



AER SUBMISSION
TO THE
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.

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, to enrich and develop the radio sector.

AER took part in all European Commission's consultations on questions alluding to Public Service Broadcasting funding in the past decade. Therefore, AER welcomes the opportunity provided by the European Commission to submit its views on this crucial matter. AER also welcomes the monitoring process the European Commission is running. AER would like once again to underline that it supports the European dual system based on a mix of public service and commercially funded radio broadcasting. However, unfair competition may hinder this model. So AER sees this public consultation as an example of the necessary dialogue with the EU institutions on the financing of public service broadcasting.

1. GENERAL

1.1. A number of significant legal developments have taken place in the public broadcasting area since 2001, namely the adoption of the Audiovisual Media Services Directive, the adoption of the Decision and Framework on compensation payments as well as Commission decision-making practice. Do you think that the Broadcasting Communication should be up-dated in light of these developments? Alternatively, do you consider that these developments do not justify the adoption of a new text?

AER firmly believes that there should be a review of the Broadcasting Communication. However, AER does not think that this review should be based only on the abovementioned regulatory texts, but, also, *inter alia*, in the light of considerations explained further in this consultation. AER has indeed answered to the question mostly relevant to the radio market, even when only television was stated. Finally, AER would like to stress that, as an association representing the interests of commercially funded radio broadcasters at EU level, it responds on behalf of its Members, and provides thereafter as many national examples as possible.

1.2. How would you describe the current competitive situation of the various players in the audiovisual media sector? Where available, please provide the relevant data on for instance leading players, market shares, market share evolution in the broadcasting/advertising/other relevant markets.

As mentioned in past consultations, public service broadcasters enjoy “historical” advantages in the radio sector: commercially funded radio has mostly appeared in Europe in the 1970’s or later. For a number of decades, public service broadcasters evolved in a monopolistic world. This is no longer the case, but, in the radio environment, a great part of the audience “stays tuned”, i.e. remains faithful to a “brand” (a radio format, a radio sound, etc.). This is also due to the fact that radio has been the first medium to go “mobile”, which is largely due to the intimate relationship which it forges with audiences, and the ease with which manufacturers have been able to make it available on portable devices.

Moreover, for some years, public service broadcasters in Europe have developed models based on “dual funding”; an interesting example can be found in the Netherlands.

THE NETHERLANDS:

In the Netherlands, public radio has 5 national channels. The programming of the public channels is similar to that of commercial stations. This holds particularly true for Radio 2 and 3, the entertainment channels. There is no justification of why the formats of Radio 2 and 3 cannot be left to the commercial market. Indeed, Radio 2 and especially Radio 3 have, since the introduction of commercial radio in the Netherlands, adjusted their formats in such a way that they are no longer distinguishable from the commercial stations. This also can be deducted from the fact that the revenues from advertising of Radio 3 are by far the largest of all five public radio stations and almost sufficient to cover the complete exploitation of all public radio stations. It goes without saying that these revenues add up to the government financial grant.

Public radio stations in the Netherlands carry advertising. Public broadcasters are “double funded”; as we mentioned earlier, experts know that the amount of advertising revenues they get is enough to cover at least the costs of the five public radio channels. These costs are not transparent and an insight of these costs is refused.

The sales organisation of Dutch public radio (STER) is the most dominant agent in the market (on advertising). That market share and the fact that only public radio can offer national coverage to advertisers allow public radio to set the price for radio advertising in the market. Commercial radio can only follow the STER and ask for lower prices.

Similar situations are observed in the rest of Europe; consequently, public service broadcasters have been able to foster their, already, strong brands. In many instances, commercially funded radio broadcasters find themselves unable to compete on sound grounds with public service broadcasters.

The table on the following page should be seen as a summary of the main market players on the radio scene in a representative set of European States.

1.3. In your view, what are the likely developments and where do you see the major challenges for the sector in the future? Do you consider that the current rules will remain valid in the light of the developments or do you believe that adaptations will be necessary?

