Notification to the European Commission and the United Kingdom of measures under Article 4 of the AVMS Directive

The European Commission and the United Kingdom are hereby notified, in accordance with Article 4 of 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 (Audiovisual Media Services Directive, AVMSD), that measures may be adopted against the broadcasters Modern Times Group MTG Limited (MTG) and Discovery Corporate Services Limited (Discovery). The broadcasters are under British jurisdiction but provide television broadcasts which are wholly or mostly directed towards the Swedish territory. Prior to any such measure being adopted, the European Commission’s decision that the measures are compatible with Union law will be awaited.

The assessment of the Swedish Press and Broadcasting Authority and the Swedish Consumer Agency is that the results achieved through the application of Article 4.2 of AVMSD are not satisfactory and 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 sponsorship of television programmes by any party whose principal activity is to manufacture alcoholic beverages (Chapter 7, Section 2 of the Radio and Television Act (2010:696)) and all forms of marketing of alcoholic beverages through commercial advertisements in television programmes (Chapter 8, Section 13 of the Radio and Television Act and Chapter 7, Section 3 of the Alcohol Act (2010:1622)).

The measures which may be adopted against the broadcasters are, firstly, an application for the imposition of a special fee for the violations of the provision that programmes may not be sponsored by a party whose principal activity is to manufacture alcoholic beverages and, secondly, proceedings concerning a ban on marketing alcoholic beverages to consumers in commercial advertisements in television programmes. These measures are objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.
The Swedish authorities will adopt the aforementioned measures if the Commission decides that the actions are compatible with Union law. If the European Commission decides that this is not the case, the authorities will refrain from adopting the proposed measures.

**Applicable rules**

**The AVMS Directive and the Swedish Radio and Television Act**

The Swedish Radio and Television Act (2010:696) implements 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 (the AVMS Directive). The Directive is based on the country of origin principle. This principle means that the Member State where a media service provider is established is to monitor that the broadcasts emanating from that Member State comply with national laws. This is to ensure a free movement within the EEA without secondary control in the receiving Member State.

The Swedish Radio and Television Act applies to television broadcasts that can be received in any state subject to the European Economic Area agreement (EEA State), if the media service provider is established in Sweden in accordance with the definition set out in Article 2(3) of the AVMS Directive, utilises a satellite up-link situated in Sweden, utilises satellite capacity belonging to Sweden or is established in Sweden in accordance with Articles 49-54 of the Treaty on the Functioning of the European Union. The provisions in Chapters 16-20 do however also apply to a media service provider under another EEA State’s jurisdiction pursuant to the AVMS Directive (Chapter 1, Section 3 of the Swedish Radio and Television Act).

Since the AVMS Directive is a minimum Directive, Member States remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Union law (Article 4(1) of the AVMS Directive).

Sweden has chosen to impose stricter rules regarding certain matters, including alcohol sponsorship and alcohol advertising on television. The Directive’s minimum rules for television advertising for alcoholic beverages state that this advertising may not, for example, create the impression that the consumption of alcohol contributes towards social or sexual success or present abstinence or moderation in a negative light. The Swedish rules are stricter than the provisions of the AVMS Directive as they entail a total ban on all forms of sponsorship of television programmes by a party whose principal activity is to manufacture alcoholic beverages (Chapter 7, Section 2 of the Swedish Radio and Television Act) and all forms of marketing of alcoholic beverages through commercial advertisements in television programmes (Chapter 8, Section 13 of the Swedish Radio and Television Act and Chapter 7, Section 3 of the Swedish Alcohol Act (2010:1622)).

Article 4 of the AVMS Directive has been implemented by means of Chapter 16, Sections 15 and 16 of the Swedish Radio and Television Act. Chapter 16, Section 15 of the Swedish Radio and Television Act states the following.

If a television broadcast wholly or mostly directed towards Sweden by a broadcaster established in another EEA State contravenes Chapter 7, Section 2 of the Swedish Radio and Television Act regarding the prohibition on programmes sponsored by a party whose principal activity is to manufacture alcoholic beverages, a competent authority in Sweden may contact a competent authority in the other EEA State in order to request the broadcaster to comply with the provision. The same applies if a television broadcast contravenes Chapter 7, Section 3 of the Swedish Alcohol Act through
the use of commercial advertisements in television programmes for the marketing of alcoholic beverages.

If the broadcaster chooses not to comply with the request, the authority may take action against the broadcaster pursuant to Chapter 16, Section 10 and Chapter 17, Sections 5 and 6 of the Swedish Radio and Television Act, as well as Sections 29 and 48 of the Marketing Practices Act (2008:486) if the broadcaster in question established itself in the other EEA State in order to circumvent the stricter rules that would have been applicable had it been established in the country whose authorities take action. The authority may not take action until it has notified the European Commission and the Member State affected, and the Commission has decided that the actions are compatible with Union law.

The competent authorities

According to its instruction, the Swedish Press and Broadcasting Authority is commissioned to monitor the content of foreign television broadcasts directed to the Swedish public. The instruction also authorises the Authority, under Chapter 16, Section 15 of the Swedish Radio and Television Act, to cooperate with competent authorities in other EEA States in the case of violations of certain provisions in the public interest (Section 3, points 6 and 7 of the Ordinance (2010:1062) with instructions for the Swedish Press and Broadcasting Authority). The special decision-making body within the Swedish Press and Broadcasting Authority – the Swedish Broadcasting Commission – uses post-broadcast reviews to monitor whether programmes that have been broadcast on television comply with the Swedish Radio and Television Act and the programme-related conditions that may apply to those services (Chapter 16, Section 2 of the Swedish Radio and Television Act). It is also the Swedish Broadcasting Commission that can apply for a special fee pursuant to Chapter 17, Sections 5 and 6 of the Swedish Radio and Television Act.

Chapter 9, Section 3 of the Swedish Alcohol Act states that the Marketing Practices Act contains special rules for regulating compliance with the marketing provisions in Chapter 7 of the Swedish Alcohol Act. It is the Consumer Ombudsman (KO) and the Swedish Consumer Agency that are responsible for regulating compliance with the provisions of the Marketing Practices Act (cf. also Govt. Bill 2009/10:115 p. 117). Consequently, it is KO and the Swedish Consumer Agency that ensure that the provision banning alcohol advertising found in Chapter 7, Section 3 of the Swedish Alcohol Act is complied with.

It therefore follows from the Swedish regulations that it is the Swedish Press and Broadcasting Authority that is formally competent under the AVMS Directive to handle cooperation with competent authorities in other EEA States and to handle this notification to the European Commission and the United Kingdom. However, given that KO and the Swedish Consumer Agency is responsible for monitoring the rules concerning the marketing of alcoholic beverages, the Swedish Consumer Agency has had a significant influence on the content of this notification and in the communication with the two broadcasters in question, Modern Times Group Limited (MTG) and Discovery Corporate Services Limited (Discovery).

The provisions on the alcohol sponsorship ban and the special fee

Programmes in television broadcasts may not be sponsored by a party whose principal activity is to manufacture alcoholic beverages (Chapter 7, Section 2 of the Swedish Radio and Television Act). By sponsorship is meant any contribution that a party who is not engaged in supplying or producing radio, television broadcasts, on-demand television or searchable Teletext makes in order to finance these media services or programmes with the intent of promoting the name, trade mark, reputation,
business, product or interest of the contributor (Chapter 3, Section 1, point 14 of the Swedish Radio and Television Act).

A party who disregards the provision on sponsorship in Chapter 7, Section 2 of the Swedish Radio and Television Act may be ordered by the Administrative Court in Stockholm to pay a special fee following an application by the Swedish Broadcasting Commission (Chapter 17, Section 5, first paragraph, point 6 and Chapter 19, Section 4 of the Swedish Radio and Television Act). The special fee will be decided to no less than five thousand SEK and no more than five million SEK. However, the fee should not exceed ten per cent of the media service provider’s annual turnover during the preceding financial year. In determining the amount of the fee, special consideration shall be given to the nature, duration and scope of the offence and the estimated revenues of the broadcaster as a result of the offence (Chapter 17, Section 6 of the Swedish Radio and Television Act).

Upon request by the Swedish Press and Broadcasting Authority, a party that carries out operations under the Swedish Radio and Television Act must provide the information required for the Swedish Broadcasting Commission to determine the amount of the special fee pursuant to Chapter 17, Section 6 of the Swedish Radio and Television Act (Chapter 16, Section 10 of the Swedish Radio and Television Act).

The provisions on the alcohol advertising ban and the market disruption fee

Marketing of alcoholic beverages to consumers may not include commercial advertisements in television programmes. This also applies to such television broadcasts via satellite as are covered by the Swedish Radio and Television Act (Chapter 7, Section 3 of the Swedish Alcohol Act).

An act that contravenes Chapter 7, Section 3 can result in a market disruption fee pursuant to the provisions of Sections 29-36 of the Marketing Practices Act (Chapter 7, Section 8 of the Swedish Radio and Television Act).

A trader may be ordered to pay a market disruption fee if the trader intentionally or negligently violates the provision in Chapter 7, Section 3 of the Swedish Alcohol Act. This also applies to a trader that intentionally or negligently has substantially contributed to the violation (Section 29 of the Marketing Practices Act). Under Section 48 of the Marketing Practices Act, proceedings in respect of a market disruption fee shall be instituted at Stockholm City Court.

The history behind the Swedish alcohol bans on Swedish television

In 1956, the Riksdag adopted a decision on the introduction of television in Sweden, which marked the official start of Swedish television broadcasts through the programme service Kanal 1, later SVT1. In December 1969, the Swedes were given a second channel, TV2, later SVT2.

On 1 July 1979, the Act (1978:763) with certain provisions on the marketing of alcoholic beverages entered into force. This Act banned the use of marketing of alcoholic beverages in commercial advertisements in radio and television programmes. The advertising ban was established in order to protect public health against the harmful effects of alcohol and constitutes a cornerstone of Swedish alcohol policy. The reason for the total advertising ban on television is, according to the preparatory works to the Act (Govt. Bill 1977/78:178 p. 29) that this medium is considered to have a special impact on its viewers. Besides this, consumers do not have the same opportunity, as in most other media, to choose whether or not they wish to view the advertising.

In spring 1984, the Nordisk Television AB, later TV4 AB, which began to broadcast advertising financed television via satellite and cable network in 1990, was founded.
On 6 June 1986, the European Commission put forward its proposal for harmonising the national legislations of the Member States. The country of origin principle thus became central to the forthcoming development of Union law.

On New Year’s Eve in 1987, TV3 started its broadcasts via satellite from London. This was the first Swedish channel financed with television advertising, and it became the start of commercial television in Sweden.

In 1991, the Government decided to grant a concession of exclusive rights for television broadcasting in the terrestrial network to Nordisk Television AB and its television channel TV4.

The old Radio and Television Act (1996:844) entered into force on 1 December 1996. This Act contained a ban on programmes being sponsored by a party that primarily manufactures or sells alcohol.

The Act (1978:763) with certain provisions on the marketing of alcoholic beverages was repealed on 1 January 2000, and its provisions on the marketing of alcoholic beverages were transferred virtually unchanged to the now repealed Swedish Alcohol Act (1994:1738).

In August 2010, the new and current Radio and Television Act entered into force, which meant the incorporation of the now applicable AVMS Directive into Swedish legislation. The ban on alcohol sponsorship was also transferred to the new Act. The Act furthermore states that the provision banning advertising for alcoholic beverages in the current Chapter 7, Section 3 of the Swedish Alcohol Act is applicable to television broadcasts and on-demand television. In order to implement the AVMS Directive, a provision was also introduced to the effect that Sweden can enter cooperation with another EEA State if a broadcaster under the jurisdiction of the other Member State broadcasts television programmes that are wholly or mostly directed towards Sweden and that contravene Swedish legislation (Chapter 16, Section 15 of the Swedish Radio and Television Act).

The new and current Swedish Alcohol Act (2010:1622), which entails an adaptation of the previous Alcohol Act to now applicable EU legislation, entered into force on 1 January 2011.

