

REVIEW OF THE COMMUNICATION FROM THE COMMISSION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING

A Response from the European Alliance of Listeners' and Viewers' Associations

EURALVA

1. The European Alliance of Listeners' and Viewers' Associations (EURALVA) is an independent and non-sectarian alliance of national associations which represents the interests of listeners and viewers of broadcasting and new media services which can be received in member states of the Council of Europe. The objects of EURALVA are to represent the interests of listeners and viewers at both European and international level in whatever way the Alliance considers to be appropriate. In particular, but not exclusively, it champions media which serve citizenship by:

- Advancing the right of citizens to receive audiovisual media which serve the public interest;
- Promoting the free flow of ideas for everyone, including access to impartial news and information, in order to maximise their democratic, social and cultural potential;
- Supporting the right of all citizens to express themselves in public dialogue which is respectful of diversity and pluralism;
- Co-operating with civil societies and regulators in Europe and Worldwide;
- Liaising with responsible media organisations, which support the development of informed democracies, and which treat and portray all citizens fairly.

The Headquarters of the Alliance are situated in the United Kingdom (<http://euralva.org/>), and it currently has Member Associations in seven European states, as well as exploratory contacts in ten further States, which have either recently joined, or are current applicants to, the European Union. In addition, EURALVA has Associate Members in two non-European countries, Australia and Canada.

2. Although individual members of the Alliance will be replying separately to the Commission's enquiry about the situation in their own country, this response represents a more broad-based response by EURALVA itself, to the issues raised by the Commission.

EXECUTIVE SUMMARY

- In general, EURALVA considers that the provisions of the European Commission's Communication on the provision of State aid to public service broadcasting have worked well. It has offered listeners and viewers increased channel choice, although in some Member States fierce competition from commercial broadcasters has reduced programme quality and narrowed choice.
- However, the provisions of the Lisbon (European Reform) Treaty, and the entry into force of the Audiovisual Media Services Directive, will now require the Commission to update its 2001 Communication.
- EURALVA considers that the Charter of Fundamental Rights and Freedoms, which has been incorporated in the Lisbon Treaty, means that the public service remit of all State-aided broadcasters will now have to fulfil the minimum standards laid down for them by the Council of Europe, notably those established by the Committee of Ministers in 1994, and its Recommendations on the Guarantee of Independence, which were adopted in 1996.
- EURALVA recognises that the public service remit of the State-aided broadcaster in each Member State will vary. Nevertheless, it considers that each State should consult its citizens, possibly once every ten years, on the scope and the range of the public value that its public service broadcaster can contribute to that State's citizens.
- The increasing complexity of the broadcasting and video-on-demand markets, accompanied by commercial moves towards brand diversification, will make it far more difficult for the European Commission, when confronted with competition issues between State-aided and commercial broadcasters, to determine the appropriate market to be analysed. For these reasons, EURALVA considers that (a) competition issues should *not* be decided by national competition authorities; and (b) the European Commission should move from simple *ex-ante* judgements on proposals for new broadcasting or video-on-demand services, towards a consultative process, possibly involving the national regulatory authority, on the public value of these proposals, which involves listeners and viewers as well as the European Commission itself.
- EURALVA considers that the incorporation of video-on-demand services into the Audiovisual Media Services Directive means that the Commission should ratify the development of video-on-demand services by State aided public service broadcasters, including those, which are offered free-of-charge to all their citizens. In general, EURALVA does not consider that State-aided broadcasters should offer pay-services of any sort to their domestic citizens, since this would undermine the justifications for allowing State aid, which serves *the general economic interest*, as specified in the Amsterdam Protocol.
- In addition, given the mobility of labour in the Single European Market, EURALVA considers that the Commission should authorise State-aided broadcasters to use their State funds to purchase the constituent copyrights (such as script rights and music rights) of those programmes which they produce and transmit, in order to enable access by all of their citizens working in any Member State in the European Economic Area.
- The Audiovisual Media Services Directive both formally forbids, but nevertheless allows in certain circumstances, the presence of product placement in television and video-on-demand services. EURALVA considers that public service broadcasters that are in receipt of State aid should not be allowed to produce, or to transmit or include in their video-on-demand services, programmes involving product placement.
- EURALVA recognises the financial and linguistic problems of State-aided broadcasters from very small EU Member States. It therefore recommends that where their State funds are insufficient to offer a viable public service, they should be entitled to apply for a subsidy from EU regional aid funds for this purpose.

RESPONSES TO THE COMMISSION'S QUESTIONS

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?*

Generally speaking, EURALVA considers that the approach adopted by the Commission, both in its Communication on the application of State aid rules to public service broadcasting, and in its subsequent decision-making practice, has worked well. Nevertheless, EURALVA considers that the Commission will need to up-date its approach for a number of reasons. The two main reasons are the adoption of (i) **the Audiovisual Media Services Directive**; and (ii) **the Draft European Reform Treaty** which incorporates into the EU new legal obligations **with an enhanced emphasis on citizenship and socio-cultural obligations which derive from the European Convention on Human Rights. In particular, the European Court of Human Rights has already established a jurisprudence relating to public service broadcasting, while the Council of Europe itself has adopted a number of Ministerial Decisions, Recommendations and Resolutions which have started to clarify the future role and responsibilities of public service broadcasting.**

