



From The Chairman

Commissioner Neelie Kroes
Commissioner for Competition
European Commission
Rue de la Loi 200
B1049 Brussels
Belgium

15 January 2009

A handwritten signature in black ink that reads "Dear Neelie,".

I have pleasure in enclosing the BBC Trust's comments about the draft Broadcasting Communication published by your services last November. This submission takes account of the views of the BBC Executive, which will not make a separate submission.

As I indicated when we met in the course of last year, the BBC Trust welcomes the debate triggered by the revision of the Communication. It offers an opportunity to discuss at European level the funding of public service broadcasting and its proper role and scope in a different, more open way than is possible in the context of specific notifications or complaints.

We fully support the aims, principles and general spirit of the draft you have published. It forms an excellent basis for further discussion and we are pleased to see that it echoes the themes of the current debate in the UK about the importance of a sustainable public service broadcasting model for the future. We agree with your analysis that a balance needs to be struck between securing public value benefits from PSB activity and having a clear understanding of PSB's impact on the market. That, of course, is one of the core principles that underpinned the establishment of the BBC Trust in 2007.

We have offered in the attached response some more detailed suggestions that we hope will be helpful in identifying those aspects of the current draft that might be improved. In our comments, we focus in particular on the level of detail which in certain sections can perhaps be reduced to the benefit of clarity. This may well be a simple matter of clarification. We have found statements made by yourself and your senior colleagues in recent months on the way the Commission interprets the draft, notably the possibility for the PSB remit to be broad in terms of content and neutral in relation to technology and platforms, greatly encouraging.

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On a personal note I would like to thank you and your colleagues for making themselves available for open and constructive informal exchanges with BBC staff. I understand that Mr Madero and his team will visit the BBC Trust in London in the coming weeks. We look forward to welcoming him and to discussing the Commission's draft in the light of our comments.

I hope that we will have the occasion to meet again soon in person and take this opportunity to wish you a Happy New Year.




Sir Michael Lyons
Chairman, BBC Trust

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BBC COMMENTS ON THE DRAFT COMMUNICATION FROM THE EUROPEAN COMMISSION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING

Introduction

The BBC Trust welcomes the opportunity to comment on the draft revised Broadcasting Communication published on 4 November 2008.

This response is submitted to the Commission by the BBC Trust as the sovereign body of the BBC. The Trust has taken account of the views of the BBC Executive in preparing it. The BBC Executive does not intend to submit a separate response.

As in the context of the preliminary consultation, this response is made solely on behalf of the BBC. The BBC is one of a number of public service broadcasters in the UK. The response does not seek to represent the views of other UK public service broadcasters or the views of the UK Government.

The Trust supports the Commission's aim of stimulating an open debate about public service broadcasting at a time of profound technological change and rapid evolution in the media market. The proper role and mission of PSB is the subject of debate across Europe; it is therefore timely and appropriate for the Commission to consider if there is a need for additional clarity in the application of state aid law to PSB.

General Comments

The Trust considers that the draft Communication published in November is a good basis for discussion. It reaffirms important principles about PSB which we fully support, such as

- its importance as a service of general economic interest for Europe's society, economy and culture;
- its potential as a beneficial resource in the new digital media environment as much as in traditional analogue broadcasting; in particular, the explicit acknowledgement that PSB values are "equally important in the rapidly changing new media environment" (para 18) and that PSBs should "be able to use the opportunities offered by digitisation and diversification of distribution platforms on a technology neutral basis, to the benefit of society" (para 50);
- the special nature of PSB among SGEIs, linking it to the specific cultural and democratic traditions of each society;
- the importance of "safeguards for the independence of broadcasting" (para 11);
- the freedom for Member States to choose the way of funding PSB, subject to case by case consideration of the effect different funding systems can have on the fulfilment of the public service mission.

We do have a concern that, in places, the new draft communication seems more detailed and prescriptive than is necessary in order to offer guidance about the way in which the Commission will apply EU state aid law in the field of public service broadcasting. Examples include the proposal for specific periods of entrustment or for financial reviews; the criteria to be followed by Member States in assessing the distinctiveness of planned PSB services (paragraph 60); and the provisions that should apply to the relationship between “internal” regulatory bodies and PSB management (paragraph 62).

The BBC’s concern would be that in the field of PSB it would be wrong to prescribe a single model for the whole of the EU. In our view PSB is rooted in each different European national culture and regulatory tradition. The BBC believes it is important that the new Broadcasting Communication should strike the same balance between detail and general principles as is achieved in the current one. Our fear is that excessive detail risks blurring the boundary between guidance and prescription.

Our more detailed comments are set out below. Overall, the BBC would like to see the Communication drafted in terms that – so far as possible and consistently with the Amsterdam Protocol – states key principles while leaving Member States with latitude as to details and the means of implementing those principles, and allowing room for public service broadcasting in each Member State to develop according to national culture and regulatory traditions.

Comments on Market Impact

The Trust acknowledges that PSB has market impact. Since public service broadcasting is an intervention in media markets which is intended to enhance the quality, range and accessibility of content offered to users across all media and all platforms, it is inevitable that it will have an impact on the wider economy of the sector. PSB should achieve these goals through its own programmes and services, as well as the influence its offer has on the commercial market.