The cases now in question

In a complaint of 4 March 2011, addressed both to the Swedish Broadcasting Commission and KO, the temperance organisation IOGT-NTO requested that certain measures be taken in response to programmes on TV3, TV6 and TV8 (MTG) and on Kanal 5 and Kanal 9 (Discovery) being continuously sponsored by a party whose principal activity is to manufacture alcoholic beverages in contravention of the provision in Chapter 7, Section 2 of the Swedish Radio and Television Act. In its complaint, IOGT-NTO also put forward the claim that the broadcasts continuously contravene the provision in Chapter 7, Section 3 of the Swedish Alcohol Act banning advertising for alcoholic beverages.

IOGT-NTO argued in the first instance that the broadcasters in question were to be considered established in Sweden and under Swedish jurisdiction. In such a circumstance, the Swedish rules regarding sponsoring, advertising and other advertisements could be applied directly to the broadcasts in question.

However, in a decision of 8 November 2012, following a consultation with the parties and the British authority, Ofcom, the Swedish Broadcasting Commission found that there was no reason to depart from the Commission’s previous position that the broadcasters and their services are under British jurisdiction. The Swedish Broadcasting Commission did not consider the emendations from 2007 to
the Directive’s wording to be intended to change the assessment of the jurisdiction issue, but rather to expand the Directive’s applicability to both linear television and on-demand television services.

On 26 November 2012, the Swedish Press and Broadcasting Authority made the decision to enter a cooperation procedure with the British authority, Ofcom, under Chapter 16, Section 15 of the Swedish Radio and Television Act (Appendix 1).

The Authority noted that two separate examinations, one performed by IOGT-NTO (Appendix 2) and one performed by the Swedish Press and Broadcasting Authority (see Appendices 3–7), showed that the broadcasts in question could be considered to contain alcohol advertising and programmes sponsored by manufacturers of alcoholic beverages. The Authority also noted that the broadcasts on TV3, TV6, TV8, Kanal 5 and Kanal 9 are directed towards Sweden since they are broadcast in Swedish or have Swedish subtitles and contain advertising directed towards a Swedish market. The broadcasters also have a licence to broadcast in the Swedish terrestrial network and it is not possible to view the broadcasts in the United Kingdom via cable or satellite broadcasts. The conditions for entering a cooperation procedure under Chapter 16, Section 15 of the Swedish Radio and Television Act were thereby found to be fulfilled, and on 26 November 2012 the Authority sent a formal request to Ofcom to request MTG and Discovery to comply with the Swedish rules banning sponsorship and commercial advertisements found in Chapter 7, Section 2 of the Swedish Radio and Television Act and Chapter 7, Section 3 of the Swedish Alcohol Act (Appendix 8). According to a notification from Ofcom on 18 February 2013, the broadcasters chose not to follow the request (Appendix 9). For this reason, despite a well-functioning cooperation between the national regulatory authorities, a satisfactory result for the Swedish Press and Broadcasting Authority and the Swedish Consumer Agency was not achieved in accordance with Article 4(3) of the AVMS Directive.

On 28 August 2014, a meeting was held at the Swedish Press and Broadcasting Authority between representatives of the Swedish Press and Broadcasting Authority, the Swedish Consumer Agency, IOGT-NTO and the two broadcasters. At the meeting, the broadcasters once again stated that they were not prepared to follow the relevant Swedish rules banning sponsorship and commercial advertisements found in the Swedish Radio and Television Act and the Swedish Alcohol Act (Appendix 10).

On 19 December 2014, the authorities jointly submitted a notification of measures under Article 4 of the AVMS Directive to the European Commission and the United Kingdom. However, the authorities chose to withdraw the notification because of the limited period of time stated in Article 4 of the AVMS Directive for the European Commission’s handling of and decision in the case and because of the need to further analyse the formal requirements for the notification’s content and the other conditions for the continued process. The authorities also announced that a new notification would be submitted to the European Commission and the United Kingdom following this further analysis.

Description of the process in the now relevant cases

The Swedish Press and Broadcasting Authority’s cases regarding alcohol sponsorship

General information on how cases are initiated

A review by the Swedish Press and Broadcasting Authority or the Swedish Broadcasting Commission is initiated either by the Authority itself, by the Swedish Broadcasting Commission or by a natural or legal person who chooses to report a programme or a segment to the Swedish Broadcasting Commission. As previously mentioned, the Swedish Broadcasting Commission is a decision-making body within the Swedish Press and Broadcasting Authority that independently examines whether the
content of radio and television programmes complies with the provisions found in the Swedish Radio and Television Act or the conditions found in broadcasting licences. Matters within the Swedish Broadcasting Commission's area of responsibility are registered with the Authority, and the Authority assists the Swedish Broadcasting Commission with the administration and preparation of decisions.

How the cases now in question were initiated

The cases in question were initiated, as described above, by a complaint from IOGT-NTO. Since the submission of this complaint, the Authority has monitored the broadcasts in the programme services TV3, TV6, TV8, Kanal 5 and Kanal 9 on a number of occasions (Appendices 3–7), and has found such content that may be considered to contravene the provision that programmes in television broadcasts may not be sponsored by a party whose principal activity is to manufacture alcoholic beverages (Chapter 7, Section 2 of the Swedish Radio and Television Act). During the summer and autumn of 2015, the Authority once again viewed broadcasts in the five above-mentioned programme services. These broadcasts are covered by the Swedish Broadcasting Commission’s decisions in Ref. no. 15/02584 and Ref. no. 15/02585, which are described below.

General information on the request for an opinion

When the Authority has taken note of the content in the programmes or segments raised by a complaint or a self-initiated matter, the Authority, on behalf of the Swedish Broadcasting Commission, decides whether there is a need to send a request for an opinion to the broadcaster. In matters of a simpler nature in which the programme or segment cannot be considered to contravene any of the rules applicable to the broadcaster and its programmes, opinions are rarely obtained. In other cases, an opinion is generally obtained. If a broadcaster chooses not to submit an opinion, the Swedish Broadcasting Commission can still come to a decision.

The request for an opinion in respect to the content in the broadcasts now in question

In the cases in question, the Authority, on behalf of the Swedish Broadcasting Commission, requested opinions from the two broadcasters, MTG and Discovery. The broadcasters were asked to submit their opinions on the above-mentioned broadcasts’ content and the content’s compatibility with the Swedish provision banning alcohol sponsorship found in Chapter 7, Section 2 of the Swedish Radio and Television Act. The request for an opinion was written in English, and the broadcasters were given a two-week deadline to submit their opinions. The Authority’s request for an opinion stated that the Swedish Broadcasting Commission would only be examining the question of the broadcasts’ content and compatibility with the Swedish provision banning alcohol sponsorship. The broadcasters were also given the opportunity to submit information that could be important for assessing the amount of any special fee. The broadcasters were furthermore informed that they, at the request of the Authority, would be given the opportunity to submit their opinions on the question of circumvention and the requirements of Article 4 of the AVMS Directive at a later stage. The broadcasters chose not to express their opinions on the broadcasts’ content with reference to the broadcasters and their programme services being under British jurisdiction and that it therefore, according to the broadcasters, was not appropriate for the broadcasters to comment on the broadcasts’ compliance with Swedish legislation.

General information on the Commission’s decision and the special fee

When a broadcaster has submitted an opinion, the Authority prepares a draft decision for the Swedish Broadcasting Commission. The case is then presented to the Commission by one of the Authority’s advisors or legal advisers at one of the Commission’s meetings. During this presentation the
Commission views the content of the broadcast in question and reviews all the case documents. The Commission assesses the broadcast on the basis of what appears in the programme or segment, what has been argued in a complaint and what has been argued by the broadcaster in its opinion.

In matters of sponsorship, the outcome is a decision either against or in favour of the broadcaster depending on whether or not the Commission considers the broadcasts to be compatible with Swedish law. If the Commission rules against a programme or segment with respect to the sponsorship provisions of the Swedish Radio and Television Act, the Commission can also decide to apply to the Administrative Court in Stockholm for the broadcaster to be imposed with a special fee of a certain amount determined by the Commission at its meeting. The Commission can also decide to allow the administrative court proceedings to be brought by the Authority on behalf of the Commission. If a broadcaster violates a particular provision for the first time, or if there is no clear and explicit case law in a certain area, the Commission can decide to refrain from applying for a special fee in an individual case.

The special fee is regulated in Chapter 17 of the Swedish Radio and Television Act. A party who disregards the provision in Chapter 7, Section 2 of the Swedish Radio and Television Act may be ordered to pay a special fee. When considering the question of imposition of a fee, the court shall give particular consideration to the nature, duration and scope of the offence (Chapter 17, Section 5, point 6 of the Swedish Radio and Television Act). The special fee is to be decided to no less than five thousand SEK and no more than five million SEK. However, the fee should not exceed ten per cent of the media service provider’s annual turnover during the preceding financial year. In determining the amount of the fee, special consideration shall be given to the circumstances considered when determining whether a fee should be imposed and the estimated revenues of the broadcaster as a result of the offence (Chapter 17, Section 6 of the Swedish Radio and Television Act).

The Commission’s decisions in the cases now in question

In the cases in question, the Commission found that the broadcasts may be considered to contain such sponsorship as referred to in Chapter 7, Section 2 of the Swedish Radio and Television Act and that the broadcasts thereby contravene the provision. The Commission also found reason to decide to apply for a special fee in light of the fact that the broadcasters had for several years received information from the Authority that they risk being imposed with a special fee if broadcasts containing alcohol sponsorship continue to be broadcast in programme services directed towards Sweden. The Commission therefore made the decision, on condition that the European Commission decides that such action is compatible with Union law, to apply for a special fee of SEK 50,000 per sponsor of each programme, a total of SEK 300,000, as regards MTG (Ref. no. 15/02585) and SEK 50,000 per sponsor of each programme, a total of SEK 200,000, as regards Discovery (Ref. no. 15/02584). The Commission also decided that possible administrative court proceedings on a special fee be brought by the Authority on behalf of the Commission (Appendix 11). These amounts, and the method of calculating the amounts of the fees, are in accordance with the case law of the Swedish Broadcasting Commission and the Swedish Administrative Courts in comparable matters concerning sponsorship. The documents in the Swedish Broadcasting Commission’s matters, and the draft applications for a special fee that will be submitted to the Administrative Court in Stockholm if the European Commission decides that the application is compatible with Union law, are appended to the notification (Appendices 12–26).
General information on the dispatching and appealability of the Commission’s decisions

When the Commission has reached its decision, this is dispatched to the broadcaster. The Commission’s decisions may not be appealed (Chapter 20, Section 6 of the Swedish Radio and Television Act).

Dispatching and appealability in the cases now in question

In the cases in question, the Commission’s decisions have been sent to the broadcasters both in Swedish and English. Information that the decisions cannot be appealed has been conveyed to the companies in English.

General information on the request for an opinion and the question of circumvention in matters under Chapter 16, Section 15 of the Swedish Radio and Television Act

In matters relating to Chapter 16, Section 15 of the Swedish Radio and Television Act there are steps that do not occur in the ordinary case process at the Swedish Press and Broadcasting Authority, when the cases concern broadcasters that are established in Sweden. As described above, the Swedish Broadcasting Commission only assesses the question of the broadcasts’ content and compatibility with the Swedish provision banning alcohol sponsorship. It is then the Authority that handles the question of circumvention of the stricter Swedish provision banning alcohol sponsorship. This part of the process begins when the Swedish Broadcasting Commission has made its decision that a broadcaster’s broadcasts contravene the provision in Chapter 7, Section 2 of the Swedish Radio and Television Act and the broadcaster is established in another EEA State.

First, a request for an opinion is sent to the broadcaster. The request for an opinion states that the broadcaster is asked to submit an opinion on the material appended to the request and to answer the questions that are directly addressed to the broadcaster and that have bearing on the Authority’s assessment of whether or not a circumvention has taken place. The request for an opinion is written in or translated into the language that is relevant in the specific case. The documents appended to the request are also translated into the language that is relevant in the specific case.

