

RadioCentre Response: **Review of the Communication from the Commission on the Application of** **State Aid Rules to Public Service Broadcasting**

Background

1. RadioCentre is the industry body for UK Commercial Radio. Formed in July 2006 from the merger of the Radio Advertising Bureau (RAB) and the Commercial Radio Companies Association (CRCA), its members consist of the overwhelming majority of UK Commercial Radio stations, who fund the organisation.
2. The role of RadioCentre is to maintain and build a strong and successful UK Commercial Radio industry - in terms of both listening hours and revenues. As such, RadioCentre operates in a number of areas including working with advertisers and their agencies, representing Commercial Radio companies to Government, Ofcom, copyright societies and other organisations concerned with radio, and working with stations themselves. RadioCentre also provides a forum for industry discussion, is a source of advice to members on all aspects of radio, jointly owns Radio Joint Audience Research Ltd (RAJAR) with the BBC, and includes copy clearance services for the industry through the Radio Advertising Clearance Centre (RACC).

Executive Summary

3. RadioCentre welcomes the Commission's decision to conduct this review, since we believe that European and UK based policy makers have an important role to play in ensuring that Public Service Broadcasters (PSBs) in receipt of State Aid are subjected to proper scrutiny of their funding arrangements and service remits.
4. We highlight a number of key issues in our responses to the questions posed by the Commission. In summary, we believe that:
 - a) Market conditions should be considered in assessing whether levels of State Aid funding are liable to be excessive;
 - b) State-funded broadcasters should conduct their activities in a manner compliant with competition law and in a manner which minimises anti-competitive impact;
 - c) The framework for applying State Aid rules to state-funded broadcasters should be consistent, clear and specific;
 - d) Service remits should be closely defined, leaving no doubt about whether an activity is to be included or not (such as potentially market-distorting arrangements to provide third parties with on-air exposure);
 - e) Member states should have particular regard to the potential for market distortions following state-funded new media interventions;
 - f) In developing new ways of using technology to distribute content, state-funded broadcasters should seek opportunities to ensure that these technologies are as open as possible;
 - g) Controls should be introduced limiting the ability of state-funded broadcasters to cross-promote or aggregate state-aid-funded content in such a way as to limit the opportunities for consumers to access content from other providers;
 - h) Ex ante evaluations should apply to all new state-funded public service broadcasting services and activities, and particularly if there may be value for money or competitor concerns
 - i) Broadcasters in receipt of State Aid should be subject to proper scrutiny of their funding arrangements and service remits by external bodies which are suitably empowered to ensure compliance with State Aid rules;

- j) Commercial bodies should be encouraged to make representations if they believe that a broadcaster may be in breach of rules regarding State Aid;
- k) There should be accounting separation and transparency between the public service and non-public service elements of state-funded PSB operations;
- l) The parameters on the basis of which funding is calculated should be established in advance in an objective and transparent way;
- m) Public funding should be necessary and not disproportionate to the public service provided – i.e. state-funded broadcasters should not be over-compensated;
- n) The amount of State Aid made available for services or service components by member states to PSB's such as the BBC is benchmarked against levels of funding available to commercially funded broadcasters, not provided to a degree which subsidises inefficiency; and
- o) State Aid must not be used to allow a broadcaster to distort the price or dominate the acquisition of any type of premium content rights, including those for sports commentary.

Responses to the Commission's questions

Market Context

Question 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?

5. RadioCentre's interest in this review is as the representative body for the sector of the UK radio industry which is not in receipt of State Aid. Publicly funded radio stations are, with the exception of small community broadcasters, exclusively offered in the UK by the BBC. As a recipient of State Aid, the BBC is subject to the rules of the EC Treaty and the Amsterdam Protocol on Public Service Broadcasting. We can identify two negative outcomes which may arise if these are not properly applied or if they are insufficiently rigorous:
- Plurality may suffer if the BBC becomes too dominant in a particular market, with the risk that citizens may only be exposed to content from a single provider
 - Markets may become distorted, with adverse repercussions for commercial operators and consumers
6. We agree that the Broadcasting Communication should be updated in light of legal developments, and particularly in light of the market developments we outline below.

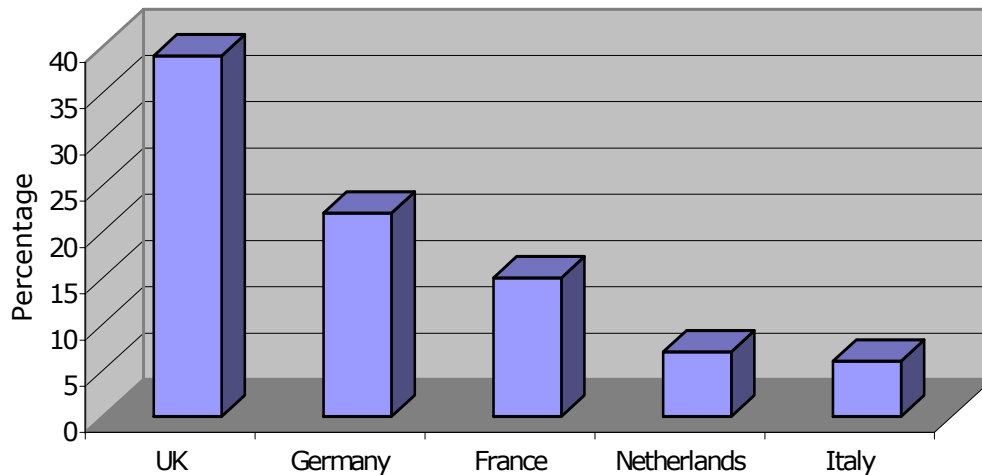
Question 1.2. How would you describe the current competitive situation of the various players in the audiovisual media sector? Where available, please provide the relevant data on for instance leading players, market shares, market share evolution in the broadcasting/advertising/other relevant markets.

