



EPC | European
Publishers
Council

COMMENTS FROM THE EUROPEAN PUBLISHERS COUNCIL ON
THE REVIEW OF THE COMMISSION'S COMMUNICATION
ON THE APPLICATION OF STATE AID RULES TO
PUBLIC SERVICE BROADCASTING

AND A RESPONSE TO THE QUESTIONNAIRE

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Introduction

The European Publishers Council (EPC) is a high level group of Chairmen and Chief Executives of Europe's leading media corporations whose interests span newspapers, magazines, periodicals, books and journals, online database and internet publishing and, in many cases our members have significant interests in private commercial television and radio. A list of our members is attached.

EPC welcomes the Commission's Communication as we firmly believe that a comprehensive Review and new EU Recommendation is appropriate and indeed urgent. Today's media and communications arena, and the role of state funded "public service" within, has become a forest of increasingly tangled and haphazard growth requiring radical change.

Part 1 of this submission gives the EPC's perspective of the development of public service broadcasting since its origins and a special focus on the distorting effects of state aided broadcasters in new media markets, particularly the internet.

Part 2 provides responses to the Commission's questionnaire.

EPC

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Part 1 - General Observations

From the origins of publicly funded broadcasters to a modern day plural media and communications sector

Since the early day's of wireless radio governments quickly recognised it as a powerful popular technology and sought to constrain its ownership and regulate its influence. In many European countries this quickly evolved as Public Service Broadcasting, a medium which tried to Inform, Educate and Entertain the citizens at all levels of society - pro bono publico.

Our original public service broadcasters were not born into a Market of Communication. The notion that they sought to fill a vacuum left by Market Failure is as valid as supposing that a religion serves its congregation through the failure of some commercial activity. After Radio came Television, a medium even more persuasive and seductive than Radio and therefore to be regulated with even greater care.

But broadcast television is already within sight of its end as a distinct medium because the internet and mobile handsets blur the distinctions between different media, different forms of transmission and different means of delivery. The very term *Public Service Broadcasting* has already become a description with no clarity of meaning. The "public service" broadcasters themselves have little conviction of purpose other than to survive or hopefully thrive in the fast spreading forest of communication. And key to the confusion of purpose and therefore control is that each nation makes its own definition of what is or is not public service so from country to country we have widely differing versions of input and output.

That which cannot be clearly defined cannot be regulated with legal certainty. We need therefore to recognise that any approach to assessing and regulating the jungle of modern communications must have more to do with the principles of good forestry than legal niceties. Take the British example. The parallels in other nations will differ substantially but the principles are much the same.

BBC Radio in 1922 grew as a slim sapling in an empty field soon to become a neat orchard. No rules applied other than the general law. Limited spectrum meant few other trees could be planted and so it was with television. But entrepreneurs in the private sector naturally wanted to exploit these extraordinary new media and both radio and TV companies flourished funded by advertising revenue. Definitions were relatively easy, regulation clear and principles definable. But then came Cable...and Satellite...Digital Terrestrial and then the Internet and with it Mobiles. As spectrum scarcity and barriers to market entry have receded, what had been a tidy orchard with a sprinkling of tall trees and sundry shrubs started to grow

exponentially, to climb on fences and to cast doubt on the role and funding of a monolithic state broadcaster.

A similar pattern has evolved across Europe to produce a major challenge to governments who nevertheless continue to confer unrivalled funding and unparalleled protection and promotion of their legacy public service broadcasters.

It is hardly surprising that Governments might feel overwhelmed. What are their options? How can they cope when a neat public orchard has become first a forest and then almost a jungle? Primitive society would go for slash and burn. More apposite might be to clear patches of undergrowth, trim overhanging branches and cull those trees that are stunting the growth of useful new trees planted for shade or fruit or flowers. Cull and cut where you can to achieve good growth for as many saplings and seedlings as you can.

The PSB organisations will regard this as vandalism, commercial broadcasters as overdue and public as a welcome change after a constant diet of products that seldom aspired beyond the Lowest Common Denominator.

Long established public service broadcasters in Europe have expanded hugely with public funds - and in some cases with advertising revenues too, and with a reputation based on a remarkable past performance. But now, these same PSBs are mainly producing products little different from their commercial competitors and with only a handful of services which an honest yeoman could truly describe as PSB. The PSBs have expanded beyond their ability to maintain broadcasting standards which critics can respect so that many now see PSB as "good while it lasted" but no longer serving the public interest. Furthermore, in many countries these PSBs enjoy advertising revenues in addition to state funding which puts further pressure on the commercial sector and inevitably distorts the market.

Take the BBC example again - held up by many European politicians as the gold standard. Two traditional TV Channels do much as they have always done but today at the level of the lowest common denominator, struggling for quality and clutching for mass audience. Their other TV Channels often blend vulgarity with fashion and barely distinguish themselves from commercial channels. Radio is likewise now over extended with a mediocre set of Local Services one strong Pop Station (Radio 1), one strong Middle of the Road (Radio 2), a weak but valued Classical Music Channel (Radio 3), a unique Speech service (Radio 4) and a News and Sport talk station (Radio 5). Add to this its plethora of digital TV and radio channels, its Internet sites and you have a massive organisation overgrown and blocking the light from new commercial growth. The answer to redefining PSB, in order to reduce a Megalith, has to be bold: to cut services, to insist that expectations for quality are raised but realities of size reduced.

All over Europe a similar pattern is emerging. A new European Broadcasting Communication should encourage national governments to reflect again on their commitment to embedded PSB organisations and see if there are ways to make commercial access to all broadcasting activities from radio through to digital TV platforms, to the internet and mobile easier and fairer. If governments and more importantly publics believe that good 'public service' broadcasting is essential to the maintenance of democracy and a decent society, now is the time to make such a review and follow fast with action to reassert core public service objectives and appropriate limits to ensure fair competition.

State Funded Broadcasters on the Internet

When it comes to the internet, the EPC would like to make the following general comments:

EPC would ask the Commission to recognise that PSB activities on the internet are not analogous to their pioneering role in conventional broadcasting, and to subsequent market developments. The traditional broadcasting industries were entirely fashioned by legislation. For over half a century the growth (or rather restriction) of competition was entirely under Government control. Commercial broadcasting was at the gift of government and in most EU countries created duopolies where newly licensed private companies rapidly became strong profit-making companies.

The present situation with the internet is substantially different. It is a market largely outside the control of national governments, and it is already highly fragmented: it is much more akin to the world of publishing than to that of conventional broadcasting. It follows that the Member State Governments cannot now act as their predecessors did in the past and create balancing commercial entities to the PSBs on the internet.

EPC would ask the Commission to consider very carefully the consequences of what has happened in the UK and to make sure that similar scenarios do not develop by default in other EU countries. Unlike the early days of traditional broadcasting, rooted in spectrum scarcity, there is no need for state-subsidised semi-monopolies to make the heavy investment necessary to ensure the growth of these new markets. On the contrary, we argue that the new market and its customers will benefit from the very opposite architecture: a wide diversity of suppliers, unrestrained by unfair competition from any dominant player.