When the broadcaster has submitted its statement, the authority will make an initial assessment of whether the broadcaster has established itself in the other Member State in order to circumvent the stricter Swedish rules following an evaluation of the content of the statement. The authority will then send the broadcaster a new request for a statement. This time, the purpose is to afford the broadcaster the opportunity to, on the one hand, review a first draft of the authority’s notification to the Commission and the Member State in question and, on the other, to respond to the arguments put forward by the authority in the draft as grounds for the authority’s assessment that the broadcaster established itself in the other Member State in order to circumvent the stricter Swedish rules. The request for a statement explains that the authority arrived at its assessment following an evaluation of the content of the broadcaster’s aforementioned statement and the arguments put forward by the broadcaster. It also explains that the draft notification contains descriptions of the grounds on which the authority is basing its assessment, thorough descriptions of the measures that may be adopted against the broadcaster if the Commission decides that such actions are compatible with Union law and thorough descriptions of the process that may follow the Commission’s decision. The request for a statement also explains that the draft notification has not yet been submitted to the Commission or the Member State in question. The request for a statement is written in or translated into the language that is relevant to the case. The documents appended to the request are also translated into the language that is relevant to the case.
If, having reviewed the broadcaster’s new statement, the authority’s assessment is still that a circumvention exists, the authority will proceed with a notification to the European Commission. The notification explains, firstly, that the Authority has made the assessment that the broadcaster has circumvented the stricter Swedish rules relevant to the case and on what grounds the Authority bases its assessment, and, secondly, which measures against the broadcaster may be adopted by the Authority if the Commission decides that such measures are compatible with Union law.

If the European Commission decides that the requirements of Chapter 16, Section 15 of the Swedish Radio and Television Act and Article 4 of the AVMS Directive are fulfilled and that the Authority may take the proposed actions, the Swedish Broadcasting Commission’s application for a special fee is sent to the Administrative Court in Stockholm. If the European Commission decides that this is not the case, the Swedish Broadcasting Commission will refrain from taking the proposed actions.

The request for an opinion in respect of circumvention in the cases now in question

In the cases in question, this part of the process has taken place in cooperation with the Swedish Consumer Agency. The request for an opinion has therefore been designed in consultation between the authorities.

On 18 December 2015, a request for an opinion was sent to the two broadcasters. The broadcasters were each given a four-week deadline to submit their opinions. The companies were subsequently upon their request granted a further four weeks’ respite to submit their opinions. The request for an opinion was written in English. The documents appended to the request were also translated into English.

The broadcasters submitted their opinions on 15 February 2016 and 16 February 2016, respectively, and these have formed the basis for the authorities’ assessment of whether or not circumvention has taken place; see below under the heading The Authorities’ assessment.

The request for an opinion, as well as the broadcasters’ opinions, are appended (Appendices 27–30).

On 9 November 2016, the authorities sent a new request for a statement to the broadcasters in order to afford them the opportunity to, on the one hand, review a first draft of the authorities’ notification to the Commission and the United Kingdom and, on the other, to respond to the arguments put forward by the authorities in the draft as grounds for the authorities’ assessment that the broadcasters established themselves in the United Kingdom in order to circumvent the stricter Swedish rules. The broadcasters were each given a two-week deadline within which to submit their statements. The companies were subsequently granted a further three-week extension to this deadline. The new request for a statement was again written in English. The documents appended to the request were also translated into English.

The broadcasters submitted their new statements on 13 and 15 December 2016, respectively, and these have once again formed the basis for the authorities’ assessment of whether or not a circumvention has taken place; see below under the heading The authorities’ assessment.

The new request for a statement and the broadcasters’ supplementary statements are appended (Appendices 31–34).

General information on the process in the Administrative Courts

Questions concerning the imposition of a special fee are examined by the Administrative Court in Stockholm following an application by the Swedish Broadcasting Commission (Chapter 19, Section 4 of the Swedish Radio and Television Act). The ordinary process in comparable matters entails the Administrative Court ordering the broadcaster to submit an opinion on the Swedish Broadcasting Commission’s application within a specified time period. If the broadcaster does not submit an
opinion, the case can still be determined (Section 10 of the Administrative Court Procedure Act (1971:291)). The deadline to submit an opinion in similar matters is usually two to five weeks. The main rule regarding the handling of a case in the Administrative Courts is that the procedure shall be in writing (Section 9 of the Administrative Court Procedure Act). The court shall ensure that the case is as well investigated as its nature requires, and shall use questions and comments to ensure that the parties’ presentations are clear and complete. The court shall also ensure that nothing unnecessary is introduced into the case and can dismiss superfluous investigation (Section 8 of the Administrative Court Procedure Act).

The Authority presumes that the broadcaster will have the opportunity to submit an opinion on the question of circumvention, the question of whether the broadcaster can and should be imposed with a special fee in accordance with the Swedish Radio and Television Act and on the question of the amount of the special fee. However, it is the Administrative Court that determines what will be subject to the court’s examination.

Depending on what the broadcaster states in its opinion, the Administrative Court can request the Authority to submit an opinion on the broadcaster’s opinion (Section 12 of the Administrative Court Procedure Act). If the Authority chooses to submit an opinion, the companies also receive a further request for an opinion if the court deems this necessary. The Administrative Court will then decide whether the Swedish Broadcasting Commission’s application for a special fee is to be approved or rejected. The Administrative Court also decides on the amount of any fee. The court’s decision may not exceed what has been claimed in the case. However, if there are special reasons, the court may decide on something better for a private party, even without such an application, provided that this can be done without detriment to an opposing private interest (Section 29 of the Administrative Court Procedure Act).

The Administrative Court’s judgment is sent to the Authority and the broadcaster as soon as it has been reached (Section 31 of the Administrative Court Procedure Act). The broadcaster then has an opportunity to appeal the judgment to the Administrative Court of Appeal in Stockholm within three weeks of the broadcaster being served with the judgment. The Authority has an opportunity to appeal the judgment within three weeks of the judgment being reached and publicised (Sections 6 and 33 of the Administrative Court Procedure Act). The Swedish Broadcasting Commission might appeal a judgment if the application is rejected in its entirety or if the amount of the fee is reduced to an amount under that which the Commission had applied for.

Examination by the Administrative Court of Appeal does not require leave to appeal (Chapter 20, Section 5 of the Swedish Radio and Television Act). The process at the Administrative Court of Appeal corresponds to that which has been described above regarding the Administrative Court.

If the Swedish Broadcasting Commission or the broadcaster appeals the judgment of the Administrative Court of Appeal, this is made to the Supreme Administrative Court (Section 33 of the Administrative Court Procedure Act). The broadcaster has once again an opportunity to appeal the judgment within three weeks of the broadcaster being served with the judgment, while the Authority has an opportunity to appeal the judgment within three weeks of the judgment being reached and publicised (Section 6 of the Administrative Court Procedure Act). Leave to appeal is required in order for the Supreme Administrative Court to examine the matter. Leave to appeal can be granted for two reasons (Section 35 and Section 36, first paragraph of the Administrative Court Procedure Act). The first reason is that a ruling in the case is important for the guidance of the application of law. The second reason is that there are extraordinary reasons for an examination, for example if grounds for relief for substantive defects exist or that the outcome of the case in the Administrative Court of
Appeal obviously results from a grave oversight or a grave mistake. The Supreme Administrative Court’s decision on leave to appeal cannot be appealed, regardless of whether leave to appeal is granted or not.

If the Supreme Administrative Court grants leave to appeal, the court will examine the question on its merits. If the court does not grant leave to appeal, the matter is concluded as of that decision. The judgment of the court cannot be appealed. The process at the Supreme Administrative Court corresponds to that which has been described above regarding the Administrative Court.

If the Commission’s proceedings are successful in the court procedure, the broadcaster shall pay the set amount to the Authority within thirty days of the ruling gaining legal force (Chapter 17, Section 7 of the Swedish Radio and Television Act). The fee shall accrue to the Swedish State (Chapter 17, Section 5 of the Swedish Radio and Television Act). If the Commission’s proceedings are not successful, the matter against the broadcaster is concluded in connection with either a judgment by the Administrative Court or the Administrative Court of Appeal gaining legal force or in connection with a judgment or a decision from the Supreme Administrative Court being reached and publicised.

The Swedish Consumer Agency’s/KO’s cases concerning alcohol advertising in commercial advertisements on television

General information on how enforcement cases are initiated

The enforcement cases that the Swedish Consumer Agency initiates against traders can be based on a complaint from the public, but the Agency can also act on its own initiative. A case begins with the trader being contacted by the Swedish Consumer Agency and, as a general rule, being given opportunity to comply voluntarily. If this is not the case, or if the legal position is deemed unclear, the Swedish Consumer Agency can submit the case to the Consumer Ombudsman (KO), which is responsible for any legal measures to be taken against the trader in the form of proceedings being instituted against the trader, or can issue the trader with a penalty payment if the legal position is clear.

How the cases now in question were initiated

The cases now in question were initiated, as described above, by a complaint from IOGT-NTO. The Swedish Consumer Agency has reviewed the television advertising that has been broadcast on TV3, TV6, Kanal 5 and Kanal 9 from 1 January 2015 to 3 November 2015, inclusive, and has on the basis of this review selected four advertisers that may exemplify the foreign broadcast alcohol advertising to which Swedish consumers are exposed, despite there being a ban on televised alcohol advertising in Sweden (Appendix 35). As regards TV8, the Agency has observed that alcohol advertising also occurs in this programme service, although there are no statistics for the period. However, it should be considered non-contentious that alcohol advertising occurs in the television broadcasts in question.

General information on proceedings in respect of a market disruption fee

If a trader intentionally or negligently violates, inter alia, Chapter 7, Section 3 of the Swedish Alcohol Act by broadcasting alcohol advertising on television, the trader may be ordered to pay a market disruption fee for the violation. The fee shall accrue to the Swedish State. A market disruption fee can also be imposed on a trader that intentionally or negligently has substantially contributed to the violation (Section 29 of the Marketing Practices Act).

The market disruption fee is a direct acting sanction that can be issued by a General Court for an already committed violation. The fee is to be decided to no less than five thousand SEK and no more than five million SEK. It should also be added that there is a Bill to raise the amount of the market disruption fee
to no less than ten thousand SEK and not more than ten million SEK for violations committed after 1 October 2016 (cf. Ds 2015:45). In the case in question, however, the alcohol advertisements were broadcast prior to 1 October 2016, which means that a market disruption fee of up to a maximum of SEK 5 million can be imposed. The fee may not exceed ten per cent of the trader’s annual turnover. The annual turnover shall refer to the turnover for the immediately preceding financial year. If the annual turnover is not available or is incomplete, it may be estimated (Section 31 of the Marketing Practices Act). In determining the market disruption fee, particular attention shall be given to the seriousness and duration of the violation. In minor cases, no fee shall be imposed and may also be waived if there are exceptional grounds for doing so (Section 32 of the Marketing Practices Act). The fee shall be paid to the Legal, Financial and Administrative Services Agency within thirty days of the judgment gaining legal force, or such later date as specified in the judgment (Section 33 of the Marketing Practices Act).

In the cases now in question

KO maintains that the broadcasters are well aware of the fact that Sweden has a total ban on broadcasting alcohol advertising on Swedish television, particularly in light of the earlier request to the broadcasters from the British authority, Ofcom, to cease broadcasts containing this type of advertising. There is therefore no doubt that the broadcasters have intentionally violated the Swedish total ban on broadcasting alcohol advertising on television.

Furthermore, the violations have been ongoing for several years and have reached a large part of the Swedish population. The violations are also serious as they violate a cornerstone of Swedish alcohol policy. The effect of measures not being taken against these violations is the risk of a very serious decrease in the significance of other measures taken by Sweden to reduce the harmful effects of alcoholic beverages on public health. KO is therefore of the opinion that the sanctions for these violations must be robust.

