



**ENPA – European Newspaper Publishers' Association  
Response to  
the European Commission's Draft Communication on the application of  
state aid rules to public service broadcasting  
(published by the European Commission 04.11.2008)**

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## **About ENPA:**

The European Newspaper Publishers' Association (ENPA) is an international association, defending and promoting the professional interests of the European newspaper publishing industry at different European and international organisations and institutions.

ENPA represents over 5,200 national, regional and local newspaper titles, published in 23 European Union Member States plus Norway and Switzerland. More than 150 million newspapers are sold and read by over 300 million Europeans every day, in addition to the millions of unique daily visits to online newspaper websites. *A full list of ENPA members can be found on [www.enpa.be](http://www.enpa.be).*

*Note: The paragraph and page numbers referred to in this document all identify with the English version of the draft Broadcasting Communication of 04.11.2008.*

Individually, some of the 25 ENPA member associations have made their own detailed submissions directly to the Commission and these should be consulted for a more in-depth analysis of the viewpoint of each country.

## **Introduction:**

ENPA first of all welcomes the opportunity to make comments about the Draft Communication on the application of state aid rules to public service broadcasting. ENPA supports the Commission's proposal to produce a new Communication in the first half of 2009 – ENPA believes that it is necessary to update the 2001 Communication in view of the technological developments and decisions adopted by the Commission. In ENPA's submission to the European Commission's first consultation in March 2008, ENPA clearly explained the impact that public service broadcasters were having on ENPA members' businesses such as the newspapers' market and newspaper industry. There is clearly an update required for the new audiovisual and digital age – it could even be questioned whether such a wide-ranging guarantee as the Amsterdam Protocol could still be relevant in the profound evolution of this sector, however, in light of the Commission's indicated direction outlined in its Communication, ENPA submits its comments to this text.

ENPA wishes to express its satisfaction that the European Commission has presented an updated Communication in this area. We trust that the Commission will stay true to its competition law principles, providing all necessary detail – within the Commission's competence - in the new Communication to protect the application of competition rules in the competitive media landscape. ENPA believes that this will require going further than the alternative expressed by those 19 Member States in their open letter to the European Commission dating from September 2008. However, it would be wholly

erroneous to understand that ENPA believes that the Commission should take on extensive new powers in the area of regulation of public/private market balance. ENPA firmly believes and maintains as in its submission to the first Commission public consultation in early 2008 that the Member States should maintain the competence to decide on their own media policy or policies. Although ENPA is asking for an update of the Broadcasting Communication, the principle of Subsidiarity and Member States' competence should be respected.

ENPA sees no reason to justify the further introduction of EU-wide media policy rules. This is where we can understand the Commission's propensity to encourage Member States through this Communication to adopt best-practice examples that expound the values of accountability, transparency and fair competition.

Nevertheless, the reality of the situation is that several ENPA members have found themselves in recent years to be in the position of needing to make a complaint against the services of public service broadcasters, particularly in light of new media offers from the public service which have crowded out the commercial operators from the market. Cultural diversity will always need to be fully respected, but there is also the need for the prevention of distortion of market by publicly-funded entities.

The Commission has justifiably set the tone of the Communication in the context of today's reality, which is a highly converging marketplace with many competitors. The privileged position of public service broadcasters especially when they are granted a vague remit for the development of new media services can invade directly into the area of operation of newspaper publishers. The number of complaints submitted over the years proves that *in some Member States there are still shortcomings in the assessments* and the European Commission's proportionate, yet legally certain role is required. ENPA is pleased that the European Commission has acknowledged publishers' concerns in Commissioner Kroes' speech of 9 June (pages 3 and 4, Rapid). Achieving a balance is indeed the key.

However, even though the Communication goes in the right direction, certain elements should be better defined by the Communication. ENPA is concerned that the draft does not go quite far enough on certain points. The special nature of public service broadcasting, in that according to the Amsterdam Protocol annexed to the Treaties, it is "directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", is essential to recall in its entirety. The need to maintain media pluralism is not to be underestimated in this particular context: It is essential to maintain a healthy market with a variety of public/private service offers.