The BBC has the most comprehensive and highly developed presence on the Internet of any publicly funded broadcaster in the EU. It has effectively used licence fee income to create a dominating presence on the Internet, through the development of content, the exploitation of brands and privileged access to promotional space across their media networks, thereby building audiences which will effectively constrain the development of commercial competition. The current situation offers none of the symmetry

of fair competition which characterised the development of broadcast television when ITV was launched. According to independent auditors, BBC Online is the leading UK Internet content site. Annexed to this submission you will find a set of documents from the British Internet Publishers Alliance cataloguing distortions of competition arising from the BBC's website activities. These documents include recent submissions which set out the failures of the new regulatory system and procedures.

Crowding out and the deterrence of investment

The expenditure, content and cross-promotional advantages enjoyed by incumbent public service broadcasters are so great as to rule out investment in wide areas of potential activity. This is compounded by the lack of transparency of PSBs future intentions, and by approvals systems in the Member States which set neither practical limits on, nor effective scrutiny of, the PSBs current or intended expansion into almost every area of internet activity. The result is that creative internet ideas will rarely progress to the planning stage if publicly funded expenditure has the effect of stifling even the prospect of commercial competition over wide areas of activity and interest.

Aggressive expansion plans and marketing budgets are now being played out in the nascent mobile market. The BBC has just relaunched its mobile presence with a new design to emulate its bbc.co.uk presence, supported by a major four-week marketing campaign.¹

The Communication should establish clear limits on permitted internet related mobile activities to the core public service mission. Distinguishing the online and mobile markets even further from traditional broadcasting, a key element in their future will be the development of e-commerce and we would therefore **propose the following principles for incorporation into the Communication:**

1. Recognition that internet publishing is not simply or solely an extension of a public service broadcasting role. It should also be considered in terms of its evolution as a separate and rapidly developing means of distribution in which diverse commercial activities and investment must play a significant part.
2. Consideration of the need to ensure a fair and open market for the development of e-commerce.

¹ The BBC's mobile browser service attracts 2.7m unique users per month and is the number one mobile site in the UK according to Nielsen Mobile. The mobile browser has seen an increase of 1m users year-on-year.

3. Examination of the cross-promotion² of existing PSB Web sites on their broadcast services.
4. Examination of the case that the PSB needs itself to operate its web services. It is arguable that the content that has been created inside the PSB using public funding should be made available to web publishers to produce appropriate sites and services. If a site is deemed to be in the public interest, the internet economy does not require a public service broadcaster to be the sole party involved in its creation and the owner and operator of the resulting franchise. This process could be achieved through an open competitive tendering process.
5. A requirement that the transparency tests for PSB commercial activities in broadcasting and publishing be extended to cover internet publishing.
6. A requirement that all PSB online services be separately and transparently accounted for in line with the EU directive to require financial transparency for the activities of state-funded entities.
7. A prohibition on PSBs from seeking advertising or sponsorship revenue from their online services. While such revenue might seem superficially attractive as a means of supplementing state aid, the unfair collateral damage to the proper development of Internet publishing would greatly exceed the benefit.
8. A prohibition on any PSB from launching an Internet access service.

The BBC is not the only PSB to have expanded onto the internet. There are many other examples including the following:

➤ Poland:

Polish public service broadcaster (TVP SA) operates two web services:

- URL address: www.tvp.pl - auxiliary, subsidiary website presenting and promoting broadcasting activities of TVP SA., a website dedicated and strictly associated with those activities, contains mainly: information about particular channels, programmes, series provided by TVP SA., TV schedules,

² This matter would seem to be analogous with the issues examined by the Sadler Inquiry in 1991, concerning the cross-promotion of BBC printed publications.



- URL address: www.itvp.pl - interactive television service; distinct, separate web service, detached project of TVP SA, web service comprising content on demand, the content comes from TV channels provided by TVP SA, some parts of the content are paid,

The above mentioned web services compete with web services operated by Agora, particularly in the area of news, sport and in the area of multimedia (video and interactivity content).

<http://wiadomosci.gazeta.pl/Wiadomosci/1,80271,4945492.html>

http://www.itvp.pl/info/news.html?channel=-1&news=661871&directory_id=2788

<http://www.itvp.pl/>

<http://wideo.gazeta.pl/wideo/0,0.html>

➤ Netherlands:

The general portal of Netherlands Public Broadcasting (NPO) is <http://portal.omroep.nl/>. Through this website you can enter theme-sites, such as the general news site

<http://www.nos.nl/nosjournaal/voorpagina/index.html> and the sports-site with sports news (text and audiovisual)

<http://www.nos.nl/nosstudiosport/voorpagina/index.html>

News Headlines are also offered by NPO on <http://headlines.nos.nl/>

Still a popular news site of the NPO is <http://teletekst.nos.nl/>

The information on this site is a copy of the Teletext service on television.

On the internet page of Teletekst online-advertisements for commercial parties are being placed (at the moment for www.one.com, a commercial supplier of web hosting services).

<http://portal.omroep.nl/nederland4> offers thematic channels (politics, culture)

All such information is also being offered by publishers on the internet. So therefore they 'compete' for a major part for the same public.

The news sites have online advertisements. The general sites of the different public broadcasting organisation (pbo) do have these components, such as the shop of pbo VARA, where you can mainly buy cd's, dvd's and books (all more or less related to their tv-programmes or tv-personality's): <http://www.vara.shopservices.nl/vara/mainpage.jsp;jsessionid=35E79D5AC4CBF964287D7D9D67BA39ED>

Also an example is the webshop of pbo KRO: http://www.webwinkel.kro.nl/kro/init.do?lang=0&bct=mi_welcome

➤ Portugal:

RTP has an online presence with more than 8.000.000 page-views per month. The website competes on advertising and on several services like for example latest news - RTP web site:

<http://ww1.rtp.pt/noticias/index.php?headline=93&visual=26>

Impresa websites, examples:

<http://aeiou.expresso.pt/gen.pl?sid=ex.sections/23450>

<http://aeiou.visao.pt/Pages/Lusa.aspx?News=200802248032668>

<http://sic.sapo.pt/online/noticias>

As you can see, they provide the same service with public aid and advertising.

Furthermore RTP not only uses Google adsense but also an agency that actively sells advertising for RTP competing with other media providers like Impresa - <http://www.hi-media.pt/tabela.htm>

➤ Sweden:

A new formula for public service is under discussion through a specially created committee looking at scope, financing, rules, etc. A proposal will be presented soon as a platform for an Agreement between PBS and the Government. With alarming echos of the situation in the UK, the Swedish PSB management is aggressive in the debate. Already they are very active online and have declared the intention to be best on web in the market. They have also started local sites in direct competition with local newspapers creating unfair competition with the long established private sector publishing sites.

➤ Spain

So far state-aid broadcasting system have not played a significant role in the online scenario, neither in terms of news-providing nor as a sound advertising competitor to their national peers. These poor results are rather alarming if we take into account that most of the websites of state-aid broadcast systems have benefited from considerable investments since their foundation in the late 1990's.

However, this scenario might change dramatically with the launch of new online services by Radio Televisión Española. The state-owned company has recently unveiled its plans to launch a 120-employees website service, offering a wide spectrum of services ranging from real-time news to community services and others. This news service might eventually turn into a serious competitor for both private broadcasting system websites and online pages of traditional media companies in the broad sense of the word.

Although there is no fixed date for the set-off of the website service, it is quite likely that it will be up and running during 2008.