With regard to the adoption of the Decision and Framework on compensation payments, **EURALVA's primary concern is with the programmes shown by both public service and commercial broadcasters, rather than with the detailed financial arrangements of any one institution. Subject to some more general concerns which we outline below, EURALVA therefore takes a neutral view about the detailed arrangements for the payment of State aid to public service broadcasters.**

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.*

The competitive situation in the audiovisual media sector varies widely within individual Member States. In general, viewers welcome a choice of services, although the result of increased competition has not always been an improvement in the programme quality of those services. In some cases, there has been a pincer movement, which has reduced quality and narrowed choice. In 2005, in a forward to a twenty nation survey of television broadcasting in Europe which included 14 EU Member States, the Representative for Media Freedom of the Organisation for Co-operation and Security in Europe (OSCE) concluded that the individual country reports plainly showed that as a result of commercial competition, public service broadcasting was facing an identity crisis. "The advent of commercial broadcasting", he observed, "- often by deluge- has put enormous pressure on public service broadcasters to enter into 'ratings wars' with commercial broadcasters. The inevitable result has been the 'dumbing down' of public service content in many countries."¹

¹ Miklos Haraszti, Foreword, in, Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, *Television across Europe: regulation, policy and independence*, Budapest and New York, Open Society Institute, 2005), 12. The EU Member States covered in the survey were Bulgaria, Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and the United Kingdom.

On the content side - which is the principal concern of listeners and viewers - the OSCE Representative noted that “Diversity of content and impartiality of news content is becoming increasingly at risk in the commercial broadcasting sector, where cross-ownership is on the rise, ownership structures are becoming increasingly opaque, and the number of broadcast media players is radically shrinking.”²

Despite these fears, especially about the situation in a number of Central and Eastern European Member States, EURALVA considers that, in general, the current competitive situation has, from a citizen’s point of view, not worked out too badly, although it also notes that with the advent of digital broadcasting, four profound, and sometimes unwelcome changes, are staring to emerge.

(a) At the end of last year, according to the latest report of the Association of Commercial Television Companies, Europe boasted 1,763 television channels, at least thirty of which were new commercial channels, which were launched during 2006. Moreover today, as well as radio and television services, advertisers can use the Internet and the socially-interactive telecommunication networks in order to market their products and services.

(b) Secondly, it is no longer possible to regard the television market as straightforward competition between commercial and public service broadcasters. A growing trend among the major broadcasting companies is brand diversification. The leading proponent of diversification is the M6 channel in France, which has already diversified into home shopping, mobile TV, web-based activities including video-on-demand, the part ownership of the *Girondins de Bordeaux* football club, and the social networking site youtribe.com. Its competitors have also launched ventures into other fields, including cinema production, the promotion and management of musical events, and book publishing. For many commercial companies, television is now but one arm of an integrated multimedia strategy in which competition takes place across media as well as within a given communications medium, such as television broadcasting.

(c) Changes in the digital advertising market are also affecting the behaviour of television viewers. For instance, recent research by BARB in the UK has shown that although the audience share per TV channel has fallen, the number of advertisements watched by each viewer has actually increased. Within this context, a growing difference is starting to emerge in Europe between those public service broadcasters, such as those in the UK and Denmark, who receive all their funds from State aid, and those who also depend on the sale of airtime for their funds. From this perspective, it is important to note that France has recently announced that its public service channels will no longer sell airtime to advertisers. Instead they will receive a proportion of the advertising revenues of the commercial broadcasters, plus the receipts from a tax on mobile telephones. At the moment, the precise arrangements have not been finalised.

(d) As the number of digital channels grows, increased competition between channels for advertising revenues is starting to highlight a growing divide between the programming strategies of public service broadcasters and those of commercial broadcasters. The role of the former is to deliver programmes to viewers, whereas that of the latter is increasingly becoming different - and more focussed - namely one of delivering certain socioeconomic categories of viewers to advertisers and programme sponsors. The programming challenge faced by public service broadcasters in those Member States where they have to rely on a mix of State aid and commercial revenues is therefore especially acute.

² Ibid.

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?*

EURALVA has indicated above, that with the advent of digital technology, the selection by the European Commission of the relevant market for decisions about State aid will become increasingly complex. According to a recent report by the European Audiovisual Observatory, by the end of 2007, there were already 258 VoD services in operation in 24 European countries, compared with 148 a year earlier. The upsurge in the number of services mainly arose because television channels have now established web-sites offering free catch-up TV, which allow viewers to access certain programmes, notably episodes of series, for a period of seven days after their first transmission. France, with 32 VoD services, the Netherlands with 30 VoD services, and Germany with 26 services, account for almost a third of Europe's VoD services.³ At the end of 2006, 142 of the 148 Video-on-Demand (VoD) services in Europe were pay-services. The other six were free access services.⁴

Although the Audiovisual Media Services Directive extends the provisions of the Television without Frontiers Directive to cover VoD Services, it does not include all VoD services within its purview, since many VoD services will not meet the six criteria laid down in the Directive.⁵ Other VoD services (and possibly all pay VoD services) will probably be regulated either by the e-Commerce Directive (2000/31/EC), or by bilateral treaties between Member States and third States outside the European Economic Area, such as the USA or Russia. State aid from third countries outside the EEA, or even access to an especially large market in third countries with poor quality television services, may therefore distort competition between VoD services within the EEA. **As a result, the Commission may have to accept that there will always be imperfect competition in the VoD market.**

