

26 JAN. 2009

Helsinki, 15 January 2009

European Commission  
Directorate-General for Competition  
Consultation (Broadcasting)  
State aid Registry  
B-1049 Brussels

A/2077

Fax (32-2) 296 12 42

[stateaidgreffe@ec.europa.eu](mailto:stateaidgreffe@ec.europa.eu)

## Draft Communication from the Commission of the European Union on the application of State aid rules to public service broadcasting

Viestinnän Keskusliitto (The Federation of the Finnish Media Industry FINNMEDIA) welcomes the opportunity to reply to the consultation on the Draft Communication on the Application of State Aid Rules to Public Service Broadcasting (hereinafter the Draft) and respectfully presents the following:

### Main messages

- **The remit of public service must be explicated and at the same time the division of labour between public service broadcasting and commercial broadcasting activities explicated. The guiding effect of the Draft text is not sufficiently precise to ensure that national authorities would be able to exercise effective oversight of compliance with the public service remit and deal with any excesses.**
- **The Communication must set forth clear and precise considerations with regard to what kinds of programming contents are related to the democratic, social and cultural needs of society and what kinds of contents safeguard media pluralism. A more precise demarcation line between “public service” and “commercial service” will be drawn at the same time.**
- **Offering pay-services is in conflict with the public service remit. It obfuscates the division between public and commercial service and distorts competition. Therefore offering pay-services either direct or through intermediaries must not at all be included in the public service remit.**
- **The biggest change that has taken place in the market since the previous Communication, issued in 2001, is growth in the importance of communication networks (especially broadband Internet). The Communication should pay especially careful attention to online services provided by public service broadcasters and an effort should**

Helsinki 15.1.09 2009

**be made to draft ground rules that are as clear and competition-neutral as possible for online activities.**

- **Public funds must not be used to produce services of the kind that are otherwise (= commercially) made available to citizens. Publicly funded activities must not skew the operation of the market.**
- **In the Finnish operational model, the activities of the public service broadcaster are paid for using funds from public sources, whereas commercial broadcasting operations are financed through revenues derived from commercial sources (mainly TV and radio advertising as well as sponsorship). This funding model works well in Finland as it is, although there is disagreement about how public funds must be arranged (TV fees paid by viewers as opposed to direct funding through the State budget).**
- **The criteria for identifying distortions of the market that are outlined in the Draft must be further explicated in order to enable national authorities to make tenable decisions with their aid.**
- **An impartial body must regularly examine, with respect not only to new public services, but also to existing ones, whether they genuinely comply with the public service remit or distort competition.**
- **The activities of a strong domestic broadcasting company that provides a public service are genuinely important from the perspective of society. What is essential is to concentrate with full vigour on discharging the core public service task. In this way, society will have also a more diverse and higher-quality range of television and radio programming to choose from.**

## General

In early 2008 the EU Commission issued an extensive questionnaire concerning revision needs and outlines of the 2001 Communication on the application of State aid rules to public service broadcasting. The reply that we gave on 10.3.2008 is published on the Commission's web site.

Based on the replies it has received, the Commission has created a draft, encompassing 106 paragraphs in all, of a new explicated Communication.

The objective of the revision should be to arrange conditions of competition between broadcasting companies in such a way that State subsidies interfere with the functioning of the market as little as possible. Because of disturbances that have been perceived as excessive, the Commission has received several complaints. The new Communication should substantially reduce the future need for complaints. Achieving this objective would presuppose especially a clearer definition of the remit and funding of public service than is contained in the 2001 Communication.

On these key points the Draft in its present form does not, unfortunately, offer adequate instruments; on the contrary, it may even encourage public service broadcasting

Helsinki 15.1.09 2009

companies to let their activities drift even further in a commercial direction and away from the core of public service. For this reason, **the public service remit** presented in the Draft **must be further explicated and at the same time the division of labour between public service and commercial service must be clarified.**

With respect to details, we point out the following (the numeration refers to the numbers of the paragraphs in the Draft):

### **The role of public service broadcasting**

As the point of departure in the Draft (paragraph 10) it is noted that “no other service (besides public service broadcasting) ... that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.” In actual fact, however, public service broadcasters’ share of TV viewing audiences is in most European countries considerably smaller than that of commercial TV companies and they offer a lot less programme content than commercial TV channels<sup>1</sup>.

