

# **REVIEW OF THE COMMUNICATION FROM THE COMMISSION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING.**

## **THE REPLY OF THE DANISH BROADCASTING CORPORATION (DR)**

### *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?**

The Danish Broadcasting Corporation (DR) welcomes the opportunity to comment on the issues regarding the application of state aid rules to public service broadcasting – as it can be fundamental to the future existence of public service broadcasting.

In this regard, it is essential for DR to stress the importance of every Member States right to preserve the sovereignty to define the national public service remit and provide for the funding. Otherwise, it can be impossible to carry out the obligation to promote the cultural, democratic and social activities which is at heart of public service broadcasting.

We emphasize the importance of the cultural, democratic and social nature of public service broadcasting

Considering the changes in the broadcasting sector which are increasingly relevant as well as the political statements for example in the Lisbon conclusions, DR finds a revision of the current communication relevant if it takes into account and acknowledges the particular aspects of public service broadcasters (PSB).

In particular we emphasize the importance of the cultural, democratic and social nature of public service broadcasting. It is our impression that the starting point in the current communication and Commission decisions is that the activities of public service broadcasting should be limited to a minimum and that the access to perform

public service broadcasting is subject to a rather restrictive interpretation. The restrictions of PSB to access new media platforms is an important example of the restrictions laid down upon PSB by the Commission.

It is our view that this situation derives from the concern that PSB prohibits commercial broadcasters from performing their activities. Further, an interpretation of state aid rules with emphasis on minimizing state aid - even when the company in question pursues the cultural, democratic and social needs of society - also leads to a limitation of PSB which we consider contrary to the underlying principles of competition rules.

DR considers the Commissions approach to be wrongly biased to the advantage of commercial broadcasting and to the detriment of PSB. Below we shall in our reply show that the approach in the current communication and Commission practice is not only harmful to public broadcasters but more importantly damaging to the culture, democracy and social coherence in our society. Further, it is our view that the existence of a strong public service media provider is to the benefit of the products on the market. This fact is supported by reports analyzing the media market, see the Mckinsey reports: "Keeping Baywatch at bay" (1999) and "Review of Public Service Broadcasting around the world (2004). Furthermore, PSB broadcasting is stimulating the market by demanding programmes and services externally. Finally, PSB in Denmark is leveraging the standard of quality by providing high quality programmes and services. Consequently, we find that the current approach by the Commission may lead to benefit of commercial broadcasters but it will hardly lead to better media products and thus not be to the benefit of the consumers.

**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.**

## **Television market in Denmark**

### **The main broadcasters in the Danish Television Market**

There are four main players in the Danish television market: TV 2, MTG/Viasat, Scandinavian Broadcasting Service (SBS) and Danish Broadcasting Corporation (DR).

Besides, a number of foreign TV channels are adapted to the Danish market with Danish speak or sub lines.

### **Danish Broadcasting Corporation (DR)**

DR is a state owned public service broadcaster entirely financed by a license fee. The license fee is collected by DR directly from the Danish public and amounted in 2007 to app. EUR 450 mill. DR was the only national television broadcaster up to 1988 when TV 2 became a reality after years of political debate. Today DR has two national free to air, analogue TV channels, DR1 and DR2. In 2007 DR started a Internet news channel, DR Update, which is now distributed on satellite, cable and free to air on DTT. Before the end of 2010 a children and history channel will be launched.

DR also provides the public with 4 FM radio channels, 14 DAB channels and 26 Internet radio channels.

DR has the most visited Danish Media site on the Internet. Dr.dk gives the Danish Internet users free access to a broad range of content including on demand-players for both TV programs and radio channels.

In 2007 DR TV had a 31% market share. The main channel DR1 had 26,5% market share and DR2 4,6%. DR Radio has a strong position with 4 FM channels counting for a 69% market share.

### **TV 2**

The state owned Television Company TV 2 was established in 1988 after years of public debate. TV 2 broke the monopoly on national TV and rapidly positioned itself as the most viewed TV channel in Denmark. TV 2 has public service obligations but those obligations are limited to the main channel TV 2. Today, TV 2 has seven TV-channels and one national radio channel. Tv2.dk is among the most visited media sites in Denmark including the on demand TV-service "Sputnik".

TV 2 currently has a 40% market share and is the commercial market leader in Denmark. 83% of the total income in 2006 came from commercials.

According to the annual report, the annual turn over in 2006 amounted to app. EUR 265 mio.

## **Modern Times Groups (MTG)**

MTG is a Swedish media company. Among the assets are Viasat and Metro International. Viasat Broadcasting is the largest business area. In Denmark Viasat is one of two companies offering satellite TV. Viasat is also a group of TV channels, including TV3 (the first commercial television channel in Denmark), sport and film channels and pay TV. MTG also owns radio networks, television production companies and studios and have shares of Metro International, which runs a chain of free newspapers.

The most viewed Viasat channels in Denmark TV3 and TV3+ have a 9% market share.

According to the annual report, the annual turn over in 2006 amounted to app. SKK 10.1 bill.

## **Scandinavia Broadcasting Group (SBS)**

SBS is operating commercial television, pay channels, radio stations and related print business in Scandinavia, Western and Central and Eastern Europe. In Denmark SBS launched "TV Danmark" in 1997 and in 2007 SBS had 4 channels, of which one "SBS Net" is terrestrial. The remaining three channels "Kanal 4", "Kanal 5" and "Voice TV" are distributed by satellite and cable.

SBS was until 2007 owned by the equity firms Permira and KKR. They also bought the German broadcaster ProSiebenSat1Media in early 2007 and on June 27 2007 it was announced that ProSiebenSat1 Media had acquired the complete SBS Broadcasting Group for EUR 3.3 billion. In concluding the takeover ProSiebenSat1 Media became the second largest broadcaster in Europe with 48 TV Stations.

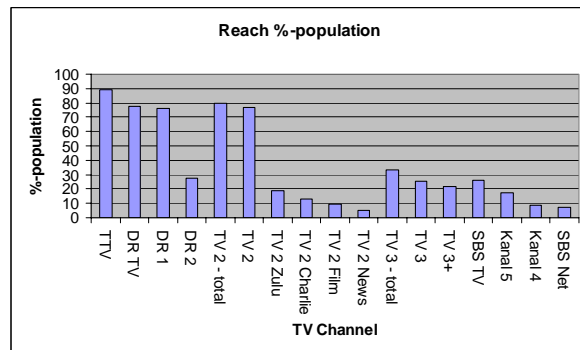
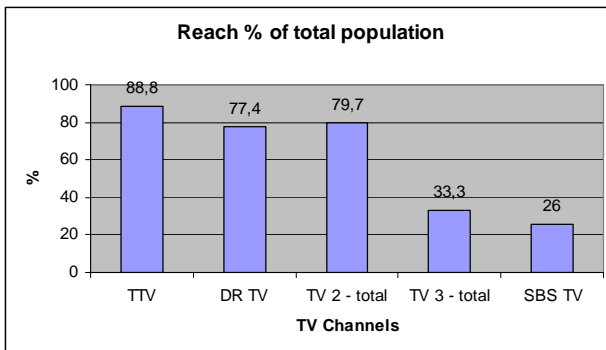
SBS has a 5% market share.