Consider the competition between free VoD services and pay VoD services. Most of the free access VoD services in Europe are provided by public service broadcasters to enable their viewers to catch up with, or to watch again, television programmes that have previously been broadcast. These organisations have a different business model to that of commercial film producers. Thus although these free VoD services may be offered to users free of charge, they cannot be considered to be providing unfair competition to VoD pay-services. Indeed, a close examination of the issue of competition, from a viewer's perspective, reveals that it is not inter-service, or more precisely inter-catalogue, competition that is important to viewers, but it is the ability to access a particular film or television programme. **What most viewers want is programme choice, which is not the same as inter-service competition.**

In practice, it will also be very difficult for the European Commission to separate the issue of inter-service competition in the field of VoD from the practices adopted by rights holders when licensing the copyright (including the constituent authors' rights) in a particular programme. Three issues are pertinent here. They are:

³ Council of Europe Press Release, *Number of VoD services in Europe grew remarkably in 2007*, Strasbourg, 19 February 2008, http://www.obs.coe/about/oea/pr/vod2008_update.html

⁴ A. Lange, 'Parameters for Business Models', *Legal Aspects of Video on Demand, IRIS Special*, (European Audiovisual Observatory, Council of Europe, 2007), 23.

⁵ An especially tricky legal issue is whether the programmes in a pay-TV service, or a pay VoD service, are actually available "to the general public", as required by articles 1(a) and 1(e) of the AVMS Directive, since contractually they are only available to subscribers to the service.

- (i) The practice of licensing programmes to separate windows, such as those of television and VoD, and of separating the release to these windows by certain time frames. Sometimes, these practices are linked to the financing arrangements for producing the programmes, which often predetermines the sequence of releasing programmes to different media. Even though this is technically collusive behaviour, this practice is often endorsed by the relevant commercial trade associations.
- (ii) The extensive practices of allowing programme makers to licence programmes to a given licensee on an exclusive basis. This practice occurs regularly, despite the ruling of the European Court of Justice, that there is a clear distinction in European law between the existence of copyright and the manner in which it is exercised.⁶
- (iii) The failure of the European Union to establish a single European-wide market in intellectual property rights. This means that in practice the European television market is frequently split into separate national copyright markets. On the other hand, DVDs are normally licensed for sale to Europe as a whole. At the moment, no single model appears to have emerged for the VoD market.

Shaping a Solution: Reconciling Fair Competition with State-aided Public Service Video-on-Demand

(a) Copyright Issues

The EU's State aid rules allow public service broadcasters to be both producers and broadcasters of programmes, although the aid can only be deployed within the national market. This means that public service broadcasters can only use their State aid revenues to purchase the domestic content rights for a programme which they intend to produce. If they subsequently wish to license the programme to be broadcast in another Member State, then they have to use non-State-aid funds to purchase the constituent rights for non-domestic territories.

The arrival of VoD therefore raises a number of tricky issues about the secondary use by public service broadcasters of State aid funds in order to purchase the rights for VoD services. A Symposium held by the European Broadcasting Union on 31 March 2006 concluded among other things that:

“Future DRM (Digital Rights Management) systems must be acceptable to all stakeholders, including consumers, and must respect basic principles of copyright law. Moreover, in order to avoid “gate keeping” effects in new media services, the abuse of proprietary rights – whether of copyright or any other nature – should be prevented. DRM systems must keep digital reception technology attractive for all viewers and listeners via open and interoperable standards, and provide equal access for broadcasters to all media platforms.”⁷

EURALVA concurs with these conclusions. In addition, it welcomes the conclusion from the German author that “To safeguard the specific public service character of new media activities, including VoD offers, [Germany's] public service broadcasters will carry out a three-step procedure:

- Firstly, public service broadcasters will be required to argue that such offer is required by the public service remit and therefore serves the democratic, social and cultural needs of [German] society;
- Secondly, the offer has to contribute to editorial competition in a qualitative way, and

⁶ See, for instance, *Deutsche Gramophon vs. Metro*, [1971] ECR, 881.

⁷ See, Gregor Wichert [ZDF], ‘The Position of Public Service Broadcasters’, in *Legal Aspects of Video on Demand* (op. cit.), 85-87 at 86.

- Thirdly, the broadcasters have to specify the financial aspect of the new service.⁸

EURALVA welcomes this approach which makes it clear that the VoD services offered by the public service broadcasters will complement, rather than compete with, those offered by commercial broadcasters. EURALVA therefore considers that these principles could well be extended to all public service broadcasters in the European Union.

(b) Making Universal Access a European Reality: the Free Movement of Citizens and their Access to Public Service Broadcasting

The advent of VoD also offers those EU citizens, who live outside their domestic Member State, the technological opportunity to benefit from the domestic, social and cultural needs that are met by their domestic public service broadcaster. For instance a German citizen temporarily living in the Czech Republic could keep abreast of German news and current affairs by watching a VoD service from one of the German public service broadcasters, and probably exercise a postal vote in a national or regional election. Similarly, a Polish citizen living in the United Kingdom could keep abreast of the social changes that are taking place in Poland by watching a VoD service from the Polish public service broadcaster.

