



AER SUBMISSION
TO THE
MAY 2009
PUBLIC CONSULTATION ON THE REVISION
OF THE
COMMUNICATION FROM THE COMMISSION
ON THE
APPLICATION OF STATE AID RULES TO PUBLIC SERVICE
BROADCASTING

The Association of European Radios (AER) is a Europe-wide trade body representing the interests of over 4,500 commercially-funded radio stations across the EU27 and in Switzerland.

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AER's main objective is to develop and improve the most suitable framework for private commercial radio activity. AER constantly follows EU actions in the fields of media, telecommunications and private radio transmission, in order to contribute, enrich and develop the radio sector.

Following the European Commission consultation of March 2008 and January 2009, AER welcomes the review of the Communication from the Commission on the application of State aid rules to public service broadcasting (the "Broadcasting Communication") of November 15th, 2001. The draft Broadcasting Communication published on April 7th, 2009, presents much less detail than in its previous version. Nevertheless, it should be seen as one more step forward towards better competition in the broadcasting markets: the main principles outlined in the previous draft remain in its most recent version. The lengthy review of this text should now be brought forward to keep up with the pace of ever-evolving new technologies and platforms.

As mentioned in our response to the previous public consultation, public and private broadcasters, like many other actors, are confronted with a difficult economic context. This should not interfere with the review of the Broadcasting Communication, nor should it loosen the implementation of state aid rules by Member States or the European Commission: AER

Members are evolving in the same context without any help from their governments, while competing for the same targets as public broadcasters (specifically, listening hours and advertising revenue)¹.

Furthermore, public broadcasters receive more than €22 billion annually from license fees or direct government aid, placing them third, after agriculture and transport companies, among recipients of state aid².

Commercially-funded radios throughout Europe have, since their inception, existed in an environment dominated by public broadcasting. The 2001 Broadcasting Communication was therefore helpful in starting to move towards a better balance between publicly- and commercially-funded radio broadcasting: in particular, its introduction made it easier to address competition issues through EC case-law. The latter, combined with technology changes modifying traditional broadcasting, justifies the review of the Broadcasting Communication.

In this review, AER finds guarantee of the following points to be vital:

- 1. Clear and meaningful definition of the public service remit, by legal act;**
- 2. Market impact assessment, prior to an extension of the remit**
- 3. Transparency: separation of public and commercial activities, as well as cost allocation to profit centres**
- 4. Independent control mechanism for ex-ante evaluation of activities, as well as for the supervision of entrustment and for the evaluation of the financial behaviour.**
- 5. Sanctions for breach of competition rules**

While we believe that the draft for the review of the Broadcasting Communication published by the European Commission on November 4th, 2008, constituted a first positive step forward towards these requirements, we had already stated our concerns with regard completion of the five points mentioned above. The draft published on April 7th, 2009, if somehow less specific than the previous one, still contains the most important principles introduced in 2008. Please note that the response below does not repeat most of the remarks already sent to the European Commission in the course of this review: it mainly compares the content of the two drafts published for this review. Therefore, it follows the order of sections used in our previous response in this review.

General Remark:

AER first welcomes the introduction in the present draft of one point of clarification: footnote 7, page 4, states that, *'[f]or the purpose of the present communication, the notion "audiovisual service(s)" refers to the linear and/or non linear distribution of audio- and/or audiovisual content and of other neighbouring services such as on-line text based information services'*. Although placed in a footnote, AER considers this new element as an important point. Indeed, while the European Commission might have drafted the previous draft text for all broadcasting, the presence of this new footnote leaves no doubt on the fact that the reviewed text concerns all public service broadcasting, and not only television.

¹ This difficult situation, combined with other unfavourable elements, can lead to dramatic consequences; e.g., in the UK, 14 commercially-funded radio stations have closed down since the beginning of 2008; please see here: <http://www.guardian.co.uk/media/2009/apr/30/utv-closes-valleys-radio>. A recently published independent report into UK local radio, commissioned by the UK government, predicted that at least 50 local stations could close down in the next two years.

² Please see European Commission's media release of November 4th, 2008: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1626&format=HTML&aged=0&language=EN&guiLanguage=en>

Introduction / Role of public service broadcasting / Legal context (§1-19):

AER agrees with this part of the draft Broadcasting Communication as the reference to the Altmark case and the Amsterdam Protocol are laid down *in extenso*. These two elements are paramount to help EU Member States execute greater control over the allocation of state funding to public broadcasting.

Definition and control of remit (§20-49):

Regarding the definition of the remit of public broadcasting, it should be noted that “*a wide range of programming*” is still considered as legitimate. However, with the introduction of footnote 39, a useful element is added: it is underlined that this legitimacy depends on the existence of “*qualitative requirements for the services offered by a public broadcaster*”, ensuring that public broadcasters do not “*adopt the conduct of a commercial operator*”. This could serve as a basis to establish a clear distinction between private and public broadcasting. It is nonetheless essential to provide further substance to this element, or, as it might appear too subjective, set quantitative criteria for EU Member States. Indeed, it is the responsibility of the EU Member States to set the public broadcasting remit’s definition: this should be done in a non-ambiguous and accessible manner, as it is the best way to enable effective control of the remit.