7. UK Commercial Radio arguably provides the best example of any European broadcast sector of the structural impact which technological change is having on the competitive media landscape. This is largely because the impact of the internet on traditional media is at its most advanced stage in the UK, and because the UK's publicly-funded broadcaster, the BBC, has its biggest competitive impact in radio.
8. As a consequence, and in response to the suggestion offered by questions 1.2 and 1.3, it may be helpful for us to share some data and market trends with the Commission before commenting on subsequent questions.

The impact of the internet on traditional media

9. The internet's primary effects on traditional media relate to the advertising market and consumer behaviour.
10. In 2007, a study published by IAB Europe revealed that the UK has "*by far the most mature online advertising market in Europe*", accounting for 39% of the total spent online in Europe, or around €3.1bn (over £2bn)¹. Germany, the next strongest market, accounted for just 22% of the European market.

Figure 1. Top 5 European Internet Advertising Markets by Share of Overall Market in 2006 (Source: IAB Europe)

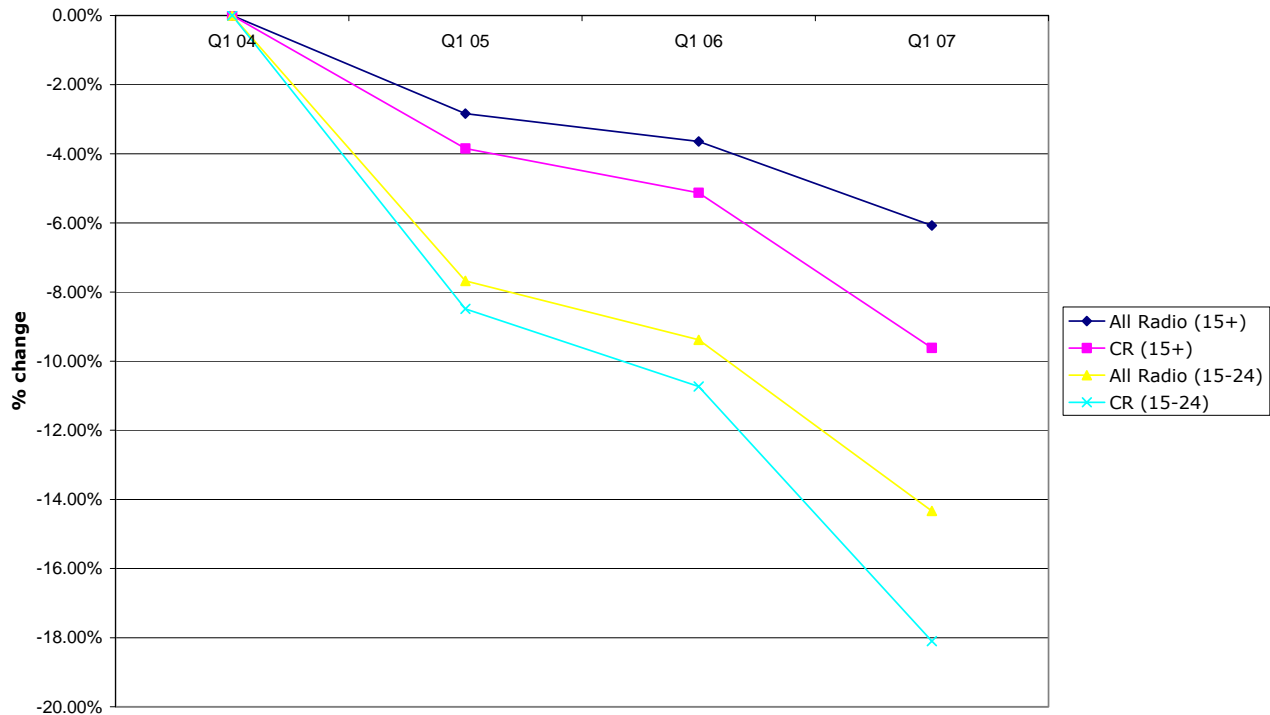


11. At the same time as this £2bn of advertiser spend has moved to the internet, radio's share of the UK display advertising market has declined from 6.7% in 2003 to 6.0% in 2007². It is difficult to avoid the conclusion that these trends are closely related.
12. A related but separate impact of the internet and other digital media are that they create competing claims on listeners' time and attention. Audio-visual material is distributed widely online. Newspaper companies are among those launching audio podcasts, content which is not subject to the Broadcasting Code. At the same time, Figure 2 shows how time spent listening amongst younger audiences in particular declined between 2004 and 2007, despite total adult hours remaining relatively strong.

¹ Mark Sweney, 'UK ahead in web ad market', Media Guardian, 05 June 2007, <http://media.guardian.co.uk/advertising/story/0,,2095299,00.html>, (Accessed June 2007)

² Source: Advertising Association

Figure 2. Average Hours per Listener, 15+; 15 - 24s (source: RAJAR)



13. In parallel to this, Ofcom's 2006 'Communications Market' report suggested that 16-24 year olds were spending on average 21 minutes more time online per week, whilst the average internet user was spending 20 minutes more online. Ofcom's interpretation of this was that these findings showed that "*Young people are moving away from old media*"³. Debate continues within the UK as to the causes of this trend, and its wider future implications.

14. Interestingly, it is Commercial Radio which is particularly losing out, with BBC services maintaining reach and hours and thus increasing their share among this age-group⁴. This may be because the BBC has invested heavily online and exploited its national scale to access the most popular content opportunities, or alternatively, other factors may be at work.

The BBC's Impact in Radio

15. UK Commercial Radio attracts over 30 million listeners a week for a total of over 400 million hours⁵. The sector employs nearly 10,000 staff⁶ and also performs a valuable economic role in stimulating small business growth through local advertising. Ownership of the industry is dispersed and unconsolidated, with over 70 different operators of Commercial Radio licences accounting for varying shares of listening, as shown below.