In practice however, this simple vision may be complicated by financial issues related to precisely through which distribution network the public service broadcaster will be able to make available its catalogue of VoD programmes, and at what price. These may include the additional cost to the broadcaster of purchasing constituent VoD rights within its programmes, such as script, commentary or music rights, and whether they can be distributed throughout the whole of the EU.

EURALVA therefore submits that public service broadcasters should be able to use State aid funds to acquire VoD rights for their own public service programmes in order that their citizens may access them, wherever they live in the European Economic Area, provided that the public service broadcaster (i) allows EU citizens to access its programme catalogue free of charge; or (ii) where this is not economically viable, it ensures that the access charge is only set at a level which is commensurate with the additional costs that the broadcaster incurs in making its VoD catalogue available.

(c) Product Placement on Public Broadcasting Services: A Clash of Principles?

The Audiovisual Media Services Directive has raised a second issue concerning the future application of State aid by public service broadcasters. Although the Audiovisual Media Services Directive continues to ban surreptitious advertising, for the first time it has allowed Member States to permit the introduction, in certain circumstances, of product placement. In some cases, it will even be possible for broadcasters, including public service broadcasters, to include product placement in their programmes without even notifying viewers of its presence.⁹ There has, as yet, been no statement from Member States as to whether they will permit their State-aided public service broadcaster to include product placement within their programmes.

Bearing in mind (a) the growing disparity in programming policy between the roles of commercial broadcasters and public service broadcasters; (b) the fact that public service broadcasters are only entitled to benefit from state aid because of the democratic, social and cultural benefits that they offer to their citizens, and (c) the fact that article 3f(1) of the Audiovisual Media Services Directive

⁸ Ibid, at 87.

⁹ *Audiovisual Media Services Directive*, article 3f(2).

prohibits product placement, **EURALVA considers that it is now appropriate for the Commission to make it clear that the production or transmission by public service broadcasters of programmes containing product placement would be an abuse of State aid.**

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. EURALVA does not consider that the requirements laid down in the Decision and Framework on public service compensation should be included in the revised Broadcasting Communication. This is because the Alliance considers that the funding of public service broadcasting will vary substantially between individual Member States, according both to the size of the Member State, the specificity of the public service remit, and – in some Member States - fluctuations in the size and shape of the markets in commercial revenues.

2.2. Definition of the public service remit

2.2.1. EURALVA notes that the specificity and the details of the public service broadcasters vary widely between individual Member States. This is because, under the principle of subsidiarity, the Commission has previously allowed individual Member States to develop their own definitions of the public service remit for their domestic public service broadcaster. This was sensible in 2001, for as many academic commentators have pointed out,

“Society and the media do influence one another, but as the stronger entity, society moulds the media and sets the parameters of their influence upon itself; it is social conditions, including social change, which create conditions for, or trigger, media action in this area.”¹⁰

At the same time, the Member States in the European Union are becoming ever more closely united, and (subject to ratification by all Member States) the EU Council of Ministers has now agreed a new European Reform Treaty which has specifically incorporated within it a Charter of Fundamental Rights and Values, which are essentially the same as those developed within the Council of Europe. There are a number of judicial decisions of the European Court of Human Rights, together with a series of Ministerial Resolutions, Declarations, Recommendations and Resolutions from the Council of Europe, all of which relate to public service broadcasting.¹¹ These can all ultimately be traced back to the provisions of Article 10 of the European Convention of Human Rights, which guarantees freedom of expression, and in particular the right for every citizen to receive information and ideas. The same principle also underpins the specific formulation of the Amsterdam Protocol, which recognises the right of public service broadcasting to be considered as a service of general economic interest.

The basic philosophy of public service broadcasting lies in a social contract between the individual listener and viewer and society itself. Although the precise manner in which public service broadcasting is financed varies from State to State, ultimately the State taxes the individual consumer in order to establish a communication institution which assists individual consumers to

¹⁰ For a more extended survey, see, Karol Jakubowicz, “Systemic Parallelism”, in *The Public Service Broadcasting Culture* (European Audiovisual observatory, Council of Europe, 2007), 16-17, at 16.

¹¹ For a full list, see Susanne Nikoltchev, “European Backing for Public Service Broadcasting: Council of Europe Rules and Standards”, in European Audiovisual Observatory, Council of Europe, *The Public Service Broadcasting Culture*, op. cit., 7-15.

establishing a common philosophy of citizenship. As the Commission itself noted in article 6 of its 2001 Communication on the application of State aid rules to public service broadcasting:

“Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.”¹²

It is important, at this point, to insist on the fundamental difference between public service broadcasting and State broadcasting. Although public service broadcasters receive financial aid from the State, it is in order for the broadcaster to serve the public. Thus in the field of broadcasting, the incorporation of the principles of the European Convention of Human Rights into the European Union marks a fundamental shift in the philosophy of the Union. Although the Amsterdam Protocol had already recognised that public service broadcasting was, or more precisely could be, a service of general economic interest, the European Commission must now also recognise it as a service which facilitates and enhances the freedom of expression of Europe’s citizens, and in particular, their freedom to receive, as well as to impart, information and ideas.

