

**COMMUNICATION FROM THE EUROPEAN COMMISSION ON THE  
APPLICATION OF STATE AID RULES TO PUBLIC SERVICE  
BROADCASTING (TEXT WITH EEA RELEVANCE)**

**Response by**

**The European Alliance of Listeners' and Viewers' Associations (EURALVA)**

*Introduction*

1. EURALVA is an Alliance of Listener's and Viewers' Associations from seven EU Member States (Denmark, Finland, Germany, Hungary, Portugal, Spain and the UK), and from a Member State of the European Economic Area (Norway). It has a seat on the Advisory Committee of the European Audiovisual Observatory. Two senior members of the EURALVA Board have been invited by the Mirovni Institut in Slovenia to provide advice on a research project entitled *Responsibility and Responsiveness – Advocating/Promoting Mechanisms to Respect Citizens Interests/Voice in the Media in Slovenia*, which has been funded by the Directorate-General on Justice, Freedom and Security of the European Commission. In addition, EURALVA received reports at its 2007 Annual Conference from delegates from four newer EU Member States (Bulgaria, Poland, Romania and Slovakia) on the feasibility of involving all or most sections of their respective civil societies in shaping domestic broadcasting policy.

2. In general, EURALVA welcomes the Communication from the European Commission on the Application of State Aid Rules to Public Service Broadcasting. In our view, it is a sensible and thoughtful document, which elaborates the Commission's strong endorsement (albeit within a certain framework of accountability and transparency) of the principle of a public intervention in broadcasting. The Commission's Consultation Document establishes the legal European framework for the application of State aid rules to public service broadcasting, as laid down thus far by the European Court of Justice and the European Court of First Instance. But it also seeks to steer a forward-looking course between the Scylla of unregulated competition between commercial broadcasters, and the Charybdis of unaccountable State-funded broadcasters, in order to take account of new technological and commercial opportunities in the field of broadcasting which will arise throughout Europe in the coming years.

*EURALVA's Two Reservations*

3. Nevertheless, despite the very important areas of agreement just mentioned, EURALVA notes what seem to be two significant shortcomings in the document; we think it important to highlight them, and hope that the European Parliament and the Commission will take account of our arguments in the course of their further deliberations. The two issues are:

(a) The failure of the Commission's draft Communication, when it analyses the public service remit(s) of public service broadcasters, to draw a clear distinction between public service broadcasting and State-aided broadcasting; and

(b) The exclusive reliance, by the Commission, on competition-based criteria when monitoring the implementation by public service broadcasters of newly-authorised services. This could result in the Commission paying insufficient regard to the contribution which these newly-authorised services make to the democratic, social and cultural needs of the societies they seek to serve.

#### *Public Service Broadcasting and State-aided Broadcasting*

4. Article 16 of the Amsterdam Treaty states that “Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union, as well as their role in promoting social and territorial cohesion, *the Community and the Member States*, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate *on the basis of principles and conditions which enable them to fulfil their missions.*” [Emphases added]

5. EURALVA submits that this means that the Community, as well as individual Member States, has a joint responsibility to ensure that such services operate according to principles and conditions which enable those public service broadcasters to fulfil their missions. This joint responsibility will become even more important once the Lisbon Treaty, with its commitment to fundamental values and freedoms for Europe's citizens, has been agreed.

6. Until now, the Commission has focussed solely on the economic dimensions of State aid, has paid virtually no regard to the public service remit of a State-aided broadcaster. In so doing, it has accepted the argument of public service broadcasters and Member States that the public service remit is an issue of subsidiarity. Nevertheless, on two occasions, the European Court of First Instance has criticised the Commission's failure to examine sufficiently carefully the conditions under which Portugal and Denmark granted State aid to their respective public service broadcasters. (T 442-03 and T 336-04)

7. In the view of EURALVA, the Commission's statement in paragraph 47, that the role of the Commission, as regards the definition of the public service remit, “is limited to checking for manifest error” needs further analysis and clarification. While we accept that “it is not for the Commission to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product”, the leap from a general statement about manifest error to statements about the suitability of particular programmes, ignores any analysis of whether or not the public service remits of individual public service broadcasters conform to the justifications for State aid which are laid down in both the Amsterdam treaty and the Amsterdam Protocol.