The turnover for the ProSiebenSat.1 group was EUR 2.1 billion.

## Current competition situation

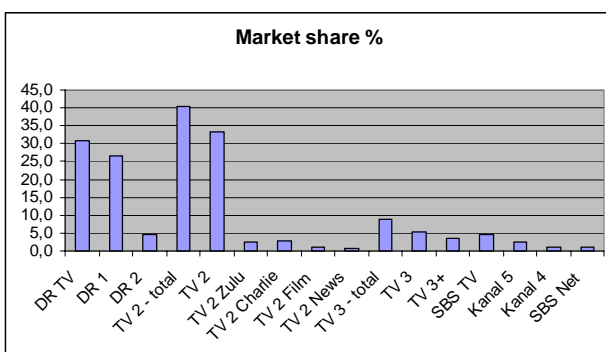
### - Big channels still big, small channels are growing

The Danish TV market is characterized by the two large public service broadcaster DR and TV 2 and the commercial companies MTG and SBS mentioned above. Together they have a 87% market share.



TV is a strong medium reaching more than 88% of the Danish population every week. The average Dane spends two and a half hour watching TV on daily basis and that has not changed much over the last 10-15 years. In the last 5-10 years the audience have had more channels to choose from since the number of Danish channels has grown and more households have turned into multichannel households with more than 30 channels. This have recently started a structural change in the viewing patterns costing a small decline in viewing of the biggest channels and a growth in the viewing of niche channels. This development has been labeled 'fragmentation'.

Public service TV has lost market share in 2007 but it still holds a strong position in Denmark. TV 2 has grown from a single channel in 1988 to 7 channels in 2007, but only the main channel is imposed with public service obligations. TV 2 has 40% market share and DR TV, with only two channels, has 31%.



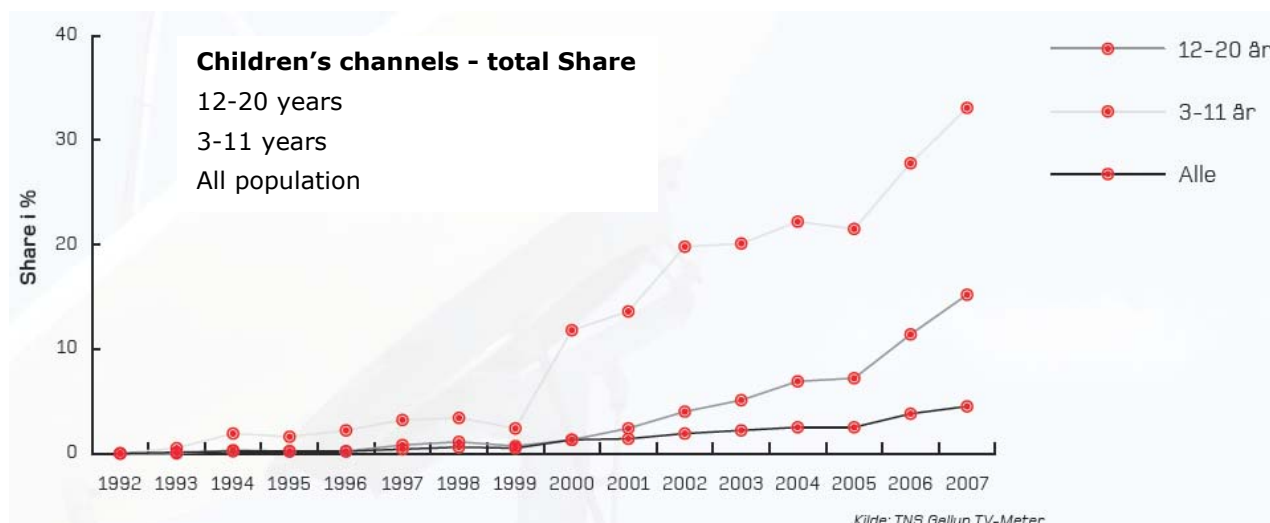
After years of decline in market shares MTG/Viasat got out of 2007 with 9% market share and that is a better result than the year before. Viasat has invested more in program productions in 2007 and this is the main reasons why they got out of 2007 with a better result. Viasat is also

a major player in transmission of sports events and have currently three dedicated sports channels and a number of film channels.

Scandinavian Broadcasting Service (SBS) came out of 2007 with a 5% market share, the lowest market share in 11 years. There are 4-5 channels in the SBS family (Kanal 4, Kanal 5, Voice TV and SBS Net) with a brand new HD-version of Kanal 5 in the market from January 2008. In January 2007 the terrestrial Kanal 4 signals were replaced by the new channels called "SBS Net" while Kanal 4 continued broadcasting by satellite and cable. This have cost a decline for the channel Kanal 4 from 3.2% market share in 2006 to only 1.2% in 2007.

### Children's channels is popular

One of the most significant changes in the TV market is the growth of children's channels. The Danish versions of Disney, Cartoon, Jetix, Nickelodeon, Toon Disney and Playhouse Disney have tripled their market share among kids 3-11 years from 2000-2007. In 2007 the foreign commercial channels have a 33.1% market share among the kids.



The foreign channels targeting children challenge especially DR who has produced award winning programs for children in many years.

### Digital TV

The fast sale of flat screens and the introduction of digital terrestrial TV (DTT) have increased the consumer interest in digital TV. More than 20% of the Danish households have a digital signal from satellite, cable or DTT. In October 2009

Denmark closes down the analog terrestrial signal and a commercial gatekeeper will offer more channels on DTT. Today there are 3 free channels on DTT.

The majority of Danish households got a TV-signal from a cable-TV operator. The big shift from analog to digital TV therefore depends on how the major operator "YouSee" will approach the shift.

## **HD TV**

Distribution of HD-channels has not been a significant factor in the Danish market. Until January 2008 there have not been any Danish HD-channels in the market and only a very few households were able to receive a high definition channel. But there are changes in the market and it seems that content owners, producers, broadcasters and gatekeepers are now reconsidering their digital strategies.

The driving forces of HD-television in Denmark are fast sales of HD-ready TV-panels and the introduction of foreign HD-channels on satellite. 27% of the Danish households had a "HD-ready" screen in 2007. The user driven demand for better picture quality and sound is growing as more people watch DVD-films in better quality than the television signal offers and the enthusiasts now buy HD-DVD/Blue Ray, HD camcorders and build their own home cinemas. HD-receivers for satellite and cable are available in the market.