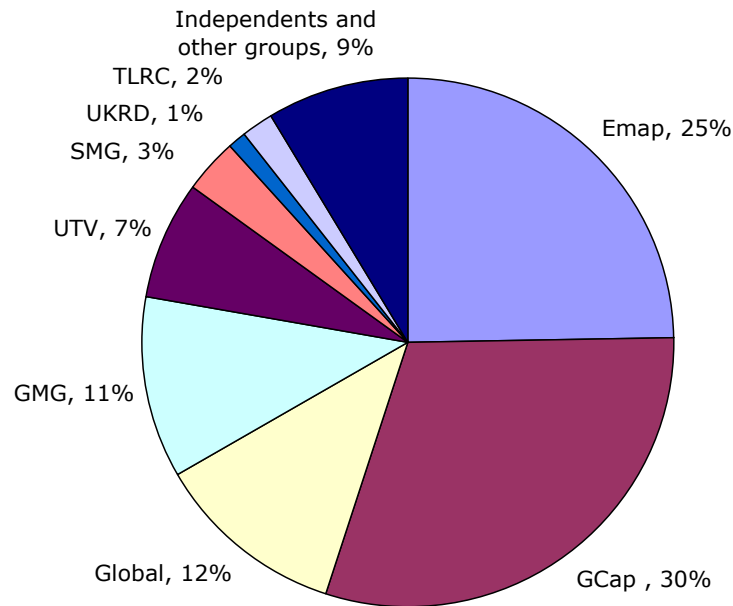
Figure 3. Breakdown of Commercial Radio listening by group, 2007 (Source: RAJAR Q4 2007)

³ Ofcom, 'The Communications Market 2006', August 2006, pg 15

⁴ Listening to BBC services by 15-24 year-olds remained roughly constant between 2001 and 2007 (Source: RAJAR)

⁵ RAJAR Q4 2007

⁶ Skillset Employment Census 2006



16. What this chart does not show is the share of listening which is accounted for by the BBC. According to the most recent audience data, the BBC has a 55.4% market share in the UK⁷. By way of comparison, and despite the consolidation which has taken place since the 2003, the largest Commercial Radio player, GCap Media, only accounts for 12.8% of all radio listening.
17. What this means is that the BBC accounts for over four times more listening than the next biggest player within UK radio. By way of contrast, the most recent UK television audience data shows that BBC television accounted for 32.5% of all television viewing, just under one and a half times the share which ITV PLC's portfolio of channels achieved, with 22% of all viewing⁸.
18. In national radio, the disparity between BBC and Commercial Radio is even greater, with the BBC accounting for 80% of listening. This suggests that the degree of existing plurality within national radio is particularly poor.
19. The disparity between the BBC and Commercial Radio sectors is replicated in revenue terms, with the BBC's funding accounting 55% of all UK radio revenues. The BBC also has none of the need to allocate a significant proportion of this revenue to sales teams or investors⁹.
20. What is particularly concerning for UK Commercial Radio is that the BBC's revenue and listening shares are currently growing. As a result of a substantial increase in the amount of cross-media competition for advertising revenue, gross Commercial Radio revenue in 2006 was almost identical to 2000's figure of just under £600m, meaning that the industry's income has dropped by around 20% in real terms, whilst outgoings are now spread across considerably more services and platforms than before. The BBC's spending on radio has increased in real terms over the same period.

Question 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?

21. We believe that these trends have a number of implications for the sector, as well as for the application of State Aid rules to Public Service Broadcasters. Commercial Radio absolutely accepts that it will need to adapt to the challenges posed by developments in digital technology, but we also believe that there is a role for European and UK based policy makers in ensuring that Public Service Broadcasters in receipt of State Aid are subjected to proper scrutiny of their

⁷ Source: RAJAR Q4 2007

⁸ Source: BARB December 2007

⁹ Source: Ofcom, 'The UK Communications Market 2007', 23 August 2007

funding arrangements and service remits by external bodies which are suitably empowered to ensure compliance with State Aid rules.

22. Within the UK, there has been a growing recognition of the importance of subjecting the BBC to greater scrutiny. The BBC's Royal Charter was renewed in 2006, leading to the formation of the BBC Trust on 1 January 2007, with the legal responsibility to (amongst other things) "*have regard to the competitive impact of the BBC's activities on the wider market*" and "*adopt ... a statement of policy on fair trading and hold ... the Executive to account for compliance with it*". Our understanding is that this means that the Trust effectively takes upon itself responsibility for ensuring the BBC's compliance inter alia with EC and UK competition laws.
23. In line with its Royal Charter requirements, the BBC Trust introduced a Competitive Impact and Fair Trading Framework in 2007, following public consultation. The BBC's new Fair Trading policy statement included in this framework contains the welcome acknowledgement that the BBC "*is legally obliged to comply with competition law (including state aid law) requirements and the Trust requires it to do so*"¹⁰.
24. We take that to mean that the BBC is obliged to do nothing that will put the UK in breach of its obligations in relation to EC Treaty rules on State Aid, and to act in full compliance with UK and Community competition law rules and principles.
25. This consultation also led to the introduction of the 'Competitive Impact Principle' for the BBC, a commitment that the BBC should "*endeavour to minimise its negative competitive impacts on the wider market*". RadioCentre used the consultation to argue that this should be strengthened, with the "*endeavour to*" qualification being removed. Our proposal, which was rejected, was that the Competitive Impact Principle should state that BBC is obliged to conduct its activities in a manner compliant with competition law and in a manner which minimises its anti-competitive impact.
26. RadioCentre does of course recognise that the BBC has obligations to provide services which represent value for money and which justify the licence fee. However, we also believe that the appropriate authorities, such as the BBC Trust, must balance these duties with a duty to have regard to the common interest. In practice, and as markets continue to develop at a rapid pace, we believe that this obliges the Trust to subject the BBC to constant scrutiny, including revising its Service Licences and Purpose Remits on a regular basis.

Compatibility Assessment Under Article 86 (2) Ec Treaty, In Combination With The Broadcasting Communication

Coherence with the Commission Decision and Framework on public service compensation

Question 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.

27. We believe that the framework for applying State Aid rules to public service broadcasters should be consistent, clear and specific.
28. With this in mind, it is sensible for the Commission to apply a common framework to all broadcasters, including large national broadcasters, whilst taking differences in scale into account. If the Commission has identified ways of simplifying a complex system then we agree that they should be implemented, provided that they do not have the effect of relaxing restrictions on the use of State Aid.