The impact that PSB activities have is not necessarily a negative one. It can be positive in cases where the overall public benefits outweigh any negative effects on competitors and stimulates competition in the offer of quality programmes, in creative innovation, and in domestic production.

The Trust also agrees with the Commission on the need for safeguards to ensure that the BBC’s place within the wider broadcasting ecology does not become an obstacle to choice, growth and innovation. This is particularly true as technological convergence blurs the dividing lines between different media and access to services becomes ubiquitous. Such safeguards, in the form of the prior, open and inclusive evaluation of planned BBC services (or significant modifications to existing services) by the BBC Trust, with input from Ofcom, under the Public Value Test, were introduced in the UK under the

Royal Charter which came into force in January 2007. These appear consistent with the requirements outlined in the draft revised Communication.

Issues raised for the BBC by the Text

The draft Communication raises some specific concerns for the BBC. In the next section we address those concerns in the discussion of the relevant specific paragraphs of the draft Communication.

Section 6.1.1: Definition of Public Service Remit – General

Paragraphs 48 and 67: Whilst these paragraphs were already included in the 2001 Communication, we hope that the Commission might clarify their effect in the context of new, dynamic governance arrangements such as the BBC's. The BBC's remit is defined at the highest level in the Royal Charter and Framework Agreement with the Secretary of State for Culture, Media and Sport, and its delivery is also formally entrusted to the BBC through that framework. The remit is primarily defined in terms of six 'Public Purposes', each of which is developed in more detail under purpose remits drawn up by the BBC Trust specifying the type of activities, outcomes and targets to be pursued by the BBC.

Within this remit, particular services are provided as described in 'Service Licences' issued by the Trust. New public services or significant modifications of existing ones proposed by the BBC Executive are subject to a Public Value Test (PVT) conducted by the BBC Trust with input from Ofcom. The test incorporates extensive public consultation, including direct engagement with the commercial media sector. If a proposal is approved, the Trust issues a new or revised Service Licence and keeps each service under review.

The BBC's Charter and Agreement set the arrangements for consideration of new service proposals but are not modified following the launch of each new service (or other activity). This is not necessary because the Trust's PVT delivers strong guarantees of broad consultation and full transparency of both process and outcome, ensuring that the service or activity comes within the BBC's remit. We wish to be sure that the Commission recognises that this process is consistent with the wording in paragraph 67 in particular.

Section 6.1.3: Procedural Safeguards

Paragraph 56: The distinction between traditional and "non-traditional" media services is no longer clear-cut. Increasingly, content services tend to be multiplatform. This may make it difficult in practice to operate different approaches depending on technologies used for service production or distribution at a time where audience behaviour increasingly disregards that distinction. In assessing the impact of new services it may be more appropriate to adopt a technology neutral approach. The words "such as in particular publicly funded non-traditional media services" risk generating confusion. This text also assumes that the impact of new PSB new media

services on the commercial sector will always be negative. This is not the UK's experience, where market impact has been assessed to be positive, at least in part, in important cases, e.g. the BBC iPlayer.

Paragraph 59: The assessment of planned BBC services (or substantial modifications to existing ones) by the BBC Trust involves extensive public consultation. The outcome of consultation is published, along with all the evidence on which the Trust's decisions are based. The Trust's established practice therefore meets the requirements set by this paragraph in that "interested parties" have an opportunity to comment and make submissions, whoever they may be. The Trust is required under the Charter to uphold the best interests of the licence fee payers for whom the BBC's services are provided. It is therefore important to emphasise that the term "interested parties" must embrace not only the commercial media sector but the broader range of stakeholders including those who may use the proposed services.¹

Paragraph 60: It is questionable whether it is helpful for the Commission to list detailed criteria for the definition of what meets the democratic, social and cultural needs of each society. This seems at odds with the Member States' competence to evaluate the public value of PSB services based on the definition of the PSB's mission, as paragraph 59 states ("it is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of significant new services with the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems"). Much of the detail in Paragraph 60 seems unnecessary and risks creating confusion.

Paragraph 61 and footnote 40: The criteria listed in paragraph 61 broadly coincide with those for the market impact assessments (MIA) which Ofcom conducts for the Trust as part of the public value test for proposed new BBC services. As drafted, the footnote appears to introduce a presumption of excessive market distortion if the PSB has a strong position on the viewer or advertising market, regardless of the distinctiveness and public value of the proposed service. The Trust's concern would be that this could defeat the purpose of assessing the specific impact on the market of each new proposal case by case. Whilst the Trust fully accepts that a full and detailed market impact assessment is necessary in situations where a strong publicly funded PSB is the cornerstone of the media system as in the UK, this approach may not be necessary or even justified in every country given that each has its own unique characteristics in terms of market, traditions and relative position of the PSB, etc. The important principle of the need for effective market testing is enshrined in the paragraph's first sentence, ending with the words "and in the absence of the planned new service". The footnote and the detail about the nature of the MIA in the second part of the paragraph seems likely to confuse rather than clarify.