All gatekeepers on cable and satellite are launching HD-channels in the Danish market in 2008. The biggest company on cable "YouSee" is expected to offer 8 or 9 HD-channels in 2008. On satellite Canal Digital is already offering 7 HD-channels to Danish households and Viasat will follow up with HD-channels on sport, entertainment and fiction in 2008.

HDTV will also be possible on DTT, but since HD will limit the total amount of TV-channels this may not be introduced by the commercial gatekeeper from the beginning. DR's official plans on HD TV are to introduce HD TV in 2012, but there will be experiments in the coming years and this could lead to a sooner introduction of public service HD TV.

## **Radio market in Denmark**

The public service broadcaster DR reaches 80% of the population every week and had a 69% market share in 2007. TV 2 launched a national radio station in 2007 called "TV 2 Radio" and the expectations among the commercial stations were very high. But TV 2 Radio did not manage to raise the market for radio advertising in Denmark in 2007 and did not reach their own goal defined as 15% market share in the segment 21-50 years.

In 2007 all Danes 12+ years listened 46 minutes to commercial radio but 127 minutes to DR Radio every day. Since the introduction of commercial radio in 2003 the total listening among the commercial radio stations has decreased 6 minutes pr. day from the share achieved in the first year - DR has in the same period lost 1 minute pr. day.

### **DAB Radio**

In 2007 37% of the Danish population have access to DAB-radio in the home. That brings Denmark in a world leading position on DAB Radio. In the beginning only DR broadcast radio on DAB. Today there are 17 different channels on DAB and there is more to come. TV 2 Radio, Radio 100FM and Radio 100Soft are the commercial channels on DAB. The four main DR channels on FM is also available on DAB and DR broadcast 10 other DAB channels with focus on specific music genres, politics, debate and children.

## **Internet market**

Internet has become an integrated part of everyday life for the majority of Danes. 85% of all Danes have access to the Internet in the home, and it is positioning Denmark as an IT-frontrunner in international statistics. The online advertising market in Denmark grew by 30% in both 2006 and 2007 and the level of media related activity is very high.

In 2007 TV/video on the Internet has taken off. Video content has become a normal part of all leading media sites in Denmark. DR is offering a number of TV programs on its own website dr.dk and TV 2 has a special TV on demand service called "Sputnik

TV". In 2007 video was introduced with great success as part of online newspapers like eb.dk. (Ekstra Bladet - The leading Danish tabloid newspaper).

Social networks also reached a higher level in 2007. In the last couple of years especially teens and young adults have used online communities but in 2007 international sites like Facebook and MySpace have broken down the wall to the broader population.

FDIM - the Danish association of Internet Media is the official Danish source to Internet statistics. The Top 20 list of the most used websites in Denmark shows that there are seven sites with more than one million users per month out of a total population of only 5.5 million. DR's website dr.dk is number one with nearly 1.9 million users per month. Of course the Danish Internet users spend a lot of time on foreign websites, but there is no reliable information available at the moment.

The growing online advertising market has been a driver behind the massive investments in the Danish Internet market. The amount of web 2.0-services has grown and the users have got a lot of new and free of charge services to use.

The Internet is playing an important role in the future strategies for the media industry. The Internet is a medium offering new types of communication and establishes a closer relation between media companies and the audience. In fact the "audience" is already a term from the mass media era, now we talk about "users" and even "producers". The Internet has opened a door to a lot of new opportunities for the media sector including IP-distribution of TV and radio programs.

**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?**

Major developments and challenges in the future may be described from a sector specific angle and/or with a focus on more pervasive trends. In the following the primary focus will be on sector specific trends. The major changes in the future are expected to arise within the following four interconnected areas: 1) technology, 2) market environment, 3) consumer behaviour and 4) the regulatory environment.

## **Technology**

### **Digital technologies and convergence**

In the recent years the term 'convergence' has been used to identify the effects of current and future technological developments within the area of ICT and broadcast technologies. Convergence may be described as: "The ability of consumers to obtain multiple services on a single platform or device or obtain any given service on multiple platforms or devices". A variety of generic technological trends and developments, are expected to facilitate this form of convergence - the most important being:

1. Linear digital broadcasting and cable casting. DAB and DVB technologies enabling television and radio services of flexible technical quality, and the addition of applications such as EPGs, digitext etc. to the traditional broadcast signal.
2. Broadband services using IP for television and radio content (IPTV and IPR) on fixed telephone lines and broadband networks.
3. Mobile services using digital broadcast technologies (DMB and DVB-H) and digital IP telephone technologies.
4. Increasing storage capacity which enhances content mobility and user control over content.
5. Sophisticated compression technologies enhancing speed, convenience and quality of broadcast and communication.

Convergence has already changed consumer behaviour and the market environment in several ways and posed difficult questions for the regulatory environment. But more changes and challenges are expected to lie ahead as the full potential of digital technologies and convergence is realised in the media and broadcast industry.

### **Consumer behaviour**

Although new digital technologies will offer a wide variety of more personalised choices it is important to remember that traditional media habits among consumers are very resilient and not easily replaced by new opportunities and services. One of the important uncertainties and challenges in the future is therefore not so much to predict what may happen (in technological terms), but rather at what speed these opportunities will be adapted by consumers and whether new media services will co-exist with more traditional media services or have the character of a paradigmatic shift. Regardless, the following three developments in consumer behaviour is expected bring change and challenges to the media market in the future.

## **Mobility**

The high level of penetration of mobile phones makes them an attractive platform to offer more rich media content to consumers. With increasing functionality in mobile phones and the development of high speed wireless infrastructure it seems more and more inevitable that consumers in the future will regard media content as something you either carry with you or have instant access to via your mobile device. The younger generations are a strong driving force behind this development and are expected to continue to be so in the future.

## **Control**

As digital storage is increasingly available, more and more consumers will exert control over the media content they consume. Person Video Recorders (PVRs) will allow consumers to time shift TV viewing and services from cable operators may in term begin to offer a similar functionality. This is not to be seen as 'the death of flow TV and radio' but rather as a development that will allow certain segments of the consumers to have more flexible media habits.

## **Participation**

Participation in different forms is expected to become more and more important for consumers in the future. The current success of media services with blogs, discussion forums and other channels allowing consumers to produce and 'broadcast' written content is expected to become more popular in the future.

The development of consumer channels with shared content on e.g. YouTube and My Space is another example of a more participatory and social media consumption pattern that is expected to become more popular in the future.

## **Market environment**

Developments in the commercial market environment do not directly affect DRs ability to fulfil its public service obligations. On the other hand market developments will influence DRs opportunities to reach its audience in different ways. The following section is therefore presented as the context in which DR must fulfil its Public Service obligations.