Websites of State-Aid Broadcasting Corporations in Spain

Unique Users per Month, Nielsen//Netratings Netview

National Broadcasting System	December 2007
Radio Televisión Española (rtve.es)	814.000
Teletexto (teletexto.com)	223.000
Televisión Española (tve.es)	164.000
Cataluña	
Televisio de Catalunya (tvcatunya.com)	581.000
Comunidad Valenciana	
Radio Televisió Valenciana (rtvv.es)	76.000
Galicia	
Corp. Radiotelevision de Galicia (crtvg.es)	58.000
País Vasco	
EITB (eitb.com)	97.000

Websites of Broadcasting Corporations in Spain

Telecinco (telecinco.es)	1.663.000
Antena 3 (antena3.com)	1.239.000
Cuatro (cuatro.com)	805.000
La Sexta (lasexta.com)	246.000

➤ Belgium:

The Flemish public broadcaster, being the “VRT”, has a website presence.

On the one hand, the website activities are focused on its radio and television channels, whereby each radio and television stations has its own specific website (www.een.be, www.ketnet.be, www.canvas.be, www.donna.be, www.stubru.be, www.klara.be, www.radio1.be, www.radio2.be, www.rvi.be) and, on the other hand, VRT exploits two specific news websites, being www.deredactie.be (general actuality, traffic, weather, ...) and www.sporza.be (sport news).

Evidently, at least the latter two websites compete with the publishers on-line efforts.

As one can notice on the website of www.deredactie.be, this is a professional and high-profile website, considered and announced by the VRT as its “showpiece”. No trouble or expenses have been spared to offer a broad range of actual and updated topics as well as archived topics, in text

articles, news images and audio files (there is even a French, English and German translation version of some parts of the website).

The website www.sporza.be also offers a broad range of sport news and live streaming of some sports events. Moreover, different articles published on the website describe on a daily basis the main and most remarking passages of interviews with sportsmen that have been published in the Flemish newspapers. The website has recently been chosen as Sports Website of the Year.

For figures in respect of daily visits compared to the news papers (and others), see below, at the end of the Memorandum. You can notice under “VRT Media” that the websites achieve a certain success.

Evidence of Cross Promotion and/or cross-subsidy from TV/radio to PSB website offerings
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➤ Poland:

TVP SA permanently promotes paid content on its TV channels, for example:

- Promotion of premiere parts of series available as a paid content on www.itvp.pl,
- A special promotion including television, internet and outdoor media of a particular event connected with a series titled “Oficerowie”, when internet users were able to watch three different endings.

➤ Portugal

There is regular cross-promotion (and revenues from advertising on the websites).

➤ Belgium

Evidently, cross-promotion occurs frequently by referring, for example, in VRT news programmes to the website www.deredactie.be (and vice versa).

Cross-subsidy will also happen; the news website has been launched together with the renewal of all of its news programs, but the cross-subsidy is sometimes difficult to prove with clear evidence.

➤ UK

See BIPA documentation. Conservative industry estimates indicate cross-promotional spend to internet sites alone run to the value of £10m per annum.

Where governments allow both state aid and advertising by public broadcasters the impact on competition on the internet market is profound.

As have been proven on the television market, mixed funding systems do not deliver successful public service broadcasting: they inevitably bring pressures to bear on the editorial processes of the broadcaster in order to deliver audience, and they also materially disadvantage unsubsidised competitors. PSBs should not be permitted (or encouraged) to pursue forms of supplementary revenue whose effect would be to introduce unfair competition to the detriment of commercial companies trading in the same market without the benefit of a public subsidy³.

➤ Belgium:

The impact is evident and concrete. The websites of the VRT are designed and exploited with public funding while additional revenue from commercial exploitation is sought by VRT.

The total investment in the content and quality of the websites, for example the website www.deredactie.be which is introduced as a reference in the on-line news sector - is probably not commercially viable for a private player.

➤ Poland:

Polish legislation allows for licence fees and advertising by public broadcasters. Result: TVP is the absolute price leader on the advertising market. Commercial TV broadcasters have no choice but to adjust their pricing policies to the ones of TVP. The same is happening on the internet.

TVPs market share in recent years is around 50%, making it the leader on that market - see page 44 and 45 of the National Broadcasting Council document "The broadcasting landscape in Poland in 2006" available in Adobe Acrobat on: <http://www.krrit.gov.pl/angielska/index.htm>

➤ Portugal:

The effect in Portugal of dual funding is devastating - RTP has more than 50 million euros in advertising revenues whilst simultaneously aided by public funds. With very doubtful TV programmes in terms of public service it competes vis-a-vis with private operators who do not have any state aid (SIC and TVI plus cable channels). On the other hand Television law specifies two channels, considering there are four licences for free channels, that does not leave much space for competition...

³ In 1986 the Peacock Committee concluded that it would be unsafe for the BBC to be funded – even in part – by the sale of commercial airtime. In a much more fragmented marketplace that conclusion is even more valid.

Furthermore funding PBS with advertising and State aid clearly violates article 87 of the European Treaty because it is a clear distortion of competition.

➤ Spain

As mentioned above the full impact of the state funded website activity has yet to be felt prior to their expected major relaunch this year. Comparing the traffic of government-funded TV and radio websites with those of private companies offers a good perspective on the acceptance levels of their websites (see graph below).

Currently, Spanish state-aid TV and radio websites are basically marketing tools in which viewers can find programme listings and schedules, as well as other information related to those stations. In addition, many of the websites offer videos on news broadcasted by the same stations and blogs posted by TV anchors, commentators or celebrities of those networks.

In the Spanish case, the only national state-owned broadcasting system, Radio Television Española (RTVE), has little advertising, if any, in its websites: Radio Nacional de España (rne.es) or Televisión Española (tve.es), among others. In the regional broadcasting systems, owned and financed by regional governments, the scenario is quite similar or worse in terms of both advertising display and audiences levels. The main exception is the Catalanian system. Televisió de Catalunya has over half a million unique users (see graph) and displays video advertising in its home page (from automakers to telecom operators, among other categories).

Grupo Prisa's main online sites are elpais.com, as.com, cadenaser.com and cincodias.com, while cuatro.com and plus.es are, respectively, the sites of its TV channel (Cuatro) and its TV subscriber platform (Digital Plus). In all these cases, one of the main strengths of the mentioned sites is online reporting on recent events in a multimedia environment (text, audio and video). With the launch of Radio Televisión Española's new online services, Grupo Prisa's sites will not only compete with private-owned sites of media companies but also with state-owned companies, that ultimately will seek both audiences and advertising in a much narrower market as time goes by.

➤ UK

In the UK, the BBC has not so far started to sell advertising on its internet sites but this is under discussion. In the BIPA documents attached you will find the case against introducing advertising to any part of the BBC's website.



Commercial Components and Merchandising

EPC is concerned about activities such as merchandising which we do not consider should form part of a public service subject to state aid. To give you an overview we can provide the following examples:

➤ Belgium:

VRT sells advertisement space on all of its websites, except - until today - www.deredactie.be.

The children's website www.ketnet.be offers tools for making its own movies, games, e-cards, ... Besides, the sports website www.sporza.be also made a mobile service available whereby a visitor could subscribe for 5 EUR to a "Tour De France"-news alert.

Even the radio player can be sponsored.