EURALVA therefore considers that the European Union now needs to define the remit of public service broadcasters more precisely. The Commission therefore needs to find a way of moving beyond the application of the principle of subsidiarity, and thus of allowing each Member State to define its own public service remit, to an approach which seeks to establish certain minimum standards for the public service remit throughout the European Union.

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?).

Although EURALVA has indicated the Commission should establish certain minimum standards for State-aided public service broadcasters, it is not simply proposing the imposition of top-down, standards on individual Member States. This although EURALVA considers that there should be a distinction between public service and other activities, it does not consider that this should – or indeed would - be achieved by issuing an *ex-cathedra* list of proscribed commercial activities not covered by the public service remit.

EURALVA proposes instead that the Commission should establish a *consultative process* in which it should invite Member States to

- **explain how they are implementing previous agreements to which they have agreed within the framework of the Council of Europe,**
- **elucidate precisely how they are consulting with their own citizens in establishing the public service remit for their domestic public service broadcaster;. And**
- **participate in a comparative EU-wide survey, possibly linked to the Euro-barometer survey, on the degree of trust which the citizens of each Member State place in their own public service broadcaster.**

In this context, EURALVA notes that:

¹² 2001/C 320/04, paragraph 6.

(a) The Amsterdam Protocol justified State aid for public service broadcasting on three grounds: namely its contribution to the democratic, the social and the cultural needs of society. It would therefore be reasonable for the European Commission to ascertain from each Member State precisely how the public service remit for its public service broadcaster helps to achieve each of these three aims.

(b) Every Member State in the EU signed the Ministerial Resolution on Public Service Broadcasting of the Council of Europe, which was agreed in Prague in December 1994. States participating in this resolution agreed, among other things, *nine principal public service missions for their public service broadcasters*. It would be reasonable for the Commission to seek to ascertain, either by evaluating existing domestic opinion polls, or by conducting their own public opinion surveys, the degree of trust that the citizens in each Member State place in the fulfilment by their public service broadcaster of these nine public service missions.

(c) The democratic histories of individual EU Member States, and of their public service broadcasters, are markedly different. In 2007, Professor Karol Jakubowicz identified three main models for the creation of public service broadcasting, or for the transformation of state broadcasting into public service broadcasting in Europe. These were the paternalistic model, the democratic and emancipatory model, and the systemic model.¹³

Therefore, before taking any further decisions to revise its 2001 Communication on the Application of State aid to Public Service Broadcasting, the Commission should establish an EU-wide poll in order to establish more clearly, on a comparative basis, the degree of trust which the citizens of each Member State currently place in the activities of their domestic public service broadcaster.

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?

EURALVA considers that

(a) In any revision of its Broadcasting Communication, the Commission needs to make it clear that public service broadcasters can provide a VoD service as part of their public service remit, even if it requires them to acquire the non-domestic VoD rights in their programmes.

(b) Public service broadcasters should make no charge for accessing their catalogue of VoD programmes, but should it be necessary to do so, their revenues from their VoD catalogue should not exceed the costs of distributing the catalogue.

(c) Public service broadcasters in receipt of State aid should be forbidden from funding their programmes by means of product placement.

¹³ Jakubowicz, *op. cit.* Although this classification needs to be refined further (for instance it ignores the distinctive history of public service broadcasting in the Netherlands) it does indicate the wide range of institutional histories which are caught under the umbrella term “public service broadcasting”.

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?

While EURALVA recognises the value of the use by the Commission of *ex ante* evaluations for proposed new media activities by public service broadcasters, it considers that it would be unnecessarily legalistic to incorporate this procedure into a revised Broadcasting Communication.

Although a change of this nature would have the value of continuing to require public service broadcasters to articulate clearly the contribution which their proposed new media activities would make to their public service remit, any such change should be part of a broader process, which also allows both the public service broadcaster and the citizens of the Member State concerned to assess and comment on the value of the new activity once it was up and running.

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?

As EURALVA indicated in its response to 2.2.4, any new media services should be subjected to a process of both ex-ante and ex-post process of evaluation which involves listeners and viewers, as well as the European Commission.

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

Logically, if the Commission were to accept the principles underpinning our answers to questions 2.2.4 and 2.2.5 (above), **EURALVA considers that no specific services, or categories of service, should be singled out for *ex-ante* evaluation.**

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)?

Please see our answers to questions 2.2.1 and after.

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?

EURALVA considers that it would be premature for the Commission to spell out, in a revised Broadcasting Communication, possible different options for determining the public service character of such activities. As indicated in our response to question 2.2.2, it would be better to establish a consultative process, which involves citizens as well as officials, which is designed to establish a set of common minimum standards across the European Union. EURALVA anticipates that many Member States may far exceed these minimum standards, but that there will be others which will need to ensure that their State-aided broadcasters genuinely serve the public, and not just reflect the views of the government of the individual Member State.