Revenues from advertising are currently a very important source of income for most commercial companies in the media market. Two trends may undermine this source of

income in the future. Firstly, the market for advertising is very sensitive to development in the general economy, so the current negative development of the world economy may have significant effect on the source of income for many commercial actors in the media market. Secondly, a radical increase in consumer uptake of PVRs may seriously hamper advertising's consumer reach, which in turn will lead to lower prices for advertising blocks in broadcast flows.

On this background it would be reasonable to assume that market environment in the future will be characterised by a fierce competition between a very heterogeneous group of companies that will shape - and adapt to - the following key trends: 1) Development of new business models that may compensate for the diminishing revenues from advertising, 2) a reconfiguration of the media value chain, 3) vertical and horizontal consolidation among major companies and 4) the continuing globalisation of media markets and competition.

### **New business models**

To the extent that advertising revenues diminish in the future, business models such as pay per view and subscription services may become more prevalent in the media market. Another consequence could be that content sponsoring and product placement may become more popular among commercial actors. Especially the first development will serve to the benefit of the gate-keepers since they will veil significant control over the content provider's opportunity to reach an audience.

### **Reconfiguration of value chains**

Until recently the media market was characterised by a scarcity of media platforms and channels. Furthermore there was only one element in the value chain separating the programme maker from the consumer - the operator of the broadcast network either being publicly owned or operated by a private company.

As new technologies have been developed and implemented this traditional value chain is being reconfigured and consumers may now, and even more so in the future, access media content through a variety of different value chains.

In the new value chain the role of content aggregation and gate-keeping is a very strong position since it allows control over the organisation and search facilities of content made available for the consumers. This puts pressure on traditional broadcaster who may find themselves in a position where their access to consumers

limited in comparison with the traditional reach of PSB. On the other hand development in IPTV allows all media actors to become broadcasters and even rights owners themselves may by-pass the complex value chain by offering their content directly to the consumer. As an example of this development a major Danish newspaper recently broadcasted a critical documentary on their web-site which Danish TV2 wouldn't air on their channel.

### **Internationalisation/globalisation**

As competition increases and becomes more internationalised more international actors are expected to enter the Danish market. This will put pressure on local media producers and strengthen competition in the market for selling rights to content. Seen from a national perspective this is a significant challenge for Public Service Providers with a 'full service' approach to the citizens since certain forms of content such as sports may simply become too expensive. Another effect may be that the amount of content produced locally (on a national level) will decrease as local media companies are being bought up or fails to find an adequate response to the international competition.

### **Vertical and horizontal concentration in the market**

As development in technology creates media convergence, companies will try to adapt to the changes with a strategy of horizontal integration which will allow them to veil control over multiple parts of the value chain. This form of vertical integration will allow companies to harvest synergies between areas and to create new business models. The increasing global competition will also drive key players in the media market to pursue opportunities to achieve a more dominant position in the market (and to obtain economies of scale) through vertical integration. The consequence of these developments will be a horizontal and vertical concentration in the media market.

### **Regulatory environment**

Many of the developments described above will pose challenges for the regulatory environment. National media regulation will have to cope with more complex paradigms as, on the one hand, media markets become more international and more competitive and business models become more complex; and, on the other hand, the role of broadcasters becomes more important in satisfying the needs of local, regional and national communities.

## **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.**

#### **The tasks of public service broadcasting**

The description in the introduction of public service broadcasting (PSB) is not correct and should be amended. In para. 7 former commissioner Marcelino Oreja is quoted for her view on what tasks PSB fulfil. Her statements may be true in the homeland of Mrs Oreja but are far from covering the situation in Denmark.

Even though the statement is supplemented in the following para. 8, it gives an impression of PSB, which we do not consider correct.

It is our opinion that PSB have an obligation to provide reliable information to all segments in society and thus being a non-commercial alternative. This means that we:

- must produce and broadcast programmes for the minorities in society as well as the majority.
- deliver all types of programs and services, thus covering all segments of our audience.
- provide content which is not influenced by commercial interests. We are very aware of the fact that commercial companies try to sneak their products or messages into all types of programs, especially where it is unexpected in order to catch the consumers off guard. We seek to deliver programs without these commercial or political messages. We cherish our financial independence and we are constantly conscious of our integrity.

Based on the above we suggest a revised introduction which defines the essence of PSB in a more adequate manner.

### **Amsterdam Protocol**

Para. 29 iii) states the proportionality test, which we also consider to be an important element of the revised communication. However, in order to obtain compliance with the Amsterdam Protocol we suggest the following to be added to the present text: "..., while the realization of the remit of that public service shall be taken into account."

It is our view that the above quoted passage from the Amsterdam Protocol is important in the interpretation of art. 86, 2 when applied to PSB. In this form we suggest that the proportionality test is included in the revised communication.

### **Definition of public service**

In para. 32 the communication refers to para 29 no. i) and concludes that it is necessary for the application of art. 86, 2, to define public service. We understand that the Commission wishes to define public service by its content and/or technological platform.

We do not agree to this approach.

The definition of public service is closely linked to the cultural inheritance and this question is a national or even a regional matter. Further, when relying on the culture of a nation or region, one has to be aware that the answer changes over time. Culture is evolving rather than static.

We consider the criteria "fulfil democratic, cultural or social need of society" to be an acceptable way of defining public service broadcasting. It is however imperative that the assessment is based on the culture in which the regulation is in effect.

The above mentioned definition is in line with Danish media regulation. Further, the Danish Radio and TV Act contains a set of rules, that defines how DR must perform and by which principles we must provide public service activities- no matter what content we are producing and broadcasting and no matter the platform on which it is distributed. These principles are a manifest example of what is regarded as essential if

a service in Denmark must qualify to shall fulfil democratic, cultural or social need of society. These principles are the essence of the public service notion in Denmark.

Whereas the Radio and TV Act regulates by which principles DR must provide public service activities - by a number of standards insuring a high level of quality and diversity in the production - the Act does not define certain types of content as public service. The public service contract provides a mandate for the specific areas in which DR performs its public service activities.

In Denmark our definition of public service is closely connected to the needs of society and the demands of the state. The definition does not specify what types of content or platforms that may qualify as public service.

It is our view that the Danish way of defining public service and its remit takes into account the democratic, cultural and social needs of society. It is also our view that it is indispensable, that the definition of the remit is based on the culture of the region/country of the PSB and that it is performed by national/regional bodies. A centralized definition will lead to unsatisfactory results in non-conformity with the principle which it aims to enforce. Such a model is likely to lead to restrictions that are not necessary and thus be contrary to the principle of proportionality.

In our opinion, the Commission approach to the public service remit is based on types of content and platforms. Referring to the above, we suggest that the Commission leaves the definition of public service to member states. Should the Commission decide to proceed with a centralized definition of public service - which we strongly oppose - we suggest a main focus on quality instead of types of content and platforms.

### **Financial buffer - annual surplus**

The regulation regarding the handling of overcompensation as well as a financial buffer would provide the needed legal certainty regarding the financial planning and consolidation of PSB. The TV2/Danmark case showed that there is a need for such clarification.

