

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

**Response by**

**The European Alliance of Listeners' and Viewers' Associations (EURALVA)**

1. In general, EURALVA welcomes the revised Draft Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting (Text with EEA Relevance). Although we have some concerns, which we shall detail below, we consider it to be an improvement on the Commission's earlier Draft Communication.
2. As the Commission notes in paragraph 2 of the Draft Communication, economic and technological developments have led to a wider choice for consumers. Moreover, EURALVA also shares the view of Member States that simple channel competition does not deliver optimum results, and that public service broadcasting ought to be maintained as a way to ensure the coverage of a number of areas, the satisfaction of listeners' and viewers' needs and the fulfilment to an optimum extent of a number of public policy objectives.
3. EURALVA also welcomes the subsequent technological developments which have now made possible digital television, IPTV, video-on-demand, and have allowed the emergence of new services, such as on-line information services and non-linear or on-demand services. Furthermore, as the Commission notes in paragraph 5, the provision of audiovisual services is converging and consumers are increasingly able to obtain multiple services on a single platform or device, or to obtain a given service on multiple platforms or device. Furthermore, in order to keep up with these challenges, both public and private broadcasters have been diversifying their activities, moving to new distribution platforms and expanding the range of their services.
4. As the Commission also notes in paragraph 5, EURALVA has observed that, the diversification of publicly funded activities has resulted in a number of complaints by other market players including publishers. Regrettably, however, many of these complaints by other players have failed to distinguish clearly between the publicly-funded diversification of new modes of audiovisual carriage, and publicly-funded diversification of new areas of production and/or financing of audiovisual content. In many Member States, for instance, the public sector has effectively subsidised the private sector, by diversifying into distribution platforms for new modes of signal carriage, such as digital television, which can carry private audiovisual services as well as publicly-financed services. Moreover, publicly-funded diversification has also encouraged – or, in the case of digital switchover, even forced - listeners and viewers to switch to new audiovisual platforms, by ensuring that both publicly-produced programmes, and publicly-funded programmes made by independent producers, are made available on the new platform free of charge.

5. In brief, therefore, EURALVA agrees with the resolution of the European Parliament on concentration and pluralism in the media in the European Union, , which the Commission cites in paragraph 15, namely that regulations governing state aid should be devised and implemented in a manner “which allows the public service and community media to fulfil their functions in a dynamic environment, while ensuring that the public service media carry out the function entrusted to them by Member States in a transparent and accountable manner avoiding the abuse of public funding for reasons of political or economic expediency.”
6. To this end, at its 2007 Annual Conference which was held in Copenhagen, EURALVA called for each Member State to establish “a circle of trust” between national governments and media regulators, the public service broadcaster, and listeners and viewers, or the organisations representing them.
7. Moreover, in an attempt to align this approach with EU Competition Policy, EURALVA proposed, at its 2008 Annual Conference which was held in Madrid, that the European Union should only allow State funding for those broadcasters whose remits and performance met the democratic, social and cultural needs of their respective societies, and that there should be regular, systematic and effective monitoring of citizens’ trust in the credibility and relevance of all electronic media platforms.
8. In its response to the European Commission’s previous First Draft Communication, EURALVA therefore emphasised the need for the EU to distinguish clearly between public service broadcasting and State-aided broadcasting. It also called for the broadcasting regulator in each Member State, and not just the competition regulator, to make the final judgment about the likely impact on the audiovisual and information marketplace of any new audiovisual media services, which were proposed by a public service broadcaster.
9. EURALVA is therefore pleased to note that in its revised draft Communication, the European Commission appears to have taken some note of EURALVA’s earlier concerns.

*Definition of the Public Service Remit*

10. EURALVA welcomes section 6.1 (paragraphs 43 to 49), in which the Commission makes it clear that it is necessary for each Member State to establish a public service mandate for its public service broadcaster, which must take account of the Community’s concept of a service of general economic interest. We also welcome the Commission’s recognition that while the public service mandate should be as precise as possible (paragraphs 45 and 46), a qualitative 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 consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism including cultural and linguistic diversity. (Paragraph 47) Moreover, we welcome the Commission’s recognition that the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms. (Paragraph 47; and see also EURALVA’s argument in paragraph 4 (above))
11. Furthermore, although the Commission’s role is limited to checking for manifest error, and it is not therefore the Commission’s duty to examine

particular programmes broadcast by a public service broadcaster, EURALVA welcomes the Commission's conclusion that it would be a manifest error if the public service remit were to include activities which could not reasonably be expected to meet the democratic, social and cultural needs of that society. (paragraph 48)

