Response from the Swedish Government to the draft Commission Communication on the Application of State Aid Rules to Public Service Broadcasting

Summary and General Remarks

Sweden was one of the signatories of the letter sent by the Dutch Minister of Education, Culture and Science, Mr. Plasterk, to Commissioner Kroes in September 2008. Attached to the letter was a position paper stating what 19 Member States considered as important principles to keep in mind if or when the Commission decides to revise the present Communication on the Application of State Aid Rules to Public Service Broadcasting from 2001. The main point of the position paper is the firm belief that there is only limited need to revise the present Communication, since the principles from 2001, interpreting Art 86 and 87 of the Treaty, essentially remain valid.

It is established that public service broadcasting can be treated by Member States as a service of general economic interest, and that the derogation from the rules of state aid set out in Art 86(2) can therefore be applied. The interpretation of the state aid rules in the case of public service broadcasting should be done by using the Amsterdam Protocol as a starting point. The protocol clearly states not only that the organisation, remit and financing of public service is something for Member States to decide, but also that the proportionality test, i.e. whether the effects on trade and competition are disproportionate, must be done taking account of the need for the broadcaster to be able to fulfil its potentially broad remit.

The common position paper of 19 Member States underlines the need for a careful revision of the present Communication, in line with general principles rather than detailed provisions. The main reason is that it is clear that public service broadcasting is a service with direct ties to the democratic, social and cultural needs of each society and thus by necessity needs to be determined, organised and financed on national...
level and according to national needs. Something that is also made clear in the Amsterdam Protocol.

This basic principle, as the starting point of all discussions on state aid in relation to public service broadcasters, is not fully reflected by the draft revised Communication. The draft contains many detailed examples and discussions also about the content of public service broadcasters. We suggest that these details are removed. The national audiovisual markets as well as the remits, organisation and financing of the public service broadcasters differ greatly across Europe. Many of the examples in the draft have little relevance for a market like the Swedish, and it is not clear how they would facilitate the interpretation of state aid rules in a case like ours. Instead of giving legal clarity they risk to add confusion and could lead to more complaints nationally and to the Commission.

For many years the most discussed phenomena of the media sector has been convergence. Its exact meaning and how the underlying technical changes would affect the media sector has been debated. We can see now that media consumers are changing their behaviour. Traditional media are still successful and newspapers, television and radio remain important. But the content of traditional media is also distributed in new ways, and complemented by new services suitable for these distribution platforms. Newspapers are developing and are no longer only paper editions of written text and photos, but also written text, photos and TV- or radio-like services published online. Television services on the other hand are not only providing their programmes broadcasted (one-to-many- distribution), but also as on-demand audiovisual and text services online. The same content can also be packaged and repackaged to be used several times on different distribution platforms. There is no reason that public service broadcasters should not be part of this development.

This development has also been recognised by the Commission and has resulted in the revision of the European legal framework for television, the AVMS-Directive.

However, we believe that the draft Communication is not fully in line with the principle of technical neutrality and does not reflect the convergence between different services that is taking place. The assumption of the Commission seems to be that in relationship to state aid rules, the public financing of media services on new platforms as the Internet should be treated differently from media activities distributed as traditional radio or TV.

Unlike what seems to be the view of the Commission, we do not consider that public service companies are entering into a markets with established players when developing new audiovisual services. Instead new services are being developed online by many different actors,
content providers as well as actors with no prior experience of developing content. The market for audiovisual services is thus partly new, and many actors – not only traditional audiovisual service providers - are taking active part in its development.

With these general remarks in mind, we nevertheless see ground for compromise. We agree to the main principles of the draft, but contest some of the detailed interpretation of these. We were happy to note that the Commission declared its willingness to discuss and revise the degree of detail within the draft at the Multilateral meeting on 5 December.

We foresee that the Commission will present another draft for discussion before finalising the Communication. The topic is important and we need to get it right in order not to disturb the development of the European audiovisual market, where public service broadcasters play an important role.

2. Suggestions for improvement of the draft Communication

6. Assessment of the compatibility of state aid under Article 86(2)

6.1 Definition of the public service remit
We welcome §§45-50 which, although somewhat rephrased, clearly determines that the remit is to be decided nationally.

6.1.2 Market developments
The important principles of §§45-50 seem to be partly contradicted by the following paragraphs.

§51 The paragraph needs redrafting to make it service and technical neutral. As it stands it seems to determine which services public service broadcasters can engage in. This contradicts the important principle that Member States should be free to set the remit. It also adds to the risk of the Communication becoming obsolete as the technical development continues.

We suggest a redraft:
...In order to guarantee the fundamental role of public service media in the new digital environment, public service broadcasters may provide audiovisual media content in the form of linear services as well as in the form of non-linear services over new distribution platforms, catering for the general public as well as special interests, provided that they address the democratic, ....

§52 The paragraph contains a valid description of market development, but the last sentence describes how Member States have treated certain
services up to now. This is irrelevant and risks to become obsolete. The last sentence should be deleted.