➤ Poland:

- www.tvp.pl - includes a shop - online service <http://info.sklep.tvp.pl> offering mainly dvds with content produced by TVP.
- www.itvp.pl - offers:
 - (i) paid content, for example:
 - <http://v1.itvp.pl/oficerowie>
 - <http://www.itvp.pl/event/mjakmilosc>
 - <http://www.itvp.pl/event/determinator/?tab=8>
 - (ii) advertising products: In-Stream VideoAd and sponsored services, <http://www.brtpv.pl/itvp/oferta>,

➤ Portugal:

In addition to the examples given previously, RTP also has other revenue streams promoted online like mobile revenues which also compete with private suppliers: <http://www.rtp.pt/wportal/participe/concursos.php>

➤ Netherlands

The general sites of the different public broadcasting organisation (pbo) do have these components, such as the shop of pbo VARA, where you can mainly buy cd's, dvd's and books (all more or less related to their tv-programmes or tv-personalities)

<http://www.vara.shopservices.nl/vara/mainpage.jsp;jsessionid=35E79D5AC4CBF964287D7D9D67BA39ED>

Also an example is the webshop of pbo KRO

http://www.webwinkel.kro.nl/kro/init.do?lang=0&bct=mi_welcome

The news sites have online advertisements, but don't contain commercial components such as merchandising.

➤ Germany

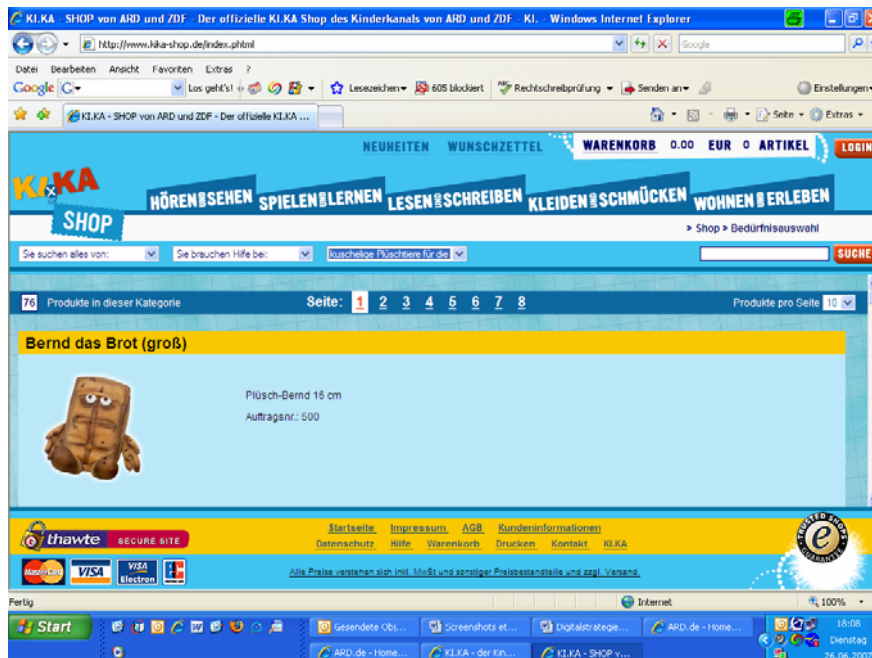
There is a wide range of activities in the field of online merchandising by publicly funded channels:

There is one site who gives an overview of the different shops of the ARD: (<http://www.daserste.de/service/shops.asp>), with Links to seven associated Online-Shops (Bayerischer Rundfunk, Norddeutscher Rundfunk u.a.). These seven shops offer **2325 different products**, breakdown in brackets (BR: 78; NDR: 869; HR: 227; RBB: 266; SWR: 439; WDR: 446). Below see a screenshot of the WDR shop:



Shop-Portal des WDR

But the ARD offers more than these seven Online-Shops. Not included is for example the children's channel of the ARD, the so called Kinderkanal "KIKa". The KIKa Online shop (<http://www.kika-shop.de/index.phtml>) offers approximately 800 products in 27 categories. (Screenshot below)



Online-Shop des Kinderkanal

Part 2 - Responses to the questionnaire

1. GENERAL

- 1.1. *Since 2001 a set of significant legal developments took place in the domain of public broadcasting, namely with the adoption of the "Audiovisual Media Services" Directive, the adoption of the Decision and Structure on compensation payment, as well as the practice of the Commission's decision taking. In the light of these developments, do you believe that the Broadcasting Communication should be updated? Alternatively, do you consider that these developments do not justify the adoption of a new text?*

EPC supports the updating of the Communication and believe changes are rather urgent in order to protect the future viability of commercial media. Of course the changes to the regulatory environment need to be taken on board but so too do the massive upheavals in technological and consumer changes need to be taken into consideration. Since 2001 the move from analogue to digital has had an enormous impact on the media market giving rise to the emergence of new players on the supply side (across radio, TV and internet) and increased consumer choice on the demand side through new services and distinct platforms.

Unless a root and branch review of the way in which publicly funded broadcasters are funded, regulated and operated is undertaken to take these changes into account, their ability to distort and harm the burgeoning private sector will go unchecked. Changes to their legacy positions in the market are particularly urgent given the current uncertainties in the commercial broadcasting market in terms of revenues given the competition for advertising from new media channels and the internet.

EPC also requests that the Commission reverts to publishing a comprehensive and transparent Scorecard of state aid to publicly funded broadcasters. The decision to remove state aid pertaining to "services of general economic interest" from the State Aid Scorecard must be reversed in order to provide transparency. When the EPC, together with colleagues from ACT and AER published our White Paper on the Financing and Regulation of Publicly-Funded Broadcasters, publicly funded broadcasters were shown to be the third largest state aided sector at European level. It is incomprehensible that publication of available data should be distorted by only partial disclosure.

- 1.2. *In terms of competition, how would you describe the current situation of the various players in the audiovisual media sector? Whenever possible, indicate all relevant data pertaining to, for example, leading players, market shares, development of market shares in the relevant broadcasting/publicity/other sectors.*

EPC is assuming that the Commission will receive detailed information from national organisations and the Member States regarding the situation in each country and have access to the many reports produced at national level.

In general competition terms though, it is clear from the experiences of our Members that the presence of state funded broadcasting organisations significantly distorts the market in a number of ways. Because state funded organisations have guaranteed, generous funding - from a mix of state aid and commercial revenues, they are not constrained by normal commercial pressures of meeting consumer demand and returning value to shareholders. This privileged, protected position means they are not keeping their operating costs, salaries or marketing costs within realistic market boundaries which goes onto have a distorting effect on the private sector. The same is true when it comes to selling advertising. Often the rates are lower than the market would be able to derive which means that rates are kept artificially low which damages the private sector.

- 1.3. *In your opinion, what are the foreseeable developments and in which area do the principle challenges for the future in the sector lie? In the light of developments, do you believe that current rules will remain valid or do you think that alterations are necessary?*

Current rules will certainly need radical overhaul as the developments and principle challenges are significant, fuelled by consumer demand and the competitive nature of the TV and broader new media markets.

These arise across the many sectors in the market, including:

- a) Investment and development in digital and multimedia developments on TV and internet related markets, in digital terrestrial television (both free to air and pay-TV), and further expansion of radio, cable and satellite channels, especially in the thematic genre;
- b) Investment in and introduction of the high definition, dolby sound and panoramic formats;
- c) Switchover from analogue to digital;
- d) Development of services for Mobile TV and IPTV;
- e) Development of multimedia web-based services.

