

## **Draft Communication on State Aid and Public Broadcasting**

### **Comments by Mediaset S.p.a. (“Mediaset”)**

#### **1 INTRODUCTION**

Mediaset welcomes the opportunity to submit further observations on the Commission initiative on the application of State aid rules to public service broadcasting (“PSB”).

As one of the first broadcasters to draw the European Commission's (“the Commission’s”) attention to certain fundamental State aid issues relating to the financing of public service broadcasting, Mediaset keenly participated in the first public consultation process leading to the adoption of the 2001 Communication and to the Review thereof in March 2008.

Following the public consultation launched by the Commission in January 2009 on a first draft of a Communication on the application of State aid rules to public service broadcasting (“the First Draft Communication”), in relation to which Mediaset submitted its observations, the Commission issued a second draft of the Communication (“the Second Draft Communication”) and asked interested parties to submit further comments.

In general terms, Mediaset believes that the Second Draft Communication is a reasonably balanced initiative, representing a notable improvement over the 2001 Communication, and a step in the right direction. However, Mediaset would like to reiterate a number of issues, discussed in more detail in the context of the January 2009 consultation and recalled below, which need still to be addressed and/or be further clarified in order to confer on the State aid rules applicable to public service broadcasters (“PSBs”) the necessary high degree of transparency and legal certainty.

As pointed out in the submission related to the First Draft Communication, Mediaset acknowledges that the public service broadcasters, play a significant role in paving the way towards the successful development of new and enhanced broadcasting services.

Although the Commission has in the past taken the view that PSBs should be entitled to offer their services in any type of distribution platform, including DTT and internet, provided that this is done on a strictly neutral manner, this presupposes that a well-defined PSB remit exists, that independent controls are carried out on the implementation of such remit and the effective fulfilment of transparency requirements.

#### **2 DEFINITION OF PSB REMIT**

Mediaset notes that very little has changed in the Second Draft Communication with respect to the definition of the PSB remit. As highlighted in previous occasions, this is a fundamental element and a pre-condition for a correct and effective compliance with Article 86(2) EC and State aid rules.

In this respect, having a list in the Communication - even an indicative one - enumerating the type of new media services or activities that fall to be considered either as part of the PSB remit or as commercial broadcasting activities, would contribute greatly to increased legal certainty and predictability.

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In the absence of a more concrete definition of PSB in the proposed text, therefore, Mediaset supports the Commission's call for at a least a more clear and precise definition of the PSB remit by Member States and a more rigorous definition of the type of activities covered thereby so that commercial operators can plan their own activities, and "Member States' authorities can effectively monitor compliance" (paragraphs 45 and 46 of the Second Draft Communication). Mediaset agrees with the Commission that, *"without a clear and precise definition of the obligations imposed upon the public service broadcasters, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore could not grant any exemption under that provision"* (paragraph 45).

In Mediaset's view, however, the very small change implemented in paragraph 47 of the Second Draft Communication (former paragraph 50 of the First Draft Communication) does not eliminate the contradictions between the current paragraphs 45-46 on one hand and paragraph 47 on the other hand. New paragraph 47, in fact, now reads: *"given the specific nature of the broadcasting sector, 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, in view of the interpretative provisions of the Amsterdam protocol, legitimate under Article 86(2)"* (emphasis added). The statements contained in paragraphs 45-46 are still therefore contradicted and weakened by paragraph 47. As the previous paragraph 50, the new paragraph 47 appears to offer a blanket exemption and to call into question the obligation imposed upon Member States to ensure that the definition of the PSB remit should now be as precise and accurate as possible.

Moreover, paragraph 47 is also at odds with paragraph 60 of the Second Draft Communication, in which the Commission, in line with what is stated in paragraphs 45-46, recognises that the State aid assessment carried out by the Commission *"requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities"*.

Accordingly, for the sake of clarity, Mediaset reiterates the request to the Commission for paragraph 47 to be redrafted and brought in line with the principles set out in paragraphs 45, 46 and 60 of the Second Draft Communication.

