

Communication on the Application of State Aid Rules to Public Service Broadcasting

Comments by Mediaset S.p.a. ("Mediaset")

1 INTRODUCTION

Mediaset welcomes the opportunity to submit its observations on this most recent Commission initiative on the application of State aid rules to public service broadcasting ("PSB").

As the Commission is aware, Mediaset actively participated in the first public consultation process leading to the adoption of the 2001 Communication and to the Review thereof in March 2008. Moreover, Mediaset was one of the first broadcasters to draw the Commission's attention to certain fundamental State aid issues relating to the financing of public service broadcasting when, as early as 1996, it lodged a complaint against the Italian State concerning the incompatibilities of the financing of the Italian public service broadcaster (i.e. RAI) with the State aid rules (17 June 1996).

Following the March 2008 public consultation, the Commission has issued a draft Communication on the application of State aid rules to public service broadcasting ("the Draft Communication").

As a member of the Association of Commercial Televisions (ACT), Mediaset endorses in general terms the content of its comments in relation to the Draft Communication, whilst wishing to make its own comments based on its specific experience of the Italian broadcasting sector.

The Draft Communication comes at a particularly timely moment when the global economic outlook is having a huge effect on advertisement-funded private broadcasters. Indeed, it could be argued that the future of television broadcasting stands at a critical juncture with the future production of high quality, advertisement-funded, free-to-air television at stake. On the other hand, as regards the Italian broadcasting market, Mediaset views the public service broadcaster, RAI, as an essential co-player in the successful development of the new generation of broadcasting services.

Against this background, Mediaset believes that the current draft Communication is a reasonably balanced initiative, representing a notable improvement over the 2001 Communication, and a step in the right direction. However, a number of issues, discussed in more detail below, need still to be addressed and/or be further clarified in order to confer on the State aid rules applicable to public service broadcasters ("PSBs") the necessary high degree of transparency and legal certainty.

As private broadcasters continue to file State aid complaints with the Commission resulting from the on-going expansion of PSBs into new market segments and distribution platforms made possible by media convergence, Mediaset would like to highlight certain concerns with regard to the likely commercial use and exploitation of the archives of RAI as a means of facilitating entry into or even strengthening RAI's current position on pay TV and/or other internet-related markets.

Although the Commission has in the past taken the view that PSBs should be entitled to offer their services in any type of distribution platform, including DTT and internet, provided that this is done on a strictly technology-neutral manner, this presupposes that PSBs do not take advantage of this freedom in order to distort competition with regard to broadcasting activities that are of purely commercial nature. Moreover, in accordance with Mediaset's consistent position in relation to ongoing EU policy and regulation concerning the delivery of audio-visual services, it is important once again in this context to stress that the PSBs' universal service obligations are only effectively achieved through open and interoperable delivery platforms.

2 DEFINITION OF PSB REMIT

Mediaset acknowledges that the application of the State aid rules to the PSBs is an ongoing process that sits at the intersection of fundamental policy choices that involve stakeholders with diametrically opposed views.

From a private broadcaster's point of view, having a list in the Communication - even an indicative one - enumerating the type of new media services or activities that fall to be considered either as part of the PSB remit or as commercial broadcasting activities, would contribute greatly to increased legal certainty and predictability. By way of example, in terms of programmes which can fall within the PSB remit, the boundaries of such PSB remit in Italy are contained in the Agreement between RAI and the Italian Government (Article 4). As it is probably the case in other Member States, the list of programmes' categories appears to be too general. As is acknowledged by the Italian regulatory Authority AGCOM in its 2008 Annual Report, the PSB remit must leave no doubt on whether a specific activity is covered or not. Nonetheless, the Annual Report does not comment on whether this is the case in the Italian broadcasting sector. In this respect, guidance from the Commission on what can reasonably be considered by a Member State to fall within the PSB remit would be most welcome. Indeed, arguably a clear definition of the PSB remit should work to the advantage of PSBs in ensuring that they are not unduly fettered in the pursuit and growth of commercial broadcasting activities.

In the absence of a more concrete definition of PSB in the proposed text, therefore, Mediaset supports the Commission's call for at least a more clear and precise definition of the PSB remit by Member States and a more rigorous definition of the type of activities covered thereby so that commercial operators can plan their own activities, and "Member States' authorities can effectively monitor compliance" (paragraphs 48 and 49 of the Draft Communication). Mediaset agrees with the Commission that, *"without a clear and precise definition of the obligations imposed upon the public service broadcasters, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore could not grant any exemption under that provision"* (paragraph 48).

