



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

**Norwegian Broadcasting Corp.**

Org. number: NO976 390 512 MVA

Mail address: NRK legal Department  
0340 Oslo

Phone: +47 23 04 87 91

E-mail: olav.nyhus@nrk.no

www.nrk.no

Your ref:

Our ref.:  
AJUR/ONYH

Date:  
15. January 2009

**Review of the Communication from the Commission on the application of State aid rules to public service broadcasting (Broadcasting Communication, OJ 2001 C320/5)**

Norway is not a member of the European Union. However, The European Economical Agreement between EU and EFTA implies that the Broadcasting Communication has indirect implication on the Norwegian State and on the Norwegian Broadcasting Corporation (hereinafter NRK).

On this background we did send a reply to the Commission's questionnaire and gave our views on the need for an update of the Broadcasting Communication. Now we welcome the possibility to comment on the Commission's first draft for a revised Communication. Together with the six other Nordic publicly funded public service broadcasters<sup>1</sup> we have submitted a common opinion on the draft. NRK also support the EBU's reply to the Commissions consultation on the draft. Accordingly this reply is meant as an additional comment to underline some core elements in our view. Any difference in the formulation between the replies and this statement should not be interpreted as a difference in substance.

Norway is a country with approximately 0.6 percent of the population in Europe. The commercial offer of international and national audiovisual content accessible for the

---

<sup>1</sup> DR, SVT, SR, UR, YLE and RUV

inhabitants, has been growing considerably year by year the last decade. The development of a network for digital terrestrial transmission (DTT) for television was fulfilled in 2008 and a full range of channels are now available for all households. In addition there has been a rapidly growing development of broadband in most parts of the country, which makes the access to audiovisual services larger than ever before. This development has led to a clear decrease in the public service broadcasting's market share in the traditional TV-market.

In this growing international and commercial media environment the public service broadcasting's role is more important than ever. The democratic, social and cultural needs of our society are no less in our time, than before. And the democratic, social and cultural needs for high quality programs and services which originates from our own society are no less, than in bigger member states of the EU. However, the production cost for such a wide range of quality programs and services are to a large extent similar. High quality drama, factual or entertaining programs are in general just as expensive to produce in Norway as in other European countries. But the basis for funding such content is considerably smaller than in larger markets.

The draft Communication presents the market developments, the technological developments and changing consumption patterns in the media sector in a good way. In addition the draft states that the values of public service broadcasting are equally important in the rapidly changing new media environment.

However, NRK finds that the draft for a revised Communication is not adequate with respect to these conditions. In our view the draft does not provide for a flexible instrument allowing Member States to define the public service remit and to design the adequate national procedures to allow public service broadcasters to adapt and develop in line with their societies, at the same time as they ensure the compliance with the relevant provisions of the EC treaty. In our view the draft is not in line with the Amsterdam Protocol and the principle of subsidiarity.

## **1. The Legal basis**

NRK welcomes the Commission's recognition of the importance of public service broadcasting and the competence of the member states to define, organize and provide for the funding of such broadcasting. The draft adequately defines the task of the Commission to check for manifest errors in the conduct of the member state. However, in the effort to prevent errors, the Commission proposes new remedies and obligations, which are restricting the competence of the Member States in an unjustifiable way.

It is NRK's view that the Amsterdam Protocol gives more latitude to Member States for defining, organizing and entrusting public service organizations. Imposing new requirements which do not already exist under EC Law, through a revision of a Communication is not judicial appropriate. In particular, Articles 87 and 86(2) EC do not expressly or implicitly require *ex ante* assessment of new services, and the Commission could not call into question the compatibility of aid simply because no *ex ante* assessment has been carried out by the Member States.

## 2. Public service remit

Public service broadcasting is primarily justified for serving the democratic, social and cultural needs of the society. The meaning of this concept can not be fully determined beyond the national context.

In NRK's view the draft should clearly specify the Member States' competence for defining the remit of the public service organizations, which is also highlighted by the Amsterdam Protocol and confirmed recently in the TV2/Denmark Case by the Court of First Instance. It is stated that a service of general economic interest is defined in relation to the general interest that it is designed to satisfy. The Amsterdam Protocol defines in general terms the general interest that Member States wish to serve as *"the democratic, social and cultural needs of each society and [...] the need to preserve media pluralism"*.

