

Brussels, 7 March 2008

Position on the

Review of the Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting

1. GENERAL

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

EURO-MEI response:

The decisions taken in the state aid cases since the entering into force of the Communication on the application of State aid rules to public service broadcasting adopted in 2001 (hereafter "the PSB Communication") prove in our view that the Communication allows to take into account the dynamics of the technological developments, in particular the digital convergence resulting in the emergence of new platforms of distribution and new broadcasting services. The adoption of the Audiovisual Media Services Directive (hereafter "AVMS Directive") contains a dynamic definition of broadcasting and delivers a clear and yet flexible definition of broadcasting services in the digital economy. Although from a legal point of view there is no direct relationship between the AVMS Directive and the PSB Communication these two legal developments are coherent and complement each other. The PSB Communication and the AVMS Directive constitute a solid and flexible framework, which takes into account the specificities of the sector and its dynamics. We believe that the current legal framework is solid and flexible enough to function well in the immediate and medium future.

We would like to stress the importance of the Amsterdam Protocol and point out that any new legislation needs to respect the principles laid down in the Protocol. In line with the Protocol Member States can and do formulate remits for public service broadcasting that are much broader than the scope of the AVMS Directive (such as radio and interactive services for example).

Any new text needs to ensure that public service broadcasters will be able to continue to develop new services and offer access to citizen on all available existing and future distribution platforms. New legislation has to enable public service broadcasters to fulfil their public service missions and evolve with the same dynamic as other players in the audiovisual sector. An eventual update of the PSB Communication needs to guarantee the

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fundamental role of public service broadcasting in the digital environment as expressed in the AVMS Directive and the Resolution of the Council of Ministers on Public Service Broadcasting (1999) as well as the in the Recommendation of the Committee of Ministers of the Council of Europe on the remit of public service media in the information society (2007).

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.*

EURO-MEI response:

We would like to underline the following key factors, which affect the competitive situation within the audiovisual sector.

The broadcasting market in Europe is characterised by fragmentation of market shares (increase of channels), relatively high concentration of ownership and growths of multinational groups (e.g. RTL Group, News Corporation, Mediaset, ProSiebenSat1). Commercial broadcasters have increased their advertising revenues and we expect them to increase further due to new opportunities (new techniques and more flexibility is allowed under the new AVMS Directive). New media platforms are gaining importance and the presence of new players such as telecom companies in the digital economy will continue to increase.

Several public service broadcasters have been subject to restrictions on their revenues (e.g. in UK, Spain, France and in several new Member States), which led to restructuring and job losses as well as cuts in original production. Alarming are projects and announcements in France and Portugal to cut all advertising revenues for public service broadcasters without any previous consultation with the broadcasters and without any serious plans to ensure the sustainability and development of the public service broadcasters in such a scenario.

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?*

EURO-MEI response:

We believe that there exists a broad consensus on the key developments in the audiovisual sector in the medium future among stakeholders and analysts. These key developments are:

- Switch from analogue to digital by 2015 resulting in increase of channels available.
- Fragmentation of traditional broadcasting market.
- Increase of distribution of broadcasting and other audiovisual media services over new platforms.
- Increase of online consumption and in particular of on-demand services.
- Decrease of consumption of traditional broadcasting.
- Advertising spending will become more important on new media platforms than on traditional broadcasting.
- Increase of mobile services.
- Growth and fragmentation of audiovisual market.

In our opinion, the fragmentation of the audience share and the growth of new audiovisual media services in particular on demand services will lead to a decrease of market power of public service broadcasters within the traditional broadcasting sector and within the whole audiovisual sector. Further we expect the difference between revenues from public funds and advertising to increase further. It is also likely that we will experience further consolidation within the audiovisual industry and an increase of cross-ownership as well as growth of multinational media and telecom companies.

