

PUBLIC CONSULTATION ON THE INDEPENDENCE OF AUDIOVISUAL REGULATORY BODIES

PURPOSE: The purpose of this consultation is to collect views on the issue of independence of regulatory bodies competent for audiovisual media services when acting within the scope of the 2010/13/EU Directive on Audiovisual Media Services (AVMSD) and on possible options for strengthening their independence, including a possible revision of Article 30 of the AVMSD.

Duration: 22.03.2013 – 14.06.2013 (12 weeks)

Targeted respondents: Citizens, organisations, public authorities

Responding to the consultation

You can either fill out the online questionnaire or send it by post to:

Public consultation on audiovisual regulatory authorities/HLG
European Commission
Directorate General for Communications Networks, Content and Technology
Unit G1
Office BU25 05/181
B- 1049 -Brussels

Personal data

Contributions will be published on the website of Directorate General for Communications Networks, Content and Technology. The responses received will be available in the Commission website unless confidentiality is specifically requested.

To this end we would kindly ask you to clearly indicate in the box below whether you would not like your response to be publicly available.

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Contact

CNECT-G1-REGULATOR@ec.europa.eu

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1. INTRODUCTION

DG CONNECT is consulting the public on the issue of independence of regulatory bodies when acting within the scope of the AVMSD and on possible options for strengthening their independence, including a possible revision of Article 30 of the AVMSD [<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010L0013:EN:NOT>]

Article 30 AVMSD reads as follows:

"Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies."

Additionally, recital 94 AVMSD refers to the fact that the Member States "are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently".

This consultation relates to the conditions of application by national authorities of existing EU internal market rules regarding the audiovisual sector, laid down in the AVMSD, as lastly modified by Directive 2007/65, which Member States were required to transpose into national law by 19 December 2009. It does not relate to, or imply, any possible amendment or extension of scope of those substantive rules but solely focuses on the functioning of independent regulatory bodies when acting within the scope of the AVMSD and addresses issues such as their organization, status, competences and resources. It should be seen, albeit distinct, in the context of the forthcoming plenary vote in the European Parliament on the AVMSD 1st Application Report,¹ on the "EU Charter: standard settings for media freedom across the EU" report² and the following studies and reports:

- Recommendation 6 of the Report of the High Level Group on Media Freedom and Pluralism³, subject to a specific public consultation (High Level Group Report);
- the results of the Study on independence of audiovisual regulatory authorities (INDIREG)⁴;
- the results of the Study on Indicators for Media Pluralism in the Member States – Towards a risk based approach⁵.

¹ The draft Report on the implementation of the AVMS Directive (PL, EPP; own initiative report (2012/21329INI)). Plenary vote on 25 April 2013 (*draft Borys Report*).

² Please see the weblink to Weber report:
[http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2011/2246\(INI\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2011/2246(INI)).

³ The Report of the High Level Group on Freedom and Media Pluralism chaired by Professor Vaira Vīķe-Freiberga with Professor Herta Däubler-Gmelin, Professor Luís Miguel Poiares Pessoa Maduro and Ben Hammersley, A Free and Pluralistic Media to sustain European Democracy, January 2013.

⁴ INDIREG Final Report Indicators for independence and functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive (SMART 2009/0001), February 2011 (http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final_report.pdf).

The systems in the various countries differ substantially. One should bear in mind the regulatory culture of Member States because a one-size-fits-all approach may be difficult to apply.

2. BACKGROUND

Free and pluralistic media are amongst the EU's most essential democratic values. In the EU, the respect of media freedom and media pluralism should not only be about the technically correct application of EU and national law, but also, and probably even more importantly about implementing and promoting these fundamental democratic principles in practice.

In this context we should examine the role that the independent audiovisual regulatory bodies can play for the preservation of these values when acting within the scope of the AVMSD.

The wording of Article 30 AVMSD does not directly establish an obligation to create an independent regulatory body if such does not already exist. Construed in the light of recital 94, it highlights though the long-term policy objective of creating incentives for Member States to establish independent regulatory bodies to ensure the proper application of the AVMSD and, in particular, the respect of media freedom and pluralism, as required by Article 11 of the Charter, when acting within the scope of the AVMSD. It also requires that Member States independent regulatory bodies play a role in collaborating with each other and with the European Commission in implementing the directive.

Additionally, recital 94 AVMSD refers to the fact that the Member States "are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently".

