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DG COMP, Unit C4 Media and Information Services – State aid control
European Commission

**European Newspaper Publishers' Association Response to DG
Competition's public consultation April/May 2009 on the:**

**DRAFT COMMUNICATION FROM THE COMMISSION
ON THE APPLICATION OF STATE AID RULES TO
PUBLIC SERVICE BROADCASTING (TEXT WITH EEA
RELEVANCE)**

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The European Newspaper Publishers' Association (ENPA) is an international association, defending and promoting the professional interests of the European newspaper publishing industry at different European and international organisations and institutions.

ENPA represents over 5,200 national, regional and local newspaper titles, published in 23 European Union Member States plus Norway and Switzerland. More than 150 million newspapers are sold and read by over 300 million Europeans every day, in addition to the millions of unique daily visits to online newspaper websites.

Introduction:

ENPA is pleased that the Commission has chosen to act transparently in this decision-making process by opening once more the process for public consultation through the publication of a second Draft Communication.

On the one hand, we cannot hide our disappointment that the draft has been shortened on certain aspects to reflect fears of certain public service broadcasters (hereafter PSB) and Member States whom ENPA is concerned are purely seeking to dilute the impact of an EU text to protect the public service broadcaster's distortive market positions. On the other hand, we trust that the Commission has genuinely reasonable intentions to improve the text in the light of all stakeholder input. There are also several useful streamlined features in the new text. We subsequently call on the Commission to come to a clearly reasoned conclusion in its deliberations, taking also newspaper publishers' views into due account with a timely publication of an updated Broadcasting Communication in 2009.

ENPA hereby presents some of its specific comments on the new draft, including its concerns and reference to what it considers to be positive developments from newspaper publishers' perspective.

This includes where appropriate a supplementary relevant reflection on some of the key themes and points that we raised during the last consultation according to how they have been dealt with in the new draft.

ENPA is perfectly aware that the responsibilities for definition of the PSB remit lies with Member States. ENPA reminds the Commission that whilst ENPA does not support new regulation at EU level of its member businesses, it is essential for the Commission to proceed with producing an updated Communication. This should ensure clarity and transparency in this particular area including appropriate guidance to Member States and PSBs based on existing Community competence and case-handling for this sector's regulation which is fundamental to ensuring a level playing field between public and private operators in a fast-changing situation of media convergence.

A key remark arising in view of ENPA's previous position January 2009:

Functional link between PSB programmes and other PSB media services: ENPA would still like the Commission to consider its point regarding the provision of a type of reference point for PSB activity on new platforms beyond traditional broadcasting. ENPA outlined in January 2009 how it would like to see a tight functional link between media services that are not programmes and a programme broadcasted by the public service media provider. ENPA believes that PSBs can very well use new distribution channels including Internet but the content they deliver must be linked to television and radio programmes.

Specific comments from ENPA on the new draft:

- **Paragraph 16:** ENPA is pleased to see that **newspaper publishers' valuable contribution to society and democracy** has been confirmed by the Commission in this text. It is not only an important new recognition of the important role that newspaper publishers and other print media play in guaranteeing an objectively informed public and democracy but namely a recognition that this debate on an updated Broadcasting Communication for the converging media landscape is impossible to hold without including newspaper publishers who have established themselves as significant and reliable content providers on all platforms of distribution. Despite ENPA's constant reminders, certain other actors in this debate at the EU level have consistently denied or overlooked that newspapers have a role to play in this debate, which is a poorly conceived perspective urgently requiring readjustment. The considerable variety of examples that ENPA has highlighted in its written positions and the past complaints to the Commission from newspaper publishers regarding PSB activities in Europe is evidence to the fact that newspapers have a role in this discussion. ENPA is therefore glad that the Commission has taken this open and inclusive approach.

ENPA also supports in this debate the Commission's point in paragraph 16 that the common interest is served through **maintaining a balanced public and private media** offer.