As far as state aid rules in public service broadcasting are concerned we believe that the current European legal framework provides sufficient flexibility and will ensure legal certainty if these developments materialise. However, regulations at Member States level may need to be adapted in order to allow public service broadcasters to adapt their remit to technological change and the digital environment in order to access to public service broadcasting services.

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.*

EURO-MEI response:

Although public service broadcasting are services of general economic interest, they have been excluded from the Framework on public service compensation. This exemption reflects the unique nature of public service broadcasting and the fact that the PSB Communication provides sound sector specific regulation. We believe that only those measures of the Framework on public service compensation should be included if they take full account of the specificity of public service broadcasting. Moreover where the PSB Communication already regulates aspects, which the Framework on public service compensation tackles as well, those rules should not be changed.

We do not believe that fewer cases concerning the financing of public service broadcasting would be notified to the Commission if some requirements laid down in the Decision and Framework on public service compensation would be included in the revised PSB Communication. We would like to stress that the objective for any update should be to achieve legal certainty and that the application of competition rules should not make it difficult to fulfil the public service mission.

2.2. Definition of the public service remit

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)?*

EURO-MEI favours a broad definition of public service broadcasting. The definition of the remit is the competence of each Member State and differences in the definitions reflect the cultural specificities of each state. In our view there is no need for further clarification between public 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?*

EURO-MEI response:

In our response to question 1.1. we have referred to the dynamic definition of broadcasting. We strongly believe that this is the key factor, which will allow public service broadcasters to fulfil their public missions in the digital economy. This principle is reflected in the Resolution of the Council of Ministers (1999) concerning public service broadcasting, in the AVMS Directive and the Recommendation of the Committee of Ministers of the Council of Europe on the remit of public service media in the information society (2007).

It is important to underline that the means of distribution are not relevant for clarifying the permissible scope of public service broadcasting activities. The crucial criteria is the content and it needs to be ensured that the content responds to the democratic, social and cultural needs of society on whatever platform this content is distributed. New services have to respond to the same criteria as traditional TV programmes.

From our point of view the PSB Communication of 2001 also reflects the principles of dynamic definition of broadcasting and platform (or technological) neutrality. Recent state aid cases have shown that on the basis of the PSB Communication the question whether new services distributed over new platforms are covered by the public service remit can be very well clarified. Our assessment is that the PSB Communication is a solid and sound tool to regulate state aid in public service broadcasting in the digital era. In our opinion the Commission should not propose new measures if the existing ones are working well. Therefore we do not see the need for further clarifications.

Further, we believe that new services should not be evaluated solely by their impact on commercial competitors and should not be regulated solely according to economic/market criteria. At worst, such an approach could lead to a situation in which free market principles are the automatic default position and in which public service broadcasting always needs to justify itself as an exception. We take the opposite view that public service broadcasting in line with the Amsterdam Protocol is self-justifying and should not be required to provide evidence of its level of impact on commercial competitors.

Finally we would like to underline that in the future the availability of public service broadcasting and new public audiovisual media services on all distribution platforms is a condition for these contents to remain public services, because of the need to give citizens universal access: the Internet as well as mobile platforms have to be open for public services if we want to preserve Europe's unique dual broadcasting system. This view is also expressed in the Recommendation of the Committee of Ministers of the Council of Europe on the remit of public service media in the information society (2007).

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?*

And

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?*

And

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

And

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)?*

And

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?*

EURO-MEI response:

The questions 2.2.4 to 2.2.8 sound to us already like proposals, which we strongly reject for several reasons.

Firstly, an ex-ante evaluation of any kind at EU level would go against the established competence of Member States to define the public service remit. The Amsterdam Protocol is very clear on this aspect and the Commission should respect the subsidiarity principle. It is the key principle guiding the distribution of competences between Member States and the EU in regulating public service broadcasting.

Secondly, the Commission already has the tool of “manifest error” to verify if necessary whether a Member State did cover purely commercial services when updating the public service mission. This ex-post measure ensures that the public service remit can evolve and respects the dynamic definition of broadcasting. Ex-ante measures would threaten innovation and development of new public audiovisual media services.

