



AER SUBMISSION
TO THE
2009
PUBLIC CONSULTATION ON THE REVISION
OF THE
COMMUNICATION FROM THE COMMISSION
ON THE
APPLICATION OF STATE AID RULES TO PUBLIC SERVICE
BROADCASTING

The Association of European Radios (AER) is a Europe-wide trade body representing the interests of over 4,500 commercially-funded radio stations across the EU27 and in Switzerland.

AER's main objective is to develop and improve the most suitable framework for private commercial radio activity. AER constantly follows EU actions in the fields of media, telecommunications and private radio transmission, in order to contribute, to enrich and develop the radio sector.

Following the European Commission (EC) consultation of March 2008, AER welcomes the fact that the EC is reviewing the Communication from the Commission on the application of State aid rules to public service broadcasting (the "Broadcasting Communication") of November 15th, 2001.

We would like to highlight that the economic context might induce EU Member States to increase State funding to public service broadcasting; we would like to take advantage of the current public consultation to recall an obvious but important fact: AER Members are evolving in the same context without any help from their governments, while competing for the same targets as public service broadcasters (audience reach, advertisers...). Furthermore, public broadcasters receive more than €22 billion annually from license fees or direct government aid, placing them third, after agriculture and transport companies, among recipients of state aid¹.

Commercially-funded radios throughout Europe have, since their inception, existed in an environment dominated by public service broadcasting. The 2001 Broadcasting Communication was therefore helpful in starting to move towards a better balance between publicly- and commercially-funded radio broadcasting: in particular, its introduction made it

¹ Please see European Commission's media release of November 4th, 2008:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1626&format=HTML&aged=0&language=EN&guiLanguage=en>

easier to address competition issues through EC case-law. The latter combined with technology changes modifying traditional broadcasting justified the review of the Broadcasting Communication.

In this review, AER finds guarantee of the following points to be vital:

- 1. Clear and meaningful definition of the public service remit by legal act;**
- 2. Market impact assessment prior to an extension of the remit**
- 3. Transparency: separation of public and commercial activities as well as cost allocation to profit centres**
- 4. Independent control mechanism for ex-ante evaluation of activities as well as for the supervision of entrustment and for the evaluation of the financial behaviour.**
- 5. Sanctions for breach of competition rules**

While we believe that the draft revised Broadcasting Communication published by the European Commission on November 4th, 2008 (the “draft Broadcasting Communication”) constitutes a positive step forward towards these requirements, it must be underlined that we still have concerns with regard completion of the five points mentioned above. We understand that the European Commission with the Broadcasting Communication intends to offer guidelines to help EU Member States in their assessment of the competition between publicly- and commercially-funded radio broadcasters. However, more thorough directions could be given to EU Member States. This would enable the latter to ensure that the presence of competition in their markets, thereby decreasing the need to refer issues to the EC. This response therefore suggests some modifications in the draft communication in order to ensure a healthy competition in the radio broadcasting EU markets.

General Remark:

We have a general comment about the fact that the present draft only refers to television examples, especially in the first pages: e.g., paragraphs 1 and 5 refer specifically to “*Television broadcasting*”, “*digital television, IPTV, mobile TV and video on demand*”. As a reminder: radio was also traditionally a “*reserved activity*”, digital radio and IP-Radio are not non-existent in Europe, and, while radio has been mobile before commercially-funded radio broadcasting truly appeared, podcasts can be seen as “radio on demand” (a similar remark can be made about paragraph 56). This comment which might seem redundant intends to clarify that the review concerns all public service broadcasting, and not only television.

Introduction / Role of public service broadcasting / Legal context:

In our view, it is positive to include the solution of the Altmark case (paragraph 6) in the draft Broadcasting Communication and to recall that the Amsterdam Protocol also specifically states public service broadcasting funding should not “*affect trading conditions and competition in the Community to an extent that would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*” (paragraph 14). These two elements are paramount to help EU Member States executing a better control of the allocation of state funding to public service broadcasting.

