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**COMMISSION DECISION**

**of 31.1.2018**

**on the incompatibility of the measures notified by the Kingdom of Sweden pursuant to Article 4(5) of Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services**

Only the Swedish text is authentic

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services,<sup>1</sup> and in particular Article 4(5) thereof,

Whereas:

- (1) On 30 October 2017, the Swedish Press and Broadcasting Authority ("SPBA") and the Swedish Consumer Agency ("SCA") notified to the Commission certain measures that the Kingdom of Sweden (hereinafter 'Sweden') intends to take, pursuant to Article 4(4) of Directive 2010/13/EU against two broadcasters established in the United Kingdom of Great Britain and Northern Ireland (hereinafter 'the United Kingdom').
- (2) According to the notification, Sweden intends to impose measures under Article 4(4) of Directive 2010/13/EU against the broadcasters Modern Times Group MTG Limited ('**MTG**') and Discovery Corporate Services Limited ('**Discovery**'). The notifying authorities assessed that the broadcasters in question have established themselves in the United Kingdom in order to circumvent the stricter Swedish rules concerning the prohibition of all forms of TV sponsorship by parties whose principal activity is to manufacture alcoholic beverages and all forms of marketing of alcoholic beverages through commercial advertising in TV programmes.
- (3) In view of the above, the notifying authorities intend, firstly, to request Swedish Courts to impose a special fee on the broadcasters for infringing the provision that programmes may not be sponsored by a party whose principal activity is to manufacture alcoholic beverages and, secondly, institute proceedings concerning a ban on marketing alcoholic beverages to consumers in commercial advertisements in television programmes. According to the notification, these measures are objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.
- (4) On 14 November 2017, the Commission requested the broadcasters to provide their observations on the notification, which were received on 27 November 2017. The observations of the broadcasters were transmitted to the Swedish authorities for comments, which were received on 4 December 2017.

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<sup>1</sup> OJ L 95, 15.4.2010, p. 1.

- (5) MTG and Discovery consider that the arguments put forward by the Swedish authorities are based on an incorrect understanding of Article 4 of Directive 2010/13/EU. In their view, the authorities failed to provide evidence of the grounds on which they base their assessment of the circumvention and have thus failed to discharge the burden of proof relating to the application of Article 4(3) of Directive 2010/13/EU. Both broadcasters claim that there is no basis for the authorities to conclude that it would be "easier" for them to produce Swedish/Scandinavian programs from Sweden or Scandinavia and that many editorial decisions are/have been made in Sweden. Both MTG and Discovery stress that they established themselves in the United Kingdom and that they continue to be established in the United Kingdom for entirely legitimate reasons and not in order to circumvent stricter Swedish rules. MTG also contends that no alcohol advertising (of the type prohibited under the Swedish stricter rules) took place on its Swedish channels until 2002, that is to say, 15 years after the launch of TV3 on 31 December 1987.
- (6) Directive 2010/13/EU is based on the principle of the country of origin, according to which media service providers shall be subject exclusively to the law and jurisdiction of the Member State of establishment, irrespective of the fact that their programmes are transmitted and viewed in other Member States.
- (7) The country of origin is, however, not an absolute principle<sup>2</sup>. In particular, Article 4 of Directive 2010/13/EU allows Member States having adopted more detailed or stricter rules in the public interest to adopt appropriate measures against broadcasters under the jurisdiction of another Member State where certain conditions are fulfilled. The existence of the conditions laid down in Article 4 is examined below, on the basis of the information provided by Sweden in the notification or otherwise available to the Commission.
- (a) Adoption of stricter rules of general public interest**
- (8) In their joint notification, the SPBA and the SCA explained that since 1979 Sweden has established a prohibition of marketing of alcoholic beverages in commercial advertising in radio and television, that the advertising ban was established in order to protect public health against the harmful effects of alcohol and that this constitutes a cornerstone of Swedish alcohol policy. The ban is currently contained in the new Swedish Alcohol Act (2010:1622).
- (9) In addition to the ban on advertising, Swedish law includes a ban on TV programmes sponsorship by a party that is primarily engaged in the manufacture of alcoholic beverages. The sponsorship ban, initially laid down in a former version of the Swedish Radio and Television Act (1996:844) has been transferred in the new version of the Radio and Television Act entered into force in August 2010.
- (10) While the Directive contains specific rules on advertising of alcoholic beverages (see Article 22 thereof), setting out some criteria and limitations for the TV advertising of such products, it does not establish an outright prohibition of TV alcohol advertising or sponsorship. As a consequence, Swedish rules on alcohol advertising have to be

