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Submission of the
European Newspaper Publishers' Association (ENPA)

to the

Public Consultation on the review of the Communication from the
Commission on the application of State Aid rules to Public Service
Broadcasting

March 2008

European Newspaper Publishers Association (ENPA) is a non-profit international organisation representing 5,200 titles from 26 European countries through its 29 member associations. It represents the interests of newspaper publishers to the European Institutions.

More than 140 million copies of newspapers are sold each day and read by over 280 million people in Europe. Newspapers online have a significant number of unique visits on their sites on daily basis.

Part 1: General Comments

- Like public service broadcasters (PSBs), newspapers operate in their national markets. Cross-border sales of printed newspapers are marginal: generally less than one percent. Online newspapers are mostly read in Europeans' own languages and close or at their place of living.
- For these reasons this ENPA submission focuses on issues on more general level; some of the 29 ENPA's member associations have made their own detailed submissions directly to the Commission. A full list of ENPA members can be found on www.enpa.be.
- The Communication is consequently a necessary tool which should give specific guidance to the EU Member States to lay rules for their PSBs.
- Member States should maintain the competence to decide on their own media policy or policies. ENPA sees no reason to justify the introduction of EU-wide media policy rules.
- ENPA sees the Commission's consultation on the Communication as an important step forward to an appropriate and urgently required comprehensive review of the existing Communication on the application of State Aid Rules to Public Service Broadcasting and new EU Recommendation.
- ENPA supports updating or completely reviewing the Communication and believes that in today's media and communication landscape, and the role of state funded "public service" within, requires major changes in order to redefine the remit of PSBs, balance different interests at national level while at the same time taking competitiveness and survival of commercial media and online newspapers in particular into consideration.
- We also believe that the revised or updated rules should follow the principles of transparency, proportionality and accountability as the Commission is proposing in its basic document.
- Public service broadcasters in Europe have expanded their activities with public funds on the internet which compete with commercial media companies' operations. With public money - and in many cases also with advertising revenues - PSBs are producing services with hardly any difference from commercial competitors such as newspapers publishers. PSBs have expanded their remit outside the traditional broadcasting activities and are no longer serving the public interest or meeting the public value test as they used to do. Furthermore, in many countries PSBs enjoy advertising revenues in addition to state funding which puts additional pressure on the commercial sector and inevitably distorts the market.

ENPA would like to draw the Commission's attention especially to some of the challenges that newspapers are facing in the internet environment with PSBs activities:

- The presence of PSBs on the internet is substantially different from the traditional broadcasting market. On the internet they operate almost as publishers with the difference being that publishers have to rely on revenues (subscriptions or advertising) to finance their online operations.
- PSBs in the EU have used licence fee incomes to create a strong presence on the internet, through the development of content, the exploitation of brands and privileged access to promotional space across their media networks, thereby building audiences which will effectively constrain the development of commercial competition.
- The ability of PSBs to outspend their actual and potential competition in terms of content, staff, promotion and technology means that they have an unbeatable advantage in outperforming commercial companies in generating audience.
- The impact of high expenditure by PSBs on the development of online publishing is fundamental: reduction of audience and revenue potential for the different content providers currently in the market. It reduces the total number of users and therefore page impressions in the commercial sector and thus the total potential advertising revenue in any market. Hence, the presence of PSBs in an online publishing sector harms current commercial providers, reduces the potential size of the commercial market and restricts the ability of new entrants to effectively enter the market.

Part 2: ENPA Responses to the Questionnaire

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?

We look forward to seeing the Communication updated and/or reviewed in the light of the developments in the media setting as well as the existing legislation. Any changes to the Broadcast Communication, which will lead to more legal certainty, while at the same time creating a level-playing field for all media are encouraged.

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.

We are willing to offer the resources of the World Association of Newspapers (WAN) of which ENPA is an affiliated member, to provide relevant data on the shares of different media (newspapers, radio, television) in terms of advertising revenues in all of the 27 European Union Member States in case the Commission would find this useful.

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?

Please find our comments at the beginning of the submission. We consider that the current rules should be adapted to meet the demands of the current and future situations. We believe that the market for new online media services is growing and that it is essential that the revised Communication seeks to ensure that a competitive and undistorted market shall exist.

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

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.