**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).**

In the framework para. 21-23 and the decision para. 13 a scheme regarding overcompensation is introduced.

In our view, it would be highly relevant for PSB to be subject to more flexible rules regarding over compensation. PSB are companies which have financial loans, own property and are dependant on concluding contracts with third parties. Such relations lead to fluctuations in costs, which are impossible to foresee at the beginning of a funding period. Like any other company, DR has to be able to withstand economic fluctuations and a financial buffer as well the opportunity to operate with a profit margin is necessary financial tools.

DRs Public service activities are funded by license fees, and the total amount is stated in the public service contract.

The compensation amount which is stated in this contract is measured in cash flow.

DRs account is, however not given in cash flow but in accordance with the Accounta Act, which is used by private as well as state owned companies. The Act requires that DR financial accounts provide an accurate picture of the overall financial state of the business - not limited to the cash flow situation.

Based on the above DR finds it of utmost importance, that the flexibility in the economic planning is taken into account in future regulation by the Commission.

To ensure the long term planning of necessary investments in new technology and facilities as well as the planning connected to obtaining loans and the return of loans, the company must be allowed to run with a profit of a reasonable size. It is our opinion, that 10% profit and a 10 % buffer would be an absolute minimum in particular if the period over which it is measured is as short as four years.

A profit is not only necessary in order to be able to invest as mentioned above, but also to allow the company to consolidate its financial standing, as any commercial broadcaster would find it necessary.

## **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.**

The Danish Radio and TV Act contains the rules applicable to public service media services. The Act comprises media content on all platforms, hereunder radio, television and internet. The Act is technology neutral as no distinction is made between traditional platforms (radio and TV) and new media services (e.g. services provided via Internet).

The public service remit for DR is determined every four years in a contract between DR and the Danish State. The contract describes the public service obligations of DR. The distribution platforms are treated on equal terms with no particular obligations or restrictions imposed on one or more platforms.

A new legal instrument regarding new services was included in the latest contract. The intended use for this new instrument is: A coherent and significant service on a given platform and it is of course a requirement that such a service is not already covered by the public service remit in the contract. Before proceeding with such a new activity, DR must perform a public value test in order to make sure that the service in question fulfils the democratic, cultural and social needs of society.

The public value test consists of the following four elements:

1. Effect - How many will use the service?
2. Finance - What does it cost?
3. New or old - To what extent is the service new and to what extent is it a direct extension of existing services and services comprised by the Public Service Contract?
4. Duration - Is the intended use of the service of a lasting or merely temporary nature?

If DR comes to the conclusion that the service passes the public service test, the test results must be submitted to the Radio and TV Board, which is independent of DR. If DR concludes that the service does not pass the test, the service will not be performed.

The Board reviews the service by measuring it against the following two criteria:

1. Does the service provide value to society and/or individuals by fulfilling democratic, cultural and social needs? and
2. Is the service in general accessible to all Danish citizens?

DR must await the decision of the Board before commencing the service in question.

**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)?**

A definition (positive or negative) of commercial activity would at the same time be a definition of public service, which should always be performed on a national and/or regional level.

In our view, the definition of public service is closely connected to mainly two issues: The culture in which the service is provided and the requirements, which are inherent to public service. On that background DR considers the Commission unable to perform the assessment of what is and what is not commercial activity. This conclusion is further explained below.

The criteria mentioned above, used by the Radio and TV Board when assessing new services, are the criteria that defines public service in Denmark. The result of a test is dependant on the definition of *democratic, cultural and social needs*. It is DRs view that a broad variety of services may contribute to the fulfilling of the before mentioned needs in society.

Further, it is in the opinion of DR - and in accordance with the Radio and TV Act - essential that the public service media content as a whole fulfils the following criteria: Quality, diversity, plurality, respect for the freedom of speech, impartiality,

objectiveness. Also emphasis is put upon art and culture and programs which reflect the cultural diversity of the modern Danish society.

Activities that are not covered by the public service contract and are not in accordance with the Radio and TV Act are in Denmark not public service activities. This distinction is usually quite clear and if DR should be in doubt the public value test will be able to provide a decisive answer. The model described above is well established in Denmark. This does however not mean that the Danish model would work well in other countries. The distinction between public service and commercial activities should always reflect the culture in which it exists. Consequently, the distinction should be made by each member state taking into consideration the cultural, democratic and social context.

Accordingly, we do not see a need for further clarification of the distinction between public service and other activities.

**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?**

DR considers this question to presuppose a distinction which DR finds contrary to the nature of public service itself. In our opinion there is no need for a distinction between TV programmes and other activities. We consider the public service definition to be technologically neutral. Consequently, we suggest that the distinction is abolished and thus creating clarity regarding the fact that the public service definition is not a definition regarding the type of activity but rather a definition founded in 1) the mandate from the government in question and 2) the principles determining the production of the content in question.

**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?**

DR does not believe that the ex ante evaluation should be incorporated in the revised Broadcasting Communication. It is our view that it is for the member states to decide

whether or not to implement an ex ante evaluation and to include this mechanism in the Broadcasting Communication would be contrary to the principle of subsidiarity.

The definition of public service is closely connected to the scope of funding and consequently a prerogative of member states. A centralized ex ante evaluation would not be able to take into consideration the different types of regulation and regulatory culture in each member state and thus potentially dictate a revision of a number of legislations for formal reasons - or no reason. Also, there is no indication that an ex ante evaluation is generally necessary. The necessity depends on the legislation adopted in each member state and whether it is necessary to implement a legal instrument in order to provide the necessary mandate.

The Danish State has decided to implement an ex ante evaluation, and our remarks in this paper concerns the Danish model unless otherwise mentioned.

As noted in 2.2.3, and further clarified in 2.3.3, it is the position of DR that public service is technologically neutral and that a distinction between TV programmes and new media activities is needless. Consequently we do not consider that an ex ante evaluation with a singular focus on new media activities could be incorporated into a revised Broadcasting Communication while maintaining the principle of technology neutrality.

**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?**

There is a wide variety in the national structures of the media sector and in the scope and terms of Public Service remits across Europe. Consequently it would probably be impossible for the Commission to provide a model suitable for all member states and it would seem more advisable to let national actors define the scope of an ex ante evaluation.

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

It is the view of DR that all types of activities are subject to the same act of entrustment and that no distinction should be made between activities or media platforms. Therefore any activity that may exceed the scope of the original act of entrustment should be covered by an additional act of entrustment (for example in the form of an ex ante evaluation). However, the mandate could also be provided in another way, e.g. by an order from the state, a contract between the state and the PSB or through legislation.

**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)?**

As noted in 2.2.5 there is a wide variety in the national structures of the media sector and in the scope and terms of Public Service remits across Europe. Consequently it would seem more advisable to let member states define the basic principles as regards the procedural and substantive aspect of an evaluation.

