EUROPEAN BROADCASTING UNION UNION EUROPEENNE DE RADIO-TELEVISION

Legal and Public Affairs Department *Département des affaires juridiques et publiques*

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Review of the Communication from the Commission on the application of State aid rules to public service broadcasting (Broadcasting Communication, OJ 2001 C 320/5)

EBU contribution to the Commission's second public consultation

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The EBU welcomes the opportunity to respond to the Commission's second public consultation of 4 November 2008 and has pleasure in setting out herewith its position, which is presented on behalf of EBU Members receiving public funding.

EBU·UER
L'Ancienne-Route 17A
Case postale 45
CH-1218 Grand-Saconnex GE
Switzerland / Suisse

Tel +41 (0)22 717 25 05
Fax +41 (0)22 717 24 70
e-mail daj@ebu.ch
Internet www.ebu.ch

Executive Summary

- New technology and convergence offer public service broadcasting the opportunity to bring benefits to citizens and to the media industry as a whole. Public service broadcasting has to be able to adapt to the *changing needs of citizens* and to assume its responsibilities vis-à-vis society, in particular by serving young audiences.

- *Technological neutrality* should become the guiding principle of any revised Broadcasting Communication. The Commission should refrain from applying different standards to "new media" services and should avoid perpetuating the distinction between "old" and "new media" in European State aid rules on public service broadcasting.

- In the EBU's view, the Commission should take greater account of the *specificity* of public service broadcasting as recognized by the Amsterdam Protocol. Public service broadcasting is not like other services of general economic interest; it is directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism. The remit of public service broadcasting is fulfilled by the totality of programmes and services which public service broadcasters offer and cannot be broken up into independent parts.

- In conformity with the principle of *subsidiarity*, the Commission should acknowledge Member States sufficient flexibility to ensure that each public service broadcaster can respond to change in ways which are suited to the particular country, culture and society in which it operates. The Commission should refrain from prescribing detailed Europe-wide rules for the definition, organization and functioning of public service broadcasting.

- The Commission cannot and should not impose on each Member State *detailed criteria and uniform procedures*, based on the prior assessment of the new services, when Member States define and entrust public service organizations. The EC Treaty and the Amsterdam Protocol do not require any specific procedure and cannot form the legal basis for imposing specific criteria and a single Europe-wide model for the definition of the public service remit.

- The *market impact assessment* for public service activities cannot form a pre-condition for defining and entrusting the public service remit. The EC Treaty cannot serve as a basis for the Commission's intervention when a service of general economic interest has an impact on the market. The Commission may intervene under the EC Treaty only if public funding causes a disproportionate distortion of competition which is not necessary for the fulfilment of public service obligations.

- As recently stated by the Court of First Instance, the scope of the remit of public service broadcasting organizations should not be dependent on the activities of commercial operators (judgment of 22 October 2008). The *only relevant criterion* for a given service to be covered by the public service remit and to be financed by public funding is whether the service fulfils the *democratic, social and cultural needs of society*, as determined by the Member State in question. In this context, the method of funding is not a relevant criterion.

- The Commission should not use European State aid law to introduce specific requirements relating to *programme rights acquisition*.

- The Commission should take into account the need for public service broadcasters' *financial independence* when designing rules on reserves and over-compensation.

- Any new obligations should not jeopardize the *editorial independence* of public service broadcasting organizations.

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Introduction

The purpose of public funding is to enable public service broadcasters to offer broad and distinctive programming as a whole, in terms of diversity, quality and impartiality. Publicly-funded broadcasters play an essential role for society and are an essential component of the European broadcasting landscape. Their importance is recognized in the Amsterdam Protocol, which states that public service broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. In other words, the public service programming offered by publicly-funded broadcasters serves the public interest and the interests of all society.

Public service broadcasters acknowledge that as a consequence of receiving public funding they have a responsibility to society as a whole. This responsibility includes the way they use their funding. The constitution of public service broadcasters is an integral reflection of each Member State's cultural heritage and national identity. Each broadcaster's mission is thus defined at Member State level so that the needs of each society are fulfilled in the national context in accordance with national traditions. In Community law, the subsidiarity principle is a guarantee of European diversity, which is a cornerstone of the European construction.

European public broadcasting is a unique model, having evolved over many years, and it should be maintained and developed. To guarantee the best outcome in terms of media pluralism, the European model is based on sectoral pluralism, where public service broadcasting plays its role as a trustworthy source for all sections of the public and guarantees the integrity and impartiality of content. Public funding is a means of guaranteeing editorial independence and sectoral diversity, and as such is a cornerstone of the European public service model.

Public service broadcasters offer content of quality and set high standards on the market. The existence of this offer tends to raise the bar for all content providers and constitutes a benchmark of quality and impartiality, free from considerations of profit. The need for a broad definition of the remit, in order to achieve and discharge that fundamental objective, was rightly recognized by the Court of First Instance in the SIC and TV2/Danmark cases.

The fundamental objective of public service broadcasting is that it should aim at all times to offer a broad range of content and a breadth of choice for citizens. Public service broadcasting delivers reliable, unbiased news, information and documentaries, produces and transmits educational, cultural, sport, and entertainment programmes, and supplies quality content for children, youth audiences and minorities. The continued provision of such content is particularly important during an economic downturn, when private operators may be tempted to reduce their expenditure on news and original European programme production, output which is particularly important in cultural or educational terms. Strong funding and a strong brand for public service broadcasting are assets which society should value and protect in the long term.

It is only in this way that public service broadcasting can serve all sections of society. The more attractive the offer from public service broadcasters as a whole, the better society is served, and the more public service broadcasting will be able to reflect the values that society prizes the most highly. This holistic approach prevents public service broadcasting from being marginalized or being confined to "ghetto programming", filling in the gaps left by the market. This ability to offer a broad range of diverse, original content mainly of European origin is all the more relevant in the new media environment.

Public service broadcasters are an essential pillar of the independent production sector and the European audiovisual industry as a whole, and they will be the driving force for maintaining a high level of investment. The contribution of public service broadcasters to upholding independent and original European production becomes all the more important in times of economic downturn. For instance, EBU Members invest each year more than ten billion Euros in audiovisual content. The 2005 Graham Report emphasizes that it is the public service broadcasters which have been the greatest investors in new productions and which have broadcast the largest proportion of European and independently-produced works.[1] Secure public funding guarantees a constant offer to society and ensures that quality and quantity are maintained.

Moreover, public service broadcasters have also on numerous occasions invested in innovative technology, opening up new markets for commercial operators. This has led to a unique media landscape much to the benefit of citizens and has contributed to the dynamics of the economy. Only adequately and securely funded public service broadcasters would be prepared to continue to invest in technological innovation, driven not by profit incentives but by a commitment to break new ground for the constant improvement of their services to citizens.