Challenges arise from the changing patterns of audience behaviour. For example, when consumers switch from general mass media TV channels to digital platforms and web-based services, audience fragmentation increases pressure on and competition for sources of revenue, especially advertising. This enhanced level of competition for audience drives diversification of content markets whereby broadcasters and

publishers look to develop new ways of delivering their content to their consumers through new formats and platforms.

The publicly funded broadcasters follow the trends set by the private sector but from an unequal position and with distorting effects. Rarely do they enter markets that are not already well served but when they do they further fragment and already small audience and inhibit the private channels' ability to maximise revenues. This serves no purpose, public or otherwise and their ability to cross-subsidise and cross-promote their services from their main TV channels creates further levels of unfair competition.

Private sector broadcasters are facing increased competition and additional expense in acquiring good quality programmes, since the public service broadcasters are bidding for the same programmes as the private broadcasters. For example, the Finnish public service broadcaster Yleisradio Oy has recently signed a deal with HBO, a US production company well known for its popular, entertaining television shows. This leads to important factors which need to be taken into consideration, not only in Finland but in other Member States such as:

- a) A more precise definition of the content of the public broadcasting remit would lead to increased focus by the public service broadcasters on the needs of special groups
- b) A more precise definition of the content of the public broadcasting remit would decrease the requirement for public financing since the purchase of the programmes which did not fall within the scope of the public service remit (such as American mainstream entertainment shows) would be financed commercially and transmitted by the private broadcasters.
- c) The public service broadcasters should, rather than competing with the private broadcasters, concentrate on their public service mission e.g. by focusing on production of domestic programmes under a clearly defined public service remit.

Meanwhile, public service obligations imposed on private broadcasters, such as subtitling and services to the disabled, should be publicly financed. Also note that in Portugal, RTP 2 has no advertising because the private channels are obliged to broadcast content included in the PSB.

Public service broadcasters' online services increasingly compete with commercial services, e.g they comprise archive and educational services competing with private undertakings' supply to both public and private customers. This leads to a misuse of public funding and provision of subsidised content/archive/educational services by PSBs. There is a need to limit the mandate of public institutions like PSBs and public financial support of these institutions to specific clear and

responsibilities that do not distort the competitive environment of private undertakings.

Any new rules must take into account the virtuous circle of intervention by publicly funded players and market impact, looking at:

- a) the clear potential of the market to provide a wide range of services of interest to consumers without the need for the publicly funded broadcasters to enter this arena;
- b) the adverse impact of publicly funded intervention particularly in new and niche markets;
- c) the dubious value to the consumer of what are clearly duplicating and often inferior quality offers from the public sector which then ruin the chances of their predecessors to thrive and foreclose the market for further private sector competition.

New rules also need to consider aspects of funding. For example:

- a) As publicly funded broadcasters seek to expand their offer into the digital platforms, mobile and the internet, their means of funding this expansion is put under pressure;
- b) Even though the publicly funded offer is often poorly financed, their mere existence puts pressure on the private sector's ability to generate commercial revenues;
- c) The diversion of public funds from the core public service channels leads to lack of investment in quality programming which then diminishes their justification for public funding in the first place.

Therefore the Communication must address the question of how to define a public service, criteria for assessing what is of value to the consumer and appropriate levels of funding to achieve this objective without distorting or damaging the private sector.

2. BROADCASTING COMMUNICATION COMPATIBILITY EVALUATION UNDER EC TREATY'S ARTICLE 86 (2)

2.1. Coherence with the Commission's Decision and Structure on public service compensation⁵

2.1.1 Do you consider that (at least some of) the requirements established in the Decision and Structure on public service compensation⁶ should be included in the reviewed Broadcasting Communication or not? Justify your answer.

EPC believes that most of requirements are helpful and relevant and should be considered for inclusion particularly those relating to cost

recovery and over-compensation. The principles must however be applied to non-monetary benefits such as promotion, preferential listings in electronic programme guides, must carry provisions and preferential space on distribution platforms.

Before approaching this task, a direct link must be created between the requirement for clear public service remits and how to establish the corresponding funding.

This would also be the moment to establish the principle that services which are clarified by remit as public service should not be subsidised by commercial revenues.

2.1.2 In the affirmative, explain which requirements should be included and indicate which alterations would be adequate to the broadcasting sector (also consult the questions below, especially those pertaining to overcompensation; section 2.6).

The Commission should consider how best to eliminate the risks of over-compensation as a result of (a) ill defined remits (b) lack of transparency of accounting (c) ineffective regulation and (d) inefficiency of publicly funded broadcasters.

Member States should be required to:

- i. Define the criteria used to determine the value of compensation
- ii. Create an inventory of essential public service tasks
- iii. Itemise any commercial activities, and fully cost them at normal market rates
- iv. Consult all stakeholders on (i) and (ii) above before allocating funding
- v. Itemise the value of non-monetary benefits (as in 2.1.1) including cost-recovery of non-public service activities
- vi. Include profits, calculated on basis of normal commercial rates, from commercial activities

In Poland for example, the only limitation on the activities of TVP and Polish Radio S.A. in the one contained in the provisions of the Polish Broadcasting Act and the Licence Fees Act. The Polish National Broadcasting Council receives reports on the use of public aid funds, however, in case these constitute an excess over public service expenditure (as shown in the report), the funds are not returned, but carried forward for the next accounting period. Also, the National Broadcasting Council has no means of verification whether the reports submitted by public broadcasters are correct.

2.2. Definition of public service mission

2.2.1 *We invite you to provide information regarding the definition of public service mission in your country, particularly in what pertains to new media activities.*

EPC is alarmed by the fact that by default Member States have extended their remits to cover whatever they consider to be public service activities with little or no regard for market impact of extending their reach beyond traditional public service broadcasting.

In the UK for example, the Secretary of State declared the Internet to be the “third arm of broadcasting” back in the late 1990s. Other governments have followed suit with serious consequences where publicly funded broadcasters have already started new TV, radio and internet services.

The Finnish public service broadcaster produces programmes and content services for television, online, mobile and radio in order to reach Finnish audiences in Finland and abroad. E.g. its online services include blogs, RSS feeds, radio podcasting, digital programming archive, online television and radio with catch-up service and EPGs (for television, radio & internet). Mobile services cover e.g. news, current affairs, educational content and entertainment. (see Act on Yleisradio Oy (Finnish Broadcasting Company) Chapter 3 Section 7 (635/2005).

In the Netherlands a public broadcasting organisation according to article 50 Mw is obliged to offer a general programme to the public containing culture, information, education and entertainment. The carrying out of these programming obligations is supervised by the independent Dutch Media Authority <http://www.cvdm.nl/pages/english.asp>

Within this framework the broadcasting organisations are free to spend their budget the way they like.