§§53-54 contain a number of examples and details which risk to confuse the principle clearly stated in §55 and thus to reduce legal certainty. Risks and possibilities with different services and models are discussed by the Commission. Examples are given that again seem to suggest that the Commission can determine the boundaries of the remit for public service broadcasting in a very specific way, i.e. by determining which specific sport events should be possible to offer in which form. We suggest that both paragraphs are deleted. The principles in §55 stand well alone. In fact the addition of detailed reasoning and examples makes it more difficult to see the guiding principle.

§55 This paragraph establishes the principles that are considered appropriate when public service-broadcasters offer services containing new financing models, (especially pay-per-view programming). We welcome this clarification, the principles are expressed in a clear and precise way and seem to be in line with the general principles of the treaty.

6.1.3 Procedural safeguards
This part deals with the requirement of Member States conducting an ex ante-evaluation of all significant new services put on the market by the public service broadcasters. There are detailed provisions concerning which services should be considered as significant new services and on how the proportionality test should be performed. Again, the starting point of the draft seems to be that audiovisual media services using the Internet significantly differ from traditionally distributed radio and television, and that the offer of the companies can be clearly divided into new and old services, a conclusion which we do not share. The examples and details given of how the evaluation should be performed also seems to imply that one system should fit all.

There are several problems with this, not least that measures that have been negotiated bilaterally in individual cases are translated into a solution supposedly appropriate for all. The public service broadcasting systems differ greatly from country to country. The specificities of a system for evaluation of new services must depend on how the remit is set, which financing is allowed, the amount of commercial activities allowed etc. We also fear that the system envisaged by the Commission could prove excessively burdensome and costly for many small Member States. Instead the Communication should be flexible enough to allow for different national systems of evaluation.

In general Sweden believes that the general principles of the present Communication:
- a requirement of proper entrustment of the remit,
• a requirement of proper monitoring of delivery,
• a requirement of transparency of funding and checks for cross-subsidising, and
• a requirement of proportionality of funding
are the most important to underline in the Communication.

§56 is partly difficult to understand. The Commission determines that important new services provided by public service broadcasters can have a significant impact on the market. It does not follow from the paragraph in what way new services differ in this respect from traditional broadcasting services. It is argued that the Internet as opposed to most other distribution platforms, often has a global reach. We agree that this is a technical difference. However, it is hard to see that for example services provided in Swedish would compete with services in other languages in any significant way, whether distributed globally or not. We fail to see in what way new services significantly differ from traditional when it comes to safeguards to avoid excessive state aid.

§§60-62 include detailed provisions about how the ex ante-evaluation should be performed. These paragraphs should therefore be deleted as the general principles are clearly stated in §§57-59.

6.2 Entrustment and Supervision
This part corresponds broadly with a part of the current Communication. However, in some parts the language is less appropriate in relation to the services concerned. This is unfortunate, and could be misinterpreted and in fact lead to an increased number of complaints.

§66 The language used is inappropriate since it might be interpreted as requiring exact quantitative parameters for providing compensation for a service such as public service broadcasting. Public service broadcasting is normally funded on a long-time basis and as editorial independence and high quality of all programming are the starting points in the relationship between the state and broadcasters, exact quantitative parameters are difficult to establish. The requirement on Member States to set quantitative parameters could lead to an increase of (undue) complaints. A solution could be to change “parameters” for “conditions”.

§69 The language is inappropriate as it seems to indicate an obligation on Member States to empower an authority to impose binding obligations and sanctions. The text within brackets should be deleted as it is up to Member States to ensure effectiveness of its public service obligations and choose the proper system of control.
6.3.3.1 Proportionality - general
§89 is difficult to understand in relationship to §88. It is already made perfectly clear that Member States set the remit and decides on financing. The task of the Commission is in line with what is stated in §88 and to check for manifest errors. The paragraph should be deleted.

6.3.3.2 Overcompensation
§§94-95 The general principle that Member States should ensure that public service broadcasters do not keep large reserves is appropriate. However, the details should be left for Member States to determine in view of national circumstances as many different situations could be envisaged. The last sentence of §94 should be deleted because such detailed provisions cannot normally be given to independent broadcasters. The second and fourth sentences of §95 should be deleted as they are too detailed.

§100 needs to be redrafted so as to make it more flexible and less detailed. It is not for the Commission to determine the exact periodicity of reviews or how these should be done.

6.3.3.4 Market distortions
§102 is again an example of too many details and discussions that seem inappropriate in an interpretative document. The reasoning is difficult to understand – what would for example constitute “using their funding to consistently overbid private competitors”? The paragraph is in its entirety difficult to understand and does not seem to describe the situation as we know it. The risk is that the paragraph as it stand would lead to more confusion than to clarity. The principles are clearly and sufficiently stated in §101 and §105 and §102 should thus be deleted.

3. Suggestion for an addition

Finally we note that the principle expressed in the last paragraph of the present Communication has not been included in the draft. We believe that there is reason to note that the possibility to provide public service broadcasting depends very much on the size of the Member State. Small Member States face different funding problems than large Member States. We would therefore suggest that §62 of the present Communication is added to the draft in an appropriate way.