As mentioned earlier, the highest fee is limited to five million SEK and may not exceed ten per cent of the trader’s annual turnover. As the broadcasters’ annual turnover far exceeds 50 million SEK (compare page 19, which shows that the alcohol advertising revenues for MTG in 2015 totalled about 123 million SEK as regards the programme services TV3, TV6 and TV8 and for Discovery totalled about 122 million SEK as regards the programme services Kanal 5 and Kanal 9), and as the violations are very serious, have been ongoing for a very long time and have been exceptionally extensive, the market disruption fee cannot be set at an amount less than five million SEK for each broadcaster. If the broadcasters continue with the violations after 1 October 2016, when the market disruption fee is proposed to be raised to a maximum of ten million SEK, KO intends to petition for a fee higher than five million SEK. The Swedish Consumer Agency’s/KO’s draft applications for a market disruption fee that will be submitted to Stockholm City Court if the European Commission decides that the application is compatible with Union law, are appended to the notification (Appendices 36–37).

General information on the request for an opinion and the question of circumvention in cases under Chapter 16, Section 15 of the Swedish Radio and Television Act

In the cases now in question, this part of the process takes place in cooperation with the Swedish Press and Broadcasting Authority. The case process at the Swedish Consumer Agency therefore corresponds to that which has been described above regarding the Swedish Press and Broadcasting Authority.

If the European Commission decides that the requirements of Chapter 16, Section 15 of the Swedish Radio and Television Act and Article 4 of the AVMS Directive are fulfilled and that the authorities may take the proposed actions, KO institutes proceedings in respect of a market disruption fee at Stockholm City Court. If the European Commission decides that this is not the case, the Swedish Consumer Agency will refrain from taking the proposed actions.
General information on the case process at Stockholm City Court and the Market Court

Proceedings in respect of a market disruption fee are instituted by KO at Stockholm City Court (Section 48 of the Marketing Practices Act). A judgment regarding a market disruption fee can always, that is, without any requirement for leave to appeal, be appealed to the Market Court. The Market Court’s judgments cannot in turn be appealed (Section 52 of the Marketing Practices Act).

The provisions of the Swedish Code of Judicial Procedure concerning civil cases in which out-of-court settlement is not permitted are to be applied in cases concerning a market disruption fee (Section 59 of the Marketing Practices Act). These provisions of the Swedish Code of Judicial Procedure mean, inter alia, that the court has a certain responsibility for the case being fully investigated. It also means that the court is not bound by any concession of a petition or an acknowledgement of a particular issue of fact, but that the court makes a free examination of evidence. The parties have the right to submit their opinions on all the circumstances and evidence put forward in the court. KO is not entitled to compensation for court costs in cases concerning a market disruption fee, while the counter-party is entitled to compensation in the event that KO’s legal action is not successful.

As of 1 September 2016, the court’s examination of intellectual property and marketing law cases and matters will, instead of at Stockholm City Court and the Market Court, take place at two special courts: in the first instance, the Patent and Market Court at Stockholm City Court and in the second instance, the Patent and Market Court of Appeal at Svea Court of Appeal (see Govt. Bill 2015/16:57). No leave to appeal is required for appealing a judgment concerning a market disruption fee to the new court of appeal. The judgments of the Patent and Market Court of Appeal shall, as a general rule, not be appealable, but if the court finds that it concerns a question that is of interest from the precedent perspective, it can allow the judgment to be appealed to the Supreme Court. The same procedural rules that have been described above will also apply to the procedure at the new court.

The broadcasters’ opinions

On 18 December 2015, the authorities sent a request for an opinion to the broadcasters. The aim was to obtain a good basis for being able to determine whether the broadcasters chose to establish themselves in the United Kingdom in order to circumvent the stricter Swedish rules. The request for an opinion covered questions on the broadcasters’ establishment in the United Kingdom, their organisation and their turnover for alcohol advertising and sponsorship messages (Appendices 27–28). The broadcasters submitted their opinions on 15 and 16 February 2016, respectively (Appendices 29–30). In these opinions, the broadcasters have referred to previous communication in the matter. The main content of the broadcasters’ different opinions is set out below. For full presentations of the content, please refer to the appendices cited in the following.

Wholly or mostly directed towards Sweden

In an opinion of 21 June 2013, MTG has previously confirmed that the condition that the broadcasts are wholly or mostly directed towards Sweden is fulfilled (Appendix 38, paragraph 2). The opinion states the following.

We accept that this condition is satisfied in relation to [TV3, TV6 and TV8].

The opinion from Discovery of 16 February 2016 (Appendix 30) states the following.

There has not been any dispute that both Kanal 5 and Kanal 9 ‘target’ Sweden for the purposes of Article 4(2)(b) of the AVMS Directive or that those channels have carried and
continue to carry advertisements and sponsorship messages for alcoholic beverages in accordance with their Ofcom licences.

The question of circumvention

MTG’s opinion of 15 February 2016 states the following.

[…] as far as we can see only those of your questions which relate to establishment and the commencement of alcohol advertising and sponsorship are relevant for the question of circumvention under Article 4(3)(b). Your questions which relate to MTG’s present day set-up are not relevant. This is because the relevant date at which the intention of a broadcaster to circumvent must be assessed is the date of establishment of the broadcaster in the Member State having jurisdiction. The test is not a continuing or “present day” test. This is a matter which we have addressed extensively in our previous correspondence, including our letter to the Swedish Broadcasting Authority dated 21 June 2013, paragraphs 5.2 to 5.4 (appendix 38).

The Issue of Circumvention

With regard to the questions which we consider are relevant for the test under Article 4(3)(b), we devoted over seven pages of our 21 June 2013 letter (sections 3 to 6 – appendix 38) to addressing the question of “intention to circumvent”, providing both factual background and legal analysis of this issue.

In our 3 February 2015 letter to the European Commission (appendix 39) we set out some further background on the nature of our UK operations - and the level of our investment and commitment to European television production (circa € 90 million in 2014).

Q.1 When did MTG or its predecessor establish itself in the United Kingdom? Please describe the full history of the broadcaster and its predecessors, including descriptions of previous establishments in other countries.

We provided this information in paragraphs 6.3 to 6.4 of the 21 June 2013 letter (appendix 38), explaining how MTG’s broadcasting business was established in the United Kingdom and had no previous establishment in any other country. MTG was originally incorporated as a company in England and Wales on 10 June 1986. It then changed its name several times, including a change from Viasat Broadcasting UK Limited to today’s name of Modern Times Group MTG Limited on 6 October 2014.

We explained in the letter how the company launched TV3 as a pan-Scandinavian channel on 31 December 1987, how it only became three separate channels, TV3 Sweden, TV3 Denmark and TV3 Norway in 1992, how TV6 was launched in 1992 and that TV8 was acquired in 1999. MTG has been broadcasting from the United Kingdom and running its broadcasting business here ever since.

We believe the above also provides an answer to your question 8 regarding when MTG or its predecessors first began to broadcast television programmes on TV3, TV6 and TV8.

Q.2 What are the full reasons for MTG’s or its predecessors’ establishment in the United Kingdom? Did the Swedish stricter rules [in relation to alcohol advertising] affect MTG’s decision on where to establish itself?

Again, we have provided you this information already in detail in the 21 June 2013 letter, paragraphs 6.5 to 6.15 (appendix 38). We explained that the principal determining factors which led to MTG being established in the United Kingdom were (a) the availability of uplink facilities and satellite transponder capacity; (b) professional technical expertise; (c) the presence of other international broadcasters: and (d) logistical advantages (paragraphs 6.6 to 6.9).

We further explained (paragraphs 6.10 to 6.11, appendix 38) that at the time TV3 was launched Sweden was not part of the European Union (the EEC as it then was) and MTG cannot therefore be accused of
“circumvention” as that term is understood in European law. We were not relying on our rights under the European Treaty (such as freedom of movement) because those rights had no application in relation to Sweden. Whatever may have been the legal position of the channel in Sweden at the time, it has no relevance to any assessment of circumvention for the purposes of European law.

In addition, as TV3 was broadcast as a pan-Scandinavian channel from 1987 until 1992 MTG’s intention when it established itself in the United Kingdom was clearly not to circumvent the stricter alcohol advertising rules in Sweden. The intention was to be able to broadcast an advertising-funded channel into Sweden, Denmark and Norway and there was no breach of European law in doing so.

Crucially, the stricter rules on alcohol advertising in Sweden could not have affected MTG’s decision because TV3 did not even carry alcohol advertising or sponsorship in its early years, as we explained in paragraph 6.12 of the 21 June 2013 letter (appendix 38): “There can be no substance to an allegation that [MTG] established itself in the United Kingdom solely in order to circumvent certain stricter rules on alcohol advertising and sponsorship in Sweden when the evidence is that it did not, as a matter of fact, carry any alcohol advertising or sponsorship on its channels for many years”.

Subsequent to the 21 June 2013 letter we undertook further research into the question of when we began broadcasting alcohol advertising and sponsorship and, as we set out in our letter of 3 February 2015 (appendix 39), “According to data provided by MMS Sweden people meter spot logs, MTG UK did not commence showing alcohol advertising on the Swedish FTV channels TV3, TV6 and TV8 until December 2002, 15 years after it was established in the UK”. Given this evidence, it is clear that the Swedish rules on alcohol advertising did not affect MTG’s decision on establishment in 1987.

We believe the above also provides an answer to your question 9, regarding when MTG or its predecessors first began to broadcast sponsorship messages containing alcoholic beverages and commercial advertisements for alcoholic beverages on TV3, TV6 and TV8.

I would remind you that all of the above information and arguments are set out in greater detail in our 21 June 2013 letter (appendix 38), the 3 February 2015 letter (appendix 39) and indeed all the other correspondence between us since 2012.

To date, the only “evidence” that you appear to have for our alleged circumvention and upon which you and the IOGT-NTO appear to rely (namely, the comments of a former Kinnevik employee in a television documentary about the founder of MTG) is spurious and more importantly irrelevant for the purposes of any assessment under Article 4 of the AVMS Directive.

Further, your notification to the European Commission on 19 December 2014 states that, “[b]ased on the significant investments into televised alcohol advertisements and the revenue which these can create for broadcasters, there are grounds for arguing that the broadcasters in question established themselves in the United Kingdom to circumvent the stricter Swedish regulations for alcohol advertisements and the sponsoring of televised broadcasts”. “Grounds for arguing” is plainly also an insufficient basis on which to assess that a broadcaster has established itself in order to circumvent stricter rules, particularly given that the Article 4(3) regime, as an exception to a fundamental freedom, must be construed strictly.

Further, given alcohol was not advertised for 15 years after TV3 was launched, it is inconceivable that “the revenue which [televised alcohol advertisements] can create” could have played any part in the decision to establish MTG or its predecessors in the United Kingdom.

**Actions of the Swedish Broadcasting Commission (“SBC”)**

As you are aware, as a matter of European law and under the AVMS Directive, our channels are under the jurisdiction of Ofcom and so we are required to follow the rules set down by Ofcom in relation to the
broadcast of advertising and sponsorship announcements. Nonetheless we note that the SBC decided on 9 November 2015 (appendix 12) that certain sponsorship announcements broadcast on our channels during September 2015 breached the Swedish Radio and Television Act. The SBC stated in its decision that it intends to apply to the administrative court to levy a special fine of SEK 50,000 per sponsorship announcement.

We accept that you may take ‘measures’ against MTG in accordance with Article 4(3) and notify the European Commission and Ofcom of your intention to take those measures when you make a notification under Article 4(4). However, your right to take action against us only arises if the European Commission agrees with your assessment under Articles 4(2) and (3) of the AVMS Directive. Until that time, neither the SBA nor the SBC has any right to take any action whatsoever for the purposes of the AVMS Directive and our sponsorship broadcasts must only comply with the Ofcom rules. Therefore, we believe that any measures that you propose to take should only have prospective and not retrospective effect. If you are entitled to levy a fine in respect of any sponsorship announcement that we have broadcast it must only be after the European Commission confirms that such a measure is compatible with European law and that your assessments under Article 4 are correctly founded.

