koncepcję “przejrzystości obustronnej”. Trzeci aspekt badań dotyczy możliwości regulacji “przejrzystości obustronnej” w proponowanym projekcie Europejskiego Aktu o Wolności Mediów (EMFA).

Słowa kluczowe: przejrzystość mediów, polityka medialna, państwo, przejrzystość obustronna