With ever-increasing convergence and the multiplicity of content, the presence of publicly-funded broadcasters online is vital to maintain trust by citizens (and particularly parents) in quality content on the Internet. The presence of public service broadcasting on new media can also help generate public trust in new technology. It is a vital tool in the information society for the cultural, democratic, social and educational good. In this new environment, public service broadcasting has an indispensable contribution to make regarding e-inclusion and social cohesion in an increasingly fragmented society.

In the EBU's view, the revision of the Broadcasting Communication should recognize that it is dealing with a world where television viewers are changing their habits. Public service broadcasting can play its role only if it is of sufficient relevance to society, and it can maintain its relevance in society only if it can respond to the rapidly-changing media needs of citizens.

[1] Impact Study of Measures (Community and National) concerning the promotion of distribution and production of television programmes provided for under Article 25(a) of the Television without Frontiers Directive, Graham Final Report, 24 May 2005.

The younger generation, in particular, is adopting new media-consumption patterns and is increasingly accessing television programmes and content via the Internet. The risk for public service broadcasters is that by neglecting to respond to the needs of young people and to adapt to their consumer habits, they will fail to fulfil their public service remit and lose contact with the public of tomorrow.

Consequently, it is vital to combine linear and non-linear offers. At the same time, the wider choice of programmes will necessarily lead to greater segmentation of viewers. Targeted groups must therefore be differentiated and addressed individually with special offers. This includes new possibilities for interactivity, search functions and individual on-demand use of broadcasting programmes and broadcasting-related information. Those offers will be combined with chat and social networks and, even, the production and making-available of own content, the so-called "user generated content".

Public service broadcasters will be able to fulfil their public service mission and the tasks defined by Member States if they can use all those tools on the Internet. The importance of the Internet is growing fast. For example, in Europe the number of Internet users has risen over the last year by 20%, and the time spent by users online over the last year has increased by 12%. On average, in Europe users spend 85 minutes per day on-line. In particular, persons aged between 14 and 29 are using the Internet daily for approximately 1.7 hours. Public service broadcasting therefore has a vital role to play in society, also serving as an electronic memory.

If public service broadcasters do not adapt their offer so that they are present on all platforms and provide new (non-linear) services, there is a danger that they will attract increasingly ageing audiences (low users of new technology) and will be confined to a niche market in the mid-to-long term. It is therefore of the utmost importance for public service broadcasters to reach young audiences, serve all groups of society and continue to be an independent source of information.

Community law should take a neutral view on the private and public sectors: the extension of public service broadcasters' activities to online content should be regarded as the extension of their *responsibilities* vis-à-vis society as a whole; it should not be viewed as a simple threat to the interests of commercial operators. The proposed new safeguards or increased regulation on public service broadcasters included in the Commission's draft, and particularly with regard to new media services, is liable to have a "chilling effect" and to hamper the ability of public service broadcasting to play its role in the long run.

In the EBU's view, the details of the new obligations and the new procedural safeguards included in the Commission's draft are not necessary to guarantee an appropriate use of public funding and they undermine the power of Member States to organize public service broadcasting and determine the system which suits them best. The Commission's draft should therefore respect the discretion of Member States to organize, define and finance public service organizations, since this is the only way of

preserving media diversity and media pluralism in Europe. In a number of proposals, the Commission's draft goes beyond checking for manifest error, and the level of detail would reduce the freedom of Member States to choose the right model and to select the appropriate mechanisms for defining and evaluating public service broadcasting in a national setting.

Consequently, the principle of subsidiarity should remain the basis of action by the Commission. The latter's role is limited to control for manifest error. Public service broadcasting is not a service of general economic interest like the others, since, as stated in the Amsterdam Protocol, it is directly linked to the democratic, social and cultural needs of society in each Member State. Thus the Commission should not interfere in the powers of Member States by imposing detailed criteria and regulations when they define the public service remit. While Member States should ensure that there is a clear, adequate definition and entrustment of the public service remit, the revised Broadcasting Communication should respect the freedom of Member States to choose the particular procedure for entrustment of public service organizations which suits them best.

As stated in the common position paper of the majority of Member States,[2] the revised Broadcasting Communication should remain a flexible instrument which allows Member States to continue to reflect their national needs, culture and constitutional law when defining, organizing and entrusting public service organizations. The public service remit cannot be harmonized across Europe by the inclusion of criteria with regard to the public service character of activities. Moreover, detailed rules on the definition of the remit would be incompatible with the need to respect European diversity. The EBU supports the standpoint of Member States as set out in the common position paper.

It is of the utmost importance for the public service remit to be defined in relation to the needs of each society, the need to serve media pluralism and the need to defend the general interest. Consequently, the means of distribution, the method of financing the services and the impact on the market are not relevant for defining a public service mission. In the EBU's view, the draft revised Broadcasting Communication should refrain from including criteria or an assessment methodology which could have the effect of limiting the scope of public service activities or could limit the remit to services which are not available on the market.

We understand that the Commission may be proposing a second draft, that would be greatly welcomed, and it is hoped that the Commission will take into account the EBU's comments and will address the concerns expressed in the EBU's response.

[2] Common position paper of 24 September 2008: "Main principles for a revision of the Broadcasting Communication of the European Commission", available at: http://www.minocw.nl/documenten/Position%20paper%20BC%20annex%20letter%20to%20Commissioner%20Kroes.pdf.

General remarks

1. In principle, the EBU welcomes the Commission's recognition of public service broadcasting's role in the new media environment. The Commission's draft revised Communication[3] (hereafter referred to as "draft Broadcasting Communication") rightly presents the technological developments and the changing consumption patterns in the media sector (paragraph 5). Nevertheless, the EBU is disappointed that such recognition is not duly reflected in the substantial parts of the draft Broadcasting Communication. To allow public service broadcasters to continue to play their role, the draft Broadcasting Communication should remain a flexible instrument and avoid imposing bureaucratic procedural safeguards and detailed criteria which limit the choice of Member States to organize their public service broadcasting systems and define the public service remit. This flexibility is necessary to allow a case-by-case approach which duly takes into account the specificities of the different national public broadcasting systems. As outlined in the introduction, it is necessary for public service broadcasting to continue to cater for all media needs of citizens, including in new media, in order to fulfil its key role in society.