Thirdly, public service broadcasters enjoy editorial independence. This is very important to ensure quality programming and objective information services free from political pressure or interference. We believe that an ex-ante evaluation for new media service would open up possibilities to interfere with the editorial independence of public service broadcasters.

Finally, the fact that Commission is suggesting that third parties should be involved in ex-ante evaluation (2.2.7) in our view is simply going too far. Is the intention of the Commission to allow purely private interests of commercial companies, which respond to the demand of advertisers and stakeholders to influence the definition of the public service remit? Is the intention of the Commission to enable private interests to limit the scope of public service broadcasters in order to reduce competition? Positive and healthy competition is guaranteed if commercial companies and public broadcasters compete for audiences on all platforms and over the full programme landscape. That will ensure better quality of audiovisual media services, trigger innovation and will offer more choice to citizen. National and European regulations need to ensure healthy competition

not as an end but as a means to provide citizens in Europe a multimedia landscape offering quality, diversity, choice and innovative audiovisual media services. However, what the Commission is suggesting here, is favouring regulation, which would give the opportunity to commercial competitors to limit the scope of the public service remit and we regret that some (although very few) Member States have introduced such mechanisms in connection with ex-ante evaluation. Instead, EURO-MEI is in favour of national procedures, which improve good governance, transparency and rely on ex post monitoring of public services.

2.3. Entrustment and Supervision

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?*

EURO-MEI response:

There exist very different systems whereby public service remit is attributed. It is for the Member States to define the objectives of the public service broadcasting remit. Member States need further to define the mission regarding the objectives to be attained and clarify the level of discretion left to broadcasters regarding the implementation of their mission. Because of the editorial independence public service broadcaster usually enjoy extensive discretion regarding their editorial policy and the implementation of their mission.

In our view it is not necessary to provide further clarifications about the circumstances in which an additional act of entrustment is necessary in the PSB Communication, since such additional attributions would disregard the editorial independence.

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?*

EURO-MEI response:

Again we wonder what the intentions of the Commission are here. We refer to our comments to question 2.2.8 and reiterate that although that fair competition needs to be ensured private interest of commercial broadcasters should not influence the definition of public service broadcasting.

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?

And

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?

EURO-MEI response:

EURO-MEI believes that in general public service broadcasting services should be universally accessible and free at the point of use. From our viewpoint, there needs to be a special justification for pay services as part of a public service remit. Such a justification can be that the pay service is an additional service, which cannot be provided within in the current financing situation. In any case the fees need to be reasonable and should cover the costs of the service.

To take one example of an existing pay service: Online catch-up services where consumers can download programmes, after they have been shown on TV, may demand a modest fee in order to finance the service (in particular the equitable remuneration of creators and other rights holders who have contributed to the production of the programme). Obviously, all existing or new pay services need to fulfil the democratic, social and cultural needs of each society and preserve media pluralism just as for any other elements of the public service remit. As far as the example of the a catch-up service is concerned, we believe it is a very useful tool for citizens to pull public service content at any given time in and it enlarges the access to public service content.

An online catch-up pay service, which would respect the above, mentioned criteria would in our view not impact negatively on the competition.

The elements above do not represent an exhaustive list of criteria for existing or future pay services. Each existing and future pay service may be admitted within the public service remit because of different criteria than we mentioned in the example of the online catch-up service.

We do not think that it would be helpful to automatically define pay services as purely commercial services and should therefore not a priori be limited to services which are not offered on the market.

2.5 Transparency requirements

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?

EURO-MEI response:

Financial transparency is important to guarantee the separation of public service and commercial activities. In our opinion the provisions the Transparency Directive provide a coherent and sound framework to regulate the separation of public service and commercial activities.

Structural or functional separation would result in the same objective being achieved, but with additional costs which would be out of proportion to the objectives to be attained. Functional separation may be an appropriate and adequate solution for the very large public service broadcasters. However, small broadcasters would have to bear additional, disproportional costs. Therefore EURO-MEI is of the opinion that an obligation for functional or structural separation should not be included in the PSB Communication.