**2.2.8. In view of the fact that the determination of the public service character of such activities may be determined in various ways, to what extent should a revised Broadcasting Communication set out possible different options?**

As noted in 2.2.7 it is DRs position that this issue should be addressed on a national level in order to adequately take into account the different structural settings that national PSB operate within. On a more general note, it is the position of DR that the definition of public service should be made with reference to citizen's needs and public service values such as: quality, divergence and independence. Furthermore the democratic, cultural and social role of PSB should be taken into account when public service remit is being determined.

## *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?**

There has been no public consultation regarding DR's public service remit. The entrustment to DR is ensured in a public service-contract provided by the Danish Ministry of Culture. The public service contract has a duration of four years and sets out specific criteria for the scope of DR's performance – as well for an overall basis account for the resource requirements for compliance with the obligations.

The independent regulatory authority, the Radio and Television Board, is in charge of supervising the implementation of the Danish broadcasting legislation and has the task to monitor DR in its efforts to fulfil its legal obligations. The Media Secretariat – an institution under the Danish Ministry of Culture and the secretariat of the Radio and Television Board – has the task of supervising that DR complies with the public service contract and the regulation regarding DRs public service activities.

It is left to DR to decide how to implement the public service contract. Accordingly, DR decides within the wording of the contract which programmes to broadcast within the public service remit and what subjects to treat in the programmes.

In order to comply with the contract and relevant regulation DR has obligations regarding certain genres (i.e. drama, children, culture) or certain areas like the orchestras.

The Radio and Television Board comments on the annual report from DR on the fulfilment of the public service obligations.

Programme services on DRs fourth FM radio channel, P2, is also subject to a license that are supervised by the Radio and Television Board.

The public service contract and its criteria for DR 's public service obligation are publicly available on the websites of both DR, the Radio and Television Board and the Ministry of Culture.

**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?**

The mechanism of supervising explained above is in our experience sufficient for the purpose of regulating public service broadcasters. Nevertheless, it is important to enter into a dialogue about the specific performance indicators and their scope and definitions in order to prevent unintended effects and interventions contrary to the principle of free media.

Concerning the possibilities for third parties to take action against infringements it is our view that there are sufficient ways of influencing the debate about DRs fulfilment of public service obligations. This is done by complaints to either the Ministry of Culture or directly to DR. Sometimes criticism is raised in newspaper articles or in branch publications. Further, DR has a "viewer and listeners editor" to whom complaints over programme content may be addressed.

**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?**

It should be clarified, that all types of activities are subject to the same act of entrustment and that no distinction is made between activities or platforms.

Further it should be clarified that an additional act of entrustment is only necessary, when you exceed the scope of the original act of entrustment regardless of the type of activity. Our view is based on the following:

Only a technologically neutral approach to public service may satisfy the need for a legal framework in accordance with the environment which it is set to regulate. As it transpires above in the market description, there is a continuous flow of users from the existing to new platforms.

The role of the PSB in society is to provide services - with certain distinct qualities - to the population. It should be kept in mind that PSB have an important democratic, cultural and social role to fulfil in society. It is therefore immanent in the function of the PSB, that all available platforms are at disposal for the public service activities, in order for the PSB to reach the audience. It would be contrary to the underlying principles of public service and to the detriment of the democracy, cultural development and social coherence if PSB should be limited to certain platforms or subject to limitations on certain platforms.

Further, it seems contrary to the principle of proportionality if such severe consequences should be accepted in order to help a commercial media market, which financially is much stronger than the PSB.

Also, there is no indication that a strong PSB is to the detriment of competition. Actually reports indicate the opposite, see regarding the Mckinsey reports above in para 1.1.

Finally, it is highly unlikely that a weakening of PSB leads to advantages for the consumers and even though consumer well being is the core principle in competition law, DR is not aware of any surveys produced by the EC Commission or others that concludes that consumers will benefit from a weakening of PSB.

**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?**

It is difficult to see how further clarifications can be made if respect for the national differences - and the diversity within the public service broadcasters' remit - shall be preserved. The possible drawback could be control mechanisms that are to the benefit of third parties but to the detriment of the viewers, listeners and users of public service broadcasting.

**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?**

Today every private operator has the right to raise issues related to the scope of the public service broadcasters' activities in public, to the politicians, to the competition authorities or by filing a formal complaint to DR. This procedure is ensuring that DRs scope of public service is always subject to discussion. Furthermore, it is crucial that the purpose to fulfil democratic, cultural or social need in the society is not compromised on behalf of commercial interests.

## **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?**

DR is funded by a licence fee which is collected by DR and paid directly from the user to DR. Accordingly, our answer is based on a model which does not have state funding.

DR cannot make public service activities subject to payment. This rule applies to all media platforms. In the public service contract between DR and the Ministry of Culture it transpires that the following two types of remuneration are not seen as "payment". The first situation "technical transmission costs" transpires from the explanatory memorandum and needs no further explanation. The second situation occurs in those situations where DR receives copyright payment according to the Copyright Act. This is mainly relevant regarding retransmission of DRs signals in cable and on satellite.

There is one exception to the principle described above. It is a public service obligation of DR to maintain several orchestras and choirs. In order to cover some of the expenses of these activities DR is entitled to demand payment for access to concerts.

The impact on competition is always present when providing public services to the public. This is apparent whether one talks about radio and tv or about on-demand services and orchestras. In the case of a broadcaster almost entirely funded by a licence fee, it is immanent to public service to have an impact on competition.

In DRs view, the impact has both positive and negative elements. On the negative side is the fact that commercial players may find it more difficult to conquer market

shares. On the positive side, the population is more likely to receive better media services when there is a strong PSB on the market to make the consumers appreciate quality content. Quality is subjective and we are aware that the quality issue has not yet been addressed by the EC-Commission. However, taking into account the fact that competition rules have the ultimate purpose of serving the consumers, we find it relevant to put emphasis on quality as an important element in the competition assessment. It is notorious, that quality plays an important role for the consumers.

In order to diminish the impact on competition, rules could be adopted that PSB should sell their public services at a price which is at market level. Such a rule would certainly lead to a lot of complaints regarding the determination of the market price especially taking into consideration the high quality of the service provided by the PSB. Further, a PSB like DR, which is almost entirely funded through a licence fee, would not be able to ask the public to pay market price for services, which they have already paid for through their licence fee. Such a rule would be entirely contrary to our funding system.

Based on the above, it is DRs view that the positive effects from the perspective of the population outweigh the negative effects. Our commercial competitors will undoubtedly focus on an array of negative effects but based on our experience such criticism cannot be avoided. When deciding to have a strong cultural media organisation to provide social coherence and boost democracy one has to realize that the commercial market will find it unreasonable that such an entity performs activities which the commercial players could make money on. Whether or not that is true depends on whether the spectator is preoccupied with making money or whether he puts emphasis on culture, a media strengthening democracy and social coherence.