2. The EBU welcomes the Commission's recognition of the importance of public service broadcasting in promoting media pluralism, diversity of media content and cultural diversity. The draft rightly emphasizes public service broadcasting's role in enhancing media diversity as stated in the UNESCO Convention on cultural diversity. In addition, the draft states that the values of public broadcasting are equally important in the rapidly changing new media environment, which was the main objective of Recommendation 2007(3) issued by the Council of Europe. The Recommendation on media pluralism and diversity of media (Recommendation Rec(2007)2) called upon Member States of the Council of Europe to ensure that public service organizations develop in order to make high-quality and innovative content accessible on a variety of platforms.

3. To enable public service broadcasting to adapt and develop in this new environment, competition rules, and especially those regarding State aid, need to respect the principle of technological and platform neutrality. The draft Broadcasting Communication should therefore expressly acknowledge and implement the principle of technological and platform neutrality and state that this principle requires that the means of distribution should not be relevant to classifying a public service activity or to making it subject to specific procedural safeguards (prior assessment); it is sufficient for the content to correspond to the democratic, social and cultural needs of society.

[3] Draft Communication from the Commission on the application of State aid rules to public service broadcasting of 04 November 2008, available at http://ec.europa.eu/competition/state_aid/reform/broadcasting_communication_en.pdf.

4. Moreover, the Court of First Instance, in the TV2/Danmark case, confirmed the possibility for Member States to define broadly the public service remit as covering new media and approved the definition in Danish law to provide as a public service "through television, radio, *Internet* and the like, a wide range of programmes and services comprising news coverage, general information, education, art and entertainment" (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 115). Consequently, the Court of First Instance confirmed the broad mandate of public service broadcasters in the new media environment.

5. The remit of a public service broadcasting organization should be considered in its entirety, and should not be split into separate parts which would, in practice/de facto, be subject to different regulatory safeguards. The discretion of Member States in respect of the definition of the public service remit must apply to the totality of programmes and services covered. There are no grounds for according different treatment or requiring specific safeguards for new media activities compared to traditional programmes when both fulfil the same democratic, social and cultural needs of society. Moreover, there are no grounds for differentiating between a "new" and an "old" service, given the cross-media nature of broadcasting and the increased technological convergence. The value of public service broadcasting lies in the range, diversity and quality of its overall offer.

6. The Amsterdam Protocol emphasizes the specificity of public service broadcasting in the Member States by stating that it is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. Public service broadcasting is not like other services of general economic interest, since it is directly related to the democratic, social and cultural needs of each society (judgment of 26 June 2008, SIC, case T-442/03, paragraph 153).

7. The specificity of public service broadcasting was highlighted in the TV2/Danmark case, where the Court of First Instance confirmed the freedom of Member States to define the public service remit broadly and essentially in qualitative terms, which leaves the broadcaster free to establish its own range of programmes. The Court stated that such a broad definition cannot be called imprecise. On the contrary, the Court held that a mandate to offer the entire population of a country varied television programming that aims to provide quality, versatility and diversity is perfectly clear and precise (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraphs 117 and 118). The freedom to establish its own range of programmes is closely linked to the principle of the editorial independence of public service organizations.

8. The Court of First Instance, in the TV2/Danmark case rejects the definition of the remit by reference to the activities of the commercial operators. Consequently, the impact that a service offered by public service broadcasters may have on the commercial offer of competitors cannot be a criterion imposed by European competition law to evaluate the scope of the remit (see point 39 below).

9. Regarding pay services, the Court of First Instance made it clear in two recent cases that the definition of the broadcasting service of general economic interest cannot be made dependent on its method of financing (see points 30 *et seq*. below).

10. The Court of First Instance states that it is precisely its objective - the need to promote democratic, social and cultural values of each Member State - and the need for editorial independence that distinguish public service broadcasting from other services of general interest. It stated that "it is not unusual - quite the contrary - for a public service broadcaster to enjoy editorial independence from political authority in the choice of its actual programmes […]. In this respect, [it is] right to stress the importance, for protecting freedom of expression, of the public service broadcaster's editorial independence from public authority - freedom of expression which, as defined in Article 11 of the Charter of Fundamental Rights of the European Union […] and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms […]" (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 118).

11. The EBU is concerned that the draft proposed by the Commission includes a number of requirements and detailed regulations that are not appropriate and could not be applicable to the various situations prevailing at the national level. Since the choice of the mechanism for defining and entrusting the public service broadcasting organizations with a public service remit falls within the competence of Member States, any details on the procedure to be followed, on the services to be submitted to the *ex ante* test and on the criteria for defining the remit or the so-called market impact assessment will go beyond the control for manifest error and will reduce the discretion of Member States to design the best and most appropriate mechanism that suits them. Moreover, additional and detailed criteria are liable to lead to more complaints at both the national and European levels.

12. Uniform requirements - for instance, in relation to an *ex ante* assessment and regarding the bodies that will monitor the fulfilment of the remit - are not appropriate in a Europe which has different traditions and different organizational structures. In addition, since the principles which may be included in the revised Broadcasting Communication are liable to introduce criteria that are foreign to, or inconsistent with, those used at the national level, they will impair legal certainty and are liable to make the work of national authorities more difficult, since they should ensure the application of parallel criteria at the national and European levels.

13. The Amsterdam Protocol gives more latitude to Member States for defining, organizing and entrusting public service organizations and cannot be interpreted as requiring Member States to assess the impact of a new service on the market; on the contrary, it specifies that the application of the State aid rules should take into account the realization of the public service remit by public service organizations.

14. A Communication is not an appropriate legal act for imposing such new requirements which do not already exist under EC Law. In particular, Articles 87 and 86(2) EC do not expressly or implicitly require *ex ante* assessment of new services, and the Commission could not call into question the compatibility of aid simply because no *ex ante* assessment has been carried out by the Member States.

15. The Amsterdam Protocol could not therefore be used as a legal basis for introducing a test - called the "Amsterdam test" by the Commission - which goes far beyond the basic requirements of the EC Treaty, and in particular the requirements laid down in Articles 87 and 86(2) EC.

16. The obligation to set up specific bodies which are separate from the public service broadcasters is contrary to the principle of the institutional and procedural autonomy of Member States. Moreover, the introduction of new bureaucracy can hamper the development of public service broadcasting. The setting-up of new specific bodies inevitably entails higher expenditure for the Member States and also public service broadcasting, since those bodies would need to be staffed and would have administrative costs.