Therefore, the Commission's statement that the public service broadcasters' offers should not be limited solely to areas not served by commercial broadcasters needs reasonable and accountable safeguards against distortion of market.

If public service broadcasters are to be allowed to offer any content service which competes with that of commercial service providers, then this should be subject to the new Amsterdam test.

The Commission must avoid at all costs the risk that the Communication ends up as little more than a justification for public services to look like commercial service provision.

Separately to this, ENPA wishes to remind the Commission that newspapers are in the business of producing high quality information which requires a large, sustained investment to produce. The Commission should ensure that the ability of the market to be able to provide high quality information is not diminished and a fair chance is given to our industry in this respect.

ENPA provides its remarks on the following pages on key points of interest to its members.

### **Public service remit:**

In ENPA's submission to the Commission's first consultation in March 2008, we stated the following: "Firstly, the remit of the public broadcasting should be defined, and secondly a list of commercial activities which are not considered to be within the remit of the public service function, should be made in a negative format. That is, listing activities that are not in the public service remit." The Commission has done this to some extent in paragraphs 47 and 48.

**ENPA trusts that the Commission will not diminish these clarifications in its final Communication.**

The Commission has again declared the responsibility of the definition of the public service remit as belonging to the Member States, which is in accordance with the Amsterdam Protocol. In light of the rapid development of services, the remit is becoming extremely diverse for the public service broadcasters and the Commission should specifically encourage the Member States to distinguish the different services in the remit, by specifically requiring them to identify the different platforms such as digital radio, digital TV and online news services, rather than simply allowing the remit to cover e.g. the category of 'new media'.

**Paragraph 48 addresses this to some extent, but more could be specified and more certainly should be specified in line with this in paragraph 51.**

Moreover, the development of new services should not just be left alone by the Commission to mushroom in broad, multi-form directions with limits which are not meaningful, through what could be argued by the Member States to be a well-defined remit according to the broad lines permitted at present. The 2001 Communication stated that: "The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1).....".

**The Commission should encourage the Member States to distinguish between the different services more clearly. This is somewhat achieved in paragraphs 48 and 49, by declaring that the public service mandate from Member States should be as precise as possible, but ENPA believes that this could be better defined, even without infringing Member State competence.**

The Austrian example is interesting here, whereby the remit has been very broadly defined (including broad genres such as entertainment, information, education and sport). It is up to the Austrian broadcasting corporation (ORF) to decide to which extent and in what quality the service conforms with these (broad - in the eyes of commercial

operators) categories, but the commercial operators do not find it is clear enough regarding where the limits of the public service broadcaster's remit lies.

An example from Ireland is also relevant to quote here, demonstrating a different aspect of how the public service remit has not been adequately defined. This concerns the RTE's service "*Cross Media Solutions*". This is a perfect example of the type of service clients now demand in this multi-media environment. Huge investment has been made in recent years by media organisations in an effort to meet such on-going demands. However, for a public service broadcaster to be offering this type of commercial service - which cannot be matched by other commercial operators - surely raises questions.

It is clear from RTE's website that the organisation has moved beyond broadcasting into a variety of areas including publishing. Whereas newspaper publishers cannot engage in broadcasting without obtaining a license, RTE is clearly operating as a publisher – both editorially and commercially - without any such obstacle despite this not being part of its public service remit.