Question 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).

29. A number of the elements outlined in the Explanatory Memorandum which accompanies this consultation strike us as potentially valuable, such as the more detailed rules regarding cost

¹⁰ BBC Trust, Statement of Policy on Fair Trading, p. 9, February 2007

allocation and requirement that there should be separate accounts for public service activities which are separate in nature. We particularly note the suggestion that Member States should define the public service remit after wide consultations and believe that this is an important means of ensuring that the competitive impact of public service activities is considered.

Definition of the public service remit

Question 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.

30. The BBC's public service remit is defined in the UK through a system of Public Purpose Remits and Service Licences. This reflects the regime established by the 2006 BBC Royal Charter and Agreement, which also led to the establishment of the BBC Trust on 1st January 2007. Both the Purpose Remits and Service Licences were subjected to public consultations in 2007, with RadioCentre submitting substantial responses to each consultation.
31. Both the Public Purpose and Service Licence consultations contained little acknowledgement of the effect that the BBC's activities have on rival broadcasters, particularly within radio.
32. We concluded that the Purpose Remits are broadly helpful, albeit that there are areas where they have been unnecessarily expanded or supplemented, or where they lack strength and consistency. We also identified potential for the Purpose Remits to be used to endorse excessive production of programming which is predominantly populist entertainment; or which could encourage the BBC to chase audience share; or which could encourage excessive expenditure.
33. We found the Service Licences to be less rigorous, which was largely because their commitments were derived from previous BBC Management documents. This is shortly to be addressed by the BBC Trust when the licences are revised in light of the consultation. We were concerned to note that many key areas of service activity were not defined, whilst in general, the way in which the BBC's radio services were defined did not provide Commercial Radio with sufficient certainty as to their parameters.
34. In particular, we recommended that each BBC Service Licence should include:
 - a) Clear quotas outlining the proportion of output that should comprise important content categories such as speech;
 - b) Timescales for the delivery of different types of content which reflect how frequently they are consumed by listeners (i.e. news delivery should be subject to daily quotas, whereas a broadcaster's requirement to broadcast live concerts might only be subject to an annual quota);
 - c) Clear parameters around music output;
 - d) An indication as to the role of entertainment programming in the delivery of the Public Purposes by that service;
 - e) A statement as to the role of daytime output (as opposed to evening or overnight output); and
 - f) A clear indication as to the expected audience, in light of RadioCentre research into the audience profile for a number of services.
35. The Service Licence consultation also revealed that budgets for individual BBC Radio services substantially exceed the level of funding available to Commercial Radio stations, raising questions about the value for money provided by BBC Radio. We recommended that the BBC's service budgets should be broken down and justified within each area of activity, to include spending on overheads including transmission, marketing, accommodation, management and rights.
36. We also recommended that in addition to the measures proposed by the BBC Trust, the BBC's performance should be assessed with reference to:
 - a) The impact of BBC activity on commercial operators;
 - b) The distinctiveness of the BBC's offering compared with non publicly funded

equivalents; and

c) A record of upheld complaints in relevant categories.

37. The BBC Trust accepted a number of our concerns, but we suggest that the Commission use this review as an opportunity to signal its expectations in each of these areas.
38. Following these consultations on the Purpose Remits and Service Licences, the Trust has recently undertaken a separate consultation on the Service Licence for bbc.co.uk. It is expected to publish its findings shortly. RadioCentre's response argued that whereas the terrestrial broadcasting market is mature, the world of new media is fast moving, and therefore careful definition of the BBC's online remit is particularly important.
39. Like the BBC, Commercial Radio is embracing new ways of making and distributing content. However, the industry's resources are finite and activities are constrained by the need to generate a tangible return on investment. In general we are concerned that this difference may lead to BBC foreclosure of nascent markets which could provide sources of future revenue for commercial broadcasters at a time when conventional sources of income are under pressure.
40. As our response to the bbc.co.uk consultation outlined, Commercial Radio's particular concerns in relation to the BBC's new media activities involve areas such as local content; music and entertainment coverage; audio aggregation; social networking; audio and video; on-demand listening; stand-alone online content propositions; live events and other third party deals; linking; leading listeners to purchase of music; and lack of budgetary transparency.
41. Furthermore, we identified three core themes which we urged the Trust to examine in detail:
- a) The relationships between the BBC and third parties (such as technology, content or sponsorship partners) in the operation of bbc.co.uk;
 - b) Whether the BBC's online scale impairs Commercial Radio's ability to generate listener and web-user interest in its own online content, in areas such as entertainment, music and local information; and
 - c) The extent to which the BBC distorts the market for content rights in new media spaces.

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?)?

42. We do, in light of a number of activities being undertaken or explored by the BBC which we believe should not be classified as public service activities. One current area of particular concern in the UK is the BBC's relationships with third parties whereby these third parties gain on-air or online exposure on BBC services. Such arrangements have the potential either to distort prices or to impair commercial operators' ability to enter into similar partnerships themselves.
43. RadioCentre is currently paying particularly close attention to the BBC's growing interest in securing sponsorship for live events programming and leading consumers to download tracks by mainstream commercial artists (such as the chart-topping Adele) or purchase of tickets for large mainstream music events (such as this summer's Foo Fighter's concert at London's Wembley Stadium).
44. The process for highlighting ambiguous public service activities which bear the hallmarks of commercial activities is to make a fair trading complaint to the BBC itself. In the case of new services, the BBC Trust's Public Value Test affords commercial operators an opportunity to make representations. The Trust is also empowered to monitor the BBC's activity for compliance with its various codes.
45. As such, we have flagged each of the issues highlighted in paragraph 42 with the BBC Trust for their attention, and are currently appealing to the Trust about a decision by the BBC's in house Fair Trading and Editorial Complaints committees to reject our complaint about the BBC's policy

on events programming sponsorship. The television broadcaster ITV is pursuing a similar complaint and appeals process in parallel.