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<sup>2</sup> See, in particular, Article 3 of Directive 2010/13 (concerning derogations to the country of origin principle where a broadcast seriously infringes Article 27(1) or (2) relating to the protection of minors and/or Article 6 on incitement to hatred) and Article 4 concerning the so-called "circumvention procedure", which is the subject-matter of this decision. See also, e.g., Case C-11/95, *Commission v. Belgium* [1996] ECR I-04115, paragraphs, 33-36. See, also, Joined Cases C-34/95, C-35/96 and C-36/95, *Konsumentombudsmannen v. De Agostini, and TV-Shop* [1997] ECR I-03843.

considered as stricter than those laid down as a minimum harmonisation measure in the Directive in accordance with Article 4(1) of the Directive.

- (11) Moreover, from the information provided in the notification, it appears that both broadcasters have engaged for several years on their Swedish channel in television advertising and sponsorship of alcoholic beverages in breach of the above prohibitions laid down in Swedish law. It also emerges from their submissions to the SPBA and SCA that neither broadcaster contests the above circumstances.
- (12) In light of the above, this condition can therefore be considered fulfilled in line with Article 4(2) (a).
- (b) Direction of a broadcast, wholly or mostly, towards the territory of the notifying Member State**
- (13) According to the notification, both MTG and Discovery are broadcasters established in the United Kingdom and therefore falling under British jurisdiction. However, the notification asserts that both broadcasters target with their television programmes, wholly or mostly, the territory of Sweden. The notifying authorities consider that this is supported by the fact that the programmes in question (TV3, TV6 and TV8 for MTG and Kanal 5 and Kanal 9 for Discovery) are broadcast in Swedish or have Swedish subtitles and contain advertising directed towards Swedish markets. Moreover, both broadcasters have a licence to broadcast in the Swedish terrestrial network, whereas it is not possible to view the broadcast in the United Kingdom via cable or satellite.
- (14) From their submissions to the SPBA and SCA, it emerges that neither broadcaster contests that the present condition is met, as they acknowledge that they target wholly or mostly with their programmes Swedish territories.
- (15) In light of the above, this condition can be considered fulfilled in line with Article 4(2) (b) of Directive 2010/13/EU.
- (c) Absence of mutually satisfactory solution following contact made by the notifying Member State**
- (16) On 26 November 2012, the SPBA addressed a formal request to Ofcom to request MTG and Discovery to comply with the Swedish rules banning television sponsorship by parties primarily manufacturing alcoholic beverages and commercial advertisements of alcoholic beverages. On 18 February 2013, Ofcom communicated to the SPBA that the broadcasters chose not to comply with the request. In this respect, broadcasters argued that they are in full compliance with UK laws which are the only applicable to them and that these laws do not ban alcohol advertising and sponsoring. As a consequence, SPBA considers that the cooperation with the authority of the Member State having jurisdiction has not led to satisfactory results in this case fulfilled in line with Article 4(3) (a) of Directive 2010/13/EU.
- (17) The broadcasters do not contest this conclusion in their submissions. As a consequence, on the basis of the information available, this condition can be considered fulfilled.
- (d) Establishment in order to circumvent stricter rules in the notifying Member State**
- (18) Regarding the broadcaster **MTG**, the SPBA and the SCA point out essentially in support of their circumvention claim, the following circumstances: (1) a temporal relationship between MTG's decision to establish itself in the United Kingdom on 31 December 1986 and the adoption, earlier that year, of the Commission's proposal for

the harmonisation of national legislative provisions concerning audiovisual media services; (2) the elements adduced by the broadcaster as a reason for establishing itself in the United Kingdom are not so important and unique to the United Kingdom and the same conditions were likely to be found in Sweden; (3) the extensive investments and revenues made by the broadcaster with respect to alcohol advertising; (4) in a documentary broadcast, a former manager of Kinnevik (the company that founded MTG) stated as follows: "... *Under Swedish law, it was forbidden to broadcast advertising on cable TV that was directly aimed at Swedish households. To circumvent the rule, it was decided to broadcast from London and then to the whole of Scandinavia*".

