

The European Commission
DG Comp
State Aid Registry
1049 Brussels
"HT.963"

SBS TV A/S
Mileparken 20A
DK-2740 Skovlunde
T: +45 70 10 10 10
F: +45 70 10 10 02
www.sbstv.dk

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Review of the communication from the Commission on the application of state aid rules to public service broadcasting

Reply to Questionnaire on behalf of SBS TV A/S, Denmark ("SBS TV").

1. General

1.1 SBS TV supports that the Broadcasting Communication is updated. SBS TV is a party in current proceedings pending before the Court of First Instance concerning state aid to Danish public service broadcaster TV2/Danmark A/S. Our comments are without prejudice to these proceedings and concern only selected elements of the questionnaire.

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

SBS TV would welcome that third parties, including commercial broadcasters, are involved in the process of defining public service remits including any public service remits comprising new media.

SBS TV finds that a remit which comprises offers which are adequately offered by the market will normally be unreasonably broad and SBS TV underlines the well known risks of distortions of competition by allowing broad public service remits in combination with public funding. Especially in nascent markets an unlimited extension of publicly founded offers can



create barriers to entry for commercial services that users will have to pay for or could lead to a severe distortion of competition to the detriment of those services.

SBS TV supports that clear rules on calculation of compensation and arrangements for avoiding and repaying any overcompensation are established in advance of any grant.

SBS TV notes that there is no justification for allowing a profit margin on the public service in case a public service broadcaster is set up and funded by a Member State as a special vehicle to ensure the provision of the public service.

Specific rules on cost allocation and separate accounting would be welcome but should be combined with full transparency and simple national procedures for dealing with complaints about cost allocation.

2.2 Definition of the public service remit

SBS TV is concerned that allowing broad and unspecified public service remits in new media markets may lead to unjustified distortions of competition in these and other markets.

It should be clear that the scope of the public service remit does not comprise commercial activities.

A mandatory *ex ante* evaluation of new media activities is supported. A thorough investigation of the need for proposed new services for public needs in the sense of a public value test combined with a analysis of expected effects on the market and a market value test could help to ensure to restrict distortive effects to a minimum. We urge the Commission to insure that the parameters of such a test are clear enough to prevent it to be watered down by the use of terms that can be widely interpreted.

The elements set out in 2.2.7 should be included.

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2.3 Entrustment and Supervision

As stated above, SBS TV would welcome that third parties, including commercial broadcasters, are involved in the process of defining public service remits.

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2.4 Dual funding of public service broadcasters

SBS TV is strongly against state funded pay services and pay services should always be considered as purely commercial activities.

2.5 Transparency requirements

The level of transparency of the commercial activities of Danish public service broadcasters is not satisfactory. Especially the commercial terms applied to advertising which constitutes an important part of the activity of TV2/Danmark and the TV2 regional stations are in our view insufficiently transparent due to use of non-transparent rebates.

SBS TV would also welcome clear rules on cost allocation.

2.6 Proportionality test – Exclusion of overcompensation

SBS TV does not see any reason that public service broadcasters that are fully or partially publicly funded should be allowed to keep a profit margin. In particular SBS TV notes that there is no justification for allowing a profit margin on the public service in case a public service broadcaster is set up and funded by a Member State as a special vehicle to ensure the provision of the public service.

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

2.7.1 Anti-competitive behaviour may in principle be challenged in courts and by complaint to the Competition Agency. In practice the existence of these avenues are not sufficient to prevent such behaviour.

2.7.3 The current text of the Broadcasting Communication could – depending upon its interpretation - be insufficient to prevent distortions of competition. It should be clear that the Member State and the public



service broadcaster, in order to invoke Article 86 (2) EC, shall demonstrate that all the conditions of this Article are fulfilled and demonstrate that the pricing of a publicly funded public service provider is not anti-competitive. This is particularly important in case of a broad and insufficiently well defined public service mandate.

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2.8 Other issues

SBS TV does not find that the actors of the different Member States should be judged by different standards and sees no need for a reference to alleged difficulties of smaller Member States.

3. Final remarks

SBS TV finds that further clarifications as set out above are necessary in order to protect a level playing field and therefore should be made.

Yours sincerely

SBS TV A/S



Henrik Ravn