The Commission refers (in paragraph 14) to the so-called Amsterdam Protocol, in which definition of the remit of public service broadcasting and funding for it are assigned, with certain provisos, to the competence of the Member States, ... “insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest...”. Therefore the Commission can not set about defining a pan-European public service remit in detail. This notwithstanding, **the Commission must in its Communication adopt a position on the general outlines of defining the task and set requirements relating to the precision with which the public service remit is defined.**

The Amsterdam Protocol states that “the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”. Nevertheless, the Commission considers (in chapter 16) that “a public service mandate encompassing a wide range of programming”, which offers balanced and varied programming and is “capable of preserving a certain level of audience for public broadcasters”, is “*to be considered legitimate*”.

The Commission refers (in paragraph 18) to a Recommendation by the Committee of Ministers of the Council of Europe in which Member States are called upon to *ensure* that public service media organisations occupy “a visible place in the new media landscape” and that their programming content is accessible “on a variety of platforms” as well as to *guarantee* the fundamental role of the public service media in the new digital environment and to “include in their legislations/regulations specific to the remit of public service media setting a clear remit for public service covering in particular the new communication services.”

---

<sup>1</sup> According to European Broadcasting Union (EBU) statistics, public service broadcasting companies’ share of TV viewing audiences was 36.9% in 1997 and only 29.5% in 2007. The fall in ten years was 7.4 percentage points. In all of the large EU countries public service companies’ (RAI, ARD, ZDF, France Television, BBC, RTVE) share of viewing audiences fell by 1.0 ... 1.8 percentage points in a year (2006-07). The greatest share of viewers watched the programming that commercial channels provided. Source: EBU: Report 2007; Strategy 2008-2011.

Helsinki 15.1.09 2009

The Commission does, however, state (in paragraph 48) that definition of the public service mandate by the Member States should be *as precise as possible* so that the authorities there can effectively monitor compliance (paragraph 49). However, this demand for precise definition is effectively submerged under argumentation in favour of providing “a wide range of programming and a balanced and varied broadcasting offer”.

The inclusion of the foregoing (paragraphs 15...18 as well as 50) in the Communication may give the picture that the scope of public service broadcasting activities carried on with the support of State aid could be broadened almost unrestrictedly to compete with commercially funded broadcasting operations. This part of the document tends to blur the Commission’s as such healthy starting point that broadcasting activities which are conducted with the support of State aid must meet the democratic, social and cultural needs of society and safeguard the need to preserve media pluralism. Therefore the paragraphs referred to above should be deleted from the Communication.

What is of greater relevance than summarising the statements that the Communication contains with regard to broadening the scope of public service broadcasting activities is to present **clear and precise views on what kinds of programming contents are associated with the democratic, social and cultural needs of society and what kinds of contents preserve media pluralism. A more precise demarcation line between “public service” and “commercial service” will be drawn at the same time.** Drawing this line is undeniably a difficult task, but it is a core question of the entire discussion. In the Communication, this section should be substantially broadened and deepened, because conceptions with respect to it seem to differ considerably both between the Member States and between different actors. In this respect we make so bold as to express the hope that the Communication will be explicated. Otherwise, there is the danger that the concept of public service will broaden unacceptably as a consequence of the imprecision of national definitions, as is the situation in Finland at the present moment.

**Something that should be clearly defined in the Communication is whether the online services provided by public service broadcasters constitute broadcasting activities and thus fall within the scope of the Amsterdam Treaty or not.** When the Treaty was signed in 1996, not many online services were yet available. The most recent Directive concerning audiovisual media services (2007/65/EC) contains separate provisions concerning “nonlinear” audiovisual media services, but also these apply to programmes containing moving pictures and sound, but not, by contrast, to other online services. These facts speak for the interpretation that online services were not originally intended to fall within the scope of the Amsterdam Treaty. An interpretation of this kind will give the Commission broader opportunities to issue regulations stipulating in what respect they may possibly be regarded as falling within the scope of public service and also on their funding. We refer in this connection also to the views that we presented, under the heading “Ground rules for online services”, regarding the importance of defining online services.

### Pay-services

The idea of including pay-services in the category of public service is viewed positively in the Draft (paragraphs 51...55). A large number of different pay-services are listed in the Draft (paragraph 52). However, it is also pointed out in the Draft that several Member

Helsinki 15.1.09 2009

States have not so far given public broadcasting companies permission to offer pay-services as part of their public service remit.