The above welcome statements are however contradicted and weakened by paragraph 50 according to which *"given the specific nature of the broadcasting sector, a definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam protocol legitimate under Article 86(2)"*. As it currently stands, paragraph 50 of the Draft Communication appears to offer a blanket exemption and to call into question the obligation imposed upon Member

States to ensure that the definition of the PSB remit should now be as precise and accurate as possible.

In any event, paragraph 50 is also at odds with paragraph 76 in which the Commission, in line with what is stated in paragraphs 48 and 49, recognises that the State aid assessment carried out by the Commission *"requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities"*.

Accordingly, for the sake of clarity, Mediaset would like to see paragraph 50 redrafted and brought in line with the principles set out in paragraphs 48, 49 and 76 of the Draft Communication.

Mediaset also views with some concern the fact that the Commission appears ready to recognise that PSBs may be allowed to offer pay services such as for instance access to archives for a fee or even pay-per-view services, as part of their PSB remit (paragraph 52). Although the Commission takes care in paragraph 53 to point out that the *"remuneration of a public broadcaster's services at the point of consumption may negatively affect the universality of such service to society as it limits its provision to a part of the population that is capable and willing to pay for the service"* and that for Article 86(2) to apply, such services should not be "commercial in their nature", the fact remains that the draft text opens the door to the likely gradual inclusion of pay TV services into the PSB remit.

More particularly, with regard to the commercial exploitation by PSBs of their archives, Mediaset considers that if PSBs are entitled to exploit on other new digital platforms their own archives, this should be done without any payment and strictly within the context of the PSB remit. Thus the Draft Communication should make it clear that PSBs cannot use their archives and other back catalogue material that result from their PSB activities in order to offer commercial broadcasting services in competition with other commercial broadcasters.

The clear risks for commercial broadcasters that could result from PSBs being allowed to offer new services, this time against payment, as part of the delivery of their PSB remit, demonstrate once again the importance to have in the first place a precise and clear definition of the PSB remit that would allow to effectively monitor whether such pay-services qualify indeed as services of general economic interest within the meaning of Article 86(2).

3 EX ANTE ASSESSMENT / PUBLIC VALUE TEST FOR NEW SERVICES

In paragraph 57, the Commission introduces the notion of an "ex ante assessment" in order to consider whether the planned introduction of "significant new services" by PSBs meets the "same democratic, social, and cultural needs of the society". In particular, Member States should consider, inter alia, the values added by such new services *"in view of the already existing offers"* (paragraph 60). In doing so, Member States should organise a public consultation and ensure that the outcome of the decision as well as the grounds of the decision taken is made publicly available (paragraph 59).

Mediaset views the inclusion in the Communication of the ex ante assessment mechanism as a positive step towards a more disciplined and rigorous approach to PSB.

Although this mechanism is meant to safeguard and preserve a degree of flexibility that may be necessary to ensure that PSB remains in tune with markets developments, it appears to entrust independent authorities with the daunting task of taking a decision on the definition of a PSB remit on the basis of abstract and/or subjective grounds such as meeting the "democratic, social and cultural needs of the society". Mediaset would therefore propose that, in order to preserve legal certainty, the ex ante assessment carried out by the envisaged independent authorities should be grounded as closely as possible on the existing definition of PSB in order to avoid that the such an assessment becomes a flexible tool for the ongoing expansion of the definitional scope of the PSB remit.

With regard to the independent character of the body that would be entrusted with carrying out the ex ante assessment, Mediaset would propose that such a body be an independent administrative authority whose decisions can be challenged before an ordinary administrative court or tribunal within the meaning of Article 234 EC Treaty. Such a court or tribunal should have thus the possibility to make a request for a preliminary ruling to the Court of Justice.

4 TRANSPARENCY

In order for the Commission to be able to assess whether Article 86 (2) EC Treaty is complied with, a clear and precise definition of the PSB remit is a fundamental element. Transparency is therefore an indispensable requirement. This is all the more important in case of the so-called "dual funding" of the PSBs, where a clear separation between public service activities and non-public service activities (i.e. purely commercial activities) is necessary in order to allow the Commission to assess the likelihood of cross-subsidisation. In this respect, Mediaset fully endorses paragraphs 76-77 of the Draft Communication where this principle is clearly stated.

A correct allocation of costs and revenues related to dually funded PSBs is of major importance to avoid over-compensation of PSBs for their activities within the PSB remit. Mediaset acknowledges the fact that the separation of accounts of PSBs might not be easy to implement in practice; in Italy, for example, although the AGCOM has required RAI back in 2005 to implement such clear separation of accounts, there are ongoing discussions in relation to the way RAI is financed and the use that RAI makes of the public funding it receives. Accordingly, Mediaset believes that clear guidance from the Commission on how to implement separate accounting would assist all stakeholders, including the PSBs themselves.

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