Finally, as we have stated many times, MTG takes its compliance obligations under English law very seriously and will continue to do so. More importantly we are always aware of the interests and concerns of our viewers. Therefore, we not only comply with the Ofcom Broadcasting Code and the Advertising Standards Authority’s BCAP Rules but we also apply additional, stricter, internal rules in relation to alcohol advertisements, as we set out in the appendix to the 3 February 2015 letter (appendix 39).

Discovery’s opinion of 16 February 2016 states the following.

[Your] letter asks us a series of questions which appear to break down into three broad categories namely:

a) full details of the establishment of Discovery and its predecessors and whether the Swedish stricter rules affected Discovery’s decision on where to establish itself (questions 1 and 2);
b) details of our current establishment and where we derive our revenues (question 3–7);
c) details of how many advertisements and sponsorship messages for alcohol products we broadcast on Kanal 5 and Kanal 9 and the revenues that we derive from these broadcasts (question 8–12).

With respect to questions 8 to 12, the number of advertisements and the revenue derived from them are not relevant to the inquiry. This information will not assist in the determination of whether Discovery established itself in the United Kingdom to circumvent stricter Swedish rules.

There has never been any dispute that both Kanal 5 and Kanal 9 ‘target’ Sweden for the purposes of Article 4(2)(b) of the AVMS Directive or that those channels have carried and continue to carry advertisements and sponsorship messages for alcoholic beverages in accordance with their Ofcom licences.

Therefore, we accept that the SBA will be able to adopt ‘measures’ against us in respect of such broadcasts provided that the other requirements and safeguards of Article 4 are satisfied and this is confirmed by the European Commission.

Current operations of Discovery

We also regard questions relating to the current establishment of Discovery as not being directly relevant to any assessment under Article 4 of the AVMS Directive. However, suffice to say that London is the headquarters of Discovery Networks International’s European television business. This includes Discovery and its operations. For example, the President of Discovery Networks International, J B
Perrette, is based at our Chiswick Park headquarters along with Dee Forbes, the President and Managing Director for Northern Europe, Dominic Coles, CFO and COO Northern Europe, Amy Girdwood, EVP HR Management, and others. Over 1,000 Discovery staff are based in the UK compared to 153 in Sweden. Staff in London are ultimately responsible for all aspects of our channel operations including, finance, scheduling, program acquisition, transmission, third party affiliate negotiations and compliance.

For operational efficiencies certain day to day decisions for the channels are made in Sweden, but all key strategic, financial, corporate, editorial, senior executive staffing and programming decisions are made in London for all our European channels including Kanal 5 and Kanal 9.

We also consider that the questions you have asked about the revenues earnt from Kanal 5 and Kanal 9 are irrelevant in relation to the issues at hand. As I noted above, we do not dispute that these channels “target” Sweden for the purposes of Article 4 and accordingly the vast majority of the revenues earnt by these channels are derived from Sweden. But this is no different to the 85 channels we broadcast from the UK which are received in other European countries. Indeed, precisely the same situation would apply to any other broadcaster which operates on a pan European basis. However, this result is not only permissible but, in our view, a natural consequence of the rules applying under the AVMS Directive.

The History of Discovery

We accept that the first two questions that you pose are relevant for the assessment you are required to make under Article 4(3)(b) of the AVMS Directive. However, the difficulty we have with these questions is twofold.

First, these questions have been addressed extensively in the submissions we made to you during 2013 and 2014 on the issue of circumvention. We note that in your original notification to the European Commission under Article 4 of the AVMS Directive you presented no direct evidence against Discovery which would support any claim that Discovery established itself in the United Kingdom to avoid the stricter Swedish rules on alcohol advertising. We assume that this is because you had read our previous detailed submissions on this point and could not take issue with them. To that extent, nothing has changed in our position.

Instead the core argument in your notification was that because significant revenues are derived from alcohol advertising, it follows that there are grounds for arguing that Discovery must have established itself in the United Kingdom to avoid the stricter Swedish rules on alcohol advertising. We assume that this is because you had read our previous detailed submissions on this point and could not take issue with them. To that extent, nothing has changed in our position.

Secondly, Discovery Networks International only acquired Discovery in 2013. As part of that transaction we were not provided with access to any of the records of SBS Broadcasting S.a.r.l (the original holding
company for the SBS Broadcasting Group (SBS)) and so we have limited information as to events which we can see took place over 20 years ago. Therefore, our review of the history of Kanal 5 is constrained by these limitations. However given the nature of your questions and to help your deliberations insofar as we are able, we have reviewed our previous submissions and also carried out some research into the history of these channels.

The key points arising out of that review and discussions are summarized below.

(a) the establishment of Discovery (which is the broadcaster of Kanal 5 and Kanal 9 for the purposes of Article 4) is set out in paras 6.3–6.11 of our 19 June 2013 submission (appendix 40) and Part 6 of our 28 August 2014 – Summary Arguments (appendix 41). In essence, it was originally established to launch a number of music channels across Europe under the Voice Music brand;

(b) as we have submitted previously Article 4 refers exclusively to the broadcaster and no other entity - this is Discovery. It is our contention that Article 4 is to be given a restrictive meaning and therefore the history of any entity other than the broadcaster is irrelevant (see paragraphs 5.1 and 5.2 of our Summary Arguments – appendix 41);

(c) Discovery has never been established in any other jurisdiction;

(d) Discovery acquired the assets of Kanal 5 Limited in 2007 which included the Ofcom licence and other assets for Kanal 5 and Kanal 9;

(e) Kanal 5 Limited was established in the UK in 1992. It became the licensed broadcaster of Kanal 5 in 1996.

(f) to the extent that the history of the Nordic Channel is relevant, we understand that SBS acquired that channel in 1991. At that time Sweden was not a member of either the EEC or the EEA and did not become so until 1995. Therefore, there can be no question of any circumvention prior to that time as the essence of the test of circumvention involves nationals from a particular Member State improperly relying on the provisions of the EU Treaty (see ‘Centros’ and under paragraphs 6.7, 6.8 and 6.15 of our Summary Arguments – appendix 41). SBS was a Luxembourg company and was established in Luxembourg in 1988. We understand that SBS had operations in Luxembourg and controlled Kanal 5 from Luxembourg, which was part of a wider plan by SBS to establish a European broadcast headquarters. Once the Chairman, Chief Executive and Founder of SBS, Mr. Harry Sloan, relocated to London in 1996, the operational headquarters of the SBS Group was also moved to London. Our 19 June 2013 submission (appendix 40) lists some of the other channels which were launched by SBS from its London headquarters consequent upon the decision to establish its operational headquarters in London (see paragraphs 6.8 and 6.9).

Summary

Therefore, to the extent the history of Kanal 5 is at all relevant, there is no evidence that the establishment in the UK was in any way motivated by any attempt to circumvent the Swedish alcohol advertising rules or any Swedish regulations. However, our primary contention is that this is all irrelevant. The test in Article 4 refers only to Discovery, as the broadcaster of Kanal 5 and Kanal 9 and there is no evidence whatsoever to assert that Discovery established itself in the UK to avoid the Swedish alcohol advertising rules. As our submissions show, Discovery was originally established in the United Kingdom to launch a pan European music station called The Voice.

The broadcaster has also appended Appendix 42, which further presents the broadcaster’s position.
The broadcasters’ supplementary statements

On 9 November 2016, the authorities sent a new request for a statement to the broadcasters. This time, as explained above, the aim was to, on the one hand, afford the broadcasters the opportunity to review a first draft of the authorities’ notification to the Commission and the United Kingdom and, on the other, to respond to the arguments put forward by the authorities in the draft as grounds for the authorities’ assessment that the broadcasters established themselves in the United Kingdom in order to circumvent the stricter Swedish rules. The request for a statement indicated that the authorities arrived at their assessment after evaluating the content of the broadcasters’ aforementioned statements and the arguments put forward by the broadcasters. It was also explained that the draft notification contained descriptions of the grounds on which the authorities are basing their assessment, thorough descriptions of the measures that may be adopted against the broadcasters if the Commission decides that such measures are compatible with Union law and thorough descriptions of the processes that may follow the Commission’s decision. The request for a statement also stated that the draft notification had not yet been submitted to the Commission or the United Kingdom.

The broadcasters submitted their statements on 13 and 15 December 2016, respectively (Appendices 33–34). In these statements, the broadcasters have referred to previous communication in the case, among other things. The principal content of the broadcasters’ various statements is reproduced below. Complete accounts of the content can be found in the appendices cited above and in the following.

MTG’s statement of 13 December 2016 states the following.

We address certain points made in the draft Notification below. However, we think it important to reiterate our position for clarity:

MTG did not establish itself in the United Kingdom (the “UK”) with the sole purpose or intention of circumventing Sweden’s stricter rules on alcohol advertising. MTG established itself in the UK and began broadcasting the pan-Nordic channel TV3 on 31 December 1987. The principle determining factors which led to MTG being established in the UK were (a) the availability of uplink facilities and satellite capacity, (b) professional technical expertise, (c) the presence of other international broadcasters and (d) logistical advantages. Contrary to the Authorities’ assertion, such advantages were not present in other EU Member States at that time. In addition, programme schedules from 1988 show that there was very little Swedish language content nor locally produced Swedish content on TV3, with the majority of content being American films and children’s shows. Consequently, it would not have been “easier to have Sweden as a starting point for such broadcasts”. Furthermore, MTG did not commence showing alcohol advertising on the Swedish Free TV channels TV3, TV6 and TV8 until December 2002, 15 years after it established in the UK. Therefore, there is absolutely no substance to the allegation that MTG established itself in the UK in 1987 with the sole intention to circumvent Sweden’s stricter rules on alcohol advertising. We refer to our letters to the Swedish Broadcasting Authority, in which we discuss this in greater detail. MTG falls under the jurisdiction of the UK and complies with its laws. Sweden cannot exercise secondary control by seeking to impose its law on alcohol sponsorship and advertising bans on MTG’s historical broadcasts, and to penalise MTG for not complying with this law retrospectively, when MTG is already complying with the rules of the Member State in which it is established. The Authorities may only take action against MTG if the European Commission agrees with its assessment under Articles 4(2) and (3) or the AVMS Directive. In such event, any “measures” that the Authorities seek to apply should be prospective in effect, not retrospective.

Is the ban on alcohol advertising proportionate, necessary and non-discriminatory?

We accept that the European Court ruled in the Gourmet case that the ban on alcohol advertising in the media could comply with European law. However, it is also true that the Swedish Marketing Court ruled
that the ban on alcohol advertising in periodicals was disproportionate because it did not apply to foreign periodicals imported into Sweden. In this regard there are obvious parallels with the ban on alcohol advertising and sponsorship on television given the number of television channels which both carry alcohol advertising and are legally free to be distributed in Sweden under the AVMS Directive.

In relation to Case C-170/04 the Court of Justice ruled that the ban on Swedish citizens importing alcohol other than through Systembolaget was contrary to European law, but could be justified on public health grounds. However, the Court refused to uphold the ban as it considered that the prohibition was designed to favour Systembolaget as a distributor rather than protect public health. Therefore, we disagree that the judgment of the Court is authority for the proposition that a ban under a national law which only applies in certain respects or only to a limited respect cannot be considered appropriate. In that case, the Court rejected the argument that the ban achieves the objective of protecting young people from the harmful effects of alcohol because the ban applied to all persons irrespective of age. Therefore it appears that such a ban may have been lawful if it had been tailored to protect only young persons, i.e. it achieved its objective of only having a limited effect. Therefore we believe that the case stands in contradistinction to the point made by the Authorities in the Notification that for the ban to be effective it must be applied not only upon actors in the Member State but also upon actors established outside that Member State but which direct efforts towards the market of that Member State. However, if it is the case that for the ban to be effective it must apply to all actors then there must be a serious doubt about the enforceability of the ban on alcohol advertising and sponsorship on television. Even if the Authorities were to be successful in this case, it is inconceivable that the ban could be enforced against all other broadcasters who broadcast channels into Sweden under the AVMS Directive and whose channels carry alcohol advertising or sponsorship billboards without a change in European law.