17. As stated in the EBU reply to the first Commission's consultation, smaller Member States encounter difficulties, such as under-compensation and the lack of funds for major technological projects, and this may complicate planning of their activities over several years. Small Member States' public service broadcasters operate under difficult conditions of small internal markets, shortage of resources (sales income, licence fee and public funds) and dependency and vulnerability to media globalization and concentration. In general, the cost *per capita* of public service broadcasting is higher for small countries. Moreover, there is little possibility of commercially exploiting and selling programmes designed and produced for small (or minority) language areas, and the secondary markets for the exploitation of independent production is insignificant. Additional efforts are required by public service broadcasters to adapt to internationalization and constraints from worldwide media groups. For small Member States in larger language markets public service broadcasting is an important pillar for upholding national production, to support creative artists and journalistic independence in coverage and content. Because of their small size in economic terms and the shortage of resources, public service broadcasters operating in small language markets face the challenge of sustaining sufficient diversity of opinions and content on the market, and national and original production. For these purposes, media and competition policy should take into account the particular situation of public service broadcasters in each small country.

18. Consequently, the EBU urges the Commission to reintroduce paragraph 62 of the current Broadcasting Communication, which refers to the difficulties some smaller Member States may have in collecting the necessary funds, and when public service broadcasting is addressed to linguistic minorities or to local needs.

Remarks on specific sections of the draft revised Broadcasting Communication

The legal context (paragraphs 21 et seq.)

19. The draft Broadcasting Communication presents the conditions set out by the case-law of the Court in the *Altmark* case, under which a public service compensation does not constitute State aid within the meaning of Article 87 EC. When the remit is clearly defined and the compensation is proportionate to the amount necessary to cover the costs of discharging public service obligations, the Member State and the Commission should carefully examine whether the other conditions of the Altmark judgment are fulfilled.

20. Recent case-law seems to indicate that *Altmark* criteria need to be adapted to the specificity of public service broadcasting.

21. With regard to the second *Altmark* condition, the Court of First Instance held that the determination of the licence fee income payable to TV2 in the media agreements may be viewed as evidence of objectivity and transparency (paragraph 225). It also held that careful examination of the setting of the amount of the licence fee could lead to the conclusion of compliance with the fourth *Altmark* condition (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 232).

22. It should be also noted that, regarding the requirement for a tender procedure, the Court of First Instance stressed that "that specific status for public service broadcasting is, moreover, the basis for the freedom accorded by the Amsterdam Protocol to Member States in the award of broadcasting SGEIs", which justified the fact that Member States cannot be required to have recourse to competitive tendering (judgment of 26 June 2008, SIC, case T-442/03, paragraph 154).

Definition of the public service remit (section 6.1)

23. In this section, the draft should clearly specify the Member States' competence for defining the remit of the public service organizations, which is also highlighted by the Amsterdam Protocol and confirmed recently in the above-mentioned judgments by the Court of First Instance. These judgments stated that a service of general economic interest is defined in relation to the general interest that it is designed to satisfy (see point 30 below). The Amsterdam Protocol defines in general terms the general interest that Member States wish to serve as "the democratic, social and cultural needs of each society and […] the need to preserve media pluralism".

24. As the draft Broadcasting Communication states, the question of the definition should not be confused with the question of the financing mechanisms chosen by the Member State to finance public service obligations, or the issue of possible

effects of the service on competition. Any interference in the criteria for the definition of the public service remit would encroach upon the competence of Member States to define the public service, as stated by the Court of First Instance in the TV2/Danmark case (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 123).

25. Any revision of the Broadcasting Communication should therefore separate clearly in the text considerations related to the definition of the public service remit in relation to the general interest on the one hand, and the method of financing and the market distortion on the other. The disproportionate distortion of competition is a separate issue from the definition of the public service remit (see also points 43 *et seq*. below).

Market developments (pay services) (paragraphs 51 to 55)

26. The EBU is opposed to the introduction into the definition of the remit of criteria that are foreign to the attainment of the general interest such as the mode of financing.

27. The draft revised Broadcasting Communication rightly acknowledges that public service broadcasting organizations should be able to use the opportunities offered by digitization and the diversification of distribution platforms on a technology-neutral basis (paragraph 51). The acknowledgment of these developments is important in a rapidly evolving environment. Nevertheless, the level of detail in the draft revised Broadcasting Communication contradicts this general acknowledgment.

28. The draft revised Broadcasting Communication explains other developments, such as the new sources of financing (paragraph 52), which would be better placed in the introductory remarks of the draft Broadcasting Communication (i.e. after paragraph 5 and following).

29. The draft Broadcasting Communication states that some Member States have chosen not to allow their public service broadcasters to collect individual remuneration at the point of consumption (see paragraph 52). Indeed, it is within the competence of Member States to organize public service broadcasting according to their needs and to choose the appropriate method of financing, including the possibility for reasonable individual remuneration. The fact that certain Member States have excluded pay services from public service remits only reflects the assessment of their national needs, but may not be used to turn this relative reality into a general Community-wide proposition. Given the competence of Member States to choose the method of financing, it is not appropriate for the Commission to make value judgments on the legitimacy of one or other method of financing (paragraph 53) chosen by Member States to fund their public service activities.

30. In two cases in 2008, the Court of First Instance has made it clear that the definition of the broadcasting service of general economic interest cannot be made dependent on its method of financing: "An SGEI is defined, *ex hypothesi*, in relation to the general interest which it is designed to satisfy and not in relation to the means of ensuring its provision" (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 108; judgment of 26 June 2008, SIC, case T-442/03, paragraph 203). The presence of a direct remuneration element is therefore irrelevant when assessing whether a service is consistent with the remit as defined by Member States. The only relevant criterion is whether the content of such a service fulfils the democratic, cultural and social needs of the society and serves to preserve media pluralism.

31. Consequently, in paragraphs 55 and 60, the element of remuneration should not be relevant for deciding whether to include such services in the public service remit, or the impact of such services on the market, and it should be deleted from the draft Broadcasting Communication. Moreover, the example mentioned in paragraph 54 on premium sports content and prize games is questionable, since it is for Member States to decide whether such programmes or programme elements are covered by the public service remit and to choose their financing method.

32. It should be emphasized that individual remuneration does not call into question the universal character of a service of general economic interest within the meaning of Community law.[4] For other services of general economic interest remuneration is often required from the user. As stated by the EBU in its reply to the Commission's first consultation, it should be possible for "pay services" to form part of the public service broadcasting remit when they fulfil the democratic, social and cultural needs of each society, including the need to preserve media pluralism.

Procedural safeguards (paragraphs 56 to 64)

33. The procedure proposed in paragraphs 56 to 64 of the draft Broadcasting Communication corresponds to the detailed regulation of new services: it involves a requirement on Member States ("shall consider"), a procedure carried out before the introduction of the service in the market (*ex ante*), a clarification of what is considered a new service, a right for competitors to give their views, and an evaluation carried out by an external body or internal body independent from the management.

