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EFTA SURVEILLANCE
AUTHORITY

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Dear Mr Madero,

Subject: Revision of the Communication from the Commission on the application of State aid rules to public service broadcasting
- Views of the EFTA Surveillance Authority -

Reference is made to your letter dated 9 January 2008, received and registered by the EFTA Surveillance Authority (hereinafter referred to as the Authority) on the same day¹, inviting the Authority to submit its views on the revision process of the Communication from the Commission on the application of State aid rules to public service broadcasting (hereinafter referred to as the Broadcasting Communication).

Thank you for consulting the Authority on the above-mentioned subject matter. Below, the Competition and State Aid Directorate (hereinafter referred to as the CSA) of the Authority will provide answers to some of the questions attached to your letter, following the numbering of your questionnaire.²

As a general comment, the CSA welcomes the initiative of the Competition Directorate-General (hereinafter referred to as DG Competition) to undertake the revision process of the Broadcasting Communication. In view of the technological developments in the broadcasting sector and related sectors, changes to the Broadcasting Communication appear necessary in order to provide the public authorities of the Member States as well as market players with legal certainty as to the rules governing the granting of compensation for the provision of services of general economic interest (hereinafter referred to as the SGEI) in the broadcasting sector. In this context, it seems also imperative to take into account the most recent developments in the decision-making practice of the European Commission.

1.1. The CSA is in favour of up-dating the Broadcasting Communication in light of various market and legal developments since the adoption of the original text in

¹ Events No 459722, 459723, 459724 and 459725.

² Questions, to which the Authority has not found reasons to provide any comments, have been left out.

2001. On the basis of its experience with state aid cases in the broadcasting sector, the CSA has observed that, in the meantime, the structure of broadcasting and neighbouring markets has significantly changed and is currently characterised by a high level of convergence. It appears that this feature, as well as adoption of certain regulatory instruments at the Community level (like the Television Without Frontiers Directive and the Audiovisual Media Services Directive mentioned by DG Competition), call for a more precise set of criteria, according to which the Commission can authorise state aid granted for the purpose of provision of broadcasting services of general economic interest.

- 2.1.1. Recent Commission cases have shown that the application of the criteria developed in the *Altmark* jurisprudence cannot easily be put into practice in the public service broadcasting sector. In particular, it proved to be very difficult to fulfil the fourth *Altmark* criterion. On one hand, Member States very rarely decide to run a public tender to choose the undertaking to be entrusted with the public service mission, as in many instances, the tasks have been provided by the same company, very often with a public ownership or origin, for many years. On the other hand, in many Member States, a comparison of the costs structure with a private well-run reference enterprise in the sector is not possible, simply due to the lack of a benchmark undertaking. Particularly in smaller Member States, there often exists only one broadcaster with an appropriate level of experience and expertise that can be entrusted with the public service remit.

However, these difficulties should not prevent the compensation for public service broadcasting from being declared compatible on the basis of Article 86(2) EC. As expressed above, following the need to define more precisely the criteria for the application of Article 86(2) EC to the broadcasting sector, some inspiration could be drawn from other sectors and documents such as the generally applicable Commission Decision (hereinafter referred to as the SGEI Decision) and the Framework on public service compensation (hereinafter referred to as the Framework).

- 2.1.2. Generally speaking, it would seem natural to incorporate into the new broadcasting framework those instruments of the SGEI Decision and the Framework which have already been applied by the Commission in its decision-making practice, for instance, the *ex ante* entrustment mechanism with a wide public consultation on the market as regards the entrustment of a public service broadcaster with new services. For the sake of greater transparency, the Authority would also welcome the requirement of separate accounts distinguishing between certain separate public service obligations. The same applies to regular control and rules for returning overcompensation which seem to require further clarification.
- 2.2.2. On the basis of its own experience with broadcasting cases, the CSA considers it necessary to provide additional guidance regarding the distinction between the public service and other activities of a public service broadcaster. In view of the very wide discretion of Member States in defining the public service remit, it would be very difficult for the Commission, or the Authority, to influence the substance of the activities provided as SGEI, unless a manifest error could be easily identified. However, from the procedural point of view, some mechanisms could be suggested in order to ensure that some minimum standards are fulfilled, for example, the public value tests as applied by the UK authorities to the BBC entrustment. Establishment of a “negative” list by the Member State (i.e. purely

commercial activities), or establishment of a “positive” list with public service activities currently performed by the public service broadcaster, in combination with an *ex ante* entrustment based on certain indicative criteria and with a wide public consultation for any new activity to be assigned in the future are other possible mechanisms.