As explained in the previous question, radio is the most intimate medium, and this is due to the ease with which it can be accessed: in the car, in the kitchen... The portability and ubiquity that this engenders are crucial to radio’s appeal. All radio broadcasters have therefore undertaken, in the past years, important investments in both distribution and content with a view to maintaining and expanding radio’s wide availability and appeal.

Consequently, the Internet is key to commercial radio broadcasters’ future strategies, offering both a means of delivering radio (via webstreaming), and a platform for offering services which complement the core broadcast services with bespoke content such as music news, social networking and media players.

However, across Europe, AER Members encounter situations where public service broadcasters seem to overrun their remit by encroaching into these online growth areas. For example, in Germany, public broadcasters expand into multimedia services such as webchannels or online archives (Mediatheken) without undertaking – as agreed in the compromise with the European Commission – an ex-ante test, to check if these services are part of their public service remit.

2007	The top 5 radio stations, ownership and audience share				
Finland	1. Yle Radio Suomi, Public, 38%	2. Radio Nova, Private, 11%	3. Yle Radio 1, Public, 9%	4. Iskelmä, Private, 8%	5. YleX, Public, 6%
France	1. RTL, Private, 12.9%	2. NRJ, Public, 11.5%	3. France Inter, Public, 9.9%	4. France Info, Public, 9.6%	5. Europe 1, Private, 9%
Germany	1. Radio NRW, Private, 2.27%	2. Antenne Bayern, Private, 1.57%	3. SWR3, Public, 1.51%	4. WDREinsLive, Public, 1.29%	5. WDR4, Public, 1.29%
Greece	1. Lampsis FM, Private, 14.4%	2. Sfera FM, Private, 14.3%	3. Sky Radio, Private, 12.7%	4. Antenna FM, Private, 9.4%	5. Village, Private, 7.9%
Italy (2006 annual data)	1. Rai Radiouno, Public, 17.2%	2. Radio DeeJay, Private, 15.15%	3. Rai Radiodue, Public, 14.44%	4. RDS, Private, 13.07%	5. RTL 102.5, Private, 12.91%
Netherlands	1. Radio 538, Private, 10.8%	2. Radio 2, Public, 10.6%	3. Sky Radio, Private, 10.5%	4. Radio 3, Public, 7.9%	5. Q-Music, Private, 7.1%
Romania	1. Radio Romania Actualitati, Public, 14.5%	2. Radio Europa FM, Private, 13.1%	3. Radio Kiss FM, Private, 12.3%	4. Radio 21, Private, 7.8%	5. Radio Pro FM, Private, 5.7%
Spain	1. Union Radio SER, Private, 39.5%	2. Onda cero, Private, 21.4%	3. Radio Nacional Espana, Public, 17%	4. Cope, Private, 14.5%	
UK	1. BBC Radio 2, Public, 15.7%	2. BBC Radio 4, Public, 11.8%	3. BBC Radio 1, Public, 10.3%	4. BBC Radio Five Live, Public, 4.6%	5. Classic FM, Private, 4.2%

2. COMPATIBILITY ASSESSMENT UNDER ARTICLE 86 (2) EC TREATY, IN COMBINATION WITH THE BROADCASTING COMMUNICATION

2.1. Coherence with the Commission Decision and Framework on public service Compensation

2.1.1. Do you consider that (at least some of) the requirements laid down in the Decision and Framework on public service compensation should be included in the revised Broadcasting Communication or not? Please explain why.

We do, since these groups of requirements would allow better control of the public service broadcasters' activities, providing greater clarity and enabling suitable conditions for healthy and competitive markets.

AER would like to recall the following: it strives for better competition rules for commercially-funded radios, not to end public service broadcasting. The European dual system is indeed a fundamental element of the European media landscape. AER is nevertheless concerned by clear anticompetitive behaviours, which risk unacceptably endangering commercially funded radio broadcasters.

2.1.2. In the affirmative, please specify which requirements should be included and explain what adaptations, if any, would be appropriate for the broadcasting sector (see also the questions below, in particular those on overcompensation; point 2.6).

The Decision and Framework on public service compensation state more requirements than the Broadcasting Communication in three areas that are essential to AER:

- specifications of the entrustment acts
- compensation criteria
- overcompensation control

Nevertheless, some adaptations could be necessary, especially for the last two areas. Please see further answers.