12. In general, EURALVA would endorse the view that the democratic, social and cultural needs of society would normally exclude e-commerce, tele-shopping, commercial prize-games and merchandising. (paragraph 48). We also welcome the distinction, which the Commission draws in paragraph 49, between the right of State-aided broadcasters to sell advertising and the prohibition on advertising being part of their public service remit. We have some reservations, however, about the Commission's apparent suggestion that public service broadcasters should be prevented from broadcasting sponsored programmes. Public service broadcasters in some Member States already show both sponsored programmes and broadcasts of sponsored events, and programme sponsorship could be especially important in small Member States which are unable to provide sufficient State aid to finance fully the public service remit of the domestic public service broadcaster.
13. On the other hand, the Commission has said nothing in paragraph 48 about the presence of product placement in broadcasts by public service broadcasters. Although the EU has banned product placement in the Audiovisual Media Services Directive, the Directive does allow Member States to permit substantial derogations from the ban, and in exceptional cases even to absolve broadcasters from the duty of informing viewers about the presence of product placement. Members of EURALVA have expressed deep concern about the introduction of product placement on Europe's television screens, especially when they may not be informed about the practice. They consider that while a Member State may possibly justify a derogation from the prohibition of product placement on the grounds of commercial expediency, they cannot understand how it could justify product placement in order to meet the democratic, social and cultural needs of society.
14. *EURALVA therefore encourages the Commission to amend paragraph 48 of its Draft Communication to indicate that a State-aided public service broadcaster should not generally produce or purchase programmes containing product placement unless they can satisfy the relevant supervisory body - and thus the European Commission (see paragraphs 15 and 16 of our submission, below) that it was necessary to do so in order to fulfil the democratic, social and cultural needs of society.*

#### *Entrustment and Supervision*

15. EURALVA welcomes the requirements set out in paragraphs 50 to 55 for Member States to establish an official act of entrustment which specifies the precise nature of the public service obligations of the State-aid broadcaster, which may be modified to allow the broadcaster to respond swiftly to new technological opportunities. (Paragraphs 50 to 52) It also welcomes the provision that an appropriate authority or appointed body should monitor the application of the official act of entrustment in a transparent and effective manner. (Paragraph 53)

16. EURALVA also recognises that it is within the competence of the Member State to choose the mechanism to ensure the effective fulfilment of public service obligations. (Paragraph 54) Moreover, since this necessarily also means that the mechanism chosen by the Member State must be competent both to evaluate the actual delivery by the State-aided broadcaster of its public service obligations, and to provide the European Commission with sufficient and reliable indications that the public service is actually supplied as mandated. (see paragraph 55)
17. *EURALVA therefore encourages the European Commission to make it clear in paragraph 55 that any such monitoring procedure which is established by a Member State must be competent to cover more than the (anti-) competitive implications, of the of the application of the official act of entrustment. It should also be competent to address other aspects of the implementation of the official act of entrustment.*

#### *Choice of Funding of Public Service Broadcasting*

18. EURALVA recognises that, as stated in the Amsterdam Protocol, the provisions of the European Treaty shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting. But it also observes that, under the provisions of Article 86(2), the Commission is required to verify that State-funding does not affect competition in the Common Market in a disproportionate manner. EURALVA considers that the use by State-aided broadcasters to broadcast programmes containing product placement could, indeed, affect competition in the Common Market in a disproportionate manner. Firstly, product placement is not just a mode of funding broadcasting, but it is also a form of audiovisual commercial communication. It is therefore more suited to the private sector than to State-aided public service broadcasting, whose sole task is to meet the democratic, social and cultural needs of society. Moreover, the acceptance by public service broadcasters of funding for product placement would adversely affect competition for such funds, both within and between private commercial broadcasters. Furthermore, it is highly likely that a State-aided public service broadcaster, whose derogation from the EU's overall ban on product placement would necessarily have been justified by the relevant Member State, would only accept funding from product placement for product and services which were on offer within that Member State, thus distorting inter-State trade in a disproportionate manner.
19. *EURALVA therefore encourages the Commission to make clear in paragraph 59 that, when verifying, under article 86(2), that a particular form of State funding did not affect competition in the common market in a disproportionate manner, it would want to consider carefully how the derogations which any Member State had made from the EU's overall prohibition of product placement in audiovisual media services, would facilitate the ability of the public service broadcaster to fulfil the democratic, social and cultural needs of that society; and in addition, whether any such derogation would be likely to affect competition with other providers of audiovisual media services within the Common Market.*