2.6. Overcompensation

EURO-MEI response:

Introduction:

EURO-MEI affiliates' members work for broadcasters, which also engage in commercial activity. We support such an approach on the basis of transparency as outlined above.

We would be opposed to any overtly restrictive approach to overcompensation by which surpluses from public service activities would automatically have to be returned to the state, or by which public service broadcasters were restricted in their ability to channel profits from their commercial activities into their public service activities.

We believe the approach to overcompensation is in danger of assuming that a free market approach is the default position and that a public service broadcasting is an exemption, which has to be restricted or specially justified.

We fundamentally disagree with this - especially as, in our view, some commercial broadcasters do contribute only very little to the output of original programming in Member States they operate while concentrating selectively on the most commercially attractive segments of the market. Instead of focussing on the justification of public service broadcasters overcompensation we believe that commercial broadcasters, which do not reach a certain minimum level of original programming and information should be required to pay a levy in order to subsidise the production of original programming of public service broadcasters.

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?*

EURO-MEI response:

The determination of the funding mechanism and the financial needs of the public broadcasters is an exclusive competence of the Member States. The PSB Communication does acknowledge this principle in line with the Amsterdam Protocol.

It is the competence of the Commission to check whether the amount of the compensation does not exceed what is necessary to cover the totality of costs and continuity arising from carrying out the public service broadcasting remit, taking into account related income, as well as a reasonable profit for carrying out the remit.

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?*

EURO-MEI response:

The current rules in the 2001 Communication are fairly flexible and allow for planning over several years. It is important that this current flexibility both in terms of the amount of reserve, the reservation mechanisms and the period during which the reserves are available to the public broadcasting organisation, is maintained to allow a case-by-case approach. The capacity to plan over several years and financial stability are prerequisites for the existence of an independent public service, which is able to propose services of quality and to contribute to fulfilling the democratic and social needs of society.

EURO-MEI Affiliates

Albania

Independent Trade Union of Artists of Albania - SPASH

Independent Trade Unions Federation of Private Commerce, Banking and Services – FSTBSH

Austria

Kunst, Medien, Sport, Freie Berufe - KMSfB

Belgium

ACOD/VRT

CGSP/RTBF

CSC-Transport et Communications - CSC Transcom

ACV Transcom Cultuur

CG-FGTB

Syndicat des Employés, Techniciens et Cadres de Belgique - SETCa

Landelijke Bedienden Centrale - Nationaal Verbond voor Kaderpersoneel - LBC-NVKS

Czech Republic

National Union of Mass Media in the Czech Republic – OS Media

Independent Trade Union of the Czech TV - ITU

Denmark

FAF (Danish Filmworkers' Union)

Estonia

Eesti Teatriliit (Estonian Theatre Union) - ETU

Finland

Theatre and Media Employees - TEME

France

Communication, Conseils et Culture – F3C-CFDT

Fédération des Syndicats des Arts, des Spectacles, de l'Audiovisuel, de la Presse et de la Communication Force Ouvrière - FASAP-FO

Syndicat Français des Réalisateur – SFR-CGT

Syndicat national de radio et télévision - SNRT-CGT

Syndicat National des Professionnels du Théâtre et des Activités Culturelles - SYNPTAC-CGT

Syndicat National des Techniciens et Travailleurs de la Production Cinématographique et Télévisuelle (audiovisuel) - SNTPCT

Syndicat national des techniciens et réalisateurs de la production cinématographique et de télévision - SNTR-CGT

Germany

Vereinte Dienstleistungsgewerkschaft - ver.di

Greece

Greek Directors' Guild - GDG

ETEKT – Film Union

Hellenic Entertainment Federation - POTHΑ

Syndicat de la Radio-télévision - POSPERT

Hungary

Filmművészek és Filmalkalmazottak Szakszervezete (Syndicat des Auteurs et des Employés du Cinéma Hongrois) - FFSZ (SAECH)