As for the specifications of the entrustment acts, requirements exposed in point 12 of the Framework and in article 4 of the Decision should be included in the Broadcasting Communication:

“The act or acts shall specify, in particular:

- (a) the nature and the duration of the public service obligations;
- (b) the undertaking and territory concerned;
- (c) the nature of any exclusive or special rights assigned to the undertaking;
- (d) the parameters for calculating, controlling and reviewing the compensation;
- (e) the arrangements for avoiding and repaying any overcompensation.”

This would constitute a positive step forward in commercially funded radio broadcasters' views.

2.2. Definition of the public service remit

2.2.1. You are invited to provide information on the definition of the public service remit in your country, in particular as regards new media activities.

As stated, *inter alia*, in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty, each Member State, for its own market, defines a public service remit. AER supports this distribution of competencies.

Therefore, AER cannot provide a single definition, but would like to ask the European Commission to formulate basic elements which a meaningful definition would have to contain. Please find some examples:

THE UK:

In the UK, the term 'public service broadcasting' is generally taken to refer to the terrestrial TV broadcasters BBC, ITV, Channel 4 and Five, all of which are subject to public service obligations. However, we take it the Commission's interest in asking this question is to understand how the remit for state-funded broadcasters (i.e. the BBC) is defined.

In 2006, the BBC's Royal Charter and Agreement was renewed by the Government. This led to the establishment of a new regime for defining the BBC's remit and holding it to account. The Charter introduced the new BBC Trust, as well as a system of Service Licences and Public Purpose Remits, a new Competitive Impact and Fair Trading framework, and a new Complaints Framework. Each of these elements refers back to the BBC's "Public Purposes", as established by the Charter, which are as follows:

- sustaining citizenship and civil society;
- promoting education and learning;
- stimulating creativity and cultural excellence;
- representing the UK, its nations, regions and communities;
- bringing the UK to the world and the world to the UK; and,
- in pursuing its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services, and taking a leading role in the switchover to digital television;

(Source: BBC Charter, 2006)

GERMANY:

In Germany, the public service remit is very wide: public service broadcasters shall provide for information, education and entertainment. So called Telemedien which correspond more or less with non-linear services defined in the Audiovisual Media Services Directive, are limited to programme accompanying services. As the understanding of public service broadcasters' programme is very wide, this definition does actually not limit the expansion of their activities in the online world. Since the German government has agreed the compromise with the European Commission, ARD has launched a new online-radio platform (ARD-Radio-net)¹ ignoring the need for an ex-ante-public-value-test. In August 2007, VPRT (AER's German Member) counted 38 webchannels and 101 programmes that were live-streamed.

SWITZERLAND:

The public service broadcaster SRG/SSR is left to define the "public service" to its very own, often commercial interests, and to re-define it constantly in order to construct arguments for a policy of systematic expansion, to the disadvantage of private broadcasters having to operate without public funds. One of the strategies seems to be copying any concept that

¹ <http://www.ard.de/radio/-/id=1884/84w4up/index.html>

works in private radio, such as the creation of format radio offers for very particular target groups, or the planned strengthening of SSR's local studios in order to expand their regional programme windows – systematically under the pretext of applying their obligation to provide public service.

2.2.2. Do you consider that the distinction between public service and other activities should be further clarified? In the affirmative, which measures could provide such clarification (e.g. establishment by the Member State of an illustrative list of commercial activities not covered by the public service remit)?

AER has observed, in many European States, that public service broadcasters are developing new commercial activities which lie outside of their traditional remit. To be clear, we do not believe that they should be prevented from doing so. However, we do believe that it is vital that this activity does not distort the market. Furthermore, there should be no ambiguity about how such activity relates to the broadcaster's remit, as defined within the member state. Further distinction between public service and other activities could therefore prove to be useful. The reviewed communication could give guidance on the main elements for such a distinction. For instance, AER thinks it is important to outline the following examples:

IN THE UK:

The BBC offers a number of elements which are outside its public service remit, by virtue of their being insufficiently distinct, and which distort the market, since they could be provided on a commercial basis. Examples include promoting ticket sales outlets for a mainstream music event (a Foo Fighters concert taking place this summer at Wembley Stadium) and taking a sponsor on live events programming (such as Robinson's sponsorship of the BBC's Sports Personality of the Year).