In Poland, the definition of public service remit is contained in Article 21 of the Polish Broadcasting Act. This definition is very unclear and allows TVP to treat all its activities as public service remit, despite the obvious fact that some of its programmes may as well have been shown on commercial television (popular TV series, “Idol” type shows). The definition also enables TVP to “work on new technologies of production and transmission of radio and television programme service” (Article 21.1a.5). This provision can be interpreted in such a way as to enable the treatment of TVP's internet activities as part of the public service remit. It is important to note that even the Polish National Broadcasting Council regards the definition of public service remit as incorrect: page 33, section 5.1.1 of the National

Broadcasting Council document "The broadcasting landscape in Poland in 2006" available in Adobe Acrobat on:

<http://www.krrit.gov.pl/angielska/index.htm>

In Portugal, Digital activities are part of the PSB remit in general terms so there the remit does not specify digital activities. Public service in Portugal like in other EU countries basically means:

- contribute to a democratic and/or pluralistic society;
- contribute to national culture and language;
- provide high access to its programming;
- provide high quality programming;

In pragmatic terms these goals are achieved with a commercial channel and a "cultural channel".

Concerning online activities there is no detail at all.

In Belgium, despite improvement in comparison to the past, the definition of the public remit in Flanders remains vague and broad. This is the case not only for issues which are familiar from analogue television - e.g., the definition of the programming mission - but there is also evidence that issues of remit definition will cause problems in the new media environment.

For example, according to the definition of the remit, the VRT needs to deploy services like "*verrijking*" ("*enrichment*") and "*interactivity*". "*Verrijking*" is defined as "*digital services, which provide a better service, additional value or sensation and extra comfort to the media user*" and "*interactivity*" as "*every application that requires an action from the media user*". In short such could imply almost any and all new media activities. Moreover, the distinction with merchandising and ancillary-activities that fall out of the scope of the remit becomes extremely blurred: the sale of a CD-Rom with a game that is related to a child program was clearly a merchandising-exploitation, but could fall now under the public service remit if such is presented as an "enrichment" or "interactivity" via digital television. One could also wonder if SMS-services - like the above-mentioned "Tour de France" news alert - are merchandising or enrichment or interactivity.

According to the remit, the VRT should offer "*its programmes and services via all relevant platforms and devices, cross-medial and multi-medial*".

The VRT is also obliged, according to the remit, to develop internet applications like "*a communication-web platform*" for children and



“a multimedia and participative broadband youth platform” where visitors can communicate and produce *blogs* and *vlogs*.

The VRT receives, on top of the large public funding and commercial revenues, a yearly supplementary sum (3.837.000 EUR in 2007 to 4.126.000 EUR in 2011) for research and development of new media projects (so-called *“e-vrt”*).

Also, while the Beheersovereenkomst sets a maximum amount for commercial financing, this applies only to linear, analogue television, allowing for unlimited commercial activity on all other media platforms such as online or digital text advertising.

In the Netherlands, “Section 13c states that

1. The tasks of public broadcasting shall be:
 - a) to provide a varied and high-quality range of programme services for general broadcasting purposes at national, regional and local level in the fields of information, culture, education and entertainment and to transmit them, or cause them to be transmitted, on open networks;
 - b) to perform all the activities relating to programme service provision and transmission required for that purpose;
 - c) to provide and transmit programme services intended for countries and regions outside the Netherlands and for Dutch people residing outside the territory of the Netherlands.
2. Public broadcasting programme services shall provide a balanced picture of society and of people’s current interests and views pertaining to society, culture, religion and belief, and
 - a) shall be accessible to the entire population in the area for which the programmes are intended;
 - b) shall contribute to the development and dissemination of the socio-cultural diversity of the Netherlands;
 - c) shall be independent of commercial influences and, subject to the provisions laid down by or pursuant to the law, of government influence; and
 - d) shall be aimed at a broad audience and at population and age groups of varying size and composition.
3. Public broadcasting may perform the tasks referred to in

subsection 1, inter alia, by providing and disseminating programme material in ways other than those referred to in subsection 1 (a).

On Friday 15th of February the Dutch council of ministers approved with sending the proposal for a new Media Act to the Dutch parliament. At the time of writing, this proposal has not been made public yet. The press release about the approval explains that all forms of electronic and digital services will be part of the remit of the Dutch public broadcasting organisation at the moment the new Media Act will enter into force (expectation is end of 2008). New media services will not anymore be considered as additional activities, but as part of the main task.

This picture is unsustainable both in terms of the future viability of private companies but also in terms of defining and funding a core public service in the digital age. Therefore, as we have said above, it is urgent and essential to redefine the public service agenda with clear limits to expansion. Just because the technologies and platforms exist does not justify entry to new markets by public service broadcasters.

If PSBs argue that they have to be present on these markets in order to justify continuation of their public funding, it is obvious to EPC that the very basis of that justification is itself questionable. Surely the more logical and sustainable in the long term is to limit the activities of the PSBs and fund these appropriately. Any attempt to expand would require an increase in funding if these new services were to excel, which on the current evidence of private sector provision cannot be justified.

2.2.2 Do you consider that the distinction between public service and other activities should be the object of major clarification? In the affirmative, what measures would propitiate these clarifications (e.g.: the Member State drawing up a list illustrating the types of commercial activities not covered by the public service mission?)?

A clear distinction between publicly funded and commercial activities requires major clarification. This is the only basis upon which public funding can be properly assessed and investment decisions made by the private sector. We would support therefore the introduction of some form of EU level obligation for ex ante evaluation in a new Communication.

A definitive list of prohibited commercial services would in our view be rather difficult to create and/or maintain as the market is changing so fast and in so many different ways. Therefore instead it is clearer to define what the public service remit is. However, it would be possible and indeed desirable to prohibit access to advertising and sponsorship revenues for any part of service covered by a clear public service remit. This would go a long way towards removing distortions



in those markets where dual funding already exists, and protect those markets where publicly funded broadcasters are exploring possibilities of introducing advertising to parts of their new media offers.

It may come as a surprise to the Commission but the BBC has been soliciting sponsorship since at least 2004. Advertisers have been invited to pay to promote their brands live during BBC programmes such as Children in Need, Saving Planet Earth or live concerts on Radio 2. Trusted presenters, such as Gary Lineker or Sir Terry Wogan, could be found naming brands in programmes in a way that commercial broadcasters would not be allowed to do. Until last week, this was helpfully spelt out on a BBC website - bbceventsponsorship.com. But following an article in The Times it was immediately taken down⁴. Not surprisingly when the site extolled the advantages of “showcasing your brand within editorial content to mass audience on radio, on TV, and online”. In sponsoring Saving Planet Earth for example, HSBC received a package in which the bank was promised “contractual visual and verbal credits” on BBC One.

Once the remit has been defined, measures should be put in place to prevent service creep into new media areas though application of clear regulatory processes to determine first whether proposed new services would damage the existing market or foreclose from newcomers and second provide for adequate review by independent regulatory authorities and redress for private sector operators when the remit has been exceeded.

In the Netherlands for example the STER-advertising (STER=Radio and Television Advertising Foundation for public broadcasting) and digital thematic channels should not be covered by the public service remit.

PSB activity in new media services must be subject to an analysis of what is already available on the market: online activities offered by a PSB (e.g. chat rooms, online games, calculators, links to third parties offers/services) do not automatically constitute services of general economic interest and may lack specific features as compared to other similar or identical already offered by the market.

The revised Communication should indeed clarify Member States' obligations to carry out ex ante evaluation of proposed expansion by PSB into new areas of business. If the revised Communication also includes meaningful rules on procedural, institutional and substantive aspects, then this would be a significant step forward in introducing an element of transparency into the system.