In contrast to the stance adopted by the Commission (in paragraph 55), we take the view that **offering pay-services conflicts utterly with the public service remit and would be conducive to broadening the range of commercial products provided by public service companies and blur the borderline between public service and commercial broadcasting.** Offering pay-services obscures the division of labour between public and commercial services and distorts competition. Therefore **it must not be possible to include the provision of pay-services in the public service remit.**

### Ground rules for online services

The biggest change that has taken place in the market since the previous Communication, issued in 2001, is growth in the importance of communication networks (especially broadband Internet). It is obvious that in online services demarcation between public and commercial service will face bigger challenges in the next few years. Here, too, a healthy starting point for a public broadcaster is to mediate only the kinds of services that meet the democratic, social and cultural needs of society and safeguard media pluralism. Special care should be devoted to implementing this in the Communication and an effort should be made to draft **ground rules that are as clear and competition-neutral as possible for the online activities of public service broadcasters.**

Getting clear ground rules for online activities is of key importance also because public service activities online compete with the online services provided by not only commercial television and radio actors, but also with those of all other commercial media (especially newspapers and magazines). Indeed, the competition interface is a lot broader where online services are concerned than in the case of traditional broadcasting-activities.

In an era of digital technology, also search engines and other actors based outside Europe compete with commercial content producers (including Internet newspapers and magazines) for consumers' time and attention as well as for online advertising revenues. Ensuring the conditions essential for the vitality of commercial news mediation is now more important than earlier. Otherwise, pluralism of independent news mediation and the diversity of material on offer will be jeopardised, especially in small language and market areas.

As an example of distortion of competition, we wish to mention a recently arisen situation in Finland, where the public service broadcaster Yleisradio Oy (the Finnish Broadcasting Company) has expanded its online news activities in a way that is likely to weaken the ability of the commercially funded news agency Suomen Tietotoimisto Oy (the Finnish News Agency) to operate successfully in the future. Publicly funded activities of this kind crowd out commercial alternatives, distort competition and over the long term are likely to lead to uniformity rather than pluralism in news mediation and communications. The future may see similar cases in various parts of Europe and they can prompt numerous complaints to the Commission. Therefore clear rules for activities of this kind should be included in the Communication and online service made neutral in the competition sense.

Helsinki 15.1.09 2009

## Market value

The Commission notes in the Draft (paragraph 56) that significant new services offered by public service broadcasters, such as in particular publicly funded non-traditional media services and pay-services, may have a significant effect on the market. Therefore, according to the Draft, an external body (paragraph 62) should conduct an advance assessment of the possible distorting impact that a new service is likely to have on commercial services (paragraphs 58...61).

In our view, public service broadcasters must concentrate on performing the core tasks within the public service remit. These do not include tasks that are commercial in character and/or compete directly with commercial services. **Public funds must not be used to produce services of a kind that are otherwise (= on a commercial basis) generally available to citizens.**

What need to be taken genuinely into account in the assessment are – not only the characteristic features and development of radio and television markets and the existing range of services – but also the range of products offered by online publications and other commercial sources of news and contents as well as the impacts that a publicly funded service has on the ability of national, independent news mediation to compete successfully.

**It would be, as such, a salutary development if an impartial national body periodically examined – with respect to not only new, but also all older services as well – whether they genuinely conform to the public service remit or are to be counted as commercial services as well as whether they possibly distort competition. Services that clearly do not belong to the public service remit should be pruned from the range offered by public service broadcasters.**

## Oversight

It is stated in the Draft that choosing the mechanism to ensure effective supervision of the fulfilment of the public service obligations is a task for the Member States. This task should be assigned to a body independent of and external to the public service broadcaster. The body should have adequate resources to implement oversight as well as the power to impose appropriate remedies (paragraph 69).

**In our view, only an external and neutral body that is independent of the actors can implement effective oversight. In addition, oversight should be uniformly arranged with respect to all broadcasting activities – both commercial and public service.** In this respect, corrective measures need to be taken in Finland. The powers of the Finnish Communications Regulatory Authority, which oversees commercial actors, hardly extend at all in practice to overseeing the public service broadcaster Yleisradio. This puts the actors in unequal positions, for which reason oversight of Yleisradio should be transferred in its entirety from a supervisory board chosen by the national parliament, the Eduskunta, to the Finnish Communications Regulatory Authority.

Helsinki 15.1.09 2009

## Funding

In the Draft, the Commission lacked the boldness to intervene in the question of funding of public service broadcasting activities, because the Amsterdam Protocol gives the Member States the power to arrange this funding in the way they see fit. The Commission is content merely to describe the existing situation (paragraphs 72...73).

Without adopting any more detailed stance on this question, which is of great topical interest also in Finland right now, we shall merely repeat what we replied to a questionnaire from the Commission in March 2008: "... the public service broadcasting company in Finland does not engage in commercial activities nor compete in the advertising market. Under the Act on Yleisradio Oy, any activities other than those that are as such included in its public service remit must be differentiated in the company's accounts ..."

