

PUBLIC CONSULTATION ON THE INDEPENDENCE OF AUDIOVISUAL REGULATORY BODIES

European Commission DG Connect

Response from Discovery Communications Europe

4 June 2013

I. RESPONDENT INFORMATION:

What type of entity do you represent?

Industry

Please indicate the name of the entity you represent:

Discovery Communications Europe Ltd

What do you consider the nationality of the entity you represent? (one selection only)

Other

Within the EU, what is the primary place of establishment of the entity you represent?

UK

Please characterise the involvement of the entity you represent in the media industry:

Exclusively active in the media industry

II. MEDIA FREEDOM, PLURALISM AND THE ROLE OF REGULATORY INDEPENDENCE:

1. In your view, how relevant is the independence of audiovisual regulatory bodies for the preservation of free and pluralistic media when applying the Audiovisual Media Services Directive?

Very relevant

2. How relevant do you consider the independence of audiovisual regulatory bodies for the effective transposition and application of the Audiovisual Media Services Directive?

Very relevant

3. In your view does a lack of independence of audiovisual media regulatory bodies cause problems for the application of the Audiovisual Media Services Directive in any of the following areas:

- *Jurisdiction: Very relevant*
- *Audiovisual commercial communication (including television advertising, teleshopping etc.): Very relevant*
- *Promotion of European works: Not very relevant*

- *Protection of minors: Not very relevant*
- *Right of reply: Not very relevant*

4. In your view, how does convergence of the media affect the necessity of regulatory independence for the application of the AVMSD?

Reinforces the need for independence

5. Overall, what relevance do you attach to the following elements for the independence of regulatory bodies?

- *Status and powers: Very relevant*
- *Financial autonomy: Very relevant*
- *Autonomy of decision makers: Very relevant*
- *Not being subject to instructions: Very relevant*
- *Dismissal conditions: Very relevant*
- *Length of term: Relevant*
- *Knowledge: Not very relevant*
- *Transparency: Very relevant*
- *Accountability mechanisms: Very relevant*

6. Do you think that it is relevant in the convergent environment for audiovisual regulatory bodies to cooperate with their counterparts within the EU when acting within the scope of the AVMSD?

Very relevant – This is especially important in the regulation of non-linear AVMS services. The Country of Origin in principle is well respected, for the most part, for linear broadcasting and yet national regulators (or co-regulators) often assert their jurisdiction over services that are available in their country regardless of whether that service is already regulated by another Member State. For example, in Discovery's experience, although the majority of our VOD channels are regulated from the UK, this has not stopped a number of other regulatory authorities from placing pressure on us to also follow their rules for services that are available in their country. Those VOD services are therefore subject to two regulatory systems and costs. Greater collaboration between all regulators of AVMS services may go some way to resolve this issue.

7. If you considered cooperation between regulatory bodies in question 6 either as 'relevant' or 'very relevant', do you consider cooperation in the following fields:

- *Jurisdiction: Very relevant - see the answer above*
- *Protection of minors: Very relevant*
- *Hate speech: Very relevant*
- *Commercial communications: Very relevant*
- *Media pluralism: Not relevant*
- *Media ownership: Not relevant*

8. If you considered cooperation between regulatory bodies in question 6 either as 'relevant' or 'very relevant', how appropriate would you consider the following arrangements to enable cooperation between regulatory bodies?

- *A voluntary gathering of competent regulatory bodies:*
 - *At EU level: Very appropriate*
 - *At pan-EU level: Appropriate*
 - *At international level: Not very appropriate*
- *A legally mandated gathering of competent regulatory bodies:*
 - *At EU level: Very appropriate*
 - *At pan-EU level: Not very appropriate*
 - *At international level: Not appropriate*
- *An agency*
 - *At EU level: Not appropriate*
 - *At pan-EU level: Not appropriate*
 - *At international level: Not appropriate*

II. IMPACT OF REGULATORY INDEPENDENCE

9. In your view, what is the impact of a lack of independence of regulatory bodies when acting within the scope of the AVMSD on the freedom and pluralism of the media and the markets in which they operate?

- *Media freedom: Significantly worsen*
- *Media pluralism: Significantly worsen*
- *Market conditions: Significantly worsen*

10. In economic terms, the independence of regulatory bodies may produce specific benefits and costs linked to the direct execution of their tasks and to the results that this produces. In your view, what economic implications does the independence of regulatory bodies have on the dimensions listed in the left-hand column when acting within the scope of the AVMSD?