**ENPA supports that the Commission recommends a list of criteria of what not to include in the remit in paragraph 47 as "manifest error". Finding a solution in this text in any case is especially important in relation to dually-financed broadcasters.**

**ENPA suggests adding a sentence to the end of paragraph 50, the paragraph 51 after "appropriate safeguards", and at the end of paragraph 56, defining that there should be a tight functional link between media services that are not programmes and a programme broadcasted by the public service media provider.**

**This revision of the Communication is an opportunity for the Commission to consider recommending to Member States that they ensure in their own way that a new online service should be linked directly to programming (effect) and not just linked to the broad "democratic, social and cultural needs" (purpose) of a country. This would make the case for justification much clearer. Paragraphs 50, 51 and 56 could be amended to reflect this.**

The services of a previously proposed (now abandoned) public service publisher in the UK would have been very difficult to justify for these very reasons.

### **Applying the Amsterdam test: to specific programming or channels?**

ENPA supports that there is not a role for the Commission to play in assessing individual programmes, as clearly stated in the Communication's paragraph 47 as the Commission role should be clearly restricted to assessing manifest error. However, there could be a case for encouraging the Member States to ensure that independent scrutiny is maintained over certain programming genres rather than only channels. Paragraph 47 addresses this to some extent.

ENPA wishes to point out that the relevancy of a certain programme to the public service remit can change over time and Member States should be required by the Commission to themselves ensure that the correct independent scrutiny mechanisms are in place to ensure that programming continually meets the overall public remit in strict line with the "democratic, social and cultural needs of society". An example from Portugal demonstrates this point:

The programme "*The Right Price*" on Portuguese public television was undoubtedly public service programming when the national currency was switched to the Euro, yet now with the Euro well-established, there is a greatly diminished justification to maintain such a programme in public service, which attracts a large amount of advertising that could otherwise be invested into commercial television.

This indicates a need for Member States themselves to ensure continual adherence to the specific remit within the confines of democratic, social and cultural **actual** needs.

**ENPA's point of view should not be perceived as against a public service reaching wide audiences here as it is rather a question of meeting the public remit. Indeed, it is not the Commission that should assess specific programmes, but the Commission should encourage Member States to require the appropriate independent oversight mechanism bodies at national level to hold the responsibility for regularly and continuously monitoring this, if they do not do so already.**

### **The Amsterdam Test: SCOPE**

This is where some clarification could be appropriate for the Amsterdam test. In paragraph 57 (page 15), the Commission states that:

"Before the introduction of **significant new services** on the market, Member States shall consider whether the service meets the same democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition, as provided in the Amsterdam Protocol."

Despite discussing the similarity of risks of the significant alteration of existing services in the previous paragraph number 56, it seems to only be the significant new services which are subject to the test in paragraph 57 and could be brought into line with paragraph 58.

Furthermore, assessment criteria as to when the introduction of a new service or modification of an existing service would qualify as “significant” would be welcome. The Commission Communication gives only a rather rough guidance in paragraph 58, 3<sup>rd</sup> sentence.

In Austria, for example, the Austrian Broadcasting Corporation has set up an online platform (<http://orf.at/>) that is strongly competing with online platforms of Austrian publishers. In a recent examination, however, those services have been considered “in dubio” as existing aid and thus, not subject to notification requirements. In view of such assessment it appears that clear guidelines for qualifying modifications of existing aids as “significant” should be put into place to make sure that any new activities of public broadcasters with significant impact on private competitors are covered thereunder.

**ENPA welcomes that the Commission strongly defends applying the Amsterdam test as it has proposed in paragraph 58 to both significant modifications of existing services and also significant new services. This is fundamental to the state of competition in the markets and for the future survival of commercial media outlets. The Commission should continue to emphasize this and defend this in the text. ENPA believes that there could be scope for the Commission to more clearly identify in paragraphs 29 and 36 whether the status of (partly) financed online services are existing aid or new aid. Clear guidelines for qualifying modifications of existing aids as “significant” should be put into place**

ENPA also welcomes the explanation given by the Commission in paragraph 61 of how to assess the impact of the public service on the rest of the market. ENPA believes that it is important to highlight the need to compare the situation in the presence and in the absence of the planned new service. This seems a logical test which should provide decisive results.