**In this Finnish operating model, the public service broadcasting company performs the public service remit and obtains its funding from public sources (i.e. viewers' TV licence fees) and commercial broadcasting activities provide a commercial service and are financed from commercial sources (i.e. mainly TV and radio advertising as well as sponsorship). We emphasise that in its main features this division-of-labour and funding model works well in its present form, although there have been different opinions on the arrangement of public funding (TV licence fees paid by viewers as opposed to direct funding through the State budget).**

## Market distortions

It is stated in the Draft that funding of public service broadcasting must not distort competition in a way that is "contrary to the public interest" (Amsterdam Protocol) or "disproportionate" (Draft, paragraphs 101 and 102). Numerous examples of distortions of this kind are listed (paragraphs 102...104). The Commission certainly has experience of distortions of competition, because numerous complaints concerning this have been made to it. The problem with the passages cited above is how open to interpretation the texts are; what is contrary to the public interest or disproportionate distortion?

In order to avoid problems of this kind, clarity with regard to the division of labour and funding and keeping them distinct from each other are essential. Public service and public funding are one totality and, on the other hand, commercial service and commercial funding are another, which must be kept separate from the public one. The more those two are mixed up with each other, the more conflicts and problems will arise for either the Commission or the Court of Justice to resolve.

**The criteria for assessing whether market distortions are taking place that the Commission presents in the Draft (paragraph 105) are too open to interpretation and vague to be of use to national authorities in making tenable decisions. The keys to a solution are more likely to lie in developing the division of labour between public service and commercial broadcasters and differentiating sources of funding.**

Helsinki 15.1.09 2009

**To conclude**

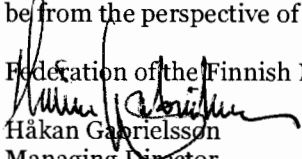
An accusation frequently levelled at commercial actors by representatives of public service companies is that the former would like to “marginalise” public service broadcasters and narrow their opportunities to offer a wide and diverse range of programming. There is absolutely nothing of this kind involved. On the contrary, public service companies obviously do not see the importance of their own public service remit and are incapable of developing, on its basis, programming contents that would meet the democratic, social and cultural needs of society and help preserve media pluralism. Instead, they are doing everything in their power to try and expand into the programming sectors where commercial companies operate and to compete with them for audiences’ time. When penetration of the commercial sector by public service companies is done with the backing of State aid, all that results is distortion of competition and a further widening of mutual conflicts as well as homogenisation of programming.

As a representative of commercial media, **the Federation of the Finnish Media Industry regards the activities of a strong domestic public service broadcasting company as genuinely important for society. It has now and will continue to have an important position and remit in Finnish society. What is essential is to concentrate on performing this remit with all its energy and leave the rest to others. In this way, society will also have more diverse and higher-quality programming to choose from.**

As important as public service broadcasting is, it does not, nevertheless, constitute the backbone of the European media field. The foundation of communications is made up of non-State media, and care must be taken to ensure that the conditions they require for successful operation are safeguarded.

The European media structure is dualistic in character, founded as it is on a delicate balance and coexistence between public and commercial service. The more clearly their remits and funding are distinct from each other, the more diverse and richer the media service that Europeans receive will be, and it is in this direction that the coming Communication ought to steer the development of European media. The smaller the market and language area in question, the more important a clear division of labour will be from the perspective of efficient use of scarce resources.

Federation of the Finnish Media Industry



Håkan Gabrielsson  
Managing Director

Viestinnän Keskusliitto (the Federation of the Finnish Media Industry FINNMEDIA) is an umbrella organisation for the media sector and printing industry. Its task is to promote the conditions essential for the effective operation of the sector with the aim of ensuring a diverse range of mass media services for the Finns. The Federation represents about 800 companies with some 25,000 employees. The companies represented have an approximately 80% share of the mass media market in Finland. The Federation’s members are the Finnish Periodical Publishers’ Association, the Federation of the Printing Industry in Finland, the Finnish Newspapers Association, the Finnish Book Publishers’ Association, the Association of Finnish Broadcasters, and the Association of Finnish Television Broadcasters.



9 (9)

Helsinki 15.1.09 2009

If required, additional information relating to this submission will be provided by:

Håkan Gabrielsson  
Managing Director  
[hakan.gabrielsson@vkl.fi](mailto:hakan.gabrielsson@vkl.fi)  
Tel. +358 - 9 - 2287 7304  
GSM +358 - 50 - 558 1048

Satu Kangas  
Director, Legal Affairs  
[satu.kangas@vkl.fi](mailto:satu.kangas@vkl.fi)  
Tel. +358 - 9 - 2287 7305  
GSM +358 - 50 - 433 7250