[4] Concerning the criterion of universality, the Court of First Instance has clarified that the fact that services have a restricted territorial or material field, or that the services in question benefit only a relatively small group of users, does not necessarily call into question the universal character of a service of general economic interest within the meaning of Community law (judgment of the Court of First Instance of 12 February 2008, BUPA, Case T-289/03, point 187).

Requirement on Member States

34. The EBU is concerned that the requirement for an *ex ante* assessment of each new service will limit the choice of Member States to design the most appropriate mechanism that suits their own needs. Such an obligation is, moreover, inconsistent with what the Commission can require under European competition law (and, in particular, under Article 87 and 86(2) EC). The obligation of a prior assessment on all Member States and public broadcasters for the definition of the public service remit goes beyond the control for manifest error.

35. The definition of the public service remit is within the competence of Member States. Member States have broad discretionary powers to define what they regard as services of general economic interest, and the definition of those services by a Member State cannot be called into question by the Commission except in case of a manifest error (judgment of the Court of First Instance of 12 February 2008, BUPA, Case T-289/03, paragraph 166; judgment of the Court of First Instance of 15 June 2005, Olsen, Case T-17/02, paragraph 216). It should be stressed that there exists, in Community law, neither a clear and precise definition of services of general economic interest nor a legal concept definitively establishing the conditions to be fulfilled for a State to be able to invoke the application of Article 86(2) EC. This absence of any precise definition confirms the prerogative of Member States concerning the definition of services of general economic interest (judgment of the Court of First instance of 12 February 2008, BUPA, Case T-289/03, paragraphs 165 and 167). Under Community law, the Commission cannot therefore impose a detailed and compulsory prior assessment procedure when Member States define the public service remit, and particularly in the field of public service broadcasting.

36. A variety of mechanisms and democratic processes can be used to evaluate the public value of the public service remit. Some Member States introduced different mechanisms prior to the introduction of new types of services, but they are tailored to their needs, and to their institutional and cultural context. Consequently, such a prior assessment should not be taken as a model applicable in all other Member States.

37. The principle of subsidiarity is all the more important with regard to the definition of the public service broadcasting remit. Its specificity is emphasized by the Amsterdam Protocol, which states that the public service broadcasting remit comprises objectives linked to the democratic and social needs of society, and to culture and education. In these areas, the European Union's action can only support that of the Member States, and cannot replace it (judgment of the Court of First instance of 12 February 2008, BUPA, Case T-289/03, point 167).

38. The Commission cannot therefore include a requirement in the Broadcasting Communication for Member States to carry out an *ex ante* assessment of each new media service, and the Amsterdam Protocol could not therefore be used as a legal basis for introducing a test - called the "Amsterdam test" by the Commission - which goes far beyond the basic requirements of the EC Treaty, and in particular the requirements laid down in Articles 87 and 86(2) EC.

39. In the field of public service broadcasting, the Court of First Instance has recently clarified the relation between the competence of Member States to define the public service remit and the reference to the activities of commercial broadcasters:

> "To accept that argument and thereby to make the definition of the broadcasting SGEI dependent […] on the range of programming offered by the commercial broadcasters would have the effect of *depriving the Member States of their power to define the public service*. […] As TV2 A/S rightly submits, *when the Member States define the remit of public service broadcasting, they cannot be constrained by the activities of the commercial television channels*" (paragraph 123 of the judgment of the Court of First Instance of 22 October 2008 in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, emphasis added).

40. It is for the Member States to determine the criteria for the definition of the remit. This definition of the remit can be accomplished in a number of ways, and uniform mandatory requirements are not appropriate in a Europe with different cultures and traditions. In the EBU's view, the impact that a service could have on the market is not relevant as a criterion for the definition of the public service remit.

41. Moreover, this *ex ante* assessment cannot serve as a model and be made mandatory for all public service broadcasters. A revised Broadcasting Communication may not translate measures negotiated in individual cases between Member States and the Commission into a single solution imposed on all Member States. The EBU is concerned that an *ex ante* assessment will increase costs. It can also affect the ability of public service broadcasters to adapt to the new media environment.

42. In addition, an overall European requirement for an *ex ante* authorization procedure *for each new service* should not jeopardize the editorial independence of public service broadcasters. In the TV2/Danmark case, the Court of First Instance approved the "latitude left to TV2 by the Danish authorities as regards its actual programming choices", by putting forward the need "for a public service broadcaster to enjoy editorial independence from political authority in the choice of its actual programmes" (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 118).

Market impact assessment

43. Paragraph 61 and footnote 40 introduce detailed criteria for *a market impact assessment*, which include a list of factors to be taken into account. If these principles were to be followed, every new service would distort competition within the meaning of this paragraph, except for totally new and innovative services which would create a new market. In particular, the implementation of such criteria could be used as a disguised way of limiting the services of public service broadcasters to those not offered by commercial broadcasters and other private operators.

44. In particular, the reference made to the potential for commercial exploitation, the unclear link with the similar existing offers and the likelihood that the introduction of a public service broadcaster's offer will drive viewers away, are closely linked with the general idea that public service broadcasters may only offer services that commercial operators do not provide. Nevertheless, the Court of First Instance clearly rejected the argument that public service organizations should offer only non-profitable services (see point 39 above). The Court also specifically rejected the argument that the public service remit should be defined by reference to the offer of commercial broadcasters.

45. As the Commission rightly states in the draft Broadcasting Communication, the possibility for a public service broadcaster to make full use of new forms of distribution will lead to the offering of new services; but the validity of their inclusion in the remit is to be assessed solely on the basis of the nature, content and satisfaction of democratic, social and cultural needs of the relevant society by the service. Neither the technical broadcasting means nor the impact on the market is a relevant criterion at the stage of the remit definition.

46. It is implicit in Article 86(2) EC and in the Amsterdam Protocol that these texts permit such funding even where it has effects on competition and trade between Member States. The market impact assessment as it stands in the draft Broadcasting Communication is misleading because it could be argued that any service has impact on the market. The question is not whether the service could have an impact on the market, but whether public funding causes a *disproportionate* negative effect on competition which is not necessary for the fulfilment of the remit.

47. As rightly stated by the draft Broadcasting Communication, under Article 86(2) EC, the competition in the common market should not be affected in a disproportionate manner. The test is therefore of a "negative" nature: whether the funding is not disproportionate and affects the development of trade to such an extent as would be contrary to the interest of the Community (paragraph 74 of the draft Broadcasting Communication; paragraph 47 of the current Broadcasting Communication). The Commission could intervene only if the effects on

competition were manifestly disproportionate, and any assessment of whether those effects are disproportionate must take into account the need for the broadcaster to be able to fulfil the public service remit which the Member State has assigned to it. This is in line with the judgment of 22 October 2008, TV2/Danmark (joined cases T-309/04, T-317/04, T-329/04 and T-336/04), where the Court of First Instance confirmed that the public service mission cannot be dependent on the scope of the commercial operators' offer.