Elsewhere, in paragraph 60 and 61, as well as paragraph 105, it is important that the Commission makes these lists of criteria regarding what would be required for a sufficient market assessment at Member State level, so that it can be assured that a reliable test will be developed and carried through at national level and thus avoid the need to make complaints.

**ENPA would like to see the Commission maintain in its Draft Communication a list of relevant assessments for Member States to undertake regarding certain market aspects. For example paragraphs 60,61 and 105 currently outline this.**

### **Pilot schemes and the Amsterdam test:**

As a follow-on to our first point under “The Amsterdam Test: SCOPE”, when ENPA reads that the Commission is allowing public service broadcasters to test “innovative new services ...on a limited scale (e.g. in terms of time and audience)” (paragraph 63), several questions arise.

ENPA members are concerned that the definition by Member States of “significant new services” would not be specific enough. Moreover, the tendency will likely be for the public service broadcasters to continue their “pilot schemes” for an indefinite amount of time. A distortion of the market is possible even in a short amount of time and can have devastating consequences for commercial operators.

**Enhancing paragraph 63 by more exactly requiring Member States to set their own specific time-limit for pilot projects according to national specificities should be considered for inclusion in the Communication. It is not enough, in ENPA’s opinion to state that innovative services can be permitted for a “limited time”. The experience of ENPA is that many pilot projects have been introduced in the market and remained with the label of “pilot project” to exempt them from due scrutiny, despite having an impact on competition. Even if the audience to which a service is exposed is “limited”, this can still shut other operators out of a niche market.**

### **ENPA on innovation and the Amsterdam test:**

Whilst there may not, subject to different national situations, necessarily be a need to exclude the possibility for innovation across public platforms, for example, the potential synergies which newspaper companies in some countries have already explored, it still remains essential that the newspaper media must support this. Proper consultation mechanisms therefore need to be in place and newspapers’ voice should be given due hearing on issues framed as “innovative” developments but with market implications.

### **Overseeing public service responsibilities and the Amsterdam test:**

**Accountable bodies which are entirely independent and external (in all and not just some cases to the public service broadcaster) must be put in place for guaranteeing the efficacy of this test at Member state level.**

The entity charged with this could even be a private entity if such a possibility exists at national level. The criteria for what qualifies as a “significant new service” as well as what is a significant alteration to a service must be continuously monitored.

The derogation in paragraph 62 that the Commission gives for certain public broadcasters to maintain internal scrutiny structures for certain circumstances is

questioned by ENPA. ENPA would prefer that the oversight body is mandatorily structurally separated (i.e. external), from the public service broadcaster, ensuring complete independence.

**ENPA believes that ideally the independent, external body, organised at national level, according to the rule of law, yet also independent from political authority, should subject the public service broadcaster to a periodic review of all tests and new services which have been done, for example, a new type of annual review of all public service activities. The procedure must demonstrate objectivity and transparency.**

This would ensure that evolutions in public service broadcasters' activities which do not qualify as significant new services but which have a serious impact on private media can still be flagged and it is clear when they need to be assessed. One example of past failure can be taken from the Danish Broadcasting Corporation's regional news sites which compete directly with local and regional newspapers' sites – ENPA received reports from its members that it is far from clear when and how these new services were assessed for their compatibility with the public service remit.

According to paragraph 59, interested parties shall have the right to give their views. ENPA believes that the process needs to be structured in such a way that the views are given due and equal consideration and included in the process as far as possible before any damage has been done to the markets.

**Furthermore, ENPA would like to see at least a public hearing recommended to Member States as part of the Amsterdam test to ensure that all third-parties are clearly informed of the intentions to develop new services and given the chance to contribute their views at a reasonable stage in the process.**

### **Third-party complaints:**

ENPA is pleased that the Commission has called on the Member States to create third party bodies for complaints in paragraph 106 as follows: “Third parties shall have the right to submit complaints concerning such alleged anticompetitive behaviour to an external body independent from the public service broadcaster. The supervisory body shall have the necessary powers to impose appropriate remedies and proportionate sanctions in case anti-competitive behaviour is demonstrated.”

