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RESPONSE TO THE PUBLIC CONSULTATION ON THE DRAFT COMMUNICATION FROM THE COMMISSION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTERS

Sky Italia (SKY) welcomes this opportunity to submit its observations on the European Commission's revised draft Communication on the Application of State Aid Rules to Public Service Broadcasters (PSBs) (the Revised Draft).

The present response follows up to the observations already submitted by SKY during the consultation process on the previous draft Communication that took place between November 2008 and January 2009.

In particular, Section 1 of the present response discusses certain amendments to the previous draft Communication that SKY perceives as excellent improvements of the existing framework. Section 2 identifies some areas in which further clarification by the Commission would be helpful. Finally, Section 3 [BUSINESS SECRETS].

1. Improvements brought by the Revised Draft

A. In the Revised Draft, the Commission has recognized *"that a number of Member States wishes to facilitate the funding of public service broadcasters by allowing them to offer new audiovisual services against direct payment by the viewers, as part of the public service remit"* (paragraph 82). However, the Commission has also confirmed that *"[t]he element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market"* (paragraph 83).

In this respect, SKY welcomes the fact that Commission has explicitly clarified that *"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"* (paragraph 85, emphasis added), thus acknowledging that the distribution of public service programming on platforms that are traditionally associated with TV broadcasting (such as satellite), as well as on new platforms, is necessarily gratuitous for the citizen. Furthermore, in full compliance with the principle of technological neutrality, the Commission's position obviously implies that also new platform operators (e.g.: an internet provider, a mobile operator) must not be charged any fee by the PSB to allow the retransmission of public service channels.

B. SKY is also pleased that the prior evaluation concerning whether significant new audiovisual services envisaged by public broadcasters meet the requirements of the Amsterdam Protocol will be based on an open public consultation (paragraph 84), through which interested stakeholders shall have the opportunity to give their views on the

envisaged significant new service (paragraph 87) and that Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service according to the criteria indicated by the Commission in paragraph 88.

However, SKY notes that, instead of providing Member States with more detailed guidance on the basic principles to be used in the evaluation of any new media services (including pay services), the Commission has further reduced the list of the criteria previously set at paragraphs 60-61 of the previous draft Communication.

C. SKY also welcomes the fact that the Commission explicitly *"invites Member States to ensure that public broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters"* (paragraph 92), in order to avoid the disproportionate market distortions that would arise if PSBs were to maintain exclusive premium rights unused without offering to sublicense them in a transparent and timely manner.

2. Outstanding need for further clarifications of the Revised Draft

A. SKY remarks that the Commission has merely given examples of programmes that cannot be considered by their nature public service, rather than defining a positive list of activities that should fall within the PSB remit (paragraph 48). Such negative list is supplemented by the statement that *"a manifest error could occur where State aid is used to finance activities which do not add clear value for citizens while leading to disproportionate distortions of competition and cross-border trade"* (emphasis added). SKY considers that the notion of "clear added value for citizens" (reiterated also in paragraph 88) is extremely vague and risks to encourage loose public service remit, given that some Member States could invoke it to continue funding PSBs which are using such funds to carry out conducts that are manifestly detrimental to their private competitors.

B. The Revised Draft also fails to include a requirement for the Member States to ensure structural or, at least, functional separation between PSB's public service and commercial activities, since it merely maintains an "invitation" (paragraph 69) that, as such, may be easily disregarded by Member States. SKY believes that only structural or functional separations can prevent the risk of cross-subsidization or other distortions of competition.

C. Paragraph 67 maintains the principle that costs that are attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. As already stated in SKY's previous submission, this approach, which the Commission recognizes as different from other utilities sector, has a number of significant shortcomings, including the fact that it provides PSBs with no incentives to increase their efficiency and undermines the Member State's ability to evaluate if the compensation granted to the PSB is appropriate. The Commission's positions appears at odd with one of the conditions established by the *Altmark* judgement, pursuant to which *"the level of compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations"* (paragraph 23 of the Revised Draft).

3. [BUSINESS SECRETS]