Thirdly given the critical importance that has been placed on enforcing this ban against our channels, we believe the Authorities (or any predecessor or subsidiary body) should disclose how it has sought to apply the informal co-operation procedures available under Article 4 of the AVMS Directive to other channels licensed in other Member States seeking co-operation of those channel operators to enforce the alcohol advertising ban. This is obviously of importance given the statement in the Notification that the proposed measures (i.e. the fines) would be taken against any other broadcaster that broadcasts from another Member State but directs its broadcast towards Sweden and which contravenes the alcohol advertising ban. There are numerous other channels which fall into this category.

Proposed Measures

We also believe that the proposed measures to be adopted are also not proportionate to the objective they pursue. Taking cases to the Swedish Marketing Court ahead of receiving the confirmation from the European Commission that it believes that all of the criteria in Article 4 have been satisfied is tantamount to an exercise of secondary control over our channels contrary to the AVMS Directive. At the time the Swedish Broadcasting Commission took this action, our TV channels were and continue to be licensed by Ofcom and our obligation is to comply with relevant Ofcom rules. In our view it would have been equally feasible for the Authorities to have indicated the level of fines that could be levied for breach of the Swedish Radio and Television Act (e.g. a fee of no less than 5 000 SEK or no more than 5 million SEK) and confirmation of the Authorities’ intention to proceed to prosecute us for breach of the relevant legislation in respect of any sponsorship billboard or advertisement featuring alcohol broadcast on our channels after the Commission’s assessment has been received.

The necessary prerequisites for circumvention

It is a question of fact that Sweden was not a member of EU (or the EEC) at the time when TV3 began broadcasting from the UK. Therefore we fail to see how we were relying on our rights under European
law to legitimise those broadcasts - clearly we were not. Sweden may have had the right to take action against TV3 at the time under its domestic law and the fact it chose not to do so was a matter for Swedish Authority at the time - however, their inaction cannot be used as an excuse to seek now to apply rules which were not applicable at the relevant time.

We disagree with the submission made by the Authorities that Sweden must be able to assert its right against the company, which at the time of the notification is responsible for the unlawful broadcasts to Sweden, even if the company has, for example, changed its company form after its establishment in the other Member State or only acquired the programme services from the original provider. Article 4 is very clear against whom circumvention must be proved - it is “the broadcaster” of the channels. As we have pointed out previously “the broadcaster” has a defined and well recognised meaning under the AVMS Directive. We should not be made to suffer because the Swedish Authorities have been dilatory in relation to taking any action they felt was necessary. The TV10 Case\(^1\) shows clearly that an action alleging circumvention could have been brought by Sweden at any time over the last 20 years or more and the fact that the circumstances may no longer be amenable to it or the passage of time has made such an action more difficult, is not a matter upon which we should be made to suffer. In relation to our reorganisation in 1999 we acted properly and in pursuit of our corporate objectives. It may be an entirely different matter if, having received the complaint, we undertook a complete reorganisation in 2012.

\(\text{The harmonisation of the Member States’ national legislation}\)

The assumption that there is a temporal relationship between the fact that the European Commission began work on a possible harmonisation measure in relation to television broadcasting in the EU (i.e. EEC) and our launching a channel from the UK in 1987 is irrelevant. The TWF Directive only had legal status when it became part of the Acquis Communautaire and in the case of the TWF Directive it was not formalised until October 1989 - nearly two years after we launched our pan-Nordic television service. In any event at that time Sweden was not a Member State of the European Union (or its predecessor).

\(\text{The reasons stated for establishment in the United Kingdom are not convincing}\)

We disagree with the Authorities’ assessment for several reasons. Firstly, as we have explained, the world of satellite broadcasting was in its infancy in 1986-87. There were few satellite broadcasters, and Sky Television (the forerunner to the Sky in the UK) had only recently been launched - proving that a Fixed Service Satellite such as that launched by Astra could be used to broadcast a television channel and its transmissions would be received with sufficient clarity by domestic receiving dishes to be commercially visible. Until around that time, it had been assumed that only a DBS satellite could be used. It is not sufficient, for the Authorities to assert that other countries in Europe, including Sweden "probably have offered and still offer corresponding conditions", without offering any facts or figures to substantiate this statement.

The Authorities simply cannot dismiss the advantages that the UK had to offer in the late 1980s as a base for establishment given the importance of uplink facilities, satellite transponder capacity, professional expertise and logistical advantages. The technical solutions required to broadcast channels required (and continue to require) huge investment by MTG - a fact which vastly outweighs the location of where a small proportion of our programmes are filmed or the presence of colleagues with local market knowledge. Whilst we do not dispute that alcohol advertising and sponsorship generates revenue for MTG, we reiterate that alcohol advertising did not appear on TV3 until 2002 and it is not logical to assert that MTG would base its decision to establish its broadcasting business in the United Kingdom solely on

\(^1\) TV10 S.A v Commissariaat voor de Media, ECR 1994 I-04795.
the basis of the future revenue it could potentially derive from alcohol advertising and sponsorship. Indeed, any such revenue would have been dwarfed by the investment required to create and maintain the uplink facilities, transponder capacity and to employ technical experts in the late 1980s.

Therefore it was reasonable that we should wish to launch from the UK which had been the home to much of this activity and therefore home to the relevant expertise at this nascent time.

Secondly, the Authorities claim that a “large proportion of the programmes on the channels in question are recorded by Swedish production companies in Sweden”, therefore it would have been “easier to have Sweden as the starting point for such broadcasts”. Again, they have produced no evidence to back this assertion. It is not clear whether the Authorities are referring to the current content on the channels or the content broadcast on TV3 from 1987 onwards. According to our schedules, the proportion of programmes produced in Sweden was 38 percent of the total amount of programming broadcast in the last 12 weeks (September - December 2016) on TV3 and between 1-5 percent of the total amount of programming broadcast on TV6, TV8 and TV10 in the last 12 weeks. The remaining proportion is made up of acquired content, (US or non-Swedish European works) which is ingested and edited in our state of the art play-out facility in London. Modern international production techniques enable our producers to upload material from across the globe almost instantaneously. From here they can be delivered, viewed, edited and ingested. It does not follow that this process would be easier in Sweden as our systems only require an internet connection in order to function regardless of the location of the end user. In addition, when TV3 was established in 1987 a majority of the content needed to be delivered in physical formats from American-based distributors making the UK an ideal location to receive transmission material. Our records from 1987-1988 indicate that there was no Swedish produced content broadcast on TV3 and that the programme schedule was predominantly made up of acquired US content and children’s programmes.

Thirdly, the assertion that the “extensive activities that the broadcasters have in Sweden make it likely that a large part, if not all, editorial decisions are made and have been made in Sweden” is again mere hearsay and not substantiated with any facts. We have been very clear in all our correspondence that editorial decisions are made in London.

Finally, the onus is on Sweden to prove that we established in London in 1987 to circumvent their rules contrary to European law. No such evidence has been produced. A mere assertion that it is reasonable to assume that it was easier to establish our operations in Scandinavia is pure conjecture and completely false as detailed above. The argument smacks of hindsight rather than a factual analysis of the situation that persisted in the 1980s. We re-emphasise that the onus is on Sweden to prove circumvention and not on us to demonstrate the opposite.

It is difficult to understand the relevance of the argument regarding the extensive investments and revenues with respect to alcohol advertising to the issue at hand. Sweden has accepted that our channels are under the jurisdiction of the UK for the purposes of the AVMS Directive. As noted above, the reasons for locating our pan-Nordic channel in London in 1986/87 had nothing to do with the Swedish ban on alcohol advertising. As we have pointed out in previous submissions, when TV3 was launched, it did not carry such advertising.

The extensive investments and revenues with respect to alcohol advertising

We acknowledge that advertising revenues are vital to the success of any advertising based media operation including our television stations. It would be nonsensical to deny it. Moreover it is self-evident that the stronger the advertising revenues, the more revenue that is potentially available to invest in local productions. The relationship is symbiotic. However this has nothing to do with the issue at hand -
whether our decision in 1987 to launch a pan-Nordic channel from the United Kingdom means that we are guilty of circumvention and so in breach of European law.

The amount of alcohol advertising in all media in Sweden in 2011 and 2015 is irrelevant to any assessment of the issue of circumvention. First, when we launched our pan-Nordic channel in 1987 we did not carry alcohol advertising. Therefore the argument put forward by the Authorities that revenues to be earned from alcohol advertising must have influenced our decision is a non-sequitur. Secondly there seems to be an implied attack that our statement that we did not begin broadcasting alcohol advertisements on our channels until December 2002 is misleading. The implication is unwarranted. In any event the Authorities’ own position seems contradictory. What is clear even from the Authorities’ own analysis from the MMS data is that brands such as Famous Grouse Whisky did not begin advertising on our channels until after 2002 as we indicated previously. Whilst it may not be known to MMS precisely what was being advertised, this is irrelevant as we have previously confirmed it was alcohol that was being advertised after December 2002. Again, as we have stated previously, advertisers like Spendrups were not advertising alcoholic beverages on our channels prior to December 2002 - such advertisements were for light beer which is not classified as a prohibited alcoholic beverage under the relevant Swedish legislation.

Statements from former representatives of the broadcasters

As we have indicated previously and as the Authorities accept, the statements from Mr. Friedman are in no way decisive and in our view should be given no weight. They may represent his view but he does not represent MTG. Therefore the Authorities cannot rely on such hearsay evidence to justify its current attempt to enforce its regulations and exercise secondary control over our channels contrary to the AVMS Directive.

The Swedish Alcohol Ban

In our view, the position in Norway in relation to our alcohol advertising is irrelevant to the matters at hand. This also applies to the statement that many viewers are put off complaining about advertisements run on our channels because we are based in the UK. Not only is this irrelevant, it is also untrue. The Authorities give no evidence for this assertion and it is mere supposition. We do not believe that viewers are put off complaining about either the editorial content or the advertising on our channels because we are based in the UK as we do indeed receive complaints. In the past 5 years we have received a total of 52 complaints across all our Ofcom licensed channels of which 47 were for editorial content, 3 were for adverts and 2 were for sponsorships. In the past 5 years we have not received any complaints from viewers about alcohol advertising on our channels.

Conclusion

According to the European Commission, the burden of proof is on the Member State, Sweden in this instance, to establish, evaluate and prove circumvention. As we have set out above and in greater detail in our letters to the Authorities dated 21 June 2013 and 15 February 2016 (Appendices 38 and 29), the Authorities have still not provided any relevant or compelling evidence to substantiate the grounds on which they base their finding that MTG has established itself in the UK in order to circumvent the Swedish stricter rules.

Discovery’s statement of 15 December 2016 states the following.

In addition to what we have previously stated, we wish to add the points set out below.
Change of the identity of the broadcaster and general comment

On 5 April 2016, Ofcom approved the transfer of the licences for both Kanal 5 and Kanal 9 to Discovery Corporate Services Limited (“DCSL”), for the purposes of further integrating the former SBS channels and related operations with Discovery. Accordingly, as stated in the Notification, DCSL is now the broadcaster of both channels.

Kanal 5 and Kanal 9 are general entertainment channels which carry a mixture of Swedish content (about 5-10 percent), acquired content and content derived from the wider Discovery group.

Circumvention

As previously advised, we do not consider that any circumvention has taken place. All of our channels are licensed and established in the UK.

Would it be proportionate and non-discriminatory to apply the Swedish alcohol ban to Discovery?

We note that you refer to the judgments of the Court of Justice in both the Gourmet case (C-405/95) and the Systembolaget case (C-170/04) to argue that a total ban on alcohol advertising and sponsorship on television is proportionate, necessary and non-discriminatory. We have previously commented on the Gourmet case in our 19 June 2013 submission (see Appendix 40) and in our Summary Argument - 28 August 2014 (see Appendix 41).