3. LIMITATIONS OF ARTICLE 30 AVMSD AND POSSIBLE RESPONSES

When enforcing the AVMSD, the Commission services have been faced with the fact that Article 30 that does not specifically address how the independence of audiovisual regulatory bodies should be ensured, which is for example the case in some other regulated sectors where existence of independent regulators is envisaged (e.g. electronic communications, postal). As such, Article 30 does not oblige Member States to guarantee the independence of audiovisual regulators. Such limitation was visible in pre-accession negotiations where the Commission lacked a binding instrument to require the independence of newly created audiovisual regulatory bodies.

The **INDIREG Study on "Indicators for independence and efficient functioning of audiovisual media services regulatory bodies"** done on behalf of the Commission also pointed out the limits of Article 30 AVMSD. The Final Report⁶ states that in some EU countries either the legal set-up does not guarantee that regulatory bodies exercise their powers independently or that regulatory bodies are formally independent, but not in practice.

⁵ Independent Study on Indicators for Media Pluralism in the Member States – Towards a risk based approach, Leuven April 2009 (http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/pfr_report.pdf).

⁶ February 2011

The Final Report of the High Level Group on Media Freedom and Pluralism also reflected the limitations of Article 30 AVMSD. The Group examined limitations of media freedom, including state interference and role and the independence of regulatory bodies. It issued recommendations to the Commission, aimed at fostering a wide debate with Members of Parliament, Member States and representatives of the media and civil society. It comprised experts, selected on the basis of their knowledge, experience, independence and proven track record as in-depth thinkers in the areas of pluralism and freedom of the media.

In January 2013, the Group issued a report with 30 recommendations. On the role of regulators in preserving media freedoms and pluralism, the report recommends greater harmonisation in the way the composition and role of regulators is defined. It recommends revising Article 30 AVMSD to guarantee that all audiovisual regulatory bodies are independent and that appointments to these bodies are made transparently, with all appropriate checks and balances. It also recommends the creation of a network of national audiovisual regulatory bodies, after the model of the electronic communications framework to share common good practices and to set quality standards.

The Study on "European Union competencies in respect of media pluralism and media freedom" by the Centre for Media Pluralism and Media Freedom (CMP) reached similar conclusions.⁷ Its findings suggest that establishing independent audiovisual regulatory bodies could help fostering media freedom and media pluralism. Lack of harmonisation in this area contrasts strongly with the electronic communications framework⁸, which regulates closely related and complementary issues to those in the AVMS Directive. Some Member States already have a single body supervising both electronic communications and audiovisual media services.

The limitations of Article 30 AVMSD also triggered a **European citizen's initiative on media pluralism** that was registered with the Commission on 5 October 2012. The deadline for collecting one million signatures ends on 1 November 2013. The leaders of the initiative aim at guaranteeing the independence of audiovisual regulatory bodies by referring to the need to protect media pluralism.

The own experience of the Commission services, the above mentioned studies and initiatives, and recurring calls for a harmonised independence obligation by the European Parliament and civil society justify the need to consult on the need to either strengthen the continuous monitoring of independence of regulatory bodies or to consider a revision of Article 30 AVMSD.

4. FORMALIZING COOPERATION BETWEEN AUDIOVISUAL REGULATORY BODIES – BACKGROUND

The Final Report of the High Level Group on Media Freedom and Pluralism recommends the cooperation between the regulatory authorities and the Commission to be formalised in order to share best practices and define quality standards.

⁷ European Union competences in respect of media pluralism and media freedom, European University Institute, Centre for Media Pluralism and Media Freedom, January 2013.

⁸ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009.

Since 2003, the Commission has already convened informal annual meetings of a **Working Group of Audiovisual Regulatory Authorities**. The existence of this group does not stem from any legal obligation contained in the AVMSD. These meetings are attended by regulatory authorities from the Member States, the candidate countries and the EEA countries.

At the moment, Article 30 AVMSD constitutes the basis for strengthened cooperation between regulatory authorities and the Commission in order to promote better enforcement of the rules of the Directive, notably when issues of jurisdiction are at stake. In practice, the meetings of the Group also provide an opportunity to discuss the implementation of specific provisions of the AVMSD, such as the rules on audiovisual commercial communication, on the promotion of European works or on incitement to hatred⁹.

A further level of formalization of the Working Group could provide a setting for agreeing collective approaches to enforcement questions in a mutually obliging manner and for identifying shared concerns requiring the attention of regulatory bodies, notably insofar as cross-border service delivery is concerned. It could provide added coherence inside the Internal Market and a more harmonious application of Union law than a voluntary cooperation at the international level, as it already exists in the form of the European Platform of Regulatory Authorities (EPRA), whose membership goes beyond the membership of the above referred Working Group.

It could also allow for discussing issues and exchanging opinions on matters that are outside the scope of the AVMSD but which are within the competences of independent regulatory authorities in the audiovisual field. Matters related to media pluralism could be among them.