This could be resolved by strengthening the regulation of the BBC by the BBC Trust, and making it an entirely independent body.

IN GERMANY:

Due to the wide definition of the remit, there is uncertainty with regard the possible expansion of public service broadcasters' activities on the internet. Please see example in 1.3.

2.2.3. In the current Broadcasting Communication, activities other than TV programmes in the traditional sense can be part of the public service remit provided that they serve the same democratic, social and cultural needs of society. Does this provision sufficiently clarify the permissible scope of such public service activities? Why? In the negative, do you consider that further clarifications should be provided in a revised Broadcasting Communication?

AER does not believe that public service broadcasters should be restricted as to the tools which it uses to perform their respective remits (i.e. "broadcast programmes in the traditional sense"). However we believe that in developing e.g. new media content, they should ensure that their outputs are distinct and do not distort the market.

2.2.4. Do you consider that the general approach in the recent decision-making practice of the Commission (i.e. determination of the public service remit based on an *ex ante* evaluation for new media activities) could be incorporated into a revised Broadcasting Communication?

2.2.5. Should a revised Broadcasting Communication further clarify the scope of an *ex ante* evaluation of the public service remit by Member States?

2.2.6. Which services or categories of services should in your view be subject to an *ex ante* evaluation?

2.2.7. Should a revised Broadcasting Communication contain the basic principles as regards the procedural and substantive aspects of such an evaluation (such as for instance the involvement of third parties or the possible evaluation criteria, including for instance the contribution to clearly identified objectives, citizen needs, available offers on the market, additional costs, impact on competition)?

Joint answer from 2.2.4 to 2.2.7.:

AER strongly believes that the revised Communication should clarify Member States' obligations to carry out *ex ante* evaluation of proposed expansion by public service broadcasters into new areas of business. This should include key provisions on procedural, institutional and substantive aspects; this would be a significant step forward in introducing an element of transparency into the system. Furthermore, the evaluation should be carried out by an independent body. Third parties and/or experts should be involved in the decision making process.

2.3. Entrustment and Supervision

2.3.1. You are invited to explain in which way entrustment is granted in your country. Is the procedure leading to the entrustment subject to public consultation? To what extent is the broadcaster's remit laid down in legally binding acts of entrustment? To what extent is the implementation and determination of the exact scope of activities left to public service broadcasters? Are any such "implementing measures" publicly available?

2.3.2. Please explain the mechanisms to supervise public service broadcasters in your country. What is your experience of the existing supervision mechanisms? Do you consider that there are sufficient possibilities for third parties to take action against alleged infringements/non-fulfilment of public service (and other) obligations in your country?

2.3.3. Do you consider that the Broadcasting Communication should contain further clarifications about the circumstances in which an additional act of entrustment (i.e. in addition to the general provisions laid down by law) is necessary or are the current rules sufficient?

2.3.4. Do you consider that the Broadcasting Communication should contain further clarifications in order to ensure increased effectiveness of supervision of public service broadcasters? What are in your view the advantages or possible drawbacks of control authorities independent from the entrusted undertaking (as referred to in the Broadcasting Communication) as opposed to other control mechanisms? Do you consider that effective supervision needs to include sanctioning mechanisms, and if so, which ones?

Joint answer from 2.3.1 to 2.3.4. (Please see also question 2.1.2):

AER strongly believes that the setting up of independent authorities is essential to guarantee healthy competition grounds between commercially funded and public service broadcasters.

AER indeed notes that the current broadcasting communication states that it “is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking.” This important statement seems to be weakly implemented across Europe; please see the following examples:

IN THE UK:

A new supervisory mechanism for the BBC was established when its Royal Charter was renewed in 2006: the BBC Trust. However, the BBC Trust is only semi-independent from the BBC, for instance being based at BBC premises. The Chairman of the BBC Trust is also Chairman of the BBC. We believe that this may hamper the BBC Trust’s ability to properly hold the BBC to account, and to operate without disproportionate influence from BBC Management.