We agree that the European Court accepted that the alcohol advertising ban in relation to magazines could be upheld on public health grounds, provided that such concerns could not be met by measures having less harmful effects on intra-community trade. However, it is equally important to note that when the issue of the proportionality of the ban was referred back to the Swedish Market Court, the Market Court refused to apply the ban, ruling that its benefits for public health were not proportionate to the damage it caused to trade. In its reasoning, the Market Court especially underlined the lack of necessity for a total ban on alcohol advertisement in Swedish magazines, given the use of other policy instruments, such as high alcohol taxes and the state-owned retail monopoly, which the Market Court considered to be a more efficient means of limiting access to and consumption of alcohol. Moreover, the Court questioned the appropriateness and relevance of the ban in question, given that its effectiveness is limited by various alternative channels available for advertising alcoholic beverages in Sweden, such as foreign newspapers and magazines sold in Sweden, foreign TV channels and through the Internet. These concerns of the Swedish Market Court are echoed in the recommendation contained in a Report of the World Health Organisation - cited by the IOGT-NTO in support of the ban - which concludes that increasing the price of alcohol has the greatest impact in reducing heavy drinking (see paragraph 3.5 of our January 2014 submission - Appendix 42). It is also supported by the preparatory works of the Swedish legislators, which laid out the reasoning behind and the envisaged goals of the Swedish policy instruments regarding alcohol and public health. In its bill for the current Alcohol Act, the Swedish Government concluded that according to its own research, new communication technologies have resulted in new advertising channels and advertising being increasingly distributed through the Internet, especially social media, where it is easily accessible for young people. This type of advertising is often international and difficult to control.

These conclusions are supported by our own market research concerning the reach of YouTube in young target groups. According to a recent study conducted by Mediavision (see Appendix 34.1), YouTube’s average daily reach is as high as 36 percent in the age group 15-24 and 20 percent in the age group 15-74. We consider that this trend shows the lack of appropriateness and effectiveness of a total ban on alcohol.

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advertising on foreign television channels as a means of limiting exposure of Swedish consumers to such products.

Meanwhile, advertising on the Internet remains largely unregulated (with the exception of video on demand services and sites targeting a Swedish audience). To the best of our knowledge, no legislative or administrative measures are taken by the Swedish authorities to address alcohol advertising and promotion through the Internet, especially on social media platforms. As we pointed out in the 20 January 2014 submission (see Appendix 42), this puts into question the effectiveness of extending the existing advertisement ban to a foreign broadcaster such as DCSL as well as the proportionality and non-discriminatory nature of such an extended ban. It should be remembered that alcohol advertising is also permitted in Swedish print media, a media which stands for 25-30 percent of all net media investments according to statistics from IRM, Appendix 34.2.

We note that you claim that Discovery received nearly 109 million SEK from alcohol advertising on Kanal 5 and just over 13 million SEK from alcohol advertising on Kanal 9. These numbers are incorrect since you have relied upon statistics by TNS Sifo based on gross prices offered to advertisers, despite the fact that TV media offers very high rebates of between 75-85 percent on gross price. Our actual alcohol revenues are accordingly only a fraction of the quoted figures. The only available Swedish statistics based on net prices are the statistics issued by IRM.

You rely on the Systembolaget case to argue that for the ban to be effective, it must be applied widely, encompassing both Swedish and non-Swedish broadcasters. However, to the best of our knowledge, despite the presence of other non-Swedish broadcasters and channels which legally broadcast alcohol advertisements and sponsorship announcements that are viewed by the Swedish public, the Swedish authorities have only initiated the informal co-operation procedure under Article 4 AVMS Directive in relation to our channels and those channels operated by MTG. Moreover, even if a total ban on alcohol advertisement was enforced on all television channels available to the Swedish public - something which is neither feasible nor legally possible - it would have little impact on the overall penetration and availability of alcohol advertising, especially given the fact that young people increasingly access such commercials primarily through the Internet.

Furthermore, the court in the Systembolaget case indicated that the ban on Swedes importing alcohol other than through the Systembolaget may have been justified on public health grounds if it had only applied to young persons and so only had a limited effect. In this regard we feel that the current ban on alcohol advertising and sponsorship billboards on television suffers from a similar defect - the ban could be justified under European law if it only applied to programs designed to appeal to young persons. However because the ban applies to all programming on Swedish television, it is too far reaching to be compatible with European law. Moreover, the UK BCAP Code already safeguards protection of the under 18s by restrictions on alcohol advertising both in relation to content and scheduling of alcohol advertising.

In summary, the reasoning of both the European Court and the Swedish Market Court in the cases cited in your draft Notification, as well as expert reports and statements from the Swedish legislators, support the conclusion that the application of a total ban on alcohol advertising on television broadcast by companies established in other Member States - and thus not subject to Swedish broadcasting rules in the first place - would neither be proportionate, nor effective. Moreover, its selective application to a few companies and their television channels appears to be discriminatory. Application of additional regulatory burdens according to Article 4 of the AVMS Directive is an exceptional measure, which may only be used restrictively and according to strict standards.
Are the proposed fees proportionate?

We note that the Swedish Broadcasting Commission intends to apply to the Swedish Courts to levy a special fee of 50 000 SEK per sponsor announcement in respect of four sponsorship announcements broadcast on our channels in September and October 2015 (which amounts to 200 000 SEK in total) subject only to the European Commission confirming that this action is legal. Further you indicate that as we have continued to violate the ban, the KO intends to apply to the Swedish Courts to impose a market disruption fee upon us which could be up to 10 million SEK.

The KO justifies the proposed action in relation to the market disruption fee as follows:

“KO maintains that the broadcasters are well aware of the fact that Sweden has a total ban on broadcasting alcohol advertising on Swedish television, particularly in light of the earlier request to the broadcasters from the British authority Ofcom to cease broadcasts containing this type of advertising. There is therefore no doubt that the broadcasters have intentionally violated the Swedish total ban on broadcasting alcohol advertising on television”.

We find this justification both troubling and lacking legal substance. The voluntary procedure under the AVMS Directive is aimed at facilitating a working compromise, whilst respecting the importance of the country of origin principle. If the country of destination, in this case Sweden, is allowed to threaten companies established in other Member States with administrative fines and other sanctions, the voluntary and informal co-operation procedures under the AVMS Directive would be meaningless. Moreover, the country of origin principle would be seriously undermined and European broadcasters would again be subject to multiple national regulations and controls. Clearly, this is not the intention behind the AVMS Directive. The Directive does not give the receiving Member State free jurisdiction over channels broadcast to its population. The receiving Member State may only obtain such jurisdiction after confirmation from the Commission has been received that Article 4 has been satisfied. In such a situation, the imposition of administrative sanctions for “violations” committed before such confirmation by the Commission amounts to a retroactive punishment in violation of the Swedish constitution and the fundamental principles of EU law.

When Ofcom requested on 17 January 2013 that we voluntarily comply with the Swedish rules relating to the prohibition on alcohol advertising, it was made explicit that our legal obligation was only to comply with UK broadcasting legislation, which we have always done. The first time that we were informed that the KO intends to seek to levy a market disruption fee upon us in relation to the broadcast of sponsorship announcements or advertising for alcoholic beverages on our channels was when you provided the draft Notification to us. This action is demonstrably disproportionate and unfair.

In this regard we consider that it would be perfectly feasible for you to point out to the European Commission as part of the Notification both the nature and the level of the fines that may be imposed if the ban is breached and that you intend to take such action against us if advertising and/or sponsorship announcements for alcoholic beverages are broadcast on either of our channels at any time after the European Commission confirms that it is satisfied that all of the criteria of Article 4 have been met (subject to a minimum of 48 hour grace period from the decision in order to effect the required changes).

Conclusion

For the reasons put forward in previous submissions, we firmly consider that no circumvention has taken place, and at any rate it would be neither proportionate nor non-discriminatory to apply the Swedish ban to Discovery.
The Authorities' assessment

Wholly or mostly directed towards Sweden

The broadcasts in question are wholly or mostly directed towards Sweden. The broadcasters have a licence to broadcast in the Swedish terrestrial network and it is not possible to view the broadcasts in the United Kingdom either via cable or satellite broadcasts. In accordance with what is stated in the appended review memoranda (Appendices 2–7, 14–15, 18, 22–23, 35 and 43), all broadcasts are broadcast either in Swedish or in English with Swedish subtitles. The programme services also broadcast largely Swedish television programmes that are produced in Sweden, refer or allude to Swedish conditions and feature Swedish actors or celebrities. The content of the broadcasts are also directed to a Swedish market with goods and services that are available in Sweden. All this speaks in favour of the broadcasters tailoring their content with Swedish viewers as the target group.

It can also be added that in opinions to the authorities both MTG and Discovery have confirmed that the broadcasts in question are wholly or mostly directed towards Sweden. The question should therefore be viewed as non-contentious in the matter.

The necessary prerequisite of circumvention

Initially, the authorities wish to state the following.

It has been argued that Sweden was not a member of the EU at the time when, inter alia, the programme service TV3 began to be broadcast from the United Kingdom and that no circumvention with reference to EU law can therefore exist. However, the ban on alcohol advertising on Swedish television already existed at the time of the companies' establishment in the United Kingdom, and it is this point in time, not the point in time of the Member State's entry into the EU, which should be decisive in a matter under Article 4 of the AVMS Directive. Sweden thereby has the right to now refer to the AVMS Directive if the broadcasters can be deemed to have established themselves in the United Kingdom in order to circumvent the stricter Swedish rules.

In order for the opportunity under Article 4 not to be merely illusory, Sweden must be able to assert its right against the company, which at the time of the notification is responsible for the unlawful broadcasts to Sweden, even if the company has, for example, changed its company form after its establishment in the other Member State or only acquired the programme services from the original provider. The company must then be considered to have either retained or assumed the rights and obligations accompanying the programme service. If it is the case that a Member State cannot assert its right against unlawful broadcasts only because a company has changed ownership structure or transferred a programme service to another company, then the purpose of Article 4 completely loses its value. In that case, the broadcasters would be able to evade the consequences of a previous circumvention merely through a change in ownership structure.

MTG has furthermore stated that the Swedish Broadcasting Commission does not have the right to turn to a Swedish court with respect to broadcasts belonging to the period before the European Commission's decision in the matter. However, the authorities are of the opinion that the opposite is true, and that it is precisely those broadcasts currently assessed by the Swedish Broadcasting Commission, and which become part of the European Commission’s examination, that the Swedish Broadcasting Commission has the opportunity to bring proceedings against before Swedish courts. This opinion has also been confirmed by the Commission, which informed the authorities in early 2015 that the Commission, in order to assess the proposed measures' compatibility with Union law, needed to know exactly which fees the broadcasters were at risk of having to pay as a result of the violations in the case in question and that it was not
sufficient for the authorities to state a potential range for this amount. In order for the authorities to be able to specify exact amounts in the notification, it was necessary for the relevant broadcasts to be assessed by the Swedish Broadcasting Commission and the Swedish Consumer Agency prior to the European Commission’s examination in order to determine what fee amounts are reasonable in accordance with Swedish law and practice and what amounts could thereby be imposed following applications to the Swedish courts. The Commission also informed the authorities that the notification needed to be supplemented with drafts of the applications for fees that will be submitted to the Swedish courts if the Commission’s assessment is that the proposed measures are compatible with Union law (see Appendices 25–26 and 36–37). As stated in this notification and the communication with the broadcasters, the authorities have not submitted these applications to the Swedish courts and will not do so until the Commission has decided that the proposed measures are compatible with Union law.

The above stated was also one of the reasons why the authorities’ withdrew the previous notification sent to the Commission and the United Kingdom in 2014, as the Commission was of the opinion that it had insufficient grounds on which to assess the proposed measures’ compatibility with Union law.

The question of circumvention

That a company has the right to choose to establish itself in the Member State with the most favourable rules for the broadcaster follows from the principle of harmonisation within the EU. This also follows from Recital 40 of the AVMS Directive, which states that media service providers should be free to choose the Member State in which they wish to establish themselves. However, it is forbidden under Union law and case law for a broadcaster to establish itself in a particular Member State in order to circumvent stricter rules in another Member State.