8. Moreover, the Commission's distinction between existing aid as opposed to new aid in section 4.2 of the Draft Communication fails to explain adequately why it continues to regard as existing State aid, measures which were introduced or put into

effect some fifteen years ago, prior to the entry into force of the EEA Agreement on 1 January 1994, and the accession of twelve former Communist Member States which acceded to the EU in 2004 and 2007. Indeed, there have been several amendments since 1994, both to the public service remits, and to the State aid which supports them, in a number of these countries.

#### *Establishing Public Service Remits*

9. EURALVA submits that Article 16 of the Amsterdam Treaty makes it clear that the Commission and Member States should co-operate in ensuring that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions. Moreover, the relevant Protocol to the Amsterdam Treaty justifies State aid for public service broadcasting on the grounds that “the system of public service broadcasting in Member States is directly related to the democratic, social and cultural needs of each society”.

10. Furthermore, as the European Court of Justice spelt out in the first condition of its Altmark judgement concerning undertakings in receipt of State aid, “the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.” [Case C-226/1, *OJ*, 20/9/2003, paragraph 2] In our view, therefore, there is already a strong legal duty for the European Union to ensure that the public service remit of every State-aided public service broadcaster has clearly-defined obligations to discharge. It is only then that the Commission can “check for manifest error”, or decide whether the degree of State aid allocated is proportionate and appropriate.

11. As a Europe-wide Alliance of national associations, EURALVA recognises that any negotiations between the Commission and an individual Member State over the public service obligations of its domestic public service broadcaster could raise sensitive political issues. Indeed, we are aware that some twenty Member States are actively opposing the Commission’s current draft Communication on the grounds. In order to resolve these tensions, therefore, it may well be necessary for the Commission – and possibly the European Parliament - to adopt a broader political approach which extends beyond simple competition issues. In our view, this is not an issue which can be ignored by simply designating it to be an issue of subsidiarity.

12. Europe’s public service broadcasters already receive 22 billion Euros annually, which is generally paid directly by Europe’s listeners and viewers through a television licence fee or a similar form of [regressive] hypothecated tax. They therefore need to be sure that the services broadcast by the recipients of these monies are genuinely related to the democratic, social and cultural needs of the society in which they live. We are not arguing that public service broadcasters generally are doing a bad job. It is already clear from a number of studies conducted by the Eurobarometer, that television is the most widely-trusted medium for Europe’s citizens, even among light television viewers. Moreover, despite the large number of entertainment channels, most EU citizens are also interested in watching news programmes, and would prefer to learn about developments in scientific research via their TV set. Furthermore, their preferred thematic channels are those which cover local or regional news and current affairs.

13. In some Member States, however, the public service remit could be improved and more sharply focussed, for as research by the Eurobarometer also shows, the citizens in certain EU Member States consider that they are poorly informed about domestic news and current affairs, and some of them even have to turn to international news channels to find out what is going on.

14. It will be totally impossible for the Commission – and in our view politically undesirable - to harmonise the public service remits of the public service broadcasters in every Member State, for each State has its own distinctive culture and history. It is important, however, for the European Union and the European Commission, gradually to establish *certain minimum standards* for the public service remits of all of Europe's public service broadcasters in order for them to continue to receive State aid.

15. Initially, the Commission could draw four basic – and we would argue fundamental - standards from the provisions of Article 16 of the Amsterdam Treaty which justifies the establishment of services of general economic interest, and from the associated protocol on public service broadcasting. Namely, the public service remit of every State-aided broadcaster should be:

- Likely to promote social and territorial cohesion;
- Directly related to the democratic needs of that society
- Directly related to the social needs of that society, *and*
- Directly related to the cultural needs of that society.

16. Some Member States have already done this, and in EURALVA's view it would be valuable to extend this discipline to the public service remit of every State-aided public service broadcaster.