IN ITALY:

The public service broadcaster RAI took the decision some time ago to carry out commercial activities while maintaining its privileges of public entity. A holding was created to break up the different activities into different companies that compete in the open market.

Recently, the control of public broadcasters’ activities has been handed over to the Communications Authority and this control is not applied in a coherent and regular manner. Furthermore, in the public broadcasters’ service contract with the state no clear indication on transparency is given.

On this issue RNA (AER’s Italian Member) has filed a request to verify the effectiveness of the separation of accounting and real transparency. More than six months later, the Authority still has to communicate its decision on the abovementioned request.

2.3.5. Should there be specific complaints procedures at national level where private operators could raise issues related to the scope of the public service broadcasters’ activities? If so, what form should they take?

Yes. AER thinks that these should be simple, quick and effective. Just to mention one example:

IN THE UK:

RadioCentre (AER’s UK Member) has recently complained about sponsorship activity being undertaken by the BBC. Complaints need to be directed to the BBC themselves in the first instance, and can be referred to the BBC Trust for appeal. There is no other national body to which complaints can be referred. As explained in RadioCentre’s own response to the Commission’s questionnaire, the complaints process is also very complicated.

2.4. Dual Funding of public service broadcasters

2.4.1. What is – in your view - the expected impact of (partly) State-funded payservices on competition?

AER thinks that pay-services hinder competition in all markets observed in the EU.

AER believes that, if a payment is needed to access a given service, its delivery should be left to market players; the latter have to be understood as operators funded through commercial means only.

2.4.2. Should pay-services always be considered as purely commercial activities or are there instances in which they could be regarded as part of the public service remit? For instance, do you consider that pay-services as part of the public service remit should in this respect be limited to services which are not offered on the market? Or do you think that pay-services could be regarded as part of the public service remit under certain conditions? In the affirmative, please specify which. For instance, should the conditions include elements such as specific public service objectives, specific citizen needs, existence of other similar offers on the market, inadequacy of existing public service obligations or inadequacy of existing funding to meet particular citizen needs?

AER does not see as appropriate for public service broadcasters to make charges for content, except through their commercial arms, e.g., in the UK, BBC Worldwide.

We would also go further and say that it is not appropriate for public service broadcasters to offer any service or product, if it is to be expected that a commercially funded broadcaster would be able to derive a significant sum by offering such a service or product to either a consumer or a client on a commercial basis. An example of activity which would not therefore be appropriate would be if a public service broadcaster offered, either for free or at a price, a popular music track for download, a lucrative sponsorship package, or promotion of how to buy tickets for a popular music concert from a commercial ticket outlet.

2.5. Transparency requirements

2.5.1. To what extent are commercial activities carried out by the public service broadcaster itself in your country? Is there a structural or functional separation between public service and commercial activities?

In most of EU Member States, public service broadcasters receive funding from commercial activities: most of them are partly funded through advertising. Some also provide access to services on the internet on a paid-for basis. An interesting example:

GERMANY:

In Germany, commercially funded radios find it difficult to compete with public service broadcasters due to public radio operators' advantageous market positions and their structural complexity, which lacks real financial control. The financial statements presented by public broadcasters ARD and ZDF to the KEF (the Commission responsible for establishing the financial needs of public broadcasters) lack clarity, particularly in relation to the outsourcing of private subsidiary companies that carry out different activities (i.e. marketing, advertising, licensing, etc.) for public broadcasters. Due to the lack of transparency, cross-subsidisation cannot be proved and consequently not be obstructed. Therefore there is a need for further clarification on the remit, on the market conformity. Furthermore, the competences of KEF and the Courts of Auditors should be strengthened in order to enable them to evaluate a proper use of the public service broadcasters' funding.