- **Paragraph 42:** ENPA notices that the Commission has adopted a **special provision for smaller member states** which provides that the Commission will also take into account the difficulty some smaller member States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher. **ENPA is strongly concerned that this provision may be abused** to justify undue market distortions in smaller member states that would be in particular detrimental to private media businesses that face equal funding difficulties and equally increased costs per inhabitant for the same reason in these member states, i.e. the smaller size of the national media customer market. **ENPA therefore strongly endorses the deletion of paragraph 42.** If not deleted, paragraph 42 should at least be amended as follows:

“The Commission will also take into account the difficulty that some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher, however, also considering the particular situation of commercial broadcasters and newspaper publishers on the relevant market and potential negative effects that State aid to public service broadcasters could have on them and their opportunities for development of new business models.”

Smaller Member States should have no more excuse than larger ones to exercise less transparency in the way that they manage their state aid/financing to PSBs, nor should they have reason to award unusually high state aid financing for

simply this reason “because they are a smaller Member State”. Moreover, this begs the question: which Member States are “smaller”?

- **Paragraph 53** (end of paragraph): a new part of the sentence adding significant detail reads (underlined): “it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit.”

ENPA recognises the helpful guidance that this should give to Member States in ensuring that they specifically define and adhere to qualitative standards.

- **Paragraph 54:** Please also see ENPA comments to paragraph 89 later in this position paper. ENPA is concerned that **supervision of the public service obligation** will not be carried out effectively unless carried out by an **external body**, as originally provided for in the Commission’s November 2008 draft text in paragraphs 69 and 99. ENPA therefore favours an amendment of paragraph 54, second sentence as follows:

“Such supervision would only seem effective if carried out by an external supervisory body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and to impose appropriate remedies in so far as it is necessary to ensure respect of the public service obligations.”

- **Paragraphs 60 and 64:** ENPA is concerned that the message to Member States may have been weakened as regards the requirement for **separation of accounts for calculation of PSB costs** through the Commission’s deletion of such from paragraphs 77 and 86 of the November 2008 draft. ENPA calls for a strengthening of the statement that the Commission believes that separation of accounts for PSB should be required and for reasons of ensuring transparent and fair/effective control of public financing, through the re-instatement of these principles in either paragraphs 60 or 64.
- **Paragraph 66:** ENPA is also concerned that the text has been slightly weakened regarding the **allocation of costs serving both public and non-public service activities** simultaneously as the useful illustrative example about the investment costs for purchasing a bundle of broadcasting frequencies which benefit both public and commercial channels has been deleted. Moreover, rather than always requiring proportionate allocation, the new language “whenever it is possible in a meaningful way”, strikes ENPA as an attempt at a clarification, although ENPA **calls on the Commission to further carefully reflect** on whether this could give PSBs an **overly wide flexibility** to decide when proportionate allocation needn’t be bothered with.
- **Paragraph 70:** ENPA is strongly concerned about the removal (what was previously at the beginning of paragraph 91 of the November 2008 draft) of the

clear statement of Member States' obligation to provide for appropriate mechanisms to ensure that there is no **over-compensation**. Whilst it is made clear that any over-compensation has to be repaid (although there is no time-limit mentioned), the notion of prevention is removed, which ENPA would like to see reinstated. The Commission should also consider recommending to Member States to consider a **time-limit for the repayment of any overcompensation**, or at least **include a requirement for repayment "without undue delay"**.

- **Paragraph 74:** ENPA believes that whilst it is good that the Commission has stipulated that public service broadcasters' financial situation should be subject to an in-depth review at the end of each entrustment period, **ENPA calls for this to be required to be an "independent" review.**

Public reserves are no longer subject to a four-year limit which the previous draft proposed. Whilst reserves are now required in the new draft to be clearly limited in time "*depending on their dedication*", ENPA calls for **reinstating this principle of exact time limit** through the wording: "and in no case longer than four years" to the end of the sentence. ENPA members have experienced that in some cases the reserves are only reviewed at the end of each entrustment period, which could be up to eight years, and therefore the proposed limit of four years would avoid PSB abuse of their reserves.