- *Staffing costs: Moderately increase*
- *Administrative costs: Moderately increase*
- *Costs of enforcement activity: No implications*
- *Private litigation costs: No implications*
- *Industrial growth: No implications*
- *Market concentration: No implications*
- *Welfare gains: No implications*

11. In your view, what administrative implications does the independence of regulatory bodies have when acting within the scope of the AVMSD on:

- *Average procedural duration*
- *Effective application of the law*
- *Impartiality*
- *Responsiveness to external pressures*
- *Public-private collaboration (between regulatory bodies, industry and other stakeholders)*

The current phrasing of this question makes it difficult to answer accurately. It is important to remember that independence in and of itself does not guarantee any of the above administrative outcomes. Independence is just one element among other relevant governance and structural

factors. For example, a regulator that is wholly independent of government may nevertheless have other internal biases or incompetences that mean that does not effectively apply the law. A regulator independent of government may nevertheless have an internal board structure that favours one section of the industry, which results in impartial outcomes.

IV. EXERCISE OF REGULATORY TASKS

12. In your view, how relevant is it for audiovisual regulatory bodies to exercise their powers without any political or other external influence when acting within the scope of the AVMSD?

The wording of this question makes it difficult to respond. It would be wrong if a regulator operated without any "influence" – regulators should listen to and take into account the views and opinions of all stakeholders including the government and parliament. A more appropriate question to ask would be how important is it for regulatory bodies to exercise their power without undue "interference". If this were the question, the answer would be "very relevant".

13. Do you consider that reserving the power to overturn the decisions to a court rather than to the government is essential to the independence of an audiovisual regulatory body?

Yes

14. In your view, are sanctioning powers to enforce decisions applying rules addressed to the audiovisual media a defining element of the regulator's independence?

Yes

15. In your view, how relevant are adequate financial resources for a regulator's independence?

Very relevant

16. How relevant are adequate human resources for a regulator's independence?

Very relevant

17. In your view, what is the relevance of the sources of revenue for the regulator's independence?

- *State funding*
- *Operator licence fees*
- *Operator turnover levy*
- *Other commercial revenue sources (such as an advertising tax)*

This question is difficult to address in the way that is framed. What is relevant here is how the funding is set-up and over-seen. For example, state funding could be as appropriate for an independent regulator as operator turnover levy, if that state funding is provided in an open and transparent way that does not attract any undue influence.

NOMINATION, APPOINTMENT & DISMISSAL OF KEY STAFF

18. In your view, how relevant is the nomination process of the head of a regulatory body for its independence?

Relevant

19. In your view, how relevant is the nomination procedure of the members of the decision making body of a regulatory body for its independence?

Relevant

20. In your view, how relevant is the appointment procedure of the head of a regulatory body for its independence?

Relevant

21. In your view, how relevant is the appointment procedure of the decision-making body of a regulatory body for its independence?

Relevant

22. In your view, how relevant for the independence of a regulatory body is the expertise of its head and decision-making bodies?

None of the answers offered are appropriate here: expertise across the decision-making body is relevant, but a mixture of experience and expertise in the body's members is often beneficial as well.

23. Where nominations and/or appointments of members of regulatory bodies are made by Parliament, do you consider that all political groups should participate in those processes?

Yes

24. In your view, how relevant for a regulator's independence is following applicable rules on conflicts of interest in the appointment and nomination procedures?

Relevant

25. How relevant do you consider non-renewability of the term of office of the head and members of the decision-making body to the independence of a regulatory body?

Not relevant

26. How relevant do you consider spreading the appointment of the members of the regulatory body over several time periods (rather than exchanging all of them at once) for the independence of a regulatory body?

Relevant

27. In your opinion, who should have the right to dismiss the head of a regulatory body?

Court

28. In your opinion, who should have the right to dismiss the (members of the) decision making body of a regulatory body?

Court

29. In your opinion, should the grounds of dismissal applicable to the head of a regulatory body and the members of its decision-making body be limited to non-fulfilment of the conditions defined in advance by law for the performance of professional duties?

Yes

RESPONSIBILITY

30. In your view is transparency of the exercise of its tasks an essential condition for a regulator's independence?

Yes

31. In your view is accountability for the exercise of its tasks, for example through a recurrent reporting obligation, an essential condition for a regulator's independence?

Yes

CLOSING OBSERVATIONS

Independence from government, Parliament and other state bodies is a vital part of a properly functioning audiovisual regulator, but it cannot alone guarantee the appropriate application of the AVMS Directive. It is important that the independence of a regulator is looked at alongside other governance, structural and accountability factors, which together with the relationship that a regulator has with the State are the key elements to ensuring a fair and above board application of the AVMS Directive.

In terms of the options to strengthen independence under AVMS outlined in the preamble to the consultation, we would support a non-legislative option. If a legislative option were to be pursued, and the AVMS Directive were amended to explicitly require the independence of national regulatory bodies, we believe that how independence is guaranteed should be left to Member States who would be encouraged to draw upon best practice gleaned from consultations and studies such as this, and through collaboration with regulators in other Member States.

SUBMISSION OF YOUR CONTRIBUTION

Do you consent to the publication of your submission?

Yes

Participation in follow-up: if you would like to indicate your availability towards these ends, please state your coordinates here:

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