⁴ [BBC closes controversial sponsorship website - Times Online](#)

The analysis to be carried out under an ex ante evaluation needs to be rigorous, objective - and above all, devoid of the subjective, abstract concepts such as “quality” which have underpinned so many distortions of competition in the broadcasting market.

It is essential that the ex ante scrutiny be carried out by an independent authority.

Any extension of the role of public service broadcasters and even a current role in online environment easily constitutes unfair competition and creates a threat for the free European commercial online content industry. European online content industry is much more vulnerable because of the publicly funded online content or services than traditional offline content or linear audiovisual services. National public funding should be misused in the production of new public online services that compete with European commercial private (online/offline) content production. Said misuse leads to weakening of commercial private online content market as it is partly in relatively early and developing stage.

2.2.3 In the actual Broadcasting Communication, activities other than television programs in their traditional sense can be an integral part of the public service mission provided that it satisfies the same democratic, social and cultural needs of society. Is this disposition sufficiently clear regarding the permitted scope of these public service activities? Why? If not, do you consider that the reviewed Broadcasting Communication should contain additional clarifications?

As mentioned above, we do not consider that activities other than traditional broadcasting services should automatically form part of the publicly funded service. The original justification and purpose of the publicly the funded broadcasters was to provide a universal, free service to meet core public service objectives. We can see no justification for change. Indeed, on the contrary, we see the need for restriction given the fundamental changes to the media and communications market.

As portrayed in our introduction, the history of the BBC’s expansion onto the internet is a classic example of how a lack of regulatory control at the point of expansion has led to the creation of a publicly funded publishing enterprise on the internet beyond anything remotely connected with their original purpose.

In the Netherlands, a public broadcasting organization according to article 50 Mw is obliged to offer a general programme to the public containing culture, information, education and entertainment. The carrying out of these programming obligations is supervised by the independent Dutch Media Authority (<http://www.cvdm.nl/pages/english.asp?>) . Within this framework

the broadcasting organizations are free to spend their budget the way they like.

2.2.4 *Do you consider that the general approach of the recent practice of the Commission's decision taking (i.e., determination of public service commission based on a prior evaluation of new media activities) could be incorporated in a reviewed Broadcasting Communication?*

As stated above EPC believes you must start from the point of first principle of defining what the public service remit can incorporate. In addition, clear *ex ante* evaluation of requests for expansion to new media should be established together with criteria for *ex ante* market impact assessment by competition authorities/independent regulators.

2.2.5 *Are you of the opinion that a reviewed Broadcasting Communication should better clarify the scope of a prior assessment of public service mission on the part of the Member States?*

Yes.

2.2.6 *In your opinion, which services, or service categories, should be subject to prior evaluation?*

All services and categories should be subject to prior evaluation.

2.2.7 *Do you consider that the reviewed Broadcasting Communication should contain basic principles pertaining to the substantive and legal aspects of such an assessment (such as, for example, third party involvement or the possible evaluation criteria, including, for example, a contribution to clearly identified objectives, citizen needs, offers available in the market, additional costs, impact on the competition)?*

Yes, detailed evaluation criteria are essential to provide transparency and the means by which to hold the publicly funded operators to account.

2.2.8 *Taking into consideration the fact that determining the public service character of such activities can be done in several ways, to what extent should a reviewed Broadcasting Communication suggest possible alternative options?*

EPC would recommend that the Communication should set out:

- a) What is public service in the digital age where spectrum scarcity and barriers to entry no longer pre-determine the need for a publicly funded provision?
- b) Some principles of what the citizen might regard as value for money from a publicly funded provider where the test of public

value should include audience success criteria (noting that some new media PSB channels are clutching for audiences, often by duplicating commercial services and failing on both grounds).

- c) The basic methodology for assessing market impact.
- d) The criteria for establishing genuinely independent oversight to provide control, redress and regular review.

2.3. Concession of and supervision

2.3.1 We invite you to explain in what manner concessions are attributed in your country. Is the process of awarding a concession subject to public consultation? To what extent is the broadcasting organization's mission established by acts of concession which are legally binding? To what extent is the implementation and determination of the exact scope of activities attributed to public service broadcasting organizations? Are any of these "implementation measures" publicly available?

We delegate responses to this question to national organisations.

As a general point though better public consultation and greater transparency would be welcomed. However, such consultation is only worthwhile if account is taken of third party interests. Evidence today would suggest that public authorities leave contracts deliberately poorly defined with broad discretionary rights left to the broadcasters in terms of alterations to the original concessions without the possibility of review or redress.

2.3.2 Explain the mechanisms existing in your country for supervising public service broadcasting organizations. What is your experience with regard to existing supervision mechanisms? Do you consider that, in your country, third parties have the necessary facilities to open up procedures against alleged infraction/non-fulfilment of public service (and other) duties?

Again, in general we delegate responses to this question to national organisations.

However as a general point, our members all note with concern the lack of supervision and redress for third parties. In countries where regulatory powers are conferred on independent authorities, these often apply less rigorous control over their publicly funded broadcasters than the private channels.

2.3.3 Do you consider that the Broadcasting Communication should contain further clarifications pertaining to the circumstances under which a supplementary act of concession (i.e., as a complement to the general dispositions established by law) is necessary or are the current rules sufficient?

Yes. Any extension should be subject to clear review against agreed criteria and market impact assessment.

2.3.4 Do you consider that the Broadcasting Communication should contain further clarification on how to guarantee increased efficacy in supervising public service broadcasting organizations? In your opinion, what are the advantages or the possible obstacles associated with the existence of supervision authorities independent of the company responsible for the service (as mentioned in the Broadcasting Communication) as opposed to other monitoring mechanisms? Do you consider that effective supervision should include sanction mechanisms and, if so, which?

As stated above, the case for independent, rigorous oversight by an independent regulator is obvious. At the moment, all across Europe publicly funded bodies are mainly left to their own devices from the moment the funding is granted until it expires.

Sanctions should be included but these should not necessarily always be financial except where commercial activities are subject to sanction. For non-commercial activities, closure of services or prohibitions on further expansions could effectively be applied as sanctions.

2.3.5 Should there be specific complaint procedures at a national level through which private operators would be able to raise issues associated with the scope of the activities of public service broadcasting organizations? In the affirmative, which form should these procedures take?

As stated above, effective means of redress by third parties is essential to ensure control. Furthermore, independent regulatory oversight must include the ability of the regulator to call the publicly funded executive to account and impose meaningful decisions and/or sanctions which meet the concerns of those who raised objections in the first place. The scope of the supervisory bodies must be broad and impartial in order to cover both remits and funding.

It is possible to file a complaint at the Dutch Media Authority with regard to unfair competition of 'nevenactiviteiten' (additional activities) of public broadcasting organisations.

With regard to state-aid it is only possible to go to the European Commission.

In Poland, there is a possibility to act against a public broadcaster, provided that it holds a dominant position in a relevant market. However, previous attempts to attack TVP on the basis of its abuse of the dominant position have ended in failure: a predatory pricing charge had to be withdrawn, since the commercial TV stations had to

follow the market leader and apply predatory pricing themselves. There was a limited understanding of the problem within the Polish competition authority, which decided to appoint an expert witness, since it could not conduct the economic analysis itself.

