

**EU public consultation
on the independence of audiovisual regulatory bodies**

ENPA-EMMA response

ENPA, the European Newspaper Publishers' Association, and EMMA, the European Magazine Media Association, acknowledge the public consultation on the independence of audiovisual regulatory bodies.

The European Union has no competence to regulate the press, including as regards media pluralism, which is an exclusive competence of the Member States with no legal basis for European legislation in the EU Treaty.

Any attempts to regulate in this direction could have unforeseen disastrous impacts on media diversity and media freedom. The press sector in Europe has to be free from any state interference, regulation or censorship which can affect press freedom and editorial independence.

In the on-going debate on the AVMS Directive and on the independence of audiovisual regulatory bodies, ENPA and EMMA would like to highlight the following principles:

- **Decisions regarding the independence of regulatory authorities must remain within the competence of the Member States.** The AVMS Directive should not be reopened for the revision of Article 30. The AVMS Directive is an essential tool regulating the audiovisual sector in Europe and has been an important legal basis used by Member States at national level. Reopening the Directive would challenge its current application and the existing legal certainty that has been put in place in the different national legislation.
- **The press sector is explicitly excluded from the scope of the AVMS Directive and should remain so.** For good reason, the AVMS Directive only applies to offerings whose principal purpose is the provision of programmes. Furthermore, recital 28 ensures that electronic versions of newspapers and magazines, which cannot be assimilated to any other type of media or audiovisual content or services, linear or non-linear, are not covered by the Directive. This exclusion should be maintained as part of any revision process of the AVMS Directive in order to prevent any prior control and licensing requirement of government and public authority on press content. This exclusion is therefore indispensable for ensuring a free and independent press, and preserving press freedom, cultural diversity and pluralism in Europe.
- **Media pluralism must not be included in Article 30** as an additional competence of audiovisual regulatory bodies as suggested in the consultation paper, because it belongs exclusively to Member States' competence. Including this matter in Article 30 would empower audiovisual regulatory authorities to touch upon issues connected directly or indirectly to the press. This would not respect the EU Treaty since there is no legal basis for

the EU to regulate media pluralism and threaten press freedom and editorial independence as established in the different Member States.

These three points are explained below in more details:

1. Decisions regarding the independence of regulatory authorities must remain within the competence of the Member States.:

Whether and to what extent the independence of regulatory bodies with powers of control over editorial content of media promotes or risks the legal and actual freedom of the respective media cannot be assessed generally, but depends on many circumstances. It therefore remains appropriate, as regards this long-discussed question, that the legislator continues to refrain from forcing Member States - without regard to their respective constitutional and media systems - to establish “independent” regulatory bodies. The AVMS Directive must therefore also remain unchanged on this point.

According to the INDIREG study of Hans Bredow, although Article 30 does not maintain a strict formal obligation for the Member States to create an independent regulatory body if one does not already exist, this article is not deprived of any legal effect when it is read in connection with Recital 94 of AVMS, article 10 ECHR and Article 288§3 TFEU.

On these bases, Member States are obliged to put in place a regulatory framework that is structurally capable of implementing the aims of the Directive in an impartial manner. Furthermore, the survey organised with stakeholders for the study indicates a high level of de facto independence among regulators.

We understand that a main reason for opening the debate on this provision is the difficult political situation in certain countries (e.g. Hungary). Various reports have revealed the pressure that currently exists on press freedom, media pluralism and on the independence of the audiovisual regulatory authority in this country.

However, such a situation cannot be generalised to other EU Member States and has to be taken into account according to each specific national system in place. In our views, the issue is not on whether and how Article 30 should be amended but about the practical implementation of this provision at the light of the national context in each Member States.

A possible European legal obligation for editorial control of media content by authorities or regulatory bodies would be very problematic. In any case, apart from broadcasting a compulsory control of editorial content could be nothing more than the subsequent responsibility under general laws before independent judges.

The elimination of media content control by government executives is an essential part of effective freedom of the printed and digital press, including supplementary videos but also additional on-demand media. It has to be underlined that structurally, any authority responsible for the control of editorial content of independent media – regardless of its configuration, and (in)dependence from

democratically elected governments – is more problematic for robust editorial freedom than any judge that is responsible in a specific case to rule on controversies regarding the lawfulness of publications.

Furthermore, in European democracies, it is only in exceptional cases and only in respect of the respective constitutions that authorities or regulatory bodies, which are independent from the democratically elected government, are mandated with state powers. Only the courts that decide in individual cases on disputes over the proper interpretation of the laws adopted by the majority can truly be considered impartial and therefore independent.

In any case, European law cannot require such interference in the media freedoms of the Member States that would, as a European requirement, ignore and eliminate Member States' constitutional requirements of media regulation and the competence of Member States to organise their media system. This question should be left to the national media regimes.