Definition and control of remit:

On the opposite, enabling public service broadcasters with “*a wide range of programming in accordance with its remit*” (paragraphs 16 and 50) may lead to non-restricted remit. Indeed, while AER agrees with the prerequisite that EU Member States should define the public service remit, there should be clear indications of the type of programming which should be excluded of the remit. Establishing a list of programming types might be too precise; nonetheless, outlining a set of criteria would be a worthwhile solution. At present, paragraph

50 of the draft Broadcasting Communication leaves too much freedom for EU Member States in defining the public service broadcasting remit: “*the obligation to provide a wide range of programming and balanced and varied broadcasting offer is generally considered [...] legitimate*”. This phrasing is not precise enough for Member States to establish a clear distinction between public service broadcasting content eligible and not eligible to state-funding.

Once again, the public service broadcasting remit’s definition should be set by EU Member States in a non-ambiguous and accessible wording. Following this, appropriate controls of the public service broadcasting activities should be enabled. Especially, when setting up new services, or when significantly altering existing services, public service broadcasters should be submitted to ex-ante evaluation: the European Commission’s inclusion of the “*Amsterdam test*” within the draft Broadcasting Communication should be seen as a great step forward. This should be a central element in order to reduce the amount of cases brought to the European Commission by EU Member States.

Besides, as the UK experience shows, this evaluation can lead to useful refining or even to the exclusion of unnecessary new public service broadcasting services (please see here: <http://www.guardian.co.uk/media/2008/nov/21/bbc-trust-local-online-video-plans>; or <http://news.bbc.co.uk/1/hi/business/7741244.stm>). In that sense, the phrasing of paragraphs 57-61 seems appropriate.

Paragraph 62 introduces an essential requirement: independence of the external body running the ex-ante evaluation. The phrasing could nevertheless be clearer:

*“the assessment **can only be effective** if carried out by a body which is external and independent from the management of the public service broadcaster”.*

Furthermore, this phrasing would ensure that instances where the controlling body is a subsidiary of the public service broadcasting entity occur “*exceptionally*”. In these cases, procedural safeguards as indicated in paragraph 62 are helpful, although these are no substitute for external evaluation by a body which is truly independent of the broadcaster and its management.

Finally, concerning the possibility to run innovative new services’ testing by public service broadcasters (paragraph 63), AER fears that, without more specific safeguards, there is a risk to be in a situation of “*fait accompli*”: this testing could end up in being a way to overturn the Amsterdam test; hence the need to require EU Member States to set conditions for this type of testing.

Entrustment and supervision:

AER supports the European Commission in the view that public service broadcasters should be “*formally entrusted*” with the provision of a well-defined public service”, and that “*the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking*”. This leads the European Commission to find “*desirable*” the appointment of an authority to control these two facts. AER believes that this should not only be “*desirable*”: it should be a “**must**” (paragraph 68).

Similarly, while AER agrees with the fact that the European Commission should be “*able to rely on appropriate supervision by Member States*”, it is felt that the European Commission should set further requirements and more clear-cut phrasing:

*“such supervision **can only be effective** if carried out by an external body independent from the public service broadcaster, which has the power and the*

*necessary resources to carry out supervision **systematically**, and to impose appropriate remedies (e.g. binding obligations, appropriate sanctions) in so far as it is necessary to ensure respect of the public service obligations” (paragraph 69).*

These two suggestions rely on the assumption that the review of the Broadcasting Communication is set to divide in a better manner powers between the European Commission and Member States in this area, and to reduce the amount of public service broadcasting State-aid law cases². If the former is to control the correct application of the rules set in this Communication by the latter, its provisions should leave little space for interpretation. Otherwise, the aim mentioned above will certainly not be reached.