The possible formalization of the **Working Group of Audiovisual Regulatory Authorities** would not have any impact on the existence and functioning of the Contact Committee, established by Article 29 AVMSD. Its existence proved very useful for the exchange of information and opinions between the Member States and the Commission.

5. OPTIONS TO STRENGTHEN INDEPENDENCE UNDER THE AVMSD

- **Status quo option** - the Commission services will not propose any changes to the relevant provision of the AVMSD if, based on the feedback from this public consultation and other analyses, they assess that the current situation is satisfactory and without likely net benefit from further EU action to guarantee the independence of audiovisual regulatory bodies.

In case the analysis provides the evidence that there is a need for action and that it would be effective and proportionate to harmonise the framework underpinning the work of regulatory bodies, the Commission services may envisage an initiative in this area.

In addition to the status-quo option, **the following options** could be considered.

- **A non-legislative option** - This option would imply the reinforcement of the Commission existing instruments, including by strengthening the monitoring activities to verify on the ground in each Member State the quality of regulatory

⁹ For example in resolving *Al Manar* case (see: *IRIS 2004-9:11*)

independence or through formalization of the cooperation between audiovisual regulatory bodies.

- **Legislative option:** In addition to cooperation between the regulatory bodies and the Commission, as in the current text of Article 30 AVMSD, one could envisage the explicit requirement for the **Member States to guarantee the independence of national regulatory bodies** and ensure that they exercise their powers impartially and transparently. This option would leave the tool box for attaining those goals to the discretion of Member States. It would not give guidance on how to best ensure independence. It could also provide for the formalisation of the Working Group of Audiovisual Regulatory Authorities.
- **Further-reaching legislative option:** This would address **more detailed characteristics of national regulatory bodies** and include among other possible criteria to ensure independence, such as explicit reference to the need for autonomous decision making, transparent and impartial dismissal rules and adequate human and financial resources. It would also provide for the formalisation of the Working Group of Audiovisual Regulatory Authorities. The institutional requirements included in the electronic communications framework could serve as a model in establishing a similar organisational set up for the independence of audiovisual regulatory bodies. Its rules prescribe that Member States protect national regulatory authorities (NRAs) against external intervention and political pressure which might jeopardise their independent assessment of matters coming before them, that they adopt rules regarding the grounds for dismissal of the Head of the NRA and that they guarantee that the NRAs have their own budget which is sufficient to allow them to recruit an adequate number of qualified staff.

The experience to date with the NRA rules is that they allow a continued variety of structures in Member States. These rules do not automatically remove all concerns regarding independence in all Member States, but they do seem to offer a higher degree of assurance of independence than prevails under AVMSD.

As a benchmark for the present consultation we take the key characteristics of independent regulatory bodies as conceived by the INDIREG study.

In line with the formal indicators of independence (reflecting the legal set-up) and the *de facto* indicators of independence (reflecting resilience to political pressure), the independence of an audiovisual body could be structured along some or all of the following lines:

- a. Status and powers – requiring bodies to be sufficiently autonomous in exercising their powers;
- b. Financial autonomy- requiring that the body disposes of sufficient financial resources, (otherwise its independence and efficient functioning are at risk);
- c. Autonomy of decision makers – requiring that nomination and appointment procedures are constructed in a way that prevents considerable structural bias in decision making. Rules against conflict of interest with regard to both government and industry are essential;

- d. Knowledge - requiring the competent body to be equipped with sufficient human resources and adequate expertise; and
- e. Transparency and accountability mechanisms –requiring reporting obligation (e.g. annual report presented to the Parliament) and audit.

6. NEXT STEPS

The results will be summarised and made public according to the Commission minimum standards for public consultations. Feedback will be used to develop, assess and select policy options in view of strengthening independence of regulatory bodies when acting within the scope of the AVMSD and might be integrated in a possible impact assessment. Stakeholders will be kept informed of progress at dedicated stakeholder meetings.

QUESTIONNAIRE

"→" indicates follow-up questions; either pre-specified ones (numbering is indicated) or open items which respondents can fill in themselves (subject to configurable character limitation)

In what quality are you replying?

- Citizen
- Public authority → Please specify:
- Regulator
- Industry → Please specify:
- Trade association → Please specify:
- Non-governmental organisation → Please specify:
- Researcher
- Other → Please specify:

Please indicate your gender:

- Male
- Female

How old are you?

- < 18 years
- 18-29
- 30-39
- 40-49
- 50-59
- 60-69
- >= 70 years

What is your nationality? (multiple choices possible)

- EU-27
- Other

What is your country of establishment/residence? (one answer only)

- EU-27
- Other

What is the highest formal level of education that you have attained?