*Transparency requirements for the State aid assessment*

20. EURALVA broadly endorses the Commission's Draft on transparency requirements. (paragraphs 60 to 69) A number of problems remain, however, in regard to the presentation of accounts, and in paragraph 69 the Commission invites Member States to consider the functional or structural separation of significant and severable activities as a form of best practice. This will present especially challenging problems if a State-aided broadcaster is allowed to accept revenues for product placement in their programmes.
21. *Therefore, when both a Member State and the Commission decide to allow a State-aided broadcaster to accept revenues from product placement, EURALVA encourages the Commission to highlight the need for the accounts of the broadcaster concerned to identify the revenues obtained from this practice.*

*Diversification of Public Broadcasting Services*

22. EURALVA shares the Commission's view that public service broadcasters should be able to use the opportunities offered by digitalisation and diversification of distribution platforms on a technology neutral basis to the benefit of society. It also agrees that public service broadcasters may use State aid to provide audiovisual services over new distribution platforms provided that they are addressing the same democratic, social and cultural needs of the society in question. (Paragraph 81)
23. EURALVA has also noted that public service broadcasters are developing new business models, and that some Member States wish to facilitate funding of public service broadcasting by introducing new sources of financing, such as online advertising or the provision of pay services. (paragraph 82)
24. EURALVA is opposed to the introduction of many of these pay services. On the one hand, it recognises that as advertisers migrate from advertising on terrestrial television to advertising online, there is no difference in principle between a public service broadcaster accepting revenues from online advertising, and that broadcaster accepting revenues from terrestrial transmissions.
25. On the other hand, public service broadcasters generally have an obligation to provide a universal service to all citizens. In EU Member States, State aid is initially raised from a fiscal or para-fiscal levy (such as a licence fee, or a tax on the use of electricity) which is ultimately paid by all listeners and viewers. It would therefore be perverse to impose a tax on all listeners and viewers in order to provide a universal service, and then to charge individual users to access the service. The result would be that those citizens who did not use the service were being taxed to subsidise those consumers who did use it. As the Council of Europe noted in its Recommendation on the remit of public service in the information society, "none of these [complementary funding] solutions should endanger the principle of universality of the public media or lead to discrimination between different groups of society." (footnote 47)
26. In its Draft Communication, the Commission seeks to draw a clear distinction between commercial audiovisual media services and those which are State-aided and meet the democratic, social and cultural needs of society. In EURALVA's opinion, however, the divisions in the field of audiovisual media services are more subtle.

27. EURALVA therefore encourages the Commission to distinguish between the production and delivery of primary services and the secondary exploitation by public service broadcasters of their assets. In our view, the former should be free at the point of use, while there is an argument for allowing public service broadcasters to charge for the latter.
28. EURALVA recognises that some secondary services, such as access to archives, or the re-release, on DVD or video, of previously broadcast television programmes, may require the broadcaster to pay an additional fee to the rights holders in a programme. Thus although this secondary exploitation by a public service broadcaster of a capital asset, namely its copyright in a programme, may not be essential to the democratic, social and cultural needs of society, it may well be desirable both socially and culturally for the public service broadcaster to be able to make the programme available for secondary use by listeners or viewers, and to require them to pay the additional marginal costs for making the programme available.
29. On the other hand, EURALVA considers that, whatever the mode of transmission of a public service broadcast, this would normally be part of the responsibility of the broadcaster to meet the democratic, social and cultural needs of that society. In footnote 48, however, the Commission indicates that charging transmission fees for broadcasting over new transmission platforms, such as mobile devices would not constitute a commercial activity. EURALVA does not accept this. It considers it essential for the Commission to distinguish between the democratic, social and cultural need for a broadcaster to make its broadcasts simultaneously available on all platforms, and the secondary and subsequent exploitation of that broadcast.
30. EURALVA does recognise, however, that consumers always have to pay the cost of the instrument which receives a broadcast, be it a radio set, a television set, a computer or a mobile phone. Indeed, public service broadcasters have traditionally provided the programmes which have encouraged consumers to buy these, normally privately manufactured, items of receiving equipment.
31. *EURALVA therefore encourages the Commission to draw a distinction between the cost paid by the public service broadcaster for the right to distribute its programmes via mobile phone, and the cost paid by the consumer to the mobile phone operator at the point of use.* EURALVA considers that the former charge is analogous to the cost paid by the public service broadcaster for the right to distribute the work by any other medium, such as analogue or digital broadcasting, whereas the latter is a charge which the consumer pays to the mobile phone operator. Moreover, since most programmes which are designed to meet the democratic, social and cultural needs of society, and are broadcast by mobile phone, they will almost certainly be those produced by the public service broadcaster with State-aided funds, and therefore the broadcaster itself can either be expected to own the mobile distribution rights already, or to pay for them with State-aided funds. In this event, it would be improper for the public service broadcaster to charge citizens to access its programmes via their mobile phone, but not to access them via their television set.
32. A borderline case between these two choices is, of course, the emerging practice by which broadcasters offer “catch-up” services which listeners and viewers can access online for a short period after the original broadcast. This period normally appears to be seven days, and therefore *EURALVA would*