FRANCE:

Public radio channels are allowed to develop sponsorship for local events. French commercially funded radios therefore find it sometimes difficult to compete with public

service broadcasters on the sponsorship of big and popular events. Just to mention an example: “France Bleu Gironde” (the local public service broadcaster in the Gironde) sponsors important local events (known as “Les Scènes d’Eté en Gironde”). The sponsorship contract requires total exclusivity for the event; moreover, the contract contains a promise to buy advertising space, enabling wide coverage of the event.

2.5.2. Do you consider that there is a need for a structural or functional separation of commercial activities, and if so why? What would the positive or negative effects of either a structural or a functional separation?

AER firmly supports separation of commercial activities; this would aid healthy competition between commercially funded and public service broadcasters. Additionally to the elements provided for in the transparency Directive, costs must be allocated to cost centers in order to ensure that cross-subsidisation does not take place.

One direct effect of purely commercial activities run by public service broadcasters might indeed be unfair commercial advantage concerning programming production. Even more concerning is the effect on advertising prices: as public service broadcasters enjoy “dual fundings”, they can set artificially low prices for advertising spaces on air. As a consequence, commercially funded radio broadcasters are forced to follow these pricing. This has a direct effect on the latter’s incomes, since almost all of AER Members are 100% funded by advertising. Hence the situation presented in question 1.2, in the Netherlands.

THE NETHERLANDS:

Please see example provided in 1.2

THE UK:

In the UK, there is insufficient distinction between the BBC’s public service activities and its trading activities. We believe that for the sake of transparency, the BBC should not be able to enter into agreements with third parties to provide them with exposure, regardless of whether or not it obtains payment in exchange. This is because the third party offering these services could be offering other services in lieu of payment, such as privileged access to an artist, or a privileged opportunity to obtain live broadcast rights for a live event. By offering on-air exposure opportunities on different terms to those offered by commercially funded broadcasters, public service broadcasters risk distorting advertising and sponsorship markets.

When it engages in activity of this kind, the BBC has the effect of distorting the market, since it alters the price which Commercial Radio stations are able to charge for sponsorship, or for promotion of artists or concerts, to take this example.

Self-evidently, preventing the BBC from undertaking any commercial activities of this kind except through a clearly separate commercial arm would negate this anticompetitive impact.

FRANCE:

In France, there is no clear separation of public service and commercially funded activities. The only element that underlines the fact that these two types of activities are somehow run on a different level is the mere existence of a media house (“régie publicitaire”), taking charge of advertising issues. There is no further separation. Furthermore, combined Radio France channels represent a market share of 19,8 % according to Mediametrie, making Radio France the 3rd national advertising offer after Lagardère Publicité and IP Radio and before NRJ Group.

GERMANY:

Some commercially funded radio companies might suffer enormous losses in their advertising income due to prize dumping considered to be originated by public service radios. As public radios are already funded by public fees they can afford giving prize reductions on their advertising space. In fact, due to the lack of transparency in the cost allocation it cannot be excluded that advertising is sold to non-market prizes. By doing so, public radios distort the market as they force private radios to adapt and lower prizes for advertising to compete. It is merely impossible to find out concrete data on the exact amount of fees allocated to a single radio programme.²

SWITZERLAND:

The financial statements of SRG/SSR do not allow the public to identify the investments, cost and revenues of the various broadcasting and side activities. Yet, internally they do seem to be able to identify costs within one programme since they have even asked this to be the future base to calculate their copyright contributions owed to SUISA/Swissperform

2.5.3. Do you consider that the rules for cost allocation as set out in the current Broadcasting Communication could be improved in light of experience in your country? If so, please give possible examples of good practice. Or do you consider that the current rules are sufficient?

AER does indeed think that the rules for cost allocation in the Broadcasting Communication could be improved. Yet it may potentially be more valuable to strengthen EU Member State control of their public service broadcasters' accounts. A good example of the positive outcomes which this can create is provided by Spain:

SPAIN:

There is no separation between the public service and commercial activities of the public broadcaster RTVE (grouping TV and radio). This has allowed an obscure financial system to develop, which created a huge public debt and a need for direct annual public subvention. At the same time, the public service broadcaster has a very large share of the advertising market creating a situation of unfair competition with private broadcasters.