It is possible, and indeed observed, that a pay service can cultivate a new market where there was none before, and by doing this open and create a market that will not only benefit the consumer but in the longer run also commercial suppliers.

The pay services can furthermore be the place to test new services in the market with no risk for commercial providers. This takes place when switching to new transmission techniques like DAB.

**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?**

Whether or not a service should be regarded as public service or a commercial activity depends on the mandate given by the state in question.

As other activities - pay services, if performed as public service, should serve the cultural, democratic and social needs of society. In our view there is no legal basis for further requirements.

The EC-Commission should be very cautious in labelling public service activities as "manifest error". Two points are of particular importance: First, the fact that culture is a national and often regional matter, which is likely to make it impossible for the EC-Commission to assess whether a service meets democratic, cultural or social needs of the country or region in question. A rule like the one that transpires from Commission decisions that certain internet services are manifest errors if included in the public service remit, is highly questionable. Second, the needs of society change over time. Consequently, DR considers it wrong to make rules on what content cannot be considered public service.

DR acknowledges that this area is characterized by its changing nature. However, we do not agree that the answer to that is setting up rigid rules, which restricts the performance of public service activities more than necessary. Such measures would in our opinion be contrary both the principle of legality as well as the principle of proportionality.

A market failure model is only relevant to those that are against PSB as a real non-commercial alternative.

## **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?**

DR's revenue from commercial activities amounted in the year 2007 to 96 million DKK (13 million EURO). This equals approximately 2.6 % of DR's total revenue of 3.623 million DKK (487 million EURO).

The major part of the revenue (app. 65 million DKK - 9 million EURO) related to commercial activities comes from "DR Multimedie" which mainly sells merchandise in the form of DVD's, CD and books. Most of the merchandise is related to DR's PS programs. Other major sources of revenue from commercial activities include rent from transmitter masts and technical production services

The major part of the commercial activities and the larger areas such as "DR Multimedie", have a structural and functional separation from public service activities. Small and new areas are not structurally and functionally separated. However, accounts are at all times separated from the public service accounts in accordance with the implementation of the transparency directive in national Danish legislation. All commercial activities are carried out on market terms.

**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?**

DR sees no need for additional structural and functional separation of its commercial activities. As indicated above in 2.5.1 DR finds it advantageous - administrative and cost wise - that small and/or new commercial activities are integrated until they have a size where it is relevant to separate them. An initial separation of all commercial activities will be unreasonably onerous on the administrative level.

**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?**

DRs method for cost allocation is adapted from the transparency directive and considered to be adequate in order to accurately calculate DRs commercial activities in accordance with the current rules. However the method is considered to be relatively

complex and administratively onerous. Being a relatively small PSB with limited funds to administration DR would like a simplification of the method.

**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?**

Yes, it is DRs view that a revised Broadcasting Communication should contain further clarifications of transparency requirements for smaller PSB. As stated above the current rules are considered complex and burdensome to administer and DR would appreciate a simplification of current rules.

**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?**

It is DRs opinion, that the Broadcasting Communication must include a requirement for the Member States to clearly lay down the parameters for determining the compensation amount. EU has a large number of member states with a very varied culture and tradition of Public Service. Public Service is not - and should never become - an element of competition, so it must be up to the individual member states to lay down output and compensation amount.

Parameters for determining the compensation amount is in line with the demand from commercial broadcasters, that PSB can use no more money on an activity, than a commercial broadcaster would use to carry out the activity. This will entail a decrease in quality to the detriment of the consumers. For example, when producing drama series in DR the cost per minute (of the broadcasted end result) is app. EUR 14,000 whereas the estimated costs of drama productions carried out by commercial broadcasters are app. EUR 5,000. If such a rule was adopted it would lead to a decrease in quality of the productions. It would most probably lead to a situation favourable to commercial broadcasters as the general level of quality would decrease but it would most certainly be to the detriment of consumers and society as a whole.

We refer the Commissions attention to the fact that the extra cost actually does materialize into an increase in quality. In competition with the rest of the world DR in

2002 won an Emmy for the Drama series "Unit One"; in 2003 DR won again with the Drama series "Nikolaj and Julie" and again in 2005 DR won with the drama series Emmy award with "The Eagle". In 2007 DR was nominated with the Drama series "The Killing". Currently, DR is sowing the two series "Summer" and "Album".

When broadcasted in Denmark, the series have very high ratings between 1.5 and 2 million viewers.

It is DRs ambition, to continuously produce Drama among the best in the world.

**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?**

DR finds that the current rules are not sufficient to allow reasonable financial planning. The reason is the fact that the current rules do not allow sufficient consolidation of the PSB as well as the rules prohibits a financial buffer and the transfer of an annual profit. The rules need to be altered in order to take into account the market conditions for PSB

**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?**

In order to consolidate the company or make investments in buildings, production equipment etc. or withstand fluctuations in the market, it is necessary for the PSB to generate and keep a surplus. Without a transferable surplus, it is not possible for the Public Service Broadcasters to provide a long term and healthy financial planning.

We also refer to 2.1.2.

**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)?**

From DRs perspective, the current measures e.g. the access to file complaints and the constant public attention on every move made by the PSB, render separate measures irrelevant.

In all events, the PSB would only be able to make use of a surplus within the limits of the mandate containing the public service obligations. As stated earlier it is necessary for a good financial planning of the company to have a surplus at disposal in order to reinvest, consolidate, etc. If any surplus is earmarked for new and different projects, it would make this planning extremely difficult.

**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?**

It is obvious that there is little incentive to achieve efficiency gains if you do not in some way experience advantages due to your effort.

DR has for other reasons been undergoing several financial reductions as well as cutbacks in staff over the past 10 years and it is our impression that DR is indeed run in a very efficient way. In fact, it is our experience that reductions has been taken to such a level that the state must be careful not to remove the basis for DRs fulfilling of the public service obligations.

Generally speaking, it is our opinion that a very restricted environment with very detailed demands on the output and a fixed amount to be produced, could very well result in a situation where there is no incentive to find efficiency gains. Only if the broadcaster has the possibility to make use of the gains to enhance the production and provide more programming and services for the consumers is the right incentive in place. We find it very important to ensure that these incentives are kept intact, in

order to make the broadcasters able and willing to develop their companies in accordance with the media environment.

**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?**

We refer to 2.1.2.

**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?**

Private operators have the following four ways to challenge anti-competitive behaviour of PSB:

1. Complain to the national competition authority (Konkurrencestyrelsen)
2. Complain to the EC-Commission
3. File a lawsuit against the PSB
4. Complain to the Ministry of Culture in order to put political pressure on the PSB.

In Denmark, only option no. 3 has not yet been used. To our knowledge, a complaint to the EC-Commission over a Danish PSB has only taken place with regard to TV2.