Mediaset also notes that, although the structure of the Second Draft Communication is partially different from the First Draft Communication, its concerns in relation to the likely gradual inclusion of pay TV services into the PSB remit have not been addressed in the Second Draft Communication. The sentence which has been added in the current paragraph 85 ("For instance, the simultaneous distribution of content already available on one distribution platform (e.g. TV, radio) on new platforms (e.g. internet, mobile devices) is not considered to be a new service") does not seem enough to eliminate ambiguities and increase legal certainty, to the extent that it is still not clear whether the exploitation of a public service oriented content may be offered on other platforms on a pay or commercial basis. In this latter case, the PSB should acquire the rights to broadcast such content on other platforms on a pay or commercial basis only with commercial-based revenues (i.e. advertising revenues), properly reflected in separate accounts. Likewise, all extra costs (conditional access, call-center, production and distribution of smart cards) related to the delivery of pay-tv services by PSBs - competing with similar services developed by commercial operators - should not be financed through the licence fee.

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This seems to be a necessary step to avoid cross-subsidisation between PSBs' activities financed through the licence fee and other activities which should be financed by the PSB exclusively through commercial revenues (e.g. advertising revenues).

### **3 ENTRUSTMENT AND SUPERVISION**

If, on one hand, the definition of PSB remit is a pre-condition for a correct application of Article 86(2) EC, on the other hand, it is also fundamental that, once the PSB remit has been defined, the public service is actually supplied as provided in the formal agreement between the PSB and the State.

Mediaset notes that the Commission has addressed this issue in paragraph 53 of the Second Draft Communication. It is worth noting that some Member states have a legal obligation to apply sanctions in case the public service remit is not carried out effectively, as provided for in the agreement between the PSB and the State.

### **4 EX ANTE ASSESSMENT / PUBLIC VALUE TEST FOR NEW SERVICES**

The notion of an "ex ante assessment" in order to consider whether the planned introduction of "significant new services" by PSBs meets the "same democratic, social, and cultural needs of the society" is maintained in the Second Draft Communication (paragraphs 84-89).

As stated in the January 2009 submission, Mediaset views the inclusion in the Communication of the ex ante assessment mechanism as a positive step towards a more disciplined and rigorous approach to PSB. However, the Second Draft Communication has not addressed the risk of entrusting independent authorities with the difficult task of taking a decision on the definition of a PSB remit on the basis of abstract and/or subjective grounds such as meeting the "democratic, social and cultural needs of the society". Mediaset would therefore reiterate that, in order to preserve legal certainty, the ex ante assessment carried out by the envisaged independent authorities should be grounded as closely as possible on the existing definition of PSB in order to avoid that the such an assessment becomes a flexible tool for the ongoing expansion of the definitional scope of the PSB remit.

Moreover, Mediaset reiterates its proposal that the independent body be an independent administrative authority whose decisions can be challenged before an ordinary administrative court or tribunal within the meaning of Article 234 EC Treaty. Such a court or tribunal should have thus the possibility to make a request for a preliminary ruling to the Court of Justice.

### **5 TRANSPARENCY**

As pointed out throughout the current and previous submissions, in order for the Commission to be able to assess whether Article 86 (2) EC Treaty is complied with, a clear and precise definition of the PSB remit is a fundamental element. Transparency is therefore an indispensable requirement, in particular with regard to "dual funding" of the PSBs (as noted in the January 2009 submission). In this respect, Mediaset fully endorses paragraphs 60-61 of the Second Draft Communication where this principle is clearly stated.

A correct allocation of costs and revenues related to dually funded PSBs is of major importance to avoid over-compensation of PSBs for their activities within the PSB remit. In this respect, Mediaset would welcome a clear guidance from the Commission on how to implement separation of accounts.

## **6 CONCLUSION**

Mediaset remains at the Commission's disposal for any clarification of the issues raised/reiterated in the present submission, and would welcome any request to expand on any of the points it has made in order to ensure that they are incorporated in any revised text of the Draft Communication.

Mediaset S.p.A, 8 May 2009