In this context, the CSA would like to suggest that, after consultation with the national authorities responsible for broadcasting matters, the Commission adopts a Best Practices document for the purpose of application of Article 86(2) EC in the broadcasting sector. Best Practices could exist in addition to the revised Broadcasting Communication as a more detailed and, at the same time, dynamic instrument which would give the Commission the opportunity to react to market developments very quickly and in a non-binding manner (i.e. also quickly reversible, if necessary). As a document at the Commission services level, the clear advantage of Best Practices is that it can be easily and quickly amended and adjusted to changing situations. Best Practices could at the same time work as a kind of recommendation of certain procedures or instruments and could also be a source of inspiration for those Member States which do not have a lot of experience in application of state aid law in the broadcasting sector. Establishment by the Member States of an illustrative list of commercial activities not covered by the public service remit could be an example of Best Practices.

- 2.2.3. Activities serving the “democratic, social and cultural needs of society” can be interpreted in a very broad sense and include a whole range of different services. This does not provide sufficient clarification for other market players as regards which activities the public service broadcaster is supposed to engage in within its public service remit, thereby creating unnecessary legal uncertainty. In light of a very wide discretion of the Member States to define SGEI, it seems very difficult for the Commission to further clarify this term with regard to the substance of the services in question. However, as already mentioned, certain instruments, like the *ex ante* entrustment could be used for the purpose of informing market participants on new services national authorities would classify as SGEI.

The above considerations concern also entrustment of public service broadcasters with a separate SGEI other than in the broadcasting sector (e.g. in the field of education).

- 2.2.4. Based on the foregoing, the CSA is of the opinion that the determination of the public service remit based on an *ex ante* evaluation could be incorporated into the revised Broadcasting Communication.
- 2.2.5. The Commission could suggest some minimum standards for an *ex ante* evaluation of the public service remit by the Member States, either in the new Broadcasting Communication itself or in the form of Best Practices.
- 2.2.6. The CSA would welcome that all new services, of whatever nature, which are not currently performed as SGEI by the public service broadcaster in question, are subject to the *ex ante* evaluation. This applies for new media services as well as any other activity, also in the traditional broadcasting sense, which the Member States’ authorities wish to assign to the public service broadcaster.

- 2.2.7. Reference is made to the answer to question 2.2.5. As examples of some minimum procedural standards or best practices could be mentioned: minimum time for public consultation, requirement of wide publication of the consultation at the national level, obligatory consultation of certain institutions having significant expertise in the sector or on the subject matters concerned, requirement of taking utmost account of the comments of consulted sectoral organisations or public authorities. Also some minimum evaluation criteria could be established such as assessment of added value, market failure, etc. A full list of best practices in this regard could be based on the relevant case-law and Commission decision-making practice and completed by new examples.
- 2.3.4. In the context of effective supervision of public service broadcasters, the CSA would welcome further clarification of the characteristics of an independent authority. Based on the CSA's experience in handling broadcasting cases under the current rules, it is unclear what is meant by an independent monitoring (and, in fact, entrusting) authority. The CSA would suggest that an institution (e.g. a ministry) which is at the same time the owner of the public service broadcaster, or a body which is not organisationally separated from the public service broadcaster cannot be accepted as an independent authority. However, on the basis of current Commission practice, the CSA is not certain as to which degree of functional separation could be acceptable for the purpose of establishing effective entrustment and monitoring of public service broadcasters. Some further guidance in this respect would contribute to a better understanding of the rules governing state aid control in the broadcasting sector.
- The CSA would also welcome it if the Commission encouraged the Member States to build up media authorities with expertise in the sector. The CSA has observed that this is of particular importance in smaller Member States.
- 2.3.5. Provided that the *ex ante* entrustment mechanism works effectively, problems related to the scope of the public service broadcaster's activities would be reduced. However, as a back-up solution, a complaints procedure at national level could be provided, for example through the special competences of a national media authority.
- 2.5.4. The transparency requirements, in particular the principle of separation of accounts, could be further clarified by providing some guidance (for example in the form of best practices) as to preferable cost allocation methods to be used by public service broadcasters.
- 2.6.1. In the CSA's view, the revised Broadcasting Communication should include a requirement for the Member States to lay down, at national level, clear parameters for determining the compensation amount. In this context, some recommendations could be provided in the form of Best Practices.
- 2.6.2. When planning investments, including long-term investments, private companies normally rely solely on their own financial means or borrowings on the financial markets secured against their own assets. The financial stability of public service broadcasters seems to be sufficiently guaranteed by yearly compensation. There seems to be no need for an additional strengthening of the position of public service broadcasters by allowing them, without restrictions, to keep a surplus and to use it for whatever purpose.