- **Paragraph 82:** ENPA acknowledges that **pay-services** are permitted; however ENPA does not understand the usefulness of the Commission's new note that a number of Member States want to allow PSBs to offer pay-services to consumers. Previously the November 2008 text remarked that a number of at Member States were against pay-services – this is a *volte-face*. ENPA would like to know the exact reason for the change and calls for reinstating the sentence that some Member States still oppose pay-services provision to reflect the diversity of situations if indeed this is the actual case.
- **Paragraphs 83 and 84:** ENPA wishes to make an important scene-setting remark here regarding how the market impact test for PSB significant new services is important for **media pluralism**. On top of the social, democratic and cultural needs, the EU Treaty also requires consideration of pluralism in this specific area. If a PSB offers new services for free to general business/enterprise customers, there is no room left for newspapers or news agencies to offer the same kind of services to those businesses/enterprises against payment. Gradually, ENPA is strongly concerned that there will be only the PSB on the market and the public is only able to receive PSB content ("the official news"). As an example, ENPA members are witnessing this in Finland as the National Broadcasting Company YLE is offering news services for free to companies that operate advertisement screens on airports and big shopping centres. When the Finnish News Agency STT (owned mainly by newspapers) offers their news service to the same clients, the answer is "no thank you, we get this service for free from the YLE".

- **Paragraphs 84 – 91:** ENPA is pleased to note that the Commission has preserved most of the core of the **Amsterdam Test (market impact assessment)** to test significant new services' adherence to the Amsterdam Protocol. However, we have some concerns as follows:
 1. **Paragraphs 84, 87 and 88:** Positively, we believe that the Commission has usefully included that there should be an **open, public consultation** which should gather all relevant information “necessary to arrive at a balanced decision” and that the outcome “shall be made publicly available”. However, we remain faithful to our position presented in January 2009 where we proposed that a **public hearing** as a minimum should also be recommended as best practice to Member States. Nevertheless, ENPA is very encouraged to see that the new language in **paragraph 88 builds on the concept of public consultation**, to ensure that the Member States shall not assess the overall impact of a new service on the market until they have obtained the outcome of the open consultation.
 2. **Paragraph 85, ENPA comment 1:** The useful detail on what constitutes a “significant new service” is welcome for ENPA. However, we question why the idea to consider “**novelty of the service**” in the assessment of its significance has been deleted, as this could be an important question to consider in terms of the innovative element/character involved and how the rest of the market would react to that. ENPA is nevertheless pleased that the new draft text states that **significant modifications to existing services shall be subject to the same assessment as significant new services**.
 3. **Paragraph 85, ENPA comment 2:** of the new draft leaves no flexibility for the body which has oversight over the market impact test to be able to rule on when the significant new service is designated. ENPA considers that **the word “primarily” plays a pivotal role here**. The previous November 2008 draft stated that this should be “primarily” up to the Member States to determine, which gave a sort of flexibility. Seeing as the administering of the market impact test should be independent from both the PSB and the Member State in the opinion of ENPA, then “primarily” should at the very least be reinstated which would allow the independent, external body to the PSB responsible for the test to exercise its judgment.
 4. **Reinstate previous (November 2008) draft's paragraph before paragraph 88:** Paragraph 60 of the November 2008 draft seems to have been entirely deleted from the April 2009 draft. ENPA rejects the Member States' argument that this paragraph would be too prescriptive, on the basis that the guidance for such new, emerging services (which risk - above many of the other services they offer - to duplicate commercially provided services), is needed in this instance, to prevent Member States

from exercising a kind of tunnel vision to ignore what is provided sufficiently already elsewhere on the market. ENPA therefore calls for reinstatement of November 2008 draft's paragraph 60.