2.3. Entrustment and Supervision

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?*

EURALVA understands that the procedures for entrustment vary widely between individual Member States. **Ideally, it considers that the broadcaster's remit should be laid down in a legally binding act of entrustment which is regularly reviewed, possibly every ten years. More important however, is the procedure by which the provisions of the legal remit are established.**

Ideally, EURALVA considers that this should involve a number of procedures:

- **An evaluation, by means of public opinion polls and other means, of the degree of trust which the citizens of that State place in their public service broadcaster, and its fulfilment of the nine principal public service missions for public service broadcasters agreed by the Committee of Ministers of the Council of Europe in Prague in 1994;**
- **The preparation by the incumbent public service broadcaster of a considered response to the findings of the survey of the degree of trust expressed by public opinion;**
- **The preparation by the relevant Government¹⁴ of a revised draft act of entrustment for the future, which outlines both the potential future remit of the public service broadcaster, including specific details about its democratic, social and cultural responsibilities; and the manner by which it proposes to ensure that the future broadcaster will be (a) independent of government; and (b) accountable to the public;**
- **The preparation by the relevant Government of an estimate of the amount of State aid that is likely to be required by the new broadcaster, and the procedure by which future levels of State aid will be agreed;**
- **A further public consultation on the Government's proposed plans for the future public service broadcaster;**
- **The establishment of a revised act of entrustment for the incumbent public service broadcaster, or alternatively a procedure for allowing other aspirant public service broadcasters to compete for the new legal remit.**

This is an outline of an ideal process. Parts of it are based on the approach recently adopted in the United Kingdom for the renewal of the BBC's Charter and Licence, but there may be other ways of ensuring that Europe's citizens consider that they can place their trust in their public service broadcaster.

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?*

¹⁴ In some EU Member States, broadcasting is authorised on a regional basis, in others where there is a degree of devolved government, the precise responsibility for regulating broadcasting may be contested.

There is a variety of supervision mechanisms for public service broadcasters throughout Europe. All of them have their own histories, their own cultures, and their own benefits and disadvantages. It is therefore likely that the experience of the existing supervisory mechanisms by listeners and viewers will vary widely from country to country.

When considering whether there are sufficient possibilities for third parties to take action against alleged infringements/non-fulfilment of public service obligations, in the opinion of EURALVA it is important for the Commission to draw a clear distinction between three scenarios:

(a) Pursuant to article 23 of the Audiovisual Media Services Directive, the mechanisms which are available to a citizen, or indeed anyone, who is portrayed in, or directly affected by, a radio or a television programme, or a programme which a public service broadcaster includes in a video-on-demand catalogue, to present a complaint with the prospect the possibility of securing an apology or redress from the broadcasting organisation itself, or from an external regulatory body, such as a Complaints Commission;

(b) The procedures which are available to a third party which wishes to take legal action in order to challenge the established supervisory arrangements, for instance by calling for a judicial review of the actions (or inaction) of the supervisory body, and

(c) The possibility of a citizen, or group of citizens, presenting evidence to the relevant supervisory body for the public service broadcaster, in order to seek a change in the policy of the supervisory body.

Ideally, the Commission should require each Member State to establish a two-stage process in which (a) every citizen can have access to the relevant supervisory body for the public service broadcaster; and (b) a citizen, or group of citizens, which is still dissatisfied, can obtain a legal review of decision which is taken by the supervisory body, which they consider not to be in the public interest.

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?

EURALVA considers that every act of entrustment should guarantee to every citizen:

(a) Access to the supervisory body in pursuit of a claim of alleged infringement/non-fulfilment of its public service remit; and

(b) The freedom to apply for a legal review of the decisions of the supervisory body.

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?

The Commission's current Broadcasting Communication allows each Member State to choose the mechanism which it deems to be the most effective in ensuring the fulfilment of the broadcaster's

public service obligations. However, the Commission also considered that such a body would only seem to be effective if its authority was independent from the entrusted undertaking.¹⁵

EURALVA is aware that current arrangements vary widely across the European Union. In our view, however, both internal supervision and external supervision have their merits, for in order to be effective, any supervision needs to be firm but fair, and to be able to effect subtle changes in editorial policy, as well as major changes within the internal structure of the broadcasting organisation. Two aspects are critical in effecting change. These are (a) the personal relations between the Chairman of the Supervisory Body and the Chief Executive Officer of the public service broadcaster, and (b) the location of the control of the flow of State aid to the broadcaster.

The difficulties in finding an appropriate solution to the problem of ensuring increased effectiveness in the supervision of public service broadcasters can be seen from a close study of the recent changes made by the UK government to the supervision of the BBC. Initially, the Government proposed to replace the BBC Governors by an outward-looking BBC Trust which would have “service contracts” with each of the main BBC broadcasting channels. On the other hand, the CEO (the Director-General) of the BBC, who is *not* a member of the Trust, would remain as the editor-in-chief of the BBC. Moreover, it was the BBC Trust, not the BBC Management formally known as the BBC Executive Board - which was ultimately, and in legal title, designated as the British Broadcasting Corporation; and thus it is the Trust which owns the copyright in all the BBC’s programmes. Thus although the BBC Trust theoretically supervises the BBC Executive Board, and is ‘senior’ to it, the Trust is also has an arms-length contractual relationship with the Executive Board, which is a separate body with its own statutory status. According to statute, the BBC Trust funds the Executive Board to produce programmes on various platforms, in specified genres, and to exercise editorial and quality control over that content – of which the Trust remains, in law, the ultimate owner, publisher and copyright holder.