48. A market impact assessment as required by the Commission in its current draft goes far beyond the disproportionate effect on competition as required by Article 87 and 86(2) EC and cannot therefore form the basis of the Commission's intervention, or of any requirement upon Member States under European competition law.

49. In addition, in the TV2/Danmark case, the Court of First Instance made it clear that the scope of the remit of public service broadcasting organizations cannot be defined by referring to the activities of commercial operators, because this would encroach upon the competence of Member States (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 123). The Court of First Instance finds this unacceptable because "the definition of the service of general economic interest would depend, in the final analysis, on commercial operators and their decisions as to whether or not to broadcast certain programmes" (paragraph 123). The Court of First Instance clearly rejects the claim that the broadcasting service of general economic interest should be limited to the broadcasting of non-profitable programming (paragraph 109).

50. The judgment of the Court of First Instance of 22 October 2008, TV2/Danmark, (joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 123), clearly rejected the definition of the remit by reference to the activities of the commercial operators. Consequently, the impact that a service offered by public service broadcasters may have on the commercial offer of competitors could not be a criterion imposed by European competition law to evaluate the scope of the remit. Moreover, European rules on State aid control could not form the basis for an obligation imposed on Member States to make the definition and entrustment of the public service remit dependent on the existing offer on the market.

51. In other words, the criteria for the definition of the remit should not be confused with the assessment of the possible disproportionate effects on competition. The Amsterdam Protocol clearly states that the Commission should fully take into account the realization of the remit by public service broadcasters. Furthermore, competition rules should not obstruct the performance, in law or in fact, of the particular tasks assigned to those public service broadcasters (Article 86(2) EC).

52. Consequently, the so-called assessment of the "impact on the market" should reflect the conditions under European competition law on the (dis)proportionality of the distortion of competition and should therefore be presented in the section concerning the proportionality test and the disproportionate effects on competition (section 6.3.3, paragraphs 74 ff). Market distortions are effectively prevented by proper control of the proportionality and transparency of the public funding.

External independent bodies

53. Paragraph 62 introduces a strong invitation to Member States to create or use independent bodies that are external to the management of public service broadcasters. The Commission requires Member States to introduce several measures to this effect.

54. The requirement of putting in place specific authorities is contrary to the principle of the institutional and procedural autonomy of Member States. The Commission has no competence to impose on Member States the setting-up of specific bodies with specific powers to evaluate whether a service fulfils the requirements which that Member State has established to define the public service character of the remit. This is all the more relevant in the field of public service broadcasting, whose specificity was not only recognized by the Amsterdam Protocol but was also confirmed twice in 2008 by the Court of First Instance (judgments of 26 June 2008, SIC, case T-442/03, and of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04).

55. The requirement of an "external" body, or body independent from the management, does not take into account the specificity of public service broadcasters, and may come into conflict with the need for editorial and financial independence from State and market forces. The Court of First Instance has emphasized the specificity of public service broadcasting in terms of editorial independence in its judgment of 22 October 2008 (TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 118).

56. It should therefore be for the Member States to choose the appropriate safeguards, mechanisms and procedures, including the bodies, to define and entrust the public service mission to broadcasting organizations, and the Commission cannot limit their choice by imposing on them a single *ex ante* assessment procedure and by imposing detailed criteria regarding the setting-up of bodies and institutions which should monitor the fulfilment of the public service obligations.

Rights of third parties

57. Services of general economic interest have as a primary objective to serve society as a whole, with particular emphasis on users and citizens. This is reflected in the Framework on services of general economic interest (Community Framework for

State aid in the form of public service compensation, OJ 2005 C 297/4). There are two distinct concepts: one is consultation of users and citizens on the remit, and the other, consultation of competitors on new services. However, one should not be used as a mechanism for the other. The definition of the public service remit of broadcasting organizations focuses on the needs of society and the viewers and listeners.

58. It is open to Member States to lay down transparent consultation procedures when defining and conferring the public service remit, but competitors should not have any formal right to be consulted. Given that private operators do not have particular and subjective rights regarding the definition of the public service remit, and that Community law has no direct impact in this connection, Member States must remain free to define the procedural rules regarding participation by third parties, the admissibility of appeals and the treatment of complaints.

Entrustment and supervision (paragraph 65 to 70)

59. The requirements related to the modification of the entrustment act before launching new services (paragraph 67 of the draft Broadcasting Communication) go far beyond the basic requirements regarding services of general economic interest under the EC Treaty and competition rules. In terms of entrustment and definition, the only requirement under the EC Treaty and case-law is a clear definition of the public service remit in an entrustment act.

60. In the field of public service broadcasting, the Court of First Instance has confirmed the possibility open to Member States to define broadcasting services of general economic interest broadly, so as to cover the broadcasting of full-spectrum programming (the judgment of 26 June 2008, SIC, case T-442/03, paragraph 201, and the judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 107). More importantly, it considers that a broad definition of the remit does not mean that it is imprecise. For instance, TV2/Danmark's mandate to offer the entire Danish population varied television programming which aims to provide quality, versatility and diversity is perfectly clear and precise (paragraph 117 of the judgment). Consequently, there would be no need for specific entrustment for new services.

61. In addition, such a requirement disregards the latitude left to broadcasting organizations in terms of programming. Indeed, a modification of the entrustment act for the inclusion of new services would impede a dynamic evolution of the remit and would significantly limit the public service organizations' ability to adapt to the needs of society.

62. As a consequence, the revised Broadcasting Communication may require only a clear definition of the remit in the entrustment act, as interpreted by the European judiciary.

Funding and proportionality (*paragraph 71 and 91)*

63. The draft Broadcasting Communication uses a variety of terms, referring to the "compensation", to the "supplementary costs" and to the "net cost" of providing public service obligations.

64. The concept of supplementary costs was clarified by the Court of First Instance in its judgment of 22 October 2008, as being capable of including "all the costs incurred by a public service broadcaster entrusted with a public service mission" (TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 111).

65. To ensure consistency, the Communication should refer only to the term "compensation" by clearly defining it as "what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations" (paragraph 14 of the Framework on services of general economic interest). The net cost used in paragraph 91 could be replaced by this definition and, in this context, the text of the Communication should clearly state that, on the cost side, all the costs incurred by a public service broadcaster entrusted with a public service mission should be taken into account for the calculation of the compensation.