17. Beyond that, it could also be valuable for the Commission to look at the consensus-building work on the definition of public service broadcasting which has already been carried out by the Council of Europe, both in establishing in 1994 the text of a universally agreed Ministerial Resolution on Public Service Broadcasting, and in following up the principles enshrined within it through various Recommendations and Declarations. This approach could be especially valuable once the European Union has finally agreed the text of the Lisbon Treaty, with its commitment to the fundamental rights and freedoms of all Europe's citizens.

18. In order to minimise the political tensions between the European Union and an individual Member State, EURALVA submits that it would also be valuable for the Member State concerned to consult its citizens – and their listeners' and viewers' organisations - about the putative public service remit for its public service broadcaster. Although the mode of public consultation within each Member State may vary, the European Union should never forget that three of the four principal duties of a public service broadcaster established by the protocol to the Amsterdam Treaty are to serve the democratic, the social, and the cultural needs of that society. In our view, it would be unwise for a national government to attempt simply to decide these matters on its own. They are matters for participative democratic discussion, rather than simple executive decisions.

19. EURALVA submits that only if the Commission and a Member State follow *ex-ante* procedures of this nature, can the EU be satisfied that each State is setting up a genuine public service broadcaster which fulfils the specifications of the Amsterdam Treaty and its associated Protocol, and is therefore entitled to enjoy the benefits of State aid.

*Control Mechanisms and Market Distortions*

20. In paragraphs 98 to 106 of its document, the Commission's draft Communication seeks to ensure that Member States "ensure regular and effective control of the use of public funding to prevent over-compensation and cross-subsidisation, and to scrutinise the level and use of reserves" (paragraph 98); and that public service broadcasters do "not affect trading conditions and competition in the Community which would be contrary to the common interest, while the realisation of that public service remit shall be taken into account" (paragraph 101).

21. EURALVA supports the Commission's proposal that Member States should be responsible for ensuring both outcomes. It is doubtful, however, whether it would be appropriate for the Commission to specify too precisely how these procedures should be carried out. For instance, the Commission proposes in paragraph 99, that a mechanism to prevent overcompensation and cross-subsidisation should be carried out by an external and independent body, preferably on an annual basis. This could be unnecessarily prescriptive, when each public service broadcaster will presumably also be required to provide a properly audited set of annual accounts, in which the auditors could also be required to certify that there was no overcompensation or cross-subsidisation. In EURALVA's view, it would be better for each Member State to propose to the Commission the means by which it would achieve an equivalent outcome.

22. Moreover, while EURALVA does not wish to see public service broadcasters causing any market distortions, it is also essential to remember that, in the field of broadcasting and audiovisual media services generally, in which the monopolistic laws of copyright and performing rights play such an important role, a plethora of sub-markets and emerging markets are already starting to appear. In EURALVA's view, although we recognise the distinction drawn by the European Court of Justice between the existence of copyright, and the exercise of that copyright, it would be premature for the Commission to assert that "when carrying out commercial activities, public service broadcasters shall be bound to respect market principles". (paragraph 103) In some instances, for example, public service broadcasters use the subsidiary copyrights in their programmes in order to establish new audiovisual media services, or even new information services, which are specifically designed to meet the democratic, social and cultural needs of their society. In these instances, a market may not yet have been established, and such services may only become "commercial activities" when private sector broadcasters seek to offer rival services, which use their own copyright-protected audiovisual media, or packets of information, on which they also seek to make a profit.

23. On the other hand, EURALVA welcomes the Commission's proposals which are designed to improve transparency, such as the proposal that public service broadcasters should be required to sublicense any unused rights to premium sports events, and to respect the arms' length principle in their relations with their

commercial subsidiaries. Even so, the commercial subsidiary of a public service broadcaster could still decide, taking into account the public service remit of the broadcaster, to make copies of a broadcast programme publicly available, even though it might incur a loss in so doing.

*Conclusion*

24. In conclusion, EURALVA would encourage the Commission and the European Parliament to bear in mind, in all the Commission's recommendations on the future provision of State aid to public service broadcasting, that it is the democratic, social and cultural needs of Europe's citizens, not just media pluralism, which should underpin all its proposals for the future. To do so, would also help to remedy the democratic deficit within the European Union.