**ENPA believes that more needs to be said here by the European Commission in respect to enforcing the remedies in a timely, efficient manner and publicising the scrutiny process for complaints procedures, as well as publicising the types of remedies that should be enforced (or indeed the specific reasons why a complaint has not been upheld) in a transparent way.**

This should be done with the express purpose of minimising the distorting effect on the market.

## **Reserves:**

Whilst ENPA recognises that the Commission wishes to bring the public service broadcasting sector into line with other utilities which benefitted from ECJ case-law, it is not logical why public service broadcasters should have a more lenient regime than other public companies.

- **Specifically, the public service broadcasters should only be permitted to save up to 10% of their total license fee income, rather than 10% of their total annual budget (which would equal 20% of their total license fee income).**
- **The possibility to save more should then be restricted not only to “exceptional and duly justified cases”, but in addition, the Commission should specify that a procedure must be put in place by each Member state to ensure that the measure is fully justified and each case is subject to the same or equivalent justification procedure.**

The Commission needn't be infringing national competence by doing this. A dually-funded public service broadcaster is better able to control its own income and therefore this flexibility permitted by the 10% of annual budgeted expenses, which is not granted to any other service of general economic interest, should be altered accordingly to fall into place with other such services. ENPA members have been made only too aware through their experience over the years that under the broad terms of the law the dually-funded public broadcaster is able to define and adapt its role according to its actual competitive needs.

Paragraph 100 states that an in-depth review of the financial situation of the public service broadcasters should be conducted at the end of each entrustment period, but it does not say who the review should be conducted by. It is only by implication that one assumes that the review would be carried out by the external body independent from the public service broadcaster at regular intervals identified in paragraph 99, though this is not explicit and ENPA would not wish to see this fall through a loophole.

### **Pay-per-view:**

ENPA acknowledges that the pay-per-view service must not be commercial in nature or go beyond a special cost of hi-tech development according to the Communication. However, this does not go far enough.

**The provisions for pay-services are rather unclearly worded and ENPA members oppose pay-services for public service broadcasters in light of the current wording.** Due to the uncertainty of the Amsterdam test, as we have explained above, there is a risk that not all pay-per-view services which should qualify would be subject to the test – especially if they are only aimed at smaller parts (or locations) of the population and they would therefore not be considered as “significant”, even though their effect on the market could be cumulatively important.

Where there is a general need for a service for society, this eliminates the need for incurring a charge to a certain section of society in ENPA’s opinion, as the cost is then borne by the whole society. ENPA is concerned that the definition of public service is gradually being distorted through this new interpretation towards benefit of the many towards benefit of the few in paragraph 54.

**ENPA calls on the Commission to take a position more aligned with what it has recognised in several Member States in paragraph 52 where it notes that several Member States maintain that it is too difficult to reconcile pay-services with the traditional objectives of public service broadcasting.**

The public service broadcaster should be investing in technologies which are accessible to the many, therefore statements such as collecting pay-per-view for “particularly advanced technological features of the public service”, accessible apparently only to the few surely cannot be in the common interest for society as defined in the Amsterdam Protocol. This said, the simple passing-on general network costs to all users may be justified in ENPA’s opinion (paragraph 54), but this must be able to be proven and accurately recorded as such.

### **Functional and structural separation:**

**ENPA believes that the functional and structural separation as recommended by the Commission is one of the best ways to help avoid cross-subsidisation and should be strongly encouraged by the Commission as such.**

This has been demonstrated in other sectors as a success, such as in telecoms.