Almost immediately after Parliament had renewed the BBC’s Charter, the UK Government announced that the BBC would get less State aid than it had originally asked for. This meant that both the BBC Trust (to which the UK Government actually pays the money) and the BBC Executive Board had to modify their programming plans, to cut back their programme budgets, and make large numbers of staff redundant. In effect, here was therefore a further supervisory body above the Trust, namely the UK Government, whose decisions on the level of State aid for the BBC limited the Corporation’s ability to fulfil its public service remit.

EURALVA therefore considers that it would be unwise, and probably ineffective, for the Commission to change the current Broadcasting Communication along the lines apparently mooted in question 2.3.4.

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?

EURALVA understands that private operators can already raise issues related to the scope of public service broadcasters’ activities at European level, but it is not convinced that it would be valuable to extend this to national level in any formal procedural sense.

In EURALVA’s view, there are three main reasons for this.

¹⁵ 2001/ C320/04, article 42.

(a) Firstly, by restricting complaints to the European level, both the European Court of Justice and the European Commission have been able to establish an EU-wide jurisprudence and set of precedents for dealing with complaints of this nature. In the view of EURALVA, if specific complaints procedures were to be established in each Member State they would all have to take account of EU precedents. Moreover, it would be unfortunate if courts in each Member State were to be able to take autonomous decisions which could completely distort the competitive environment across the European Union. For instance, courts in some Member States could allow their public service broadcasters to conduct very commercially-oriented activities, while others would not. Furthermore, it would depend whether the specific arrangements at national level would be *ex-ante* or *ex-post* procedures, and if *ex-ante*, whether the decision of a court, or supervisory body in one Member State would set a precedent for another Member State.

(b) Judicial and supervisory outcomes would also depend on the regulatory and supervisory arrangements in each Member State. They might also involve a high degree of guesswork. For instance, the United Kingdom has established what it calls a “market-impact assessment” procedure for any future public services which the BBC wishes to establish. Under this procedure, Ofcom - which is responsible for the oversight of all broadcasting and telecommunication activities in the UK – and the BBC Trust *jointly* consider whether any new BBC services would have an impact on the market. If there is disagreement, Ofcom formally advises the BBC Trust of its own position.

(c) This, or any similar process, raises several problems. First, it is by no means clear in which market will be appropriate for Ofcom and the BBC Trust to assess the impact. *Prima facie*, it must be assumed that they will be considering a UK market, and not an EU-wide market. But the real issue is how they should establish an impact assessment for a market which does not yet exist, but which it is in the EU’s purview to influence. As EURALVA noted above in its response to question 1b, it is no longer possible simply to regard the television market as straightforward competition between commercial and public service broadcasters. Brand diversification means that for many commercial companies, television is now but one arm of an integrated multimedia strategy in which competition takes place across media as well as within a given communications medium. Moreover, if the public service broadcaster is launching an innovative service it may well create, and therefore have a major impact upon, a new ‘sub-market’. If the public service broadcaster is the second entrant into a new market, it is likely to have an impact on that market, because of the competition it offers to the first entrant.

EURALVA does not therefore consider that there should be specific complaints procedures at national level where private operators could raise issues related to the scope of the public service broadcasters' activities.

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?

EURALVA does not have access to the data which is needed to estimate the impact of wholly or partly-funded services on competition. Nevertheless, EURALVA considers that all State-funded services should be free at the point of use, however they are financed. The introduction by public service broadcasters of pay-services or subscription services would undermine the principle of universal access (and probably remove those services from the regulatory field covered by the Audiovisual Media Services Directive). At the same time, EURALVA recognises that rights owners may wish to license their programmes or sports events to pay-TV services before licensing

them to free-to-air TV services. On the other hand, article 3i of the Audiovisual Media Services Directive allows a Member State to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which it regards as being of major importance for society, in such a way as to deprive a substantial proportion of its public from following that event.

EURALVA would therefore recommend to the Commission that it forbids the introduction of pay services by State aided broadcasters, whether they are wholly or partly funded. It should also encourage each Member State to provide its public service broadcaster with sufficient funds to fulfil its public service remit with services that are free at the point of use. On the other hand, EURALVA also recognises that smaller Member States may not have access to sufficient State aids to establish a fully State-funded service. If this is the case, rather than introduce a pay-service, they should be authorised to apply to one of the EU's regional funds in order to augment their public funding.

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?

EURALVA considers that any pay-services should not normally be considered part of the public service remit. It recognises, however, that in some Member States, especially in small Member States, a public service broadcaster may not be able to fulfil its public service remit completely without introducing a pay-service.

In some circumstances, it may also be possible for a public service broadcaster to co-operate with a commercial broadcaster. In the UK, for instance, the *Freeview* digital terrestrial platform, which is jointly owned by the public service broadcasters and commercial operators, offers both free-to-air services and pay-services. In this case, it is almost certain that the public service investment in the digital terrestrial platform is actually subsidising the commercial operators who are also using the platform for pay-services. The crucial element about this arrangement, however, is that citizens' access to the digital platform itself is free, although they obviously have to pay to access the pay services on that platform. It would also be possible to envisage the development of a VoD service, in which the VoD catalogue contained both public service programmes to which citizens could have free access, and commercial programmes, which for which consumers had to pay for access.

2.5. Transparency requirements

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?

As far as the general principles are concerned, on questions 2.5.1-4; 2.6.1-6; and 2.7, 1-3, EURALVA does not have the detailed information, or the specialist methodology which is necessary to draw the precise boundary between public service and commercial activities. Nor do

we have the data that would be required to establish formulae which would put limits, or legitimate margins around State aid.