The mechanisms outlined above are effective. The complaints regarding DR are usually communicated directly to the minister of culture in order to put political pressure on DR. This procedure can be very effective depending on the political situation.

In some cases the complainants direct their complaint to the national competition authorities (KS). In that case a formal proceeding takes place and ultimately, the case may end by declaring the activity contrary to competition rules and imposing a fine.

DR have experienced a few complaints to KS all of which have been dismissed or settled.

Overall, DR considers that the existing procedures are efficient and providing both access to put forward complaints as well as an opportunity for DR to provide additional relevant information.

**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?**

The requirement regarding separate accounts and market conditions transpire from the Transparency Directive, which is implemented in Denmark. Consequently there is no need for further legal clarification.

**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.**

There are no formal limitations regarding the methods to detect price undercutting. The method used to lifting the burden of proof is in principle free. Competition authorities or a third party may use whatever necessary to prove their case before the national Danish courts.

**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?**

No distinction should be made with regard to premium sports rights (hereinafter referred to as "PSR").

DR is aware that the Commission is reluctant to let PSR being broadcasted on non-commercial free-to-air channels. The ratio decidendi is apparently that such use of PSR suffocates the commercial broadcasters who can make profit on the broadcasting and that it consequently distorts competition.

DR does not agree with the EC Commission approach and refers in particular to the following:

1. Consequences in the future: The basis for view of the EC-Commission must be that PSR is a right of high commercial value. The commercial value principally depending on the ability of the PSR to attract viewers which can be subject to the commercials broadcasted in breaks, half-time etc.

It is true that PSR are commercially interesting, but that goes for a number of TV-concepts in the cultural entertainment area e.g. X-Factor, Hot on Ice, Let's Dance and the in-house drama productions of DR which have very large ratings indeed. If all these types of programmes were assessed on the same principle as PSR, none of them could be broadcasted on public service free-to-air channels but would only be available to commercial broadcasters. Public service broadcasters would be left with broadcasting commercially non interesting content, which is content that most of the population takes no interest in - the market failure approach.

The aim of competition regulation is to bring benefits from competition to the consumers. It is however, apparent that the results of the proposed distinction are unsatisfactory to the consumers in more than one way. First, it is socially irresponsible to leave the lower social classes in a position where they may not be able to receive the cultural content that they appreciate. This has already happened to a certain extent as small public service broadcasters like DR, are unable to pay the exorbitant amount of money which the PSR right holders ask for - this proposal will make sure that the cultural content will be even more limited for those who cannot afford to pay the required, large sums of money. Accordingly, the suggested distinction will create the conditions for the emergence of a culturally suffocated social class which are bound to get the feeling that it is no longer member of society on equal terms. It is the opinion of DR, that it is one of our most important task to provide content which will lead to social coherence and part of this is to aim at all segments in society.

Second, based on the competition situation in the media market in Denmark, there is little doubt that a strong public service broadcaster is to the benefit of the media output and thus to the benefit of the population. For instance, DRs in-house production of TV-series have recent years had great success. The productions are of a very high quality and DR has recently received three Emmys each for best TV-series outside the U.S. I refer to 2.6.1 above. The success connected to DRs award winning Drama series has entailed a number of Danish Drama productions outside DR. TV2 and Viasat have launched their own series. Both channels have enjoyed success in this area.

Based on the above, it is DRs view that there is no legal basis for making the distinction regarding PSR.

2. Sport is culture: PSR may be commercially interesting, but that cannot change the fact that PSR is part of the cultural life of the nation. Just because it can make money does not mean that it is not culture. That goes for all sports at all levels but is particularly emphasized when it comes to the performance of national teams in popular sports like handball or football.

The EC-Commission approach tries to subordinate culture to a commercial assessment. It is of-course not possible, nor desirable to make such a decapitation of culture.

3. PSB and competition distortion: DR provides content to the population in Denmark. Content, which is free of commercial interests. There are no adverts, no product placement, no company or politician can buy time on-air, no one can pay to influence our programs in any way. DR cherishes this principle and we feel that it is highly important for the viewers to have a non-commercial alternative. A content provider where the news are objective, the entertainment free of hidden commercial messages, sport commentators with no particular interest but to enhance your experience, etc.

From time to time, commercial broadcasters complain that we have to high viewer ratings but to see this in its right perspective the following must be taken into account:

3A. Acquisition of sports rights

Over the past 5-10 years it has become apparent, that DR will in the future not be able to compete for PSR. The costs of the PSR have reached a level which clearly supersedes the financial ability of DR.

Consequently, DR rarely acquires PSR and when we buy them, we do it in a joint agreement with another media, public service or commercial. We either split the rights or make sub-licence agreements.

### 3B. The turn-over size of the market players

We believe that this question is aimed at larger and financially much more powerful PSB than DR. For the comparison I refer to the market description above in which the two providers of satellite TV were mentioned, Viasat and Canal Digital. The parent company of Viasat has an annual turnover three times as much as DR - the parent company of Canal Digital has an annual turnover of thirty times that of DR. None of these companies have public service obligations and may concentrate their efforts on commercially interesting activities. It seems quite unnecessary to weaken the PSB further in order to clear the way for our strong commercial competitors.

## *2.8. Other issues*

### **2.8.1. Do you consider that the reference to the difficulties of smaller Member States is necessary?**

Yes - PSB in smaller member states have smaller budgets and smaller administrations. Consequently, the procedures which the Commission wishes to apply will be more onerous to smaller PSB.

### **2.8.2. What would you consider to be typical difficulties of smaller Member States and how should these be taken into account?**

Structural and functional separation with regard to all commercial activities would be very burdensome and in our view disproportionate. From time to time, DR launches small commercial probes in order to see how the users respond or to see if there is a market. Such initiatives are of a very limited financial value and the costs of a functional and structural separation would not correspond to the formal effect of the separation.

### **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.**

The impact of the amendments suggested by DR is primarily legal certainty, ability to withstand financial fluctuations and perhaps a profit.

It is hard to say whether or not it will entail an increase in workforce. The workforce depends on the number and kind of services DR must provide. If a profit is used to initiate new services or extend existing services, it may well lead to an increase in work force. In the current situation, a profit would most likely be used by DR to cover deficits from the past regarding the building of the new domicile of DR.

If a profit was at the disposal in DR, it is likely that it would be used to produce new services or to enhance the quality of services already planned. The latter could be the case if DR decided to record a new TV-series in HD quality, provide a more expensive lights setting or produce better settings, etc. There is no doubt that an increase in funds would benefit the consumers due to the increase in quality or extended choice of services, as described above.

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

As we have suggested above, future rules must provide for a simplification and thus a less onerous administrative burden on PSB. Consequently, we do not support amendments which lead to a more onerous administrative system.

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

No, not necessarily. As stated above, DR believes that some of the outlined clarifications are either unnecessary or with negative consequences.

**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.**

We kindly refer to our answers above