ENPA is a joint association representing national publishers' associations at EU level. Therefore, we refer you to the detailed submissions made by our member associations.

However, our members are all in agreement that a revision and tightening of the definition of the public service remit is required in their country since there is rarely a reference to the new media activities.

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?)?

We are of the view that the said distinction should be made clearly in the Communication. Firstly, the remit of the public broadcasting should be defined, and secondly a list of commercial activities which are not considered to be within the remit of the public service function, should be made in a negative format. That is, listing activities that are not in the public service remit.

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?

In addition to our general and specific comments at the beginning of the submission, we consider that the concepts of “democratic, social and cultural needs” are too vaguely defined and should be clarified in order that they do not offer PSBs an open mandate to develop services (internet, mobile etc) that would not be necessary to meet the limits of their remit, and which would compete with the operations of commercial media operators, thereby distorting the online and digital media market.

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

We believe that the concept of ex ante evaluation should certainly be included in the Communication.

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

Yes, we believe so.

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

ENPA believes that all services financed by the public purse should be subject to rigorous ex-ante analysis, but in particular all the new “non-traditional” services, especially (i) internet activities, (ii) mobile and similar activities, (iii) sports rights acquiring activities and (iv) similar direct or indirect commercial activities, which potentially go beyond PSBs remit and compete with commercial media operators such as online newspaper publishers.

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)?

ENPA believe that the evaluation mechanism included in the revised Broadcasting Communication should contain not only aspects regarding procedural rules and the evaluation criteria, but also the involvement of third parties and their legal status.

2.3. Entrustment and Supervision

Since all of these questions are EU Member State specific, ENPA is not in the position to provide replies to these questions. However, we believe that supervision is required by an independent institution/regulator at national level which should be given the means to impose meaningful decisions and/or sanctions.

2.4. Dual funding of public service broadcasters

2.4.1. What is - in your view - the expected impact of (partly) state-funded pay-services on competition?

Newspapers as businesses generate revenues from sales and advertising. On the internet the revenue model is predominantly based on advertising. When PSBs get their revenues from the taxpayers - in one way or the other - and compete directly with online newspapers, these state funded internet operations distort competition. Therefore the negative impact is, in our view, very significant.

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, and existence of other similar offers on the market, inadequacy of existing public service obligations or inadequacy of existing funding to meet particular citizen needs?

Pay-services should be regarded as purely commercial activities. One could well ask why they shouldn't be regarded as such activities. We are of the view that PSBs should not be involved in pay-services (direct or indirect commercial activities) when there are for example newspapers who are offering exactly similar services. In addition, pay-services should not be part of the public service remit.

2.5. Transparency requirements

These questions are country specific and hence we rely on the fact that the member organisations will provide the necessary information.

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?

In the name of transparency both the sources of funding and the actual accounts should be disclosed.

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)?

We are strongly of the view that these types of issues should be detailed in the Communication in order to set clear guidelines for the Member States.

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?

Similarly, we are strongly of the view that these types of issues must be detailed in the Communication in order to set clear guidelines for the Member States.

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?

This is a country specific question and hence ENPA refers you to the responses of its member associations.

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?

ENPA strongly believes that these requirements are absolutely essential in order to prevent any distortion of competition.

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.

As we have explained in the general part of this submission, competition between newspapers at national, regional and local level is not guaranteed if PSBs compete directly with online newspapers. And in cases where PSBs are able to finance their activities with advertising revenues, the situation is even worse. For this reason price undercutting of advertising prices should be completely banned. The ideal solution would be to forbid PSBs to use advertising revenues to finance their activities or operations.

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?

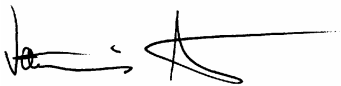
Newspapers have experienced difficulties with event organisers as far as their (sport) journalists' reporting on newsworthy events is concerned. Irrespective who is the exclusive broadcasting rightholder, access to events and the right to report should be guaranteed in an EU-level instrument. AVMS Directive guarantees this right to non-exclusive right broadcasters but this rule is not applicable to newspapers. This issue needs to be addressed in the Communication. We are willing to help the Commission draft this text.

3. FINAL REMARKS

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

Yes we do, and also create a better-functioning media environment.

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