- (19) Having regard to the first argument, the authorities claim in essence that since on 31 December 1986 (the date when MTG established itself in United Kingdom) the Commission proposal for the harmonisation of the Member States' national legislation concerning audiovisual services had recently been adopted, MTG decided to establish itself in the United Kingdom because it was aware that the principle of the country of origin established in this Directive would have allowed it to circumvent the application of Swedish stricter rules on alcohol advertising and sponsorship. However, the Commission considers that the mere existence of a Commission's legislative proposal cannot in itself be regarded as a sufficient element to establish the circumvention for the following reasons.
- (20) First of all, it is a fact that at the time when MTG established itself in the UK, the Directive had not yet been adopted. The mere adoption of a Commission's proposal does not amount to existing legislation, as it remains uncertain whether and when such proposal would be endorsed by the European Parliament and the Council in the legislative process and, if so, in which form and content. As a matter of fact, when MTG established itself in the United Kingdom, the examination of the legislative proposal by the European Parliament and the Council could only have just started and negotiations would last until the Directive adoption more than three years later on 3 October 1989. Therefore, MTG could not have drawn from the mere existence of a Commission's proposal any guarantee of the fact that such proposal would be adopted or that it would not be adopted in a substantially modified form.
- (21) Furthermore, since when MTG decided to establish itself in the United Kingdom the Directive and the country of origin principle did not exist, the fact that MTG established itself in a country other than Sweden would not have in principle allowed the broadcaster to escape the application for its Swedish channels of Swedish rules on alcohol advertising. In other words, no circumvention would have been technically possible, which is also the reason why no circumvention can be established in this respect in this case. Any alleged link between the existence of a Commission's proposal and MTG's decision to establish itself in the United Kingdom can therefore only be considered as weak and merely hypothetical.
- (22) Even accepting the view that in 1986 MTG decided to establish itself in the United Kingdom to evade Swedish stricter rules on alcohol advertising and sponsoring relying exclusively on the hope that the Commission's proposal would soon be adopted, it should still be considered that Sweden at that time was not yet a Member of the then European Economic Community (EEC) and that it would not become a member until 1995, i.e. approximately 8 years later. In addition, Sweden only became a member of the European Economic Area and was therefore bound by the Directive in 1994, i.e. 7 years after MTG's decision to establish itself in the United Kingdom. Moreover, the European Convention on Transfrontier Television, containing similar rules, was only

signed in 1989, only entered into force for other Contracting Parties in 1993 and was never ratified by Sweden. MTG's establishment in the United Kingdom would not have enabled this broadcaster to circumvent Swedish rules on alcohol advertising and sponsorship for several years. As a consequence, circumvention was not legally and technically an option when MTG established itself in the United Kingdom. For this reason, no causal link between the stricter Swedish rules and MTG's decision to establish itself in the United Kingdom can convincingly be made on the basis of this argument.