**However, below, ENPA brings some of the pitfalls of functional and structural separation to the Commission's attention which, whilst we do not intend to mean that it should not be recommended as best practice, ENPA trusts that a separation should be accompanied by strict transparency obligations.**

ENPA members have witnessed that outsourcing of activities to structurally separated subsidiaries can prove problematic in terms of transparency. For example, in the case of Austria, the public broadcaster ORF has already outsourced most of its commercial activities to 100% owned subsidiary companies. This causes problems where the subsidiary companies do not operate as transparent a cost-accounting system as would be desired for the public service broadcaster itself. ENPA's Austrian member reported that particularly in the case relative to the outsourced public online activities in Austria: "The status of a private company makes it difficult to retrace the financial transactions with the mother company and to get a reliable picture of the cost accounting of the ORF online services." Therefore, special transparency measures and cost monitoring of outsourced activities should be required.

There are also other cases of separation which have proved successful, such as that experienced in Portugal, whereby the commercial and financial services were separated in the past, but the recent merger two years ago has now put the effectiveness of this separation into question.

**There are therefore different cases and it should be indicated clearly by the Commission in the Communication which of the models have tested well in the past.**

### **Separation of accounts and risk of cross-subsidies:**

Paragraph 52 states that: “The obligation of separation of accounts does not apply to public service broadcasters whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of those services.” Public service broadcasters might not operate a service outside of general economic interest, but they can operate a service alongside advertising for part-financing.

**The Commission’s position should be better specified in the Communication regarding this to require separation of accounts wherever part-financing occurs.**

### **The attribution of costs to public service activities which also benefit commercial activities:**

This is a very complicated area. The public service broadcaster should be able to identify its cost allocation for the most part at least. For example, it should be possible for a public service broadcaster to identify the extent of advertising revenue generated from a particular programme created within the remit. There could be potential for possible abuse if costs which benefit commercial activities are entirely attributed to public service activities.

To allocate the costs for certain infrastructure and resources to public service activities e.g. transmission costs, when a certain proportion equally benefits the non-public arm of the public enterprise, has the potential to be confused easily with the practice of cross-subsidisation.

- **The Commission should therefore seriously reconsider whether it could be possible to require Member States to have a further, clearer separation of costs – where a reasonable proportion should not be allocated solely to the publicly funded costs accounts, similar to that discussed in paragraph 83 for e.g. investment costs. ENPA believes that this should be investigated further with accountancy specialists and ENPA also requests further clarification of which specificities in particular the Commission refers to differentiate the broadcasting sector from other utilities sectors in this case.**
- **The example outlined in paragraph 85 clearly shows a strong benefit in favour of inflating the public service costs and ENPA believes that a more reasonable solution could be found.**

One option which should also be explored further concerns the costs of broadcasting of advertising spots where this is possible – the costs of resources for broadcasting of advertising spots could be charged specifically to the advertising subsidiary of the public broadcaster rather than allowing the general allocation to the public service costs.

This cannot be said without touching on the issue of competitiveness of public broadcasters on the advertising market. Restricting the possibility of deriving income from advertisements exclusively to commercial programmes would lower pressure of public broadcasters on the advertising market.

**Although imposing an obligation from EU level to refrain from advertising-funded models (advertising/license fee or other public fund split) may not be entirely feasible due to Member State competence in choosing funding models for public service, a more robust framework is urgently required, including a more regular and in-depth independent review of advertising-funded public service.**

**Other ENPA relevant comments:**

- Control mechanisms – ENPA calls on the Commission to ensure effective and regular reviews of the Member state mechanisms at all times.
- ENPA senses a problem of consistency of interest. In the original Amsterdam Protocol annexed to the Treaties, it states that decisions should be made in the “common interest”. However, decisions should be made in the “general interest” (see below) in the 2001 Communication. “General interest” is then also presented as a term to describe how the services offered to the public are offered by the public service remit in the draft Communication’s paragraph 47. ENPA would like to see the Commission confirm a clear and consistent definition in line with the original Protocol regarding whose interest this Communication is in.

ENPA remains at the disposal of the Commission for any further information that it may require.

This issue is of profound importance for our members and we request that we are consulted by the European Commission in its further reflections in this sensitive area.

Brussels, January 2009.

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