*encourage the Commission to include this within the framework of a legitimate public service for which the public service broadcaster can use State funds.*

33. A second, but parallel, issue relating to diversification is the overseas distribution of broadcasts produced by the public broadcaster. Since it is only legitimate for a State-aided broadcaster to use State aids to purchase the domestic rights when it is producing a programme, if it wishes to distribute the programme overseas, the public service broadcaster must necessarily co-finance the programme with an independent commercial organisation who can simultaneously acquire the overseas rights to the programme. The independent commercial organisation could be a wholly-owned commercial subsidiary of the public service broadcaster (such as BBC Worldwide), an independent producer who is commissioned to make the programme by the public service broadcaster, but is allowed to retain the overseas rights, or an independent broadcaster which broadcasts to other countries. Public-private co-operation of this nature can produce a win-win situation for listeners or viewers both in the domestic State of the public service broadcaster, and for those in living in other EU Member States. It enables a State-aided broadcaster with restricted revenues to leverage the funds for higher budget productions, which may not only enhance its ability to fulfil its domestic public service remit, but which may also contribute to the social and cultural needs of listeners and viewers in other Member States. By so doing, the public service broadcaster can continue to make these programmes available to its domestic listeners and viewers free at the point of use, but it can also facilitate the distribution of programmes which might otherwise not have been made, to listeners and viewers in other Member States, without affecting trading conditions and competition in the Community to an extent which would be contrary to the common interest.
34. *EURALVA therefore submits that State-aided broadcasters*
- should not be allowed to charge listeners viewers for the simultaneous access to their broadcasts, whatever the nature of the receiving equipment;*
  - should be permitted to make their broadcasts available online or by any other means, free of charge to listeners or viewers for a given period after the first broadcast, possibly for seven days*
  - should only be allowed to charge consumers the additional marginal costs which are necessary in order to make their broadcasts commercially available for purchase by the public*
  - should be able to co-finance a broadcast with independent commercial partners, in order to make it available for overseas audiences, even though they are not allowed to use State funds to acquire the overseas intellectual property rights in a programme which they are producing in order to fulfil their public service remit.*

#### *Proportionality and Market Behaviour*

35. EURALVA agrees with Commission that while it is legitimate for public service broadcasters to acquire premium content as part of their overall public service mission, they should not engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling that mission. (Paragraph 92) It also agrees that when carrying out commercial

activities, State-aided broadcasters should respect market principles.  
(paragraph 93)

36. EURALVA also agrees that public service broadcasters should not use their State aid artificially to depress the price of advertising, or consistently to overbid for premium programme rights. (Paragraphs 93 and 94)
37. On the other hand, EURALVA cannot accept that the prices which public service broadcasters charge for commercial pay services should be set by their commercial competitors. (Paragraph 94) Competition for listeners and viewers in the field of subscription and commercial pay services is highly specific, and must take account, not only of price, but also of several factors. These include the quality, range and diversity of programmes which are available. In paragraph 28 (above), EURALVA argued that State-aided broadcasters should only be allowed to charge consumers additional marginal costs in order to provide additional pay services. EURALVA therefore considers that it would be perverse, if State-aid broadcasters were required, by the application of unsophisticated competition principles, to charge the same price for pay services as their commercial rivals.
38. *EURALVA therefore encourages the Commission to amend Paragraph 94 of the Draft Communication, either to remove the reference to commercial pay services, or to expand it in a more nuanced manner in order to ensure that when considering trading conditions and competition in the European Community, the common interest of Europe's listeners and viewers is to ensure that all broadcasters, whether public or private, deliver their services at the lowest price, and not at the highest.*