Separation of accounts (paragraphs 81 to 85)

66. As is the case with the current version, the draft Broadcasting Communication rightly recognizes that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side, and that public service and non-public service activities may share the same input to a large extent, and the costs may not always be proportionately severable. The main example is the cost of producing programmes - to be clearer, the draft should also add the cost of acquiring the programmes, or remain general and refer to the "cost of programmes".

67. The examples presented and the rule of proportionally allocating common costs to public service and non-public service activities in paragraph 83 are inconsistent with the methodology used in paragraph 84. To ensure consistency, it is therefore advisable to delete paragraph 83. In principle, the EBU considers that the text of the current Communication is clear and could remain therefore unchanged.

Structural and functional separation (paragraph 86)

68. As pointed out in the EBU's reply to the Commission's questionnaire, transparency is one of the objectives of public service broadcasters. Structural or functional separation would result in this objective being achieved, but the cost could be disproportionate. Particularly for small organizations, the creation of subsidiaries or other separate structures can entail significant administrative costs and an increase in costs for personnel and infrastructure.

69. It should be noted that the risk of cross-subsidization and anti-competitive practices is overestimated in the draft Broadcasting Communication. The Court of First Instance emphasized in the TV2/Danmark case: "It is necessary to reject - as a mere hypothesis - the claim that a broadcaster entrusted with a service of general economic interest defined in broad and qualitative terms and dual-funded will inevitably be led, through the practice of selling its advertising space at artificially low prices, to subsidise its commercial activity through the State funds received for the public service. At the very most, there is only a risk of such behaviour, which it is for the Member States to prevent and, where necessary, for the Commission to penalise" (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 109). Any suggested measure by the Commission as a "best practice" should be proportionate to the level of risk of the behaviour it aims to address.

70. In the EBU's view, Member States should remain free to choose between accounting separation and functional or structural separation.

Profit margin (paragraph 93)

71. The considerations in the draft Broadcasting Communication on the profit margin disregard the Commission's past practice and recent case-law (in particular, *Altmark*). The third *Altmark* criterion includes a reasonable margin of profit and would apply to determining whether State funding granted to any broadcaster, even if not profit-oriented or constrained, is State aid. This is also consistent with the Commission's approach for services of general interest in other sectors (see paragraph 15 of the Community Framework for State aid in the form of public service compensation, OJ 2005 C 297/4).

72. Moreover, allowing for a reasonable profit margin would give the public service organizations additional incentives to maximize their revenue from commercial activities and ensure that they adopt market conform behaviour. The State aid rules, and in particular the rules concerning over-compensation, should give the right incentives to public service broadcasters. For instance, public service organizations should be allowed to keep and freely use an amount corresponding to a reasonable economic profit from revenue generated by their commercial activities.

73. The draft Broadcasting Communication should therefore allow for such a reasonable profit in all cases.

Reserves (paragraphs 94 to 96)

74. It should be remembered that proper management of an undertaking includes a guarantee of sufficient resources to ensure continuity of its activities. That is particularly important in the case of undertakings with a public service remit, such as public service broadcasters. Moreover, the principle that public service broadcasters must fulfil their remit with complete independence also includes financial independence.

75. Reserves fulfil this goal precisely and guarantee the public service organizations sufficient financial resources to deal with fluctuations in costs and revenue. A ceiling on the reserves that applies to all public service organizations could run the risk of putting a number of them facing major fluctuations in costs and revenue in a difficult position regarding the fulfilment of public service obligations. Pursuant to the principle of subsidiarity, it is for the Member State concerned to determine the level of annual reserves and, if necessary, minimum and maximum levels and duration which would indicate the amount of reserves that would be necessary to ensure the fulfilment of public service obligations.

76. Consequently, the draft should ensure that the mechanism of a ceiling on reserves should remain a flexible measure that will not jeopardize the ability of public service organizations to fulfil their remit. In this respect, the EBU welcomes the calculation of reserves by reference to the total budget, as this puts public service organizations with different financing models (public funding or mixed funding) on an equal footing.

77. However, the EBU expresses concern regarding the rigid rules in relation to the treatment of reserves in excess of 10% of the total budget. Although earmarking is an acceptable accounting practice for improving transparency in the use of public funding, earmarking in a binding way and for the purpose of financing *non-recurrent* major investments constitutes a disproportionate and rigid measure. Such a measure, while increasing the constraints on public service broadcasters, would not improve transparency or the control of over-compensation. Reserves in excess of 10% may be necessary for organizations which have costs that vary significantly or, for a particular year, to cover public service costs related to predetermined projects or events. They may be justified for major technological investments scheduled to occur at a certain time or other investments that are necessary for the fulfilment of the public service remit. When the licence fee remains unchanged during a long entrustment period, such excess reserves may be necessary to cover increased costs and deficits at the end of the period. Consequently, the only condition for the use of reserves in excess of 10% should be the use of such funds for the fulfilment of the public service remit.

78. In principle the financial situation of public service broadcasters should be subject to an in-depth review at regular intervals. This may correspond to the entrustment period, or to a shorter period within the entrustment period. Moreover, any revised Broadcasting Communication should not lay down any specific duration for the entrustment period. In line with the principle of subsidiarity, this should be left to Member States.

79. While such regular review increases transparency and ensures that the compensation does not exceed what is necessary for the fulfilment of the public service tasks, it should be noted that the Commission cannot base its decision to order the recovery of all the sums constituting a reserve on a simple alleged failure by Member States to carry out adequate checks (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 220). The level of reserves existing at the end of this period will be taken into account when re-evaluating the financial needs in the sense that public service organizations should maintain an appropriate level of reserves according to their specific needs for the beginning of the next period. It is generally accepted that an appropriate level of reserves is normally included in the compensation, since it is a necessary financial guarantee for the continuity of activities.

80. It should be noted that rules on reserves apply only to revenue and costs related to public service activities. Revenue from purely commercial activities - those not related to the public service activities - should not be subject to the rules on State funding.

Control mechanisms (paragraphs 98 to 100)

81. Paragraphs 98 to 100 deal with the effective control of the use of public funding. While control mechanisms are effective when carried out at regular intervals, a recommended period of one year would seem inappropriate. Member States should be free to introduce adequate safeguards at regular intervals decided by them.

Market distortions (paragraphs 101 to 106)

82. As regards anti-competitive conduct, it should be recalled that broadcasting organizations with a public service remit are subject to the scope of Community and national competition law. Consequently, they have an obligation to respect competition rules.