Indeed, an appropriate implementation of Article 30 strongly depends on various factors which are independent from the AVMS Directive itself but are essential for the proper institutional and political functioning of a country: the Constitution, the independence of the judicial system, the respect of fundamental rights, etc.

If a regular EU wide assessment of the independence of Audiovisual Regulatory Authorities in the different Member States is necessary, this assessment therefore has to consider the actual context in which this authority exercises its competences. In this perspective, identifying the obstacles at national level which prevent the proper implementation of Article 30 would be more relevant than calling for its revision.

2. The press sector does not fall under the AVMS Directive and this should remain the case.

For good reason, the AVMS Directive only applies to offerings whose principal purpose is the provision of programmes. This does not cover for example videos that are part of offers which contain mainly text and pictures. This is still an important and correct decision. Furthermore, recital 28 of the AVMS Directive explicitly states that the scope of this Directive should not cover electronic versions of newspapers and magazines.

This explicit exclusion of the press from the scope of the Directive is indispensable to guarantee a free and independent press and the respect of press freedom in Europe. This exclusion is also reinforced by the definition given in Article 1ai) of an audiovisual media service which include linear and non-linear audiovisual services but does not cover the press.

The press sector cannot be regulated as the audiovisual sector (whether linear or non-linear) because the latter involves more prior control of content by regulatory authority¹, the establishment of

¹ Historically, the need for regulation of the audiovisual sector was also based on the limited availability of radio frequencies which has notably led to the establishment of audiovisual regulator.

licensing authorisation and the use of coregulation. These principles are incompatible with the existence of a free press which strongly relies on the use of self-regulation and editorial independence.

The need to maintain this distinction between audiovisual media services which fall under the Directive and the press is indispensable also as regards the audiovisual regulatory authority. The role and the competence of this authority is therefore by law and in practice very limited or totally non-existent when it comes to press related issues.

In any event, any assessment of the functioning of this authority and of its competences has to respect and take into account the exclusion of the press from the scope of the Directive. The legislative options as suggested in the Commission's consultation paper open the risks for widening the scope of the competences of the audiovisual authorities to press related issues. We note that the Commission in its consultation paper mentions matters related to media pluralism as one of them.

The extension of powers in these areas, enshrined in a revised version of Article 30, would be unacceptable since it would directly affect press freedom and editorial independence.

3. Media pluralism must not be included in Article 30

Media pluralism is an exclusive competence of the Member States. The EU Treaty therefore does not provide a legal basis for any European legislation in this area. The media sector in Europe has to comply with general EU Competition policy which also clearly indicates that it is up to the Member States to take appropriate measures to protect legitimate interests including plurality of the media.

This has also been confirmed by the Commission in its Staff Working Document from 2007² which states: "European competition law cannot replace - nor does it intend to do so – national media concentration controls and measures to ensure media pluralism".

The Charter of Fundamental Rights of the European Union states that the pluralism of the media shall be respected, according to Article 11. However, despite the fact that the Charter is binding through its inclusion in the Treaty, Article 51(2) of the Charter clearly indicates that the EU competencies cannot be extended in order to protect the rights included in the Charter.

The AVMS Directive refers to media pluralism as an objective of public interest in various recitals. However, introducing such a matter in Article 30 as an additional competence of the audiovisual regulatory authority is not acceptable since it would prejudice the exclusive competence of Member States in this field and would not find its legal basis in the EU Treaty.

The distinction between EU and national competence in the field of media pluralism is essential because it is at the heart of pluralism and cultural diversity in Europe. The respect of these two principles strongly depends on the possibility for Member States to adapt their media and cultural policy according to their national history, traditions and specificities.

² "Media pluralism in the Member States of the European Union (SEC (2007)32" (see: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/media_pluralism_swp_en.pdf)

Furthermore, empowering audiovisual regulatory authority with matters related to media pluralism would not solve the issue of independence of this authority. On the contrary, it could increase its control of the media, including the press, and prejudice press freedom and editorial independence.

Conclusion:

ENPA and EMMA are not in favour of reopening Article 30 of the AVMS Directive because it provides an important legal certainty for the media sector in the different Member States.

Revising Article 30 would not solve the issue of independence of audiovisual regulatory authority but would rather increase the risk of further government control of the media, including the press although it is explicitly excluded from the scope of the AVMS Directive.

Including media pluralism as part of the competence of the audiovisual regulatory authority in Article 30 is not compatible with Member States' exclusive competence in this area and would directly threaten press freedom and editorial independence, as well as self-regulation.

ENPA and EMMA would therefore accept that a non-legislative option as suggested in the consultation document could be a constructive way forward, which "would imply the reinforcement of the Commission existing instruments by strengthening the monitoring activities to verify on the ground in each Member State the quality of regulatory independence or through formalisation of the cooperation between audiovisual regulatory bodies."

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