As stated in the draft Communication, the question of the definition should not be confused with the question of the financing mechanisms chosen by the Member State to finance public service obligations, or the issue of possible effects of the service on competition. Any interference in the criteria for the definition of the public service remit would offend upon the competence of Member States to define the public service. This is clearly stated by the Court of First Instance in the TV2/Denmark case<sup>2</sup>.

In NRK's view any revision of the Broadcasting Communication should therefore separate clearly in the text considerations related to the definition of the public service remit in relation to the general interest on the one hand, and the method of financing and the market distortion on the other. The disproportionate distortion of competition is a separate issue from the definition of the public service remit.

## 3. New services

NRK welcomes the Commission's recognition of public service broadcasting's role in the new media environment. However, the proposal of introducing requirements on the introduction of new services, are not appropriate in our view.

New public services might serve the democratic, social and cultural needs of society, and at the same time have some effects on competition in the market. How to strike the balance between these effects is in essence a political decision that should be left to the national level.

---

<sup>2</sup> (Judgment of 22 October 2008, TV2/Denmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 123).

The discretion of Member States in respect of the definition of the public service remit must apply to the totality of programs and services covered. There are no grounds for according different treatment or requiring specific safeguards for new media activities compared to traditional programs when both fulfill the same democratic, social and cultural needs of society. Moreover, there are no grounds for differentiating between a "new" and an "old" service, given the cross-media nature of broadcasting and the increased technological convergence. The value of public service broadcasting lies in the range, diversity and quality of its overall offer.

The specificity of public service broadcasting was highlighted in the TV2/Denmark case, where the Court of First Instance confirmed the freedom of Member States to define the public service remit broadly and essentially in qualitative terms, which leaves the broadcaster free to establish its own range of programs. The Court stated that such a broad definition cannot be called imprecise. On the contrary, the Court held that a mandate to offer the entire population of a country varied television programming that aims to provide quality, versatility and diversity is perfectly clear and precise (judgment of 22 October 2008, TV2/Denmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraphs 117 and 118). The freedom to establish its own range of programs is closely linked to the principle of the editorial independence of public service organizations.

The Court of First Instance, in the TV2/Denmark case rejects the definition of the remit by reference to the activities of the commercial operators. Consequently, the impact that a service offered by public service broadcasters may have on the commercial offer of competitors cannot be a criterion imposed by European competition law to evaluate the scope of the remit.

The Amsterdam Protocol could not therefore be used as a legal basis for introducing an ex ante test which goes far beyond the basic requirements of the EC Treaty, and in particular the requirements laid down in Articles 87 and 86(2) EC.

#### **4. Entrustment and supervision**

The draft communication contains several requirements for Member States to use independent bodies to supervise the fulfilment of the public service remit, the use of public funding and the public service broadcaster's market behaviour. The Commission states that the monitoring body should have the power to impose remedies (e.g. binding obligations, appropriate sanctions). The very existence of formal sanctions might be perceived as a violation of the principle of editorial independence. For this reason many states have preferred to rely on transparency and public debate, rather than on formal sanctions, to ensure that public service obligations are fulfilled.

The only requirement under the EC Treaty and relevant case law is a clear definition of the public service remit in an entrustment act. The choice of instrument for the entrustment as well as for the supervision should be left to the individual state, in line with the principle of procedural autonomy.

In NRK's view it is for the Member States to choose the appropriate safeguards to define and entrust the public service remit. There is no legal basis for the Commission to impose such new requirements.

## **5. Smaller member states**

As mentioned in the introduction of this reply, the public service broadcasters in smaller Member States operate under conditions of smaller internal markets and, shortage of resources (sales income, license fee and public funds). Thus the system of public service broadcasting is more dependent and vulnerable to media globalization and concentration. In general, the production cost is at the same level as in bigger markets, but the basis for funding is smaller. In addition, productions made in languages of smaller countries, have a considerable smaller potential for commercial exploitation.

Because of their small size in economic terms and the shortage of resources, public service broadcasters operating in small language markets face the challenge of sustaining sufficient diversity of opinions and content on the market, and national and original production. For these purposes, media and competition policy should take into account the particular situation of public service broadcasters in each small country. The democratic, social and cultural needs are to be considered equally in smaller Member States as for the larger Member States, and not to be rejected due to the more difficult market conditions.

NRK request the Commission to reintroduce paragraph 62 of the current Communication.

Norwegian Broadcasting Corp.

Olav A. Nyhus  
Legal director