- (23) It should also be noted in further support of the absence of a causal link that MTG contends that, while it started broadcasting in Sweden from the United Kingdom in 1987 with its channel TV3, it is only many years after that it started alcohol advertising or alcohol sponsorship on its Swedish channels. In particular, MTG states that alcoholic beverages would only be advertised on MTG's channel TV3 for the first time in 2002, i.e. 15 years after MTG established itself in the United Kingdom. The SPBA and the SCA object that they found evidence in a database ("MMS") that there have been advertisements on MTG's channels prior to 2002 for companies which, among others, produced beer. However, as the notification itself recognises, the database in question does not specify whether the advertisements in question concerned beer or rather other non-alcoholic products. Since the advertisers concerned also manufactured and sold other products, no clear evidence can be drawn from the MMS database alone that MTG advertised alcoholic beverages in its Swedish channels before 2002. The mere fact that it had advertised products of companies manufacturing, among other things, beer does not demonstrate that these advertisements actually concerned beer.
- (24) With regard to the second argument – i.e. that the elements put forward by the broadcaster to demonstrate that they did not establish themselves in the United Kingdom in order to circumvent Swedish alcohol advertising rules are not convincing – it should be considered as a general principle that it is for the Member State invoking the application of Article 4(4) of Directive 2010/13/EU to prove that the broadcasters at stake have established themselves in the United Kingdom in order to circumvent Swedish stricter rules. Conversely, broadcasters should not be obliged to justify their choice of another Member State as their country of establishment for the purpose of the Directive, at least in the absence of other compelling indications pointing to such circumvention from their part.
- (25) The notification refers in this respect to the following elements pointing, in the authorities' view, to circumvention on the part of MTG: (i) several countries in Europe, including Sweden, "*probably have offered and still offer corresponding conditions*" to the United Kingdom, (ii) a large proportion of the programmes are recorded by Swedish production companies in Sweden with Swedish personnel and participants; therefore what is needed to create programmes "*appears to be found in Sweden and not in the United Kingdom*"; (iii) "*it is reasonable to suppose*" that the central operational base for pan-Scandinavian programmes should be within and not outside Scandinavia; (iv) the extensive activities that the broadcasters have in Sweden "*make it likely*" that a large part, if not all, editorial decisions are made in Sweden.
- (26) In the Commission's view, the above arguments are too general and vague and can therefore not be taken into account as elements proving that MTG established in itself in the United Kingdom to circumvent Swedish alcohol advertising rules. Not only are these statements not substantiated by the notifying authorities, but they are also formulated as a mere possibility or a suggestion ("*probably have offered*"; "*appears to*

*be found in Sweden*"; *"it is reasonable to suppose"*; *"make it likely"*) rather than as affirmative facts.

- (27) In its written submissions to the Swedish authorities and to the Commission, MTG indicated a number of reasons why it has decided to establish itself in the United Kingdom in 1986. Among others, it referred to the availability of satellite technology and know-how, professional and technical expertise, the presence of other international broadcasters, logistical advantages, ready and plentiful access to content owners, technical skills, investments, broadcasting and transport infrastructure, stable and high quality business environment and the intention to establish in the United Kingdom a central operating database for its pan-European television business. In this connection, it should be considered that the United Kingdom is a well-known hub for broadcasting companies in Europe and worldwide. Many companies have chosen London as their main establishment from which they broadcast their channels in the whole world. According to a recent MAVISE study, the United Kingdom is the most significant hub for linear and on-demand services targeting other countries<sup>3</sup>. The reasons provided by MTG to establish itself in the United Kingdom and to broadcast from there its many channels in several Member States appears thus to be consistent with this market reality and have not been convincingly rebutted in the notification.
- (28) With regard to the third argument, i.e. that MTG realises significant revenues from alcohol advertising in Sweden, it is important to note that it is compatible with the country of origin principle and the freedom of establishment that a company chooses its place of establishment in a Member State other than that in which revenues are made. The Court of Justice has also emphasised that *"the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established"*<sup>4</sup>. It follows that the argument brought by the SPBA and the SCA cannot in itself prosper as it is absolutely compatible with the spirit and the letter of the Treaty and the Directive that revenues are made in the country where the services are provided (i.e. country of destination) and not necessarily in the country provider is establisher (i.e. country of origin). The fact that part of the broadcasters' revenues stem from alcohol advertising does not change this assessment. The argument brought by the notifying authorities is therefore not convincing.
- (29) Having regard to the fourth and last argument brought forward by the notifying authorities concerning the statement from a former manager of Kinnevik (the company that founded MTG), the Commission notes that MTG counter-argued in its reply that these are informal comments by an individual with no power of authority to speak on behalf of MTG and that therefore such statement can have no bearing on a legal analysis. The Swedish authorities have not addressed in their response the objections raised by MTG in this regard. Even accepting that the statement could be taken into account, the Commission observes that the former manager of Kinnevik refers to MTG's intention to circumvent the prohibition to broadcast advertisements on cable TV and not to the prohibitions to advertise or sponsor alcoholic beverages on Swedish television, which are the subject-matter of the present notification. Seen in this perspective, the statements in question do not appear as pertinent to demonstrate circumvention of Swedish stricter rules on alcohol advertising.