46. We have found the process of highlighting these issues to be complex and believe that it lacks transparency and clarity for commercial operators. We firmly believe that it is inappropriate for the BBC to have responsibility for investigating fair trading complaints in the first instance and agree that member states should be encouraged to designate an authority with independent responsibility for clarifying the public service remit where ambiguities such as these arise. This could be achieved by outlining types of activities which are unlikely to constitute appropriate state-aid-funded activity.
47. In the UK, this should have the intention of restricting the BBC's ability to directly lead consumers to purchase of any third party or commercial subsidiary materials. It should also oblige the BBC to resist any request to include sponsored material in its programmes, except when it is out of the BBC's power to do so without impairing its ability to offer a certain type of programming. The intention here would be to allow the BBC to broadcast names of sponsors or logos only in exceptional cases (such as where the sponsor in question is sponsoring a major third party event such as a football competition, and where the BBC demonstrably has no control over the terms of the sponsorship contract).
48. BBC Events Sponsorship: The BBC's growing interest in taking sponsorship for live events programming is worth highlighting in more detail, since it draws attention to the lack of distinction which we believe currently exists in relation to the definition of public service as opposed to commercial activities.
49. In summer 2007, we became aware of a website, www.bbceventsponsorship.com, which the BBC was using in order to seek commercial sponsors for live events. These are attended by members of the public, but are also broadcast, meaning that sponsorship the physical live event is viewed by advertisers as an attractive way of associating themselves with the BBC brand, and reaching the audience at home via radio and TV. What has been unclear in the past is the extent to which there is an unspoken understanding that a sponsor will get this on-air impact, or whether this is formalised in the sponsorship arrangement.
50. The website makes it quite clear that the BBC is engaging in contractual agreements to provide on-air credits via both radio and television. This activity is managed not by BBC Worldwide, the BBC's commercial subsidiary, but directly by the public service operation of the BBC itself. It is also subject to none of the rules about sponsorship which Commercial Radio operates under, specifically section 9 of Ofcom's Broadcasting Code (from which the BBC is specifically excluded), and the BCAP Radio Advertising Code. Some of the sponsors which the BBC has sought fall into restricted categories for which pre-clearance by the Radio Advertising Clearance Centre is required; again, the BBC is not subject to this requirement, such that there may not be adequate consumer protection in place.
51. For instance, the Sponsorship and Marketing pack for BBC Proms in the Park, as accessed by RadioCentre in November 2007, explained that the sponsorship deal with National Savings and Investments includes "*Contractual verbal credits on BBC ONE, BBC TWO, BBC FOUR, Radio 2 & 3, BBC Local Radio, BBCi red button*".
52. Other sponsorship packs for BBC Children in Need, the BBC Jazz, Folk and World Music Awards, the Radio 3 New Generation Artists, and BBC Sports Personality of the Year, explained that the commercial sponsors ASDA, Ebay, BT, Boots, HSBC, Aviva and Robinsons would all receive exposure, with Aviva and Robinsons being offered specific on-air credits. The latter deal gained particular public exposure when BBC Sports Personality of the Year took place in December 2007, gaining a degree of press and public attention in view of the prominent sponsorship credits enjoyed by the sponsor across TV, radio and online.
53. The BBC has rejected RadioCentre's complaint about this activity via a letter from its Director General, Mark Thompson on 14th February 2008. Mr Thompson's letter did make one concession, acknowledging that in light of the website www.bbceventsponsorship.com, "it is possible that the BBC's activities might potentially be misunderstood", and promising that the BBC "will therefore be reviewing the content of the website to ensure that it effectively and

accurately communicates its message". Following a report in The Times newspaper, this website was taken down on 8th March 2008¹¹.

54. We believe that our complaint remains valid for a number of reasons, which is why we are pursuing an appeal with the BBC Trust. For the purposes of the Commission's current review, the following points are particularly worth highlighting:

- a) 68.1-2 of the 2006 BBC Agreement (the "Agreement") states that "*The BBC as a corporation shall not directly provide any commercial services, but it may carry out other trading activities*". The BBC argues that offering on-air promotion opportunities does not constitute a commercial service.
- b) 75.1 of the Agreement states that the BBC must not "*include any sponsored material in any of its services*" unless it has the approval of the Secretary of State. The BBC argues that the on-air credits offered do in fact comply with its editorial guidelines.
- c) 75.2 of the Agreement states that the BBC must not use its licence fee to fund activities "*which are carried on for the purposes of a television, radio or online service which is wholly or partly funded by advertisements, subscription, sponsorship, payper-view system or any other alternative means of finance, unless the Secretary of State has given prior written approval*". Again, the BBC argues that its activity complies with its editorial guidelines.
- d) 75.5 of the Agreement states that funds provided by third parties may be used in order to "*share the costs of carrying out, using or mounting the activity, facility or event*", not that these funds may be provided to allow the third party to secure on-air promotion opportunities. Nevertheless, the BBC has argued that this clause also licenses sponsorship activity of this kind.

55. We infer that the BBC's belief that it is permissible to carry out activities of the kinds outlined above is owing to the lack of clarity and proper definition surrounding the public service remit, and an insufficient regard for the requirement in the Agreement (i) that "*The Trust must have regard to the competitive impact of the BBC's activities on the wider market*". We feel that it also reflects the inadequacy of the BBC's Competitive Impact Principle, as outlined above in paragraph 25, which only requires the BBC to "*endeavour to minimise its negative competitive impacts on the wider market*".

56. In reviewing the Broadcasting Communication, the Commission should make it a priority to require member states to address areas of ambiguity of this kind, leaving no doubt about whether an activity is to be included or not.

Question 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?

57. We assume that where the Commission refers to 'TV programmes' above, it also means radio programmes.

58. RadioCentre believes that, in theory, there should be no restriction as to the distribution technologies which the BBC can employ in performing its remit. However we believe that in developing new services, such as those involving new media content, the BBC Trust should ensure that the BBC's output is distinct and does not distort the market.