¹ The recent judgment of the European Court of First Instance in the joined cases T-309/04, T-317/04, T-329/04 and T-336/04 (TV2 Denmark) states (para 118) that "when the Member States define the remit of public service broadcasting, they cannot be constrained by the activities of the commercial television channels".

Paragraph 62: The Trust supports the key principle formulated in the first sentence of the paragraph, ending with the words “independent from the management of the public broadcaster”. The BBC Trust is the sovereign body of the BBC and operates independently of the BBC’s Executive. So whilst not completely separate from the BBC it is set up in a way that maintains an appropriate degree of independence to enable it to fulfil its remit effectively. Whilst we believe that this particular model works well for the BBC, it does not necessarily follow that it will be the best solution for PSBs in other Member States. Here, as elsewhere in the text, we would question whether a detailed description of the way this independence must be ensured is necessary. It also draws a laborious and arguably unnecessary distinction between “internal” and “external” control bodies. This seems to confuse the otherwise clear principle of independence from management, helpfully enunciated in the crucial first sentence – a notion forcefully and helpfully reaffirmed in paragraph 69 in relation to the supervision of the fulfilment of the public service obligations. The sentence in paragraph 62 would be even clearer without reference to the need for the regulatory body to be “external”: “In the interest of ensuring impartiality and of safeguarding the rights of third parties (e.g. with regards to the confidential treatment of the information submitted), the assessment would only seem effective if carried out by a body which is independent from the management of the public broadcaster”.

Section 6.3.3.3 – Control Mechanisms

Paragraph 99: The BBC Trust is responsible for assuring oversight over the use of public funding. It does so on a regular basis with reference to both specific services and the overall spend of public funding received by the BBC. In addition the UK Parliament’s National Audit Office (NAO) reviews, at the invitation of the Trust, specific aspects of the BBC’s financial affairs according to a rolling programme leading to several studies being carried out each year. Whilst the general principle in paragraph 98 clearly and precisely obliges Member States to “ensure regular and effective control of the use of public funding” leaving the form of that control under the competence of each Member State, the detailed reference to a review “carried out by an external body... preferably on yearly basis” leaves a degree of uncertainty as to whether arrangements that differ from those detailed prescriptions can be considered effective or not. This should at least be clarified, although the simplest way of achieving clarity would seem to delete the paragraph.

Paragraph 100: The BBC’s Royal Charter and Framework Agreement are the means through which the UK Government entrusts public service broadcasting obligations to the BBC. The current Charter and Agreement took effect from 2007 and runs for a period of 10 years. During this period the level of the licence fee will be reviewed at least once. In addition, the BBC Trust conducts general reviews of both the efficiency in the BBC’s use of public funding and the performance of its services, every 3 to 5 years. This is separate from the review of individual services, from PVTs for new services or substantial modifications of existing ones, from the 5-year review of each service licence and from the yearly Statements of Programme Policy. In addition, the National Audit Office conducts, at the invitation of the Trust, its

reviews of specific aspects of the BBC's financial performance. The renewal of the BBC's Charter takes place every 10 years after an open and inclusive Government-led review process involving extensive public debate about every aspect of the BBC's role and performance.

Paragraph 100 mentions "an in depth review" of the PSB's financial situation "at the end of each entrustment period or an equivalent period which in any event, should not exceed four years". Leaving aside the questions raised earlier concerning the authority and justification for such a requirement, it is unclear whether it is proposed that this should be in addition to the controls and reviews currently in place. In addition, this approach appears to imply that entrustment should be for finite periods. Clarification would be necessary on these points, or preferably simplification, stating the principle while leaving Member States free to decide upon appropriate periods and other arrangements.

Paragraph 102: It is not clear to the BBC what the Commission intends when it invites "Member States to enhance transparency concerning the general framework of acquisition, use and possible sub-licensing of premium rights by public service broadcasters". For example, the BBC's sport rights acquisition policy is transparent insofar as it corresponds to its stated scheduling and service objectives aimed at providing the rich and diverse offer of sport events – both high profile major events and disciplines which have narrower audience appeal. It is also bound by the requirement to make judicious use of public funding and to maximise the benefit to the public of bids made in competition with commercial players who can normally rely on stronger cash reserves than the limited public funding available. The Commission seems to be under the impression that PSBs risk distorting the market for premium rights by "overbidding" through the use of public funding. This does not correspond to the BBC's experience. If anything, the recent failure by the European Broadcasting Union to secure rights for the 2014-2016 Olympic Games is evidence that PSBs are at risk of seeing their chances of securing premium rights reduced going forward. The BBC agrees that PSBs should not acquire rights and then fail to use them. The BBC would never have any incentive to distort the market in this way; on the contrary, it has a strong disincentive from wasting the investment it makes in rights acquisition. In practical terms, it is not clear what "framework of acquisition" the text refers to, and how its transparency could be enhanced in practical terms. Even the notion of "overbidding" would need to be explained.

This response is submitted by the BBC Trust on behalf of the BBC. For further information please contact Matteo Maggiore, Controller EU and International Policy, BBC, matteo.maggiore@bbc.co.uk, tel +3222869105