Accounting systems are mixed for commercial and public service activities, and the public service broadcaster has not shown so far any willingness to separate accounts since this would be a mechanism of control. The public service broadcaster alleges that all programmes offered are in the "public service" therefore there is no need for separating accounts. This could be arguable if a serious analysis of the programmes is undertaken. However, the lack of a clear definition of the public service remit makes this exercise impossible.

Based on a clear definition of what the public service remit is (which, as we said earlier, does currently not exist in Spain), Spanish commercially funded radio operators believe that advertising revenues should only be used to fund the commercial activities of the public broadcaster. In addition, they should be accounted separately, justified to the competent parliamentary committee, published for the information of private broadcasters and limited on an annual basis. On the other hand, public money should be used to fund exclusively public

² advertising income of psb: 189,65 Mio € plus income from fees of 2,5 bln € vs. income of commercial operators of 678 Mio. € in total (567 Mio. € of advertising) – sources: ZAW-Yearbook, ARD-yearbook;GEZ-report

service activities. It should also be subject to separate accounting and prevented from being increased using the procedure of accumulating debt (as is currently the case). The public service broadcaster's large debt causes a great damage to commercially funded broadcasters because it is used by the public broadcaster to justify an aggressive commercial strategy.

2.5.4. Against the background of your answers to the previous questions (2.5.1, 2.5.2, 2.5.3), do you consider that a revised Broadcasting Communication should contain further clarifications of transparency requirements?

Considering the abovementioned examples, AER firmly believes that the Broadcasting Communication should contain further clarifications of transparency requirements, such as cost allocation according to cost centers.

2.6. Proportionality test – Exclusion of overcompensation

2.6.1. Do you consider that the Broadcasting Communication should include a requirement for Member States to clearly lay down the parameters for determining the compensation amount?

Yes indeed: AER has repeatedly mentioned that one of the main issues when it comes to the unfair competition maintained between commercially funded and public service broadcasters is due to a lack of control by EU Member States of the latter. As the European Commission can mainly check manifest errors in this area, it has to lay down these additional criteria, in order to enhance its control of EU Member States' public service supervision. This would constitute a positive first step with regard to this matter.

2.6.2. Do you consider that the requirements currently laid down in the Broadcasting Communication allow sufficient financial stability for public service broadcasters? Or do you think that the current rules excessively limit pluri-annual financial planning of public service broadcasting?

AER represents the interest of commercially funded radio broadcasters; therefore it does not see itself entitled to answer this question.

2.6.3. Under what circumstances could it be justified for public service broadcasters to keep a surplus at the end of a financial year? Do you consider that the related provisions in the service of general economic interest Decision and Framework (cf. the overview in the explanatory memorandum and in particular the 10% cap on annual surplus) could be incorporated into the new Broadcasting Communication?

AER represents commercially funded radio broadcasters: they depend 100% on advertising revenues. Therefore, they have no access to such "surplus at the end of a financial year". While it is understandable that public service broadcasters enjoy the latter in accomplishing their public service remit, as soon as commercial activities are mixed to provide additional incomes, this is hardly sustainable. Commercially funded radio broadcasters would indeed have to compete with "protected operators", able to develop in a much less risked manner. Again, it is a high priority to ensure separation of "commercial" and "public" activities within public service broadcasters'.

2.6.4. What should be the safeguards/limits in order to avoid possible undue distortions of competition (e.g. should the 10% margin remain at the public service broadcaster's free disposal within the limits of its public service tasks or should it be earmarked for particular purposes so that reserves may only be used for

predetermined purposes/projects? Should there be a re-evaluation by the Member State of the public service broadcaster's financial needs in case of consistent surpluses)?

AER would once more stress the need for deeper controls run by the EU Member States on their public service broadcasters. In that sense, the European Commission's suggestion of requiring re-evaluation by the EU Member State of the public service broadcaster's financial needs in case of consistent surpluses seems positive.

2.6.5. Do you consider that the current rules laid down in the Broadcasting Communication could possibly act as a disincentive for public service broadcasters to achieve efficiency gains? If so, how could this situation be remedied? What are the mechanisms in place in your country which could be referred to as a good example?