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<sup>3</sup> See MAVISE, Audiovisual service in Europe – Focus on services targeting other countries, June 2017.

<sup>4</sup> Case C-212/97 *Centros* [1999] ECR I-01459.

- (30) Furthermore, the Commission considers that the statement of the former manager of Kinnevik does not find any support in the facts of the case. Since MTG established itself in the United Kingdom before Directive 2010/13/EU was adopted and before Sweden became a member of the EEC, circumvention of the Swedish rules was not legally possible as explained in paragraphs 20-22. Therefore, such statement cannot be considered in itself sufficient to demonstrate "circumvention" within the meaning of Article 4 of Directive 2010/13/EU.
- (31) Having regard to the above considerations, the Commission considers that the requirement of circumvention cannot be considered to be fulfilled in the present case with regard to the broadcaster MTG.
- (32) As regards **Discovery**, the notification essentially relies on two arguments in order to demonstrate that this broadcaster established itself in the United Kingdom to circumvent Swedish rules on alcohol advertising. *First*, Sweden argues that the elements adduced by the broadcaster as a reason for establishing itself in the United Kingdom are not so important and unique to the United Kingdom to justify its decision to establish itself in this member State and that the same conditions were likely to be found in Sweden as well. *Second*, Sweden points to the extensive investments and revenues made by the broadcaster with respect to alcohol advertising.
- (33) Having regard to the first argument, the Commission reiterates that the onus to prove circumvention within the meaning of Article 4 of Directive 2010/13/EU lies with the notifying Member State. As already explained in paragraph 24, broadcasters should not be obliged to justify themselves for their decision to establish themselves in a particular Member State or to prove the absence of circumvention. In this respect, the arguments put forward by the notifying authorities cannot prosper, at least in the absence of other compelling indications pointing to such circumvention from their part. The reasons stated by the Commission in paragraphs 24-26 apply, *mutatis mutandis*, also with regard to Discovery.
- (34) Moreover, in its observations submitted to the Swedish authorities and to the Commission, Discovery put forward a number of arguments why it decided to establish itself and to continue to be established in the United Kingdom. In particular, the broadcaster mentions the following elements as determining factors for his choice of United Kingdom as a place of establishment: (1) the then Chief executive was resident in London; (2) perceived cost advantages in launching the channels in the United Kingdom as opposed to Sweden in clearing music performing rights from the UK collecting society rather than the Swedish one; (3) tax advantages relating in particular to the more competitive corporation tax; (4) perceived regulatory efficiencies in operating under a single regulatory regime in terms of advertising and programme content rules; (5) operating efficiencies in having a single technical playout for all existing channels; (6) the broadcaster operated already channels under Ofcom licenses that were received in other territories including Denmark and Sweden. As already observed above, United Kingdom is a well-known hub for broadcasting companies in Europe and worldwide (see above paragraph 27). The reasons provided by Discovery to establish itself in the United Kingdom and to broadcast from there its many channels around the world appear consistent with this market reality and this has not effectively been rebutted by the authorities in their notification.
- (35) Having regard to the second argument, the Commission reiterates that it is inherent to the country of origin principle and to the freedom of establishment that a company chooses its place of establishment in a Member State other than that in which revenues

are made. As recalled in paragraph 28, the Court of Justice emphasised that "*the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established*". It follows that the argument brought by the SPBA and the SCA cannot in itself prosper as it is absolutely compatible with the spirit and the letter of the Treaty and Directive 2010/13/EU that revenues are made in the country where the services are provided (i.e. country of destination) and not necessarily in the country of origin. The fact that part of the broadcasters' revenues stem from alcohol advertising does not change this assessment. The argument brought by the notifying authorities can therefore not be accepted.

- (36) Having regard to the above considerations, the Commission considers that the requirement of circumvention cannot be considered to be fulfilled in the present case with regard to the broadcaster Discovery,

HAS ADOPTED THIS DECISION:

*Article 1*

The measures notified to the Commission by Sweden pursuant to Article 4(4)(a) of Directive 2010/13/EU are incompatible with Union law.

*Article 2*

This Decision is addressed to the Kingdom of Sweden.

Done at Brussels, 31.1.2018

*For the Commission*  
*Mariya GABRIEL*  
*Member of the Commission*