Ex-ante evaluation (§80-91):

The draft Broadcasting Communication still refers to the *ex-ante* evaluation of new services provided by public broadcasters. AER welcomes this fact. Nevertheless, most of the “*procedural safeguards*” have vanished or were watered-down. This reduction in the level of specifications relating to the *ex-ante* test certainly constitutes the most regrettable modification compared to the text published in November 2008.

Thus, it should be stressed that the presentation of this evaluation is much less detailed than in the previous draft: description of new services, the need to check their effects on the market, especially their crowding-out consequences for private operators or their impact on neighbouring countries, no longer appear in the text. Furthermore, the requirement for the controlling body to be external to the management of the public broadcaster³ was replaced by the requirement for this body to be “*effectively independent from the management of the public broadcaster*”. AER still believes that the controlling body should be external to the management of the public broadcaster.

AER also would like to repeat its firm belief that *ex-ante* evaluation of public broadcasters’ new services (or significant alteration of existing services)⁴ should remain in the present text. This prior evaluation can be adapted to the size and the budget of the EU Member State considered. The present text therefore adds a useful element: the requirement to run an open public consultation, which results are publicly available. One should make sure that the latter follows best practices: it should be clearly and timely announced, it should last for an appropriate amount of time and its results should properly be taken into consideration.

³ and, when this would not be feasible, the precise elements ensuring the independence of the controlling body from the management of the public broadcaster

⁴ AER therefore understands that podcasts should be seen as new services

Entrustment and supervision (§50-55):

AER welcomes the added requirement for EU Member States to ensure appropriate supervision of compliance by the entrusted organisation of the public service remit “*including the qualitative standards set in that remit*”.

Besides, the present text still states the necessity to ensure regular supervision of this compliance. However, instead of suggesting attributing this control to an “*external body independent from the public service broadcaster*”, it should now be performed by a “*body effectively independent from the management of the public service broadcaster*”. This modification is seen as rather confusing as it is hard to establish what “*effectively independent*” entails. Similarly, the deletion of examples of remedies reduces the impact of the European Commission’s requirement for control of the entrusted organisation. Moreover, *ex-post* and *ex-ante* controls do not necessarily have to be done by the same body. AER would therefore recommend that the draft Broadcasting Communication keep the phrasing used in November 2008: controlling bodies should be “external” to the public broadcaster.

Funding of public service broadcasting / transparency requirements (§56-69):

AER would like to recall that, while it is a fact that many public broadcasters in the EU enjoy dual-funding, we believe that pay-services might hinder competition in all markets observed in the EU. Pay-services might thereby reduce media pluralism. It must be ensured that the admission of public broadcasting pay-services is approved on a case-by-case basis.

In addition, public broadcasting partial funding through advertising should be better controlled to prevent cross-subsidisation or overcompensation. In order to enable such controls, transparency of accountings – especially an allocation of costs to profit centres – is essential.

Funding and proportionality (§70-76):

As stated in our response to the previous consultation on the review of the Broadcasting Communication, AER represents commercially-funded radio broadcasters: they depend 100% on advertising revenues. Therefore, they have no access to surplus at the end of a financial year, unlike public broadcasters, as the present draft Broadcasting Communication mentions at paragraphs 74-76. The ability for public broadcasters “*to keep an amount in excess of 10% of the annual budgeted expenses of their public service mission*” do not appear to be based on a reasonable justification, and seem rather arbitrary.

While it is understandable that public broadcasters want to enjoy overcompensation for reasons of business fluctuations in order to accomplish their public service remit, as soon as commercial activities are mixed to provide additional incomes, this position becomes unsustainable. Commercially-funded radio broadcasters would indeed have to compete with “protected operators”, able to develop in a much less risked manner; and controls of cross-subsidization are rendered more difficult, if not impossible. Besides, in the present draft, the limit in time to retain reserves described in the previous text is deleted⁵. This deletion seriously decreases the pressure to apply strict control of the financing of public broadcasters.

⁵ “*This time period may not exceed the entrustment period or an equivalent period which may not be longer than four years*”

Independent and external control (§77-79):

In the present text, control of overcompensation remains executed by an “*external body independent from the public service broadcaster*”. This is a positive statement which could be reinforced. Overcompensation nonetheless seems not to necessitate anymore of an “*earmarked purpose*”⁶. This reinforces the feeling that such overcompensation, which should be an extraordinary measure, might be loosely controlled.

Breach of competition rules and complaint mechanisms (§92-97):

Finally, an important element brought forward by the previous draft published in November 2008 has severely been watered-down: the right for third parties to “*submit complaints concerning [...] alleged anti-competitive behaviour to an external body independent from the public service broadcaster*”⁷. While this was seen as a very positive step towards fairer competition, AER hardly understands on which grounds this last element was set aside: recent financial developments have shown that third parties access to supervisory bodies should be seen as a safeguard for a healthy market.

Conclusion:

To conclude with, even though AER still sees room for improvements of the draft present text, we would like to encourage the European Commission to adopt the reviewed Broadcasting Communication’s final version by this summer.

AER remains available to explain this position in further details, should this be helpful to the European Commission.

ENDS
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⁶ Nor does it requires a “*timeframe*”, as indicated in the previous paragraph

⁷ Apparently, it was replaced by the following general statement: “*Member States shall have the appropriate mechanisms in place which allow assessing any potential complaint in an effective way*”. This doesn’t seem to replace satisfactorily third parties’ right to complain to an independent body.