- Secondary school
- High school
- Undergraduate degree
- Postgraduate degree
- Other:

How would you describe your current professional status?

- In education (including apprenticeships)
- Self-employed
- Employee
- Middle management
- Executive management
- Other:

Do you have, or have you previously had, by way of your employment a direct relationship with the media industry?

- Yes → Please specify:
- No

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 enforcement of the Audiovisual Media Services Directive taking into account the principle of the preservation of free and pluralistic media?

- o Very relevant
- o Relevant
- o Not very relevant
- o Not relevant
- o No opinion

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

- o Very relevant
- o Relevant
- o Not very relevant
- o Not relevant
- o No opinion

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:

	Very relevant	Relevant	Not very relevant	Not relevant	No opinion
Jurisdiction					
Audiovisual commercial communication (including television advertising, teleshopping etc.)					
Promotion of European works					
Protection of minors					
Right of reply					

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

- o Greatly reinforces the need for independence
- o Reinforces the need for independence
- o Slightly reinforces the need for independence
- o Does not affect the need for independence
- o Reduces the need for independence
- o No opinion

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

	Very relevant	Relevant	Not very relevant	Not relevant	No opinion
Status and powers					
Financial autonomy					
Autonomy of decision-makers					
Not being subject to instructions					
Dismissal conditions					
Length of term					
Knowledge					
Transparency					
Accountability mechanisms					

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 → 7, 8
- Relevant → 7,8
- Not very relevant
- Not relevant
- No opinion

7. [If the answer to 5 is very relevant/relevant, ask] Do you consider cooperation within the EU between regulatory bodies in the following fields:

	Very relevant	Relevant	Not very relevant	Not relevant	No opinion

Jurisdiction					
Protection of minors					
Hate speech					
Commercial communications					
Media pluralism					
Media ownership					

8. [If the answer to 5 is very relevant/relevant, ask] How appropriate would you consider the following arrangements to enable cooperation between regulatory bodies?

		Very appropriate	Appropriate	Not very appropriate	Not appropriate	No opinion
A voluntary gathering of competent regulatory bodies	At EU level					
	At pan-European level					
	At international level					
A legally mandated gathering of competent regulatory bodies	Within the EU					
	At pan-European level					
	At international level					
An agency	At EU level					
	At pan-European level					
	At international level					

Other → Please specify both the form and its geographical reach (EU, pan-European, international):						
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III. 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?

	Significantly improve	Moderately improve	No impact	Moderately worsen	Significantly worsen	No opinion
Media freedom						
Media pluralism						
Market conditions						

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?

	Significantly increase	Moderately increase	No implications	Moderately decrease	Significantly decrease	No opinion
Staffing costs						
Administrative costs						
Costs of enforcement activity						

Private litigation costs						
Industrial growth						
Market concentration						
Welfare gains						
Other → Please specify:						

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

	Significantly increase	Moderately increase	No implications	Moderately decrease	Significantly decrease	No opinion
Average procedural duration						
Effective application of the law						
Impartiality						
Responsiveness to external pressures						
Public-private collaboration (between regulatory body, industry and other stakeholders)						
Other (please specify :)						

IV. ELEMENTS OF REGULATORY INDEPENDENCE

IV.1 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?

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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
- No
- No opinion

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 (please explain)
- No (please explain)
- No opinion

IV.2 RESOURCES

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

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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

- Very relevant
- Relevant

- o Not very relevant
- o Not relevant
- o No opinion

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

	Very relevant	Moderately relevant	Slightly relevant	Not very relevant	Not relevant	No opinion
Funded by the state						
Funded by licence (spectrum) fees						
Levies based on broadcaster's turnover						
Other commercial revenues (e.g. advertising)						
Other (please specify :)						

IV.3 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?

- o Very relevant
- o Relevant
- o Not very relevant
- o Not relevant
- o No opinion

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?

- o Very relevant

- Relevant
- Not very relevant
- Not relevant
- No opinion

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

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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
- No
- No opinion

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?

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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?

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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?

- Very relevant
- Relevant
- Not very relevant
- Not relevant
- No opinion

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

- Parliament
- Minister
- Court
- Citizens
- Other → Please specify:

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

- Parliament
- Minister
- Court
- Citizens
- Other → Please specify:

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
- No
- No opinion

IV. RESPONSIBILITY

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

- Yes
- No
- No opinion

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
- No
- No opinion

V. CLOSING OBSERVATIONS

32. Are there any further observations on the subject matter of this consultation that you would like to share (such as examples of best practices)?

- Yes → Please specify:
- No