59. In addition, we believe that the BBC can play a useful role in collaborating with other broadcasters in the development of new technologies which are likely to have wide applicability. It follows therefore that state-funded broadcasters should be obliged to seek opportunities to

¹¹ Dan Sabbagh, 'It's just semantics, Auntie, when it comes to sponsors', The Times, 07 March 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/media/article3491989.ece

ensure that the platforms they develop are as open as possible, with third party content being made available where appropriate.

60. Finally, and as digital media proliferate, we believe that controls should be introduced limiting the ability of state-funded broadcasters to cross-promote or aggregate their content in such a way as to limit the opportunities for consumers to access content from other providers.

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?

61. We agree that this is valuable, and would draw the Commission's attention to the BBC's Public Value Test mechanism for conducting ex ante evaluations of new services.

Question 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?

62. We believe that it should.

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

63. It is vital that all services or significant activities are subject to evaluations of this kind and that the scrutinising body has the power to refuse to grant approval for services or changes to services. Pre-scrutiny is likely to be particularly crucial where, for instance:

- a) The required budget for the service or activity is such that there may be value for money or efficiency concerns;
- b) It is likely that the proposed activity may impact on existing commercial operators; or
- c) The activity is in a nascent market with potential for future exploitation, such that the state-funded intervention might distort consumer or supplier expectations with regards to costs and prices for future operators.

64. At present, the BBC's Public Value Test process is applied whenever BBC management proposes to launch a new service or make significant changes to an existing service. The test was applied last year to the BBC's 'iPlayer' service, and will be applied again to the forthcoming BBC online 'MyLocalNow' service.

65. A Public Value Test would also need to be applied in the event that the BBC developed proposals to introduce new radio stations or distribution technologies, or to increase its focus on specific content areas. In the new media arena, it goes without saying that any proposals for services such as a free customisable radio station in the manner of Pandora or Last.fm, a new social-networking aspect to the BBC site or extensive message board around a community of interest such as sport should also be subject to pre-scrutiny.

Question 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)?

66. We believe that it should. The involvement of the national regulatory authority Ofcom and third parties are particularly important to the success of the Public Value Test mechanism in the UK. These external representations are particularly crucial in light of the fact that the BBC Trust is only semi-independent from the BBC, both in legal and practical terms.

Question 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?

67. We believe that member states should retain a degree of discretion in this regard, but believe that the Public Value Test constitutes one example of how the public service character of such activities may be determined.

Entrustment and Supervision

Question 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?

68. The BBC's role and remit is established through the Royal Charter and Agreement. There was an extensive parliamentary and public consultation prior to the agreement of the most recent iterations of these documents in 2006. The renewal of the BBC's Charter was also the occasion for the establishment of the BBC Trust, which was statutorily obliged to implement the Service Licences, Public Purpose Remits and Fair Trading and Competitive Impact Framework outlined above, each of which was subject to public consultation.

Question 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?

69. We believe that it is crucial that Public Service Broadcasters in receipt of State Aid are subject to proper scrutiny of their funding arrangements and service remits by external bodies which are suitably empowered to ensure compliance with State Aid rules.

70. Although RadioCentre's predecessor organisation the CRCA advocated a more independent model for supervising the BBC prior to the establishment of the BBC Trust, it is our experience that the BBC Trust is well-resourced and focused on its supervisory role, as laid down in the BBC Charter and Agreement. We are also aware that the Trust has mechanisms in place to ensure separation from the rest of the BBC, for instance in terms of holding confidential data and information.

71. In addition, the Trust does afford sufficient opportunities for third parties to contribute to its consultations and reviews. For instance, it is currently undertaking a benchmarking study into the cost of BBC on-air and on-screen talent, which UK Commercial Radio groups have been closely involved in.

72. Finally, it is vital that there are mechanisms in place which encourage commercial bodies to make representations if they believe that a broadcaster may be in breach of rules regarding State Aid. We have commented on this in paragraphs 76 to 77, as well as outlining some areas of current concern in paragraphs 42 to 56.

Question 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?

73. We note the concerns around new media services outlined in the Explanatory Memorandum which accompanies the Commission's questionnaire, and note that when the Trust approves new services or amendments through the Public Value Test mechanism, the respective BBC Service Licences are updated accordingly. Third parties also have an opportunity to make representations before the BBC takes on expansions to its remit of this kind. This implements the framework established by the 2006 Charter and Agreement.

Question 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?

74. We believe that it is important that supervision of public service broadcasters in receipt of State Aid is properly resourced, clearly defined, and independent of the broadcasters themselves. We also believe that supervisory bodies should have strong sanctioning powers, such as the power to refuse requests for new services or changes, or to require a service to be closed or withdrawn.
75. In general, it is probably still too early to properly evaluate the suitability of the BBC Trust model, given its relative infancy. A new Complaints Framework for the BBC was introduced only very recently, with the outcome of a public consultation undertaken by the BBC Trust yet to be announced.

Question 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?

76. As outlined above, we are currently pursuing a complaints and appeal process about the BBC's policy on third party sponsorship of events programming. Our complaint was treated as two separate editorial and fair trading complaints. Each strand is investigated by a relevant committee within the BBC itself, but appeals may be made to the BBC Trust.
77. We are now at the point of appealing the BBC's response to our complaints with the Trust, and will be able to comment further on the suitability of the complaints framework once this process is concluded. It may be that we make further representations to the Commission on this matter in due course.

Dual Funding of public service broadcasters

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

78. We do not have experience of dual funding of public service broadcasters in the UK, or of state-funded broadcasters offering pay services, and therefore do not have a view about the impact of this.

Question 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?

79. It would be inappropriate for the BBC to develop pay-services in the UK, in light of its remit. Under the framework currently in place in the UK, we believe that such services would be considered as purely commercial activities which are the responsibility of commercial operators or subsidiaries.

Transparency requirements

Question 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?

80. The BBC does not (at least in theory) carry out commercial activities of its own; these are the responsibility of its subsidiary, BBC Worldwide, which is subject to structural and functional separation.

Question 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?