83. The EBU considers that application of national and Community antitrust legislation is an effective, sufficient mechanism for controlling possible anti-competitive behaviour on the part of public service broadcasters. All Member States without exception have a competition authority applying national and Community law and,

in particular, Article 82 EC. Antitrust procedures guarantee that competitors and third parties have a high level of participation and transparency. Finally, the possibility of submitting a complaint to the Commission in case of breaches of antitrust rules is an effective, appropriate instrument to prevent such anti-competitive conduct. Consequently, it is not appropriate to envisage additional obligations regarding the conduct of public service broadcasters on the market, which may also lead to additional complaints or legal action.

84. In any case, in considering market distortions and possible anti-competitive practices, the Commission should not use standards other than those commonly recognized under national and European competition law. Independently of the position of the public service organizations on the market and their market power, the disproportionate distortion of competition and negative effects on the market should be assessed and demonstrated according to the conditions and standards of national and European competition law. Creating special new rules for public service broadcasters would run contrary to the objective of safeguarding effective competition on the market.

Premium content

85. In paragraph 105 of the draft Broadcasting Communication, the Commission gives the example of overbidding for programme rights. Nevertheless, the concerns about "overbidding" by public service broadcasters are not justified, given the market situation and the position of public service organizations in the programme acquisition market. In particular, the market for the acquisition of sports rights has become very competitive. Broadcasting sports events is part of the commercial strategy of pay-TV, and also international media groups and telecom operators with strong financial power. Consequently, the cost of rights for acquiring sports events has increased considerably. Often, public service broadcasters do not have the financial means to match offers made by private purchasers and have had to abandon the prospect of buying such rights. As stated in the EBU reply of March 2008, the public or mixed funding of public service broadcasters does not create an advantage vis-à-vis other operators. On the contrary, the budgetary constraints of public service broadcasters mean, together with the rigidity inherent in public funding, that public service broadcasters are often unable to meet the increase in prices and the fluctuation.

86. Although public service broadcasters produce or commission a substantial proportion of programming, the acquisition of third-party material plays an essential role. The acquisition of programme rights - including what are called premium rights - is vital for public service broadcasters as part of their

comprehensive and diverse programming. It is an essential component of the activities of the public service broadcasters. In addition, public service broadcasters have a specific role to play and have specific obligations with regard to investment in national, original or independently produced programmes. Any specific rules concerning the acquisition of programmes will put them at an unfair disadvantage and could have the effect of diminishing their ability to acquire certain programmes and, therefore, prevent them from fully complying with their public service remit by responding to all citizens' needs. When public service broadcasters acquire premium rights, they guarantee that they will make such content available to the public.

87. The introduction of rules in relation to the legitimate behaviour of public service broadcasters in the rights acquisition market would increase uncertainty with regard to the legal environment in which they operate. Consequently, the sentences on overbidding should be deleted (paragraphs 102 and 105).

88. With regard to sports rights, as stated in the EBU reply to the first consultation the exclusivity accorded for exploiting media content is not, as such, contrary to Community competition law (judgment of the Court of 6 October 1982, Coditel SA, Case 262/81, point 15 *et seq*.). There is no reason to create rules *per se* concerning exclusive contracts for the acquisition and sublicensing of sports transmission rights in a Communication regarding the application of State aid rules.

89. However, when the exercise of sports transmission rights is likely to restrict competition on the market, competition law, and in particular Article 81 EC, as well as the relevant provisions of national competition law, are likely to resolve these problems effectively, and without any disproportionate limitation of the conduct of public service broadcasters. This provision, as well as the provisions regarding national law, is better suited to a detailed analysis of the economic context relating to the acquisition of sports rights and the extent of the obligation to sublicense unused rights.

90. Regarding appropriate mechanisms to prevent market distortions, the draft Broadcasting Communication should not introduce controls beyond those which have already been put in place by competition law, and the requirement in paragraph 106 is therefore superfluous.

Concluding remarks

In the EBU's view:

- The Commission should take better account of the specificity of public service broadcasting as recognized by the Amsterdam Protocol and refrain from prescribing detailed Europe-wide rules for the definition, organization and functioning of public service broadcasting. Public service broadcasting is not like other services of general economic interest. It is directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism.

- New, fast changing technology offers public service broadcasters the opportunity to bring huge benefits to citizens and to the media industry as a whole. The Commission should recognize the new responsibilities of public service organizations in the new media environment. It should leave Member States enough flexibility to ensure that each public service broadcaster can respond to change in ways that suit the country, culture and society in which it operates. It should also recognize that technological convergence blurs the distinction between "old" and "new" media, and avoid perpetuating that distinction in European State aid rules on public service broadcasting. Technological neutrality should become the guiding principle of any new revised Broadcasting Communication.

- The Commission cannot and should not impose on every Member State detailed, uniform procedures based on the prior assessment of the new services when the Member State defines and entrusts public service organizations. Articles 87 and Article 86(2) EC, and *a fortiori* the Amsterdam Protocol, do not require any specific procedure and cannot form the legal basis for imposing at the European level specific criteria and a unique model for defining the public service remit.

- Any market impact assessment for public service activities cannot form a pre-condition for defining the remit. Articles 87 and Article 86(2)EC, and *a fortiori* the Amsterdam Protocol, cannot serve as a basis for intervention when a service of general economic interest has an impact on the market, since by their very nature the existence of these services implies that they will have an impact. Consequently, in the field of services of general economic interest, and particularly public service broadcasting, the EC Treaty provisions can form the basis for intervention by the Commission only if a service causes a disproportionate distortion of competition which is not necessary for the fulfilment of public service obligations.

- The only relevant criterion for a given service to be covered by the public service remit and to be financed by public funding is whether the service fulfils the democratic, social and cultural needs of each society, as defined by each Member State. The method of funding is not a relevant criterion for defining the remit. Member States should remain free to choose how to finance public service broadcasting, including through individual payment by users.

- The Commission should not use European State aid law to change the competition rules relating to restrictive practices, and especially vis-à-vis public service broadcasters. The new requirements on the acquisition of premium content, and in particular on "overbidding" for premium content, would jeopardize legal security and could hamper the ability of public service broadcasters to fulfil their obligations and maintain an offer of high quality.

- The Commission should take into account the need for public service broadcasters' financial independence when designing rules on reserves and over-compensation. Any "ceiling" which might be introduced should be used as a principle, and not as a presumption to indicate over-compensation. Excessively strict rules on reserves beyond such a ceiling could endanger the ability of public service organizations to fulfil their public service obligations. Moreover, the new rules should not indicate, or intervene on, the entrustment period, which is a matter for Member States.

- Any new obligations should not jeopardize the editorial independence of public service broadcasting organizations.

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