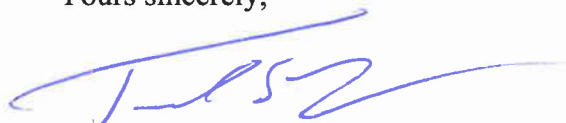
- 2.6.3. First, it should be stressed that any surplus is in principle an overcompensation, i.e. unlawful state aid. As such, it should be returned to the state authorities at the end of the financial year as it infringes the underlying principle of no overcompensation. The CSA would welcome a clear statement of the above principle in the revised Broadcasting Communication, before any exceptions from this rule are accepted by the Commission. That being said, it seems incomprehensible at this stage that the provisions concerning the possibility for public service broadcasters to keep, for example, up to 10% of annual surplus, are not incorporated, as this rule has been already acknowledged by the Commission's decision-making practice. It should not be possible, however, for a broadcaster to apply these rules for several years thereby accumulating large funds.
- 2.6.4. In answer to this question, the Authority refers to the suggestion of the establishment of Best Practices guidelines. In any case, it should be clearly stressed that any possibility of undue distortions of competition should be avoided and any cross-subsidisation excluded.
- 2.6.6. A market economy investor may choose to take dividends from his company or retain earnings within the company. The same should apply to public service broadcasters with regard to their commercial activities. It seems natural that any profit on public service tasks should be transferred to the owner or set off against future contributions to the company, subject to the possibility for public service broadcasters to keep some profit as referred to in 2.6.3. above.
- 2.7.2. At this stage, it would appear inconsistent with the Commission's decision-making practice if the requirements for public service broadcasters to respect market conditions when carrying out commercial activities, including appropriate control mechanisms, were not incorporated into the revised Broadcasting Communication.
- 2.7.4. Regarding the question of acquisition of sports rights, the CSA concurs with DG Competition's view that public funding of premium sports rights does not *per se* unduly affect competition and trade conditions across the EEA. In many Member States, law provisions require that public service broadcasters, which often have the widest coverage in the country, should hold the sport rights to certain events of general interest, for example, the Olympic Games. Possible adverse effects on competition could be addressed on the basis of the provisions of antitrust law at national or Community level. From the state aid perspective, it could be stressed again that in order for a definition of the public service remit to be considered sufficiently clear and precise, it is required that the programming activities follow the rules of balanced and varied choice of programmes. A Best Practice document could give some further guidance in this regard.
- 2.8.1. As already mentioned above, amendments to the Broadcasting Communication with a view to providing additional clarifications and to aligning it with the current Commission's decision-making practice would certainly contribute to increasing legal certainty for all involved stakeholders.

On a more procedural note, the CSA wonders which form the revision of the Broadcasting Communication would take and whether the Commission is considering addressing appropriate measures to the Member States.

As there is no confidential information contained in this letter, the response can be published in its entirety.

Finally, the Authority would like to apologise for the delay in transmitting this response.

Yours sincerely,



Tormod S Johansen
Acting Director
Competition and State Aid Directorate