81. As we have outlined, the BBC represents a substantial state intervention into the UK media landscape, which is why we have expressed the concerns that we have above the definition which should be applied to its public service activities. Similarly, we believe that it is vital that commercial activities are handled separately, in view of the power and value of the BBC brand and output.

Question 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?

82. The BBC does not take advertising, which has hitherto limited the potential for ambiguity over whether the cost of generating an audience should be allocated to the public service activities or commercial subsidiary, or shared between the two.

83. However, there is a potential for future ambiguity to arise as the BBC introduces advertising on the version of its website which is operated for international audiences by BBC Worldwide (bbc.com). If the Commission believes that the experience of other member states would support further clarification, then we would support it in making revisions accordingly.

Question 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?

84. We believe that it should, given the impact which state-funded broadcasters have on commercially funded operators, and in light of the likely negative impacts should a broadcaster fail to demonstrate compliance in this area.

Proportionality test – Exclusion of overcompensation

Question 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?

85. We do, believing that it is vital that the parameters on the basis of which funding is calculated are established in advance in an objective and transparent way. This should be with a view to ensure that the public funding is necessary and not disproportionate to the public service provided.

86. In the course of calculating the appropriate level of 'compensation' provided, reference should be made to the levels of funding available to commercial operators. The licence fee settlement awarded to the BBC in early 2007 guaranteed that its income would continue to rise over the term of the settlement, whereas there is no guarantee as to whether UK Commercial Radio revenues will rise over this period, or indeed fall, as they have been doing over recent years.

Question 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?

87. We believe that the current requirements offer no threat to the financial stability of a public service broadcaster like the BBC.

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

88. In the context of the UK's broadcasting ecology, we believe that it would be inappropriate for the BBC to be able to retain a significant surplus at the end of a financial year.

Question 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)?

89. It is our experience that the BBC tends to have little difficulty in spending the budget allocated to it, but believe that it should be the responsibility of national authorities and member states governments to ensure that the funding given to public service broadcasters is not excessive, as outlined in answer to the following question.

Question 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?

90. The BBC does have some incentive to achieve efficiency gains, being directed to achieve value for money in spending the funds which it receives from the Licence Fee. We believe that the most appropriate means to increase this incentive on state funded broadcasters is to restrict the funds which they have at their disposal. A key way to determine funding levels is by benchmarking the BBC's performance against that of third parties.

91. In addition, the 2006 Charter established terms under which the BBC is accountable to the UK National Audit Office. It has now undertaken eight value for money studies at the BBC, publishing reports for instance on the BBC's preparedness for the switchover from analogue to digital television, and the BBC's approach to procurement. Each has been very valuable, and we believe that this could be strengthened.

Question 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?

92. Under the current framework for public service broadcasting in the UK, commercially-funded broadcasters are entitled to retain a profit margin, whereas the state-funded BBC is not. This clear distinction and absence of dual funded broadcasters reduces the potential for ambiguity, and makes this question less applicable in the UK.

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

Question 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?

93. We have already provided extensive details of the arrangements made to minimise anti-competitive behaviour by the BBC. The BBC Trust is little over a year old, such that its new Fair Trading and Competitive Impact Framework and Complaints Framework are both relatively untested. In view of that, we do not yet have a view on whether these mechanisms will ensure sufficient and effective control.

94. Nevertheless, it is our strong perception that, prior to the introduction of these measures, there were insufficient safeguards to ensure that the BBC did not distort the market. This is demonstrated by the unsuitability of the BBC's own editorial and fair trading frameworks in preventing more commercialised activity such as that which have outlined in response to question 2.2.2 (paragraphs 42 to 56).

95. The BBC does not take advertising, meaning that there is little scope for it to engage in anti-competitive behaviour by undercutting advertising prices. However we believe that the BBC's arrangements with the commercial partners listed in paragraph 52 constitute sponsorship, and that they represent a distortion of the UK market for commercial sponsorship of TV and radio programming.
96. In addition, we have serious concerns that wherever the BBC engages in deals with third parties to secure content, or to provide exposure of a third party organisation, event or artist, there are risks of market distortions. Examples would be agreements outlined above in paragraph 43, or those which BBC Radio 1 reached with the popular social networking website Bebo¹² and the British Security Services¹³ to provide them with exposure on BBC Radio.
97. We have no reason to suspect that there was any payment involved in either of these deals, but the fact that the BBC provides opportunities of this kind is highly likely to distort the sponsorship and promotions markets in Commercial Radio, since the commercial terms of these agreements are likely to significantly undercut those sought by commercial operators.

Question 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?

98. We do.

Question 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.

99. This question is less applicable to the UK, given that it does not have any dual-funded broadcasters.

Question 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?

100. We agree that the Broadcasting Communication should contain clarifications as regards the public funding of premium sports rights. These could take the form of prohibitions on State Aid being used to allow a broadcaster to dominate any type of premium content rights, and obliging member states to define expectations in this regard. As well as considering sports coverage, rights for other types of premium content such as coverage of live music events and festivals should also be included.

101. This view is informed by the BBC's continuing dominance of premium sports rights on UK radio. As we outlined to the BBC Trust in our response to the BBC's Service Licences consultation in April 2007, the programming budget for the BBC national sports and news service, BBC Radio Five Live, dwarfs that of talkSPORT, the commercially funded equivalent. At the time, we calculated Five Live's budget as being over 12 times that of talkSPORT, translating to an estimated 'cost per listener hour' figure of just under five times that of the commercial service.