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?

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?

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?

2.6. Proportionality test – Exclusion of overcompensation

2.6.1. Do you consider that the Broadcasting Communication should include a requirement for Member States to clearly lay down the parameters for determining the compensation amount?

In the opinion of EURALVA, public service broadcasters receive State aid to deliver their public service remit, and not as compensation for their lack of commercial viability. **EURALVA certainly considers that both member States and public services broadcasters should be held procedurally accountable in cases of alleged over-compensation, but it would be extremely cautious concerning any proposal which sought “to clearly lay down the parameters for determining the compensation amount.” EURALVA would also reserve the right to examine, and take a view on, any general criteria that might be proposed for enforcing such a proposal.**

Otherwise, please see our response to question 2.5.1.

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?

EURALVA considers that the predictability which comes from pluri-annual funding arrangements is extremely important for the strength, stability and independence from unwarranted governmental interference, of public service broadcasters.

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?

As noted above, in our replies to questions 2.5.1 and 2.6.1, EURALVA considers that public service broadcasters should receive sufficient State funds in order to fulfil their public service remit. These could vary significantly from year to year, depending on developments in the democratic, social and cultural needs of the State concerned.

EURALVA therefore considers that it would therefore be inappropriate for the Commission to include the *ex-ante* and prescriptive provisions related to the Decision and Framework into the new Broadcasting Communication.

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)?

See EURALVA's answer to questions 2.5.1 and 2.6.3.

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?

To the best of EURALVA's knowledge, the current rules are not a disincentive to efficiency gains. On the contrary, public service broadcasters in several EU Member States perceive themselves to be under increasing pressure from their national governments to achieve efficiency gains.

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?

EURALVA considers that no public service broadcaster should be allowed to keep a profit margin, as all its State aid should be spent in fulfilling its public service remit. This should not, however, prevent a public service broadcaster from covering its real costs, or keeping a reserve of working capital.

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

2.7.1. What are the available mechanisms in your country under which private operators could challenge alleged anti-competitive behaviour of public service broadcasters? Please indicate whether you consider that these mechanisms ensure a sufficient and effective control. Are lower revenues due to demonstrated anti-competitive behaviour (e.g. price undercutting) taken into account when determining whether or not the public service broadcasters have been overcompensated?

EURALVA has no detailed evidence on this topic, but it assumes that others, including commercial broadcasters will be in a position to provide the information.

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?

EURALVA would not condone anti-competitive behaviour by public service broadcasters. Their task is to fulfil their public service remit. See also, EURALVA's answers to questions 2.5.1 and 2.6.1.

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.

Please see EURALVA's answers to questions 2.5.1 and 2.6.3.

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?

In most Member States, the public service remit includes the coverage of national and European sporting events. It is not clear what the Commission means by the phrase "premium sports rights". In addition, article 3i of the Audiovisual Media Services Directive allows Member States to prevent a major proportion of the public from being deprived of following events which are of major importance for society. EURALVA definitely opposes any proposal to limit the sports coverage of public service broadcasters to the less popular sporting events.

2.8. Other issues

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

Yes. It is clearly the case that, *ceteris paribus*, in smaller Member States, the cost per inhabitant of a public service broadcaster will be higher, and the Commission should continue to take account of this.

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

The principal difficulties are those of (a) funding the public service broadcaster; (b) ensuring that the public service is sufficiently broad and diverse, and (c) offering enough programming which has been produced in the domestic language of the Member State concerned. One solution would be to allow small States to have access to the EU's regional funds in order to subsidise public service broadcasting.

3. FINAL REMARKS

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.

In general, EURALVA observes that the general impact of the development of innovative services is that where they are successful, they reduce the time which EU citizens spend watching television. One indicator of this is the increased proportion of spending by advertisers which is going towards advertising on the Internet, and consequently, a smaller proportion is going to television. Moreover, the advent of digital television means that, in many parts of the EU, the advertising revenue per channel is decreasing. Furthermore, as we noted in our response to question 1.2, many erstwhile television broadcasters have started to diversify into parallel, but related activities.

The EU's State-aided public service broadcasters are, in EURALVA's opinion, the principal programme-making organisations which will provide home-grown content reflecting European values and traditions, as opposed to re-broadcasting North American or other non-EU programmes. They are therefore essential to the maintenance of consumer choice in this area.

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

EURALVA would oppose any additional clarification that would impose new administrative burdens or compliance costs on State-aided public service broadcasters, unless the Commission could demonstrate that these changes would significantly help to ensure that they improved their delivery of their public service remit.

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

As EURALVA has indicated in its responses, it is important for the Commission to recognise and acknowledge the changed emphases and priorities which result from the introduction into the European Reform Treaty of values traditionally associated with the Council of Europe.

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.

In general, EURALVA – as stated at the outset – supports the approach taken by the Commission both in its 2001 Communication and in its record of adjudications. EURALVA is concerned, however, that the present consultation is too narrowly focussed on competition issues. While competition issues are certainly relevant, the questionnaire and the subsequent decision-making process fail to address directly the question of how public service broadcasters can improve their delivery of the democratic, social and cultural benefits to their domestic citizens that justify their State aids.

March 2008