The authorities are of the opinion that the broadcasters established themselves in the United Kingdom in order to circumvent the stricter Swedish rules. There are a series of circumstances that speak in favour of this being the case.

The harmonisation of the Member States’ national legislations

It is possible to assert the temporal relationship between the fact that the European Commission on 6 June 1986 presented its proposal for a harmonisation of the Member States’ national legislations and MTG’s decision to start broadcasting from the United Kingdom on 31 December 1987. With the European Commission’s proposal, which gave expression to the country of origin principle, the broadcasters gained confirmation that they would be able to broadcast alcohol advertising in accordance with the United Kingdom’s less strict rules in the near future, even though the broadcasts were directed towards Sweden.

The reasons stated for establishment in the United Kingdom are not convincing

The broadcasters have, inter alia, asserted that access to “uplink facilities and satellite transponder capacity”, professional technical expertise, the presence of other international broadcasters, logistical advantages and the opportunity to be subject to only one regulatory framework and to have only one “single technical playout”, led to the companies choosing to establish themselves in the United Kingdom. Even if there is no reason to question that these reasons played a role in the companies’ choices, these conditions cannot be considered to be of such importance or so unique to the United Kingdom that they can be the main reasons for the companies to establish themselves in the United Kingdom. Several countries in Europe, including Sweden, probably have offered and still offer corresponding conditions.

Given that a large proportion of the programmes on the channels in question are recorded by Swedish production companies in Sweden with Swedish personnel and Swedish participants, it would moreover be
easier to have Sweden as the starting point for such broadcasts. What is needed to create the programmes and the editorial content (recording locations, participants, cooperation with producers, etc.) appears to be found in Sweden and not in the United Kingdom. In the authorities’ opinion, it is reasonable to suppose that it would be easier to establish activities, whose original intention is to create a central operational base for pan-Scandinavian programme activities, within, and not outside of, Scandinavia. The reasons listed by the broadcasters for an establishment in the United Kingdom cannot, in the authorities’ opinion, be considered to demonstrate that the companies did not establish themselves in the United Kingdom in order to circumvent the stricter Swedish rules.

Furthermore, it can be noted that the extensive activities that the broadcasters have in Sweden make it likely that a large part, if not all, editorial decisions are made, and have been made, in Sweden by persons with a good knowledge of the Swedish market. Discovery has also made it clear that a number of daily decisions are made in Sweden. That the broadcasters nevertheless chose to establish themselves in the United Kingdom was, in the authorities’ assessment, done in order to circumvent the already applicable Swedish ban on alcohol advertising on television. That the broadcasters comply with the stricter rules found in the British regulatory framework does not rule out that the purpose of the establishment was, after all, to circumvent the Swedish bans on advertising. The revenues from advertising must be considered of decisive importance to the companies.

The extensive investments and revenues with respect to alcohol advertising

The extensive investments that have long been made, and are still made, on alcohol advertising on television, and the income that these investments might result in, speak in favour of the broadcasters establishing themselves in the United Kingdom in order to circumvent the stricter Swedish rules banning alcohol in television broadcasts. In their opinions, the broadcasters also conceded that the possibility of broadcasting advertising attracted them to establish themselves in the United Kingdom. Revenues from advertising are decisive for being able to conduct the activities they conduct, and alcohol advertising is a major part of this. In its letter to the European Commission, MTG has also written that revenues from alcohol advertising are of great importance to the company’s ability to invest in Nordic productions.

Measurements during 2015 show that the investments only in alcohol advertising in Sweden in all media, amounted to a total of approximately 2,629 million SEK. Of this significant sum, just over 70 million SEK went to MTG in order for alcohol advertising to be shown in the programme service TV3, just over 39 million SEK to MTG in order for alcohol advertising to be shown in the programme service TV6 and nearly 14 million SEK to MTG in order for alcohol advertising to be shown in the programme service TV8. On the part of Discovery, the company received nearly 109 million SEK in order for alcohol advertising to be shown in the programme service Kanal 5 and just over 13 million SEK in order for alcohol advertising to be shown in the programme service Kanal 9 (figures from TNS Sifo).

The corresponding figures from 2011 (837 million SEK), 2013 (1,064 million SEK) and 2014 (1,376 million SEK) show that the investments in alcohol advertising in Sweden are constantly increasing from year to year. Even though the figures now presented do not correspond to the investments for the years the broadcasters established themselves in the United Kingdom, the figures show that great gain is to be found in alcohol advertising, which is not likely to have changed over time. Based on the extensive investments made in alcohol advertising on television, it is obvious that there was and still is a strong economic incentive for the broadcasters to offer this marketing channel, which would not have been possible with an establishment in Sweden on account of the already existing alcohol ban.

In this context, it can be added that MTG, in an opinion both to the authorities and to the European Commission, has asserted that the broadcaster did not begin to broadcast alcohol advertising on TV3, TV6 and TV8 until December 2002. In support of this, the company states the following.
“According to data provided by MMS Sweden people meter spot logs, MTG UK did not commence showing alcohol advertising on the Swedish FTV channels TV3, TV6 and TV8 until December 2002, 15 years after it was established in the UK”.

The Authorities would like to give an account of the following information, received from Mediamätning i Skandinavien AB (MMS) in June 2016.

MMS has measured and classified advertising spots since 1997. MMS can see which advertiser is behind the advertisement film, but not exactly what was being advertised. In other words, MMS is able to see, for example, that it is Spendrups that is doing the advertising, but MMS does not know if this is for light beer, soft drinks or something else. In MTG’s case, MMS verified a set of processed data that MTG sent to MMS during February 2016. MTG had produced the viewing figures for various advertising spots in the categories of beer and other beverages. What the information from MMS showed was that there were advertisements on MTG’s channels prior to 2002 for companies who, among other things, produce beer. MMS cannot see what these companies were advertising, but it cannot be ruled out that they were advertising beer, for example. After 2002, there are also advertisers who solely or primarily sell alcoholic beverages, such as Famous Grouse Whiskey or Freixenet. It is again not known to MMS exactly what the companies were advertising.

**Statements from former representatives of the broadcasters**

As a supplement to what has been noted above, mention may also be made of a documentary programme that was broadcast on Sveriges Television (SVT, the Swedish public service broadcaster) in January 2013. Jan Friedman, media director at Kinnevik – the founder of the MTG Group – states in the programme: “via satellite hovering over the equator with overseas broadcasts circumnavigating the Nordic political systems and giving the people television advertising without the Riksdag taking an active decision on this. It was very, very naughty.”. It was also stated in the programme: “There was a snag. 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” (Stenbeck – den motsägelsefulla kapitalisten, part 2, SVT 2013). These statements are in no way decisive evidence that MTG chose to establish itself in the United Kingdom in order to circumvent Swedish legislation, but they still have some bearing on the question as the statements come from a former high-ranking representative of MTG.

**Proportionate, necessary and non-discriminatory**

In the Gourmet case (Case C-405/98), the Court of Justice of the European Union ruled that it is compatible with the rules on free movement to restrict, and in certain cases, ban the marketing of alcoholic beverages to consumers with reference to the protection of public health. However, such a restriction shall be proportionate. The Court of Justice of the European Union has also in Case C-262/02 and C-429/02 regarding the French Loi Évin found that a ban on alcohol advertising in television broadcasts was justified and proportionate on the basis of the protection of public health.

In Case C-170/04, the Court of Justice of the European Union pronounced that a ban, in order for it to be viewed as appropriate, must have the intended effect. This means that a ban under national law which only in certain respects or only to a limited extent has a prohibitive effect cannot be considered appropriate. In order for a ban to be maintained, it must therefore be applied in an effective and systematic manner and bear upon actors that are established in the Member State and actors that have established themselves in another Member State but that direct efforts towards the market of first Member State.
The intended effect may also not be achieved through a less coercive measure. If so, the measure cannot be viewed as necessary. Finally, the measure may not be discriminatory, meaning that the measures may not discriminate against broadcasts from other Member States or indirectly protect certain domestic broadcasts.

The compatibility of the Swedish alcohol bans and the proposed measures with Union law

The Swedish alcohol bans

In accordance with the judgments of the Court of Justice of the European Union, the Swedish alcohol bans may be considered compatible with Union law with reference to the protection of public health. The bans may also be considered proportionate as they cannot be considered to go beyond what is required to achieve the goals of the bans. The reason for there being a total ban on alcohol advertising and alcohol sponsorship on television is that, in accordance with what has been stated previously, this medium is considered to have a special impact and influence on consumer values and behaviours. A total ban on alcohol advertising and alcohol sponsorship on television is therefore necessary.

The Swedish alcohol bans are already applied effectively and systematically to actors that are established in Sweden. In order for the bans to be appropriate and non-discriminatory, the authorities are now pursuing these proceedings against the British broadcasters on account of the said broadcast content to ensure that the bans are also applied effectively and systematically to actors that are established in other Member States but direct efforts towards the Swedish market. If measures are not taken against the British broadcasters' violations, the intended effect of the bans loses its value and other measures taken by Sweden to reduce the harmful effects of alcoholic beverages on public health lose significance. Since it is a question of a total ban on sponsorship by a party whose principal activity is to manufacture alcoholic beverages and on alcohol advertising in a particular medium of a cross-border nature, it should not be possible to classify coercive measures as a result of the provision as discriminatory. The fact that the authorities are not simultaneously starting equivalent proceedings against all broadcasters that could be considered to be broadcasting advertisements and sponsorship messages in violation of the stricter Swedish rules cannot be decisive in determining whether or not proceedings can be instituted against the broadcasters in question.

The public is also of importance in this context. Even if the broadcasters try to be aware of their viewers’ interests and only receive a few complaints each year regarding alcohol advertising, the Swedish authorities receive all the more complaints and inquiries from the public. When the authorities inform people about the prevailing legal position, many are deterred from proceeding with their complaints to the United Kingdom. There is thus a greater dissatisfaction among the Swedish audience than the broadcasters are perhaps aware of.

Besides this, the broadcasters have declared in Norwegian media that they will not broadcast alcohol advertising in channels directed to Norway as they do not believe this would be well received among the Norwegian audience. In accordance with what has been presented above, corresponding consideration should be given to the will and wishes of the Swedish population.

The proposed measures

The proposed measures are proportionate and necessary in order to achieve the intended goals of the alcohol bans. Without the imposition of the proposed fees, the continuation of the broadcasters’

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violations cannot be deterred. This has been demonstrated by the broadcasters’ decision not to comply voluntarily with the stricter Swedish rules on alcohol sponsorship and alcohol advertising despite a request from the British authority, Ofcom, and the meeting with the broadcasters at the premises of the Swedish Press and Broadcasting Authority on 28 August 2014.

The proposed measures would be taken against a Swedish broadcaster or any other broadcaster that broadcasts from another Member State but directs its broadcasts towards Sweden if their broadcasts are deemed to contravene the stricter Swedish rules now in question. The proposed measures can therefore not be considered discriminatory. As stated above, it cannot be decisive for the case in question that equivalent proceedings are being instituted against any other broadcasters in parallel with these proceedings.

The European Commission and the United Kingdom are hereby notified that actions might be taken against the broadcasters MTG and Discovery by means of application for the imposition of a special fee for violation of the provision that programmes may not be sponsored by a party whose principal activity is to manufacture alcoholic beverages and by means of proceedings concerning a ban on marketing alcoholic beverages to consumers in commercial advertisements in the broadcasters’ television programmes. Before such actions are taken, the European Commission’s decision on whether the actions are compatible with Union law will be awaited.

If further information or documentation is required, the Swedish Press and Broadcasting Authority and the Swedish Consumer Agency are at the disposal of the European Commission and the United Kingdom.

Charlotte Ingvar-Nilsson
Director General
The Swedish Press and Broadcasting Authority

Cecilia Tisell
Director General
The Swedish Consumer Agency

Sent for information to:

The Ministry of Culture, Division for Media and Film
The Ministry of Finance, Division for Consumer Affairs
The Swedish Post and Telecom Authority
The Swedish Competition Authority
IOGT-NTO
Discovery Corporate Services Limited
Modern Times Group MTG Limited