2.6.6. In what circumstances and under which conditions would you consider that public service broadcasters could be allowed to keep a profit margin?

Please see previous answers under question 2.6.

2.7. Proportionality test – exclusion of market distortions not necessary for the fulfilment of the public service mission

2.7.1. What are the available mechanisms in your country under which private operators could challenge alleged anti-competitive behaviour of public service broadcasters? Please indicate whether you consider that these mechanisms ensure a sufficient and effective control. Are lower revenues due to demonstrated anti-competitive behaviour (e.g. price undercutting) taken into account when determining whether or not the public service broadcasters have been overcompensated?

2.7.2. As regards the possible anti-competitive behaviour of public service broadcasters (and in particular as regards allegations of price undercutting), do you consider that the Broadcasting Communication should include requirements for public service broadcasters to respect market conditions as regards their commercial activities in line with Commission decision-making practice, including appropriate control mechanisms?

Joint answer for 2.7.1. and 2.7.2.:

Yes: as previously mentioned, in order to enable competition on fair grounds, public service and commercially funded broadcasters should be submitted to similar market conditions. This is, for the most part, already required by the European Commission in the current Broadcasting Communication. Therefore, application of the latter is to be promoted; one of the means is through appropriate control mechanisms. Please see also answer to question 2.3.5.

2.7.3. Do you consider that the methodology for detecting price undercutting should be clarified, possibly also including other tests which could be used as an alternative to the methodology currently referred to in the Broadcasting Communication? Please make reference to tests applied in your country to the pricing behaviour of public service broadcasters and which could be used as an example of good practice.

One of the most worrying effects of public service broadcasters' unclear dual funding arrangements is their direct impact on commercially funded operators: price undercutting on

advertising undermines the latter's ability to develop. Therefore, any improvement in this regard is essential.

2.7.4. Do you consider that the Broadcasting Communication should contain clarifications as regards the public funding of premium sports rights? In the affirmative, what further requirements should in your view be included in the Broadcasting Communication and how would they specifically address potential competition concerns resulting from State funding? Alternatively, do you think that potentially adverse effects on competition due to the acquisition of such rights by public service broadcasters would be sufficiently addressed under the antitrust rules?

AER finds it difficult to respond this question, since this particular problem primarily concerns television broadcasting.

However we note the extensive commentary which RadioCentre has provided about the difficulties faced by commercial operators in the UK in attempting to secure premium content rights and suggest that the Broadcasting Communication could be updated to prevent broadcasters in receipt of state funding from developing aggressive acquisition strategies which distort commercial markets.

3. FINAL REMARKS

3.1. You are invited to explain what would be in your view the impact of the possible amendments to the current rules on for instance the development of innovative services and in more general terms employment and growth in the media sector, consumer choice, the quality and availability of audiovisual media and other media services, media pluralism and cultural diversity.

3.2. To what extent do you expect that the possible additional clarifications outlined above could create new administrative burdens and compliance costs?

3.3. Do you consider that the possible additional clarifications as outlined above would create a better regulatory framework?

3.4. Please explain whether or not you consider that the positive impacts of possible additional clarifications along the lines outlined in this questionnaire outweigh the negative impacts.

Joint answer from 3.1. to 3.4.:

AER finds guarantee of the following points to be vital:

1. Clear and meaningful definition of the public service remit by legal act;
2. Separation of public and commercial activities according to cost centers;
3. Existence of an independent control mechanism for ex-ante evaluation of activities as well as of the evaluation of the financial behaviour.

In AER's views, this would require additional clarifications to the current Broadcasting Communication. So the latter's positive impacts would certainly outweigh its negative impacts.

This is perfectly explained by AER's UK Member:

“The BBC is undermining plurality in UK radio by accounting for 55% of all listening. We believe that this is a negative outcome of the current approach to public service broadcasting in the UK, and believe that any negative impacts of subjecting the BBC to greater regulatory restriction and scrutiny or limiting the amount of state aid it spends on radio would be offset by the beneficial effects of improving plurality and reducing the BBC’s dominance.”

ENDS
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