Ireland

Services, Industrial, Professional, Technical Union - SIPTU Film and Theatre Technicians' Branch

Services, Industrial, Professional, Technical Union - SIPTU Broadcasting Branch

Italy

Federazione Informazione Spettacolo e Telecomunicazione - FISTel-CISL

Sindacato Lavoratori de la Comunicazione - SLC-CGIL

Unione Italiana Lavoratori della Comunicazione - UILCOM

Latvia

Latvian Trade Union Federation for People Engaged in Cultural Activities - LKDAF

Lithuania

Trade Union for Creative Workers of Lithuanian Radio and Television - LRT

Lithuanian Service Workers Trade Union – LPSDPS

Luxembourg

Confédération Syndicale Indépendante du Luxembourg - OGB-L

Malta

*General Workers' Union – GWU
t*

Netherlands

Kunsten Informatie en Media - FNV-KIEM

Poland

Federacja Związków Zawodowych Pracowników Kultury i Sztuki - FZZPKIS

Federacja Związków Zawodowych Pracowników Radia i Telewizji - FZZPRT

Portugal

Sindicato dos Trabalhadores de Telecomunicações e Comunicação Audiovisual - STT (CGTP-IN)

Russia

Kulturarbeitergewerkschaft – KAG

Serbia

Branch Union of Arts and Culture - GS KiU

"Nezavisnost" Media Trade Union

Slovakia

Slovak Trade Union for Arts and Entertainment - SOZSP

Slovenia

*SUKI - Union Conference of
Freelance Workers in Culture and Media at GLOSA*

Spain

*Federación de Comunicación y Transporte de CC.OO – FCT
CC.OO*

*Federación de Empleados, Técnicos y Alimentación – FETA
de ELA*

Federación de Servicios - FeS-UGT

Técnicos Audiovisuales Cinematográficos Españoles - TACE

Sweden

*UNIONEN
Broadcasting Section*

Teaterförbundet - TF

Switzerland

*Comedia, die Mediengewerkschaft
Präsident: Christian TIREFORT*

UNIA – Die Dienstleistungs-Gewerkschaft

Schweizer Syndikat Film und Video - SSFV

Schweizer Syndikat Medienschaffender - SSM

Ukraine

Cultural Workers' Union of Ukraine

United Kingdom

*Broadcasting, Entertainment, Cinematograph & Theatre Union
- BECTU*

The Writers' Guild of Great Britain – WGGB

EURO-MEI Partners

Armenia

Armenian Council of Cultural Workers' Unions

Belarus

Cultural Workers' Union of Belarus – CWU-BY

Bulgaria

Syndicat national de la radio-télévision

Georgia

Georgian Independent Union of Workers in Culture

Hungary

Confédération des Syndicats des Arts - MSZSZ

Magyar Radio Union

Television Workers Union - TVDSZ

Writers' Union of Hungary - ISZ

Ireland

Irish Playwrights' and Screenwriters' Guild – IPSG

Kazakhstan

Kazakhstani Cultural Workers' Union - KCWU

Kyrgyz Republic

Cultural Workers' Union of Kyrgyz Republic - CWUKR

Lithuania

Lithuanian Trade Union Federation of Culture Workers - LTUFCW

Moldova

Sindicatul lucratorilor culturii din Republica Moldova

Poland

Polish Union of Filmmakers

Secrétariat de Culture et Mass Media, (Solidarnosc)

Portugal

Sindicato das Artes e Espectáculo - SIARTE-UGT

Romania

Federatia Sindicatelor Libere "Arta, Cultura, Audiovizual" - ACAV

Slovakia

Trade Unions of Mass Media

Turkey

Trade Union of Media, Communication and Press Workers - MEDYA SEN, DISK

Türkiye Sinema Emekçileri Sendikası, - SINE-SEN, D