¹² Sweney, Mark, 'Radio 1 DJs star in Bebo show', Media Guardian, 06 March 2008, <http://www.guardian.co.uk/media/2008/mar/06/bebo.bbc?gusrc=rss&feed=media>

¹³ Richard Norton-Taylor, 'MI6 seeks budding Bonds through Radio 1', Media Guardian, 26 November 2007, <http://www.guardian.co.uk/media/2007/nov/26/bbc.radio>

102. For national sports broadcasters, access to premium sports rights – such as those which entitle a broadcaster to provide commentary of Premier League matches – is essential in building a substantial audience. A service without such rights has to construct a substantially different business plan, built around a different set of sports and lower audience expectations.
103. Five Live's Service Licence requires it to provide "live commentary on major sporting events"¹⁴, with the qualification that this is "subject to rights". However, rights have never proven an obstacle to the BBC dominating sports coverage on radio. Indeed, as Five Live Controller Bob Shennan said in 2005, "The rights for football are extremely expensive, they underpin what Radio Five Live does."¹⁵
104. Such a statement is highly revealing about the current situation regarding football coverage in the UK. Because Five Live has determined that football should "underpin" its output, it is prepared (and uniquely able) to pay above the market rate to ensure that it retains the rights. It is this which has caused their cost to be "extremely expensive" and excluded commercial broadcasters from gaining national coverage rights. We believe that this has impaired competition, whilst also distracting Five Live from focusing on the Charter and Agreement requirement that the BBC cover "sport of minority interest"¹⁶ (this phrase was inexplicably excluded from its Service Licence as published in 2007).
105. Under the new arrangement for distributing live commentary rights in packages, which was designed to break-up the monopolies previously enjoyed by BSkyB and the BBC, talkSPORT won the broadcast rights to 32 Saturday 3pm Premier League fixtures per season for three years starting in 2007-8. The remaining rights were acquired by the BBC. The 2007-8 season is therefore the first in which a broadcaster other than the state-funded BBC has been able to offer this premium content.
106. Nevertheless, we still believe that the BBC exercises excessive dominance of the market for premium sports rights in UK radio. As BBC Director of Sport Roger Mosey wrote following the rights decision, the BBC still "came out of this extremely well"¹⁷. The other six packages, including those containing rights for flagship matches selected by BSkyB for television coverage, were won by the BBC. Crucially, the new arrangement will do nothing to free up more time for minority sports on Radio Five Live, as Mosey himself points out: "The only package we don't have is a second choice on Saturday at 3pm: a game that would currently be broadcast on Five Live Sport Extra. Every other kick-off time is in a BBC package."¹⁸
107. We believe that the BBC's policy on this issue may be influenced in part by the requirement that Radio Five Live should "aim to give listeners free access to sports coverage often available only on a pay-to-view basis elsewhere"¹⁹. We believe that radio and TV are two distinct sports rights markets and should be treated as such.
108. In fact, if a Commercial Radio station such as talkSPORT were to share Premiership football commentary rights equally with BBC 5 Live this would in no way "take these programmes beyond the reach of the less well-off"²⁰, as the BBC's 'Stimulating creativity and cultural excellence' Purpose Remit warns. In fact by increasing consumer choice it would have quite the opposite effect. The present arrangement in radio represents a severe "reduction of choice for such members of the audience", the precise situation which the BBC Trust has claimed that it wishes to avoid.
109. Finally, we note that BBC Radio's success in acquiring sports rights has been such that it now has an occasional digital service, Five Live Sports Extra, which it uses to broadcast coverage of events which cannot be accommodated on Five Live, since they clash with other events to which the BBC also owns the rights.

¹⁴ BBC Radio Five Live Service Licence, p. 2

¹⁵ Peter Osborne, 'How football ruined my radio', The Observer, 09 January 2005

¹⁶ BBC 'Stimulating creativity and cultural excellence' Public Purpose Remit, p. 5

¹⁷ Roger Mosey, 'Football tomorrow and beyond', Sport Editors Blog, http://www.bbc.co.uk/blogs/sporteditors/2006/10/football_tomorrow_and_beyond.html, (Accessed 26 March 2007)

¹⁸ Roger Mosey, 'Football tomorrow and beyond', Sport Editors Blog, http://www.bbc.co.uk/blogs/sporteditors/2006/10/football_tomorrow_and_beyond.html, (Accessed 26 March 2007)

¹⁹ BBC Radio Five Live Service Licence, p. 5

²⁰ BBC 'Stimulating creativity and cultural excellence' Public Purpose Remit, p. 7

110. The Service Licence for Five Live Sport Extra contains a welcome admission that the service must not be used to justify extra rights purchases²¹. Nevertheless, the requirement that it should "exploit sports rights owned by the BBC that cannot be accommodated by BBC Radio 5 Live or Radio 4 LW"²² acknowledges that the BBC acquires and holds more rights than it can reasonably put to air.

111. We believe that it would be a measure of the BBC's success in delivering value to the licence fee payer if there were no longer a need for Five Live Sports Extra. If BBC Sport was to suspend its policy of purchasing more sports rights than it is conceivably able to use across its core services this would also allow it to devote more time to the all-important Charter and Agreement requirement for the BBC to cover "sport of minority interest"²³.

Other issues

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

112. We do not have a strong view on this issue, although we believe that member states should continue to enjoy a large margin of discretion in planning their own broadcasting systems.

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

113. We do not have a view on this issue.

Final Remarks

Question 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.

114. As we have outlined in paragraphs 7 to 20, UK radio is currently dominated by the BBC, to the detriment of the commercial sector, which faces financial and structural challenges. We believe that strengthening and clarifying the Broadcasting Communication would aid the BBC's ability to perform its remit, whilst also providing greater certainty and protection for commercial operators as they adapt their businesses to the demands of the digital age.

115. With this in mind, we strongly urge the Commission to take this opportunity to undertake a thorough revision.

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

116. The possible additional clarifications could create additional costs for supervisory bodies such as the BBC Trust, as well as compliance costs, but we firmly believe that this should not prevent their implementation.

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

117. We do, since they would ensure that state-funded broadcasters are properly focused on the remits established for them, whilst also providing greater certainty and protection for commercial operators.

Question 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.

²¹ BBC Radio Five Live Sports Extra Service Licence, p. 2

²² BBC Radio Five Live Sports Extra Service Licence, p. 2

²³ BBC 'Stimulating creativity and cultural excellence' Public Purpose Remit, p. 5

118. We strongly believe that the positive impacts of these additional clarifications would outweigh the negative impacts. As we outlined in paragraph 5, there is a risk that severe damage could be done to European broadcasting if State Aid rules are not properly applied or if they are insufficiently rigorous.

RadioCentre, March 2008

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