Finally, paragraph 70 indicates that if the European Commission does not receive “*sufficient and reliable indications that the public service is mandated, the Commission would not be able to carry out its task under Article 86(2) and, therefore, could not grant any exemption under that provision*”. This is a positive provision; but, AER believes that it should be complemented in order to produce a more efficient effect, by reminding that the European Commission can be asked to check if the mechanism in place to control the public broadcaster is actually used³.

Funding of public service broadcasting / transparency requirements:

While it is a fact that many public service broadcasters in the EU enjoy dual-funding, AER believes that pay-services hinder competition in all markets observed in the EU.

In addition, public service broadcasting partial funding through advertising should be better controlled to prevent cross-subsidisation or overcompensation. In order to enable such controls, transparency of accountings – especially an allocation of costs to profit centres – is essential.

Therefore, AER firmly supports separation of public service broadcasting commercial and “public” activities; this would aid healthy competition between commercially-funded and publicly-funded broadcasters. So the introduction of clear references to Directive 2006 / 111 / EC (“Transparency Directive”) in paragraphs 78-80 is welcomed by AER. Additionally to the elements provided for in the Transparency Directive, costs must be allocated to cost centres in order to ensure that cross-subsidisation does not take place.

Another positive element in the draft Broadcasting Communication is the suggestion in paragraph 86 to encourage “*functional or structural separation*”, although we believe that functional separation is not as effective as true structural separation. AER recommends that this phrasing be strengthened further to read as follows:

*“the Commission invites Member States to **implement** functional or structural separation”.*

This requirement would help lowering the disastrous effects on the market of public service broadcasting dual-funding. One direct effect of purely commercial activities run by public service broadcasters might indeed be unfair commercial advantage concerning programming production. Even more concerning is the effect on advertising prices: as public service broadcasters enjoy “*dual funding*”, they can set artificially low prices for advertising spaces on air. This has a direct effect on the pricing of commercial broadcasters and on their incomes, since almost all of AER’s Members are 100% funded by advertising.

² So far there were 24 cases decided upon by the European Commission concerning State aid to PSB since 1999; please see here : http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf

³ as illustrated by the Court of First Instance Decision in Case T-442/03 *SIC vs. Commission*

Funding and proportionality:

AER represents commercially-funded radio broadcasters: they depend 100% on advertising revenues. Therefore, they have no access to surplus at the end of a financial year, unlike public service broadcasters, as the draft Broadcasting Communication mentions at paragraphs 94-96. While it is understandable that public service broadcasters enjoy the latter in accomplishing their public service remit, as soon as commercial activities are mixed to provide additional incomes, this position becomes unsustainable. Commercially-funded radio broadcasters would indeed have to compete with “protected operators”, able to develop in a much less risked manner; and controls of cross-subsidization are rendered more difficult, if not impossible. A level-playing field seems even “more impossible” in the case described in paragraphs 95 and 96: commercially-funded radio broadcasters have to make the same investments as public service broadcasters in the development of new technologies.

Independent control:

As for control of such overcompensation, it is crucial that it is executed by an external independent body; so the provision in paragraph 99, although sustainable, should be more definite:

*“Such control mechanisms **should** be carried out by an external body independent from the public service broadcaster on a yearly basis”.*

The evaluation should also be published, in order to deliver public accountability.

Finally the inclusion at paragraphs 104-105 of price undercutting as an example of anti-competitive practice is warmly welcomed by AER. However, this infringement of competition should be followed by efficient and timely procedures ending such behaviours. Indeed, as AER Members are 100% funded by advertising, price undercutting in the radio sector has the direct effect of weakening all public service broadcasting radio broadcasters’ competitors. With this in mind, we view the proposal in paragraph 106 as being likely to provide an effective means of independent dispute-resolution; it should therefore be encouraged in the Member States:

*“The supervisory body shall have the necessary powers to impose appropriate remedies and proportionate sanctions **ending anti-competitive behaviours; this is clearly the case of price-undercutting.**”*

ENDS
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