5. **Paragraph 88:** Some of the detail about **what could form part of the prior evaluation assessment impact on the market** has been removed, e.g. “potential for commercial exploitation”; “potential effect on neighbouring markets”; potential effect on other Member States markets....” have been deleted. ENPA would like to see these aspects reinstated. Perhaps the Commission needs to add an explanation in the text regarding why each of these would need to be considered if this would resolve Member State/PSB concerns.
6. **Paragraph 89 (also relevant to paragraph 54):** ENPA is very concerned indeed to see that the **assessment of what constitutes a significant new service** now needs to be **carried out by what is only now defined as an “independent” body** from the management of the broadcaster. The November 2008 draft text required that it should be “independent” and normally “external”. **ENPA calls for the reinstatement of a “normally external” body to the public service broadcaster in both paragraphs 89 and 54.**

The details have also been deleted in the **list of four “adequate measures”** which previously generated ideas on how to effectively ensure that where a body remains internal but independent e.g. employ a “Chinese walls” concept between the assessing body and the PSB itself. **ENPA finds that this deletion is not justified; rather, the public service broadcasters need encouragement through such illustrative examples** to be able to change their practices for the better.

7. **Paragraph 90: Pilot projects:** ENPA is confused about the addition of the word “already” which appears in the English version at least (it does not appear for example in the German version of the text). ENPA is concerned that the addition of the word “**already**” in the English version at least would give an indication to public service broadcasters that they could avoid the possibility of assessing pilot schemes for market impact altogether, or at least reduce the assessment of pilot schemes to only prevent those which have a reasonable risk of a significant impact on the market from the outset.

It would therefore seem to imply that there would be no incentive for Member States to establish a continuous monitoring mechanism for pilot schemes, and subsequently **it would fail to assess those schemes which are long-running pilot schemes which have turned into significant services after modest beginnings** i.e. where a pilot project has been subject over time to small, gradual changes, which nevertheless significantly increase that pilot project's impact on the market.

This leads ENPA to express its concern again as in its January 2009 paper that **whilst it is glad that the Commission has stated that pilot projects should be limited in time, ENPA would like this to be a stronger requirement**, e.g. set the time limitation in writing from the beginning of consideration of the project with the clearly defined objectives and time-limit of the project to be made publicly available before the project enters into operation; as well as an annual review for long-duration (e.g. two+ years) pilot projects.

8. **Paragraph 91: Credibility of the test:** The new draft has deleted that the test should be “carried out in an independent manner, taking into account the above safeguards”. ENPA cannot understand why this has been deleted as it reinforces the principle that the test must be carried out by an independent body in an independent way. ENPA calls for this to be reinstated to guarantee the credibility of the test.
 9. **Paragraph 93: ENPA supports** the way in which the text has been clarified in paragraph 93 in April 2009 draft. Paragraph 103 (and also with similar reference in paragraph 87) of the November 2008 draft regarding the issue of **structural separation** between public and non-public activities of the public service broadcaster has been moved. **ENPA reiterates** the importance of keeping structurally separated commercial subsidiaries (carrying out non-public service activities) **at arm’s length and ensuring the respect of market principles**.
- **Paragraph 96, ENPA comment 1:** The changes made to this paragraph could be of particular concern as there is a fundamental change to **focus on ex-post complaints rather than prevention** of distortive market practice in the new draft (and even then, complaints are dealt with more vaguely in the new draft than in the November 2008 text). **Publishers count on the Commission to update the status quo by introducing the market impact test** which can successfully assess what would constitute a market distortion **before** it damages the future viability of publishers or other private media operators businesses which could have consequences for **media pluralism**.
 - **Paragraph 96, ENPA comment 2:** ENPA remarks with dismay that the previous draft’s (November 2008) requirement that the **complaints body** should be external and independent from the public service broadcaster has been removed, as has the requirement that supervisory bodies should have the necessary powers to impose appropriate remedies and proportionate sanctions. **ENPA is deeply disappointed by this** and considers that this is one of the most important features of the Commission’s text. **We urgently call on the Commission to consider reinstatement rather than substituting the above with the term “effective”** to replace the detail, which ENPA finds insufficient and believes that it will simply lead to the question: “effective for whom?”

ENPA trusts that the Commission will take its concerns into account as a genuine stakeholder in this important debate for the future viability of the newspaper publishing sector.

Brussels, 8 May 2009.