In Portugal, basically one can appeal to the Media Regulator (ERC) and/or Competition Authority (Autoridade da Concorrência) but with uncertain outcome when it comes to the activities of the state funded media.

In Belgium, there is no specific mechanism available to challenge the anti-competitive behavior, save via the general Belgian Competition Council. An independent authority specifically dealing with all aspects in respect of the financing and exploitation of the VRT would be welcomed.

The Flemish Regulator for the Media limits its control to the respect by the VRT of the criteria and obligations of the Beheersovereenkomst. The Regulator does not control anti-competition practices, neither is it able to demand refund of any overcompensation.

In the UK, the BBC Trust acts as an appeals body (as opposed to an independent regulator) but has only been in operation for a short time. Its effectiveness in dealing with and solving complaints remains untested.

2.4 Double financing of public service broadcasting organizations

2.4.1 In your opinion, what is the expected impact on competition of paid services which are (partially) financed by the State?

The impact can only be negative for the following reasons:

- PSBs can charge below prevailing market prices, or worse below cost
- PSBs have unfair advantage when bidding for the rights to sporting events, films, imported serials, etc.
- PSBs can undercut market provision to third party operators such as mobile companies, in-flight/in-train news or entertainment services
- The entry of PSBs into already established pay markets creates direct competitive threats to commercial revenues
- When PSBs enter new markets they bring to bear their unrivalled opportunities to cross subsidise and cross-promote from their main channels. Commercial competitors are then locked out as

their ability to compete for audiences and revenues is adversely impacted.

- The need to attract revenues brings into question the public service justification of the service.

2.4.2 *Paid services should always be considered as purely commercial activities or are there cases that could be viewed as part of the public service mission? For example, do you consider that services paid while part of the public service mission should, in what regards this aspect, be limited to services which are not offered in the market? Or are you of the opinion that, in certain circumstances, paid services should be considered as part of the public service mission? In the affirmative, specify which. For example, should these circumstances include elements such as specific public service objectives, specific citizen needs, the existence of similar offers in the market, existing public service duties inadequate or existing funding inadequate to satisfy the specific needs of the citizens?*

We can see no reason to include pay services as part of any public service mission. They are purely commercial and indistinguishable from the commercial offer.

2.5. Transparency requirements

2.5.1 *In your country, to what extent do public service broadcasting organizations carry out commercial activities? Is there a structural or functional separation between the public service and commercial activities?*

In general, in terms of securing an appropriate balance between the public and commercial services, it is likely for the foreseeable future that the overwhelming proportion of public patronage will be for the PSBs' existing free-to-air radio and television services. This may be supplemented with ancillary commercial income from programme sales and the concomitant exploitation of assets for the benefit of the core services, (so long as the core services are properly delineated in a remit).

Nonetheless these activities have their limits. Exploitation of assets should not be permissible where they effectively involve the PSBs in using the state funding as a subsidy to undercut commercial competitors. Nor should there be any question of profit-maximisation superseding public service obligations as their central purpose. After all, the core purpose of public service broadcasters is editorial not entrepreneurial. It would be a disservice to viewers and listeners - already well supplied with a wide variety of programming and internet content - if this were to change.



If public services become significantly driven by the needs of commercial exploitation, then this removes the very editorial distinction between the PSB and commercial broadcasters which is the justification for the public subsidy. The Communication should make it clear that PSBs should concentrate on their core broadcasting responsibilities, rather than pursue the chimera of a commercial role.

Insofar as PSBs are justified in providing purely commercial services, we believe that it is essential that they should be clearly separate enterprises. The Communication should address the need for structural and functional separation so that PSBs operate transparently, even though their purpose may be to feed revenue back into the public services. Above all it must be manifest that the PSBs' commercial activities do not benefit from hidden subsidies from the public subsidy, in programme assets, resources or labour and talent. Given the fact that a great proportion of the PSBs' assets have been created by state funded revenue, the achievement of such transparency is of paramount importance.

2.5.2 *Do you consider that there is a need for structural or functional separation of commercial activities and, if so, why? What would be the positive or negative consequences of structural or functional separation?*

Yes, there is a need for structural and functional separation. In many countries, the introduction of any increased separation would be an improvement.

Even in cases where there appears to be a level of separation, this does not always deliver either transparency or fair trade. Take the BBC where BBC Worldwide operates as a commercial subsidiary. Although the accounts are kept separately there is no functional separation. BBC Worldwide enjoys unrivalled benefits which are not available to commercial players including preferred partner status with the BBC, first option on programme rights for commercial exploitation, shared facilities with the BBC, privileged access to valuable information about new developments and programme commissioning. When it comes to news provision there is no functional or structural separation so that the commercial news channel derives direct benefit and subsidy from the BBC's public service news resources.

Such a lack of functional separation increases the risk of anti competitive behaviour through benefits of vertical integrations, cross-subsidy, discrimination and market distortion.

In Belgium, accounting separation is no longer a satisfactory guarantee for the transparency level that must be achieved. Financing non public service programming activities such as e-commerce, Internet advertisement, sponsorship, merchandising, pay-



TV, Pay-per-view, paid contents through public funding, is not acceptable, and these activities should be carried out with full legal and accounting transparency, preferably through different legal entities within the same Group to which the public service broadcaster belongs. This is necessary to ensure full transparency and help prevent the risk of market distortions.

We recommend that the Commission includes an analysis of the varying degrees of functional separation available to Member States but insists that member states move towards establishing clear separation of commercial and public service activities. In particular a complete prohibition on preferred partnership status should be implemented as well as a prohibition on cross subsidy.

- 2.5.3 *Do you consider that the rules for cost distribution, as defined in the current Broadcasting Communication, could be improved in the light of the experience in your country? In the affirmative, indicate possible examples of good practice. Or do you consider that current rules are sufficient?*

Yes, the rules should be improved but this can only ever be effective in conjunction with a) functional separation and b) proper scrutiny. Existing methods are insufficient to eliminate discrimination and cross-subsidy.

- 2.5.4. *Taking into consideration the answers to the previous questions (2.5.1, 2.5.2, 2.5.3), do you consider that a reviewed Broadcasting Communication should contain additional clarifications with regard to transparency requirements?*

Yes and as stated above at the very least Member States should be required to introduce functional separation. Furthermore, clarification of the link between public financing and the public service is indispensable.

2.6. Proportionality test - Overcompensation exclusion

- 2.6.1 *Do you consider that the Broadcasting Communication should make it compulsory for Member States to establish clearly the determination parameters for compensation amounts?*

Yes. Both the amounts and sources of funding should be disclosed. Criteria for establishing levels of funding and calculating over compensation should be included. There should also be an efficiency test for commercial services so that where PSBs fail to attract sufficient revenues by market standards, such services should be withdrawn.

- 2.6.2 *Do you consider that the obligations at present defined in the Broadcasting Communication allow public service broadcasting organizations a reasonable degree of financial stability? Or do you*



believe that current rules excessively curtail the public service broadcasting's capacity to make long-term financial plans?

The current rules give the public service broadcasters financial security and carte blanche to do as they wish. Curtailment does not appear to exist at any level.

- 2.6.3 *In what circumstances would it be justifiable for public service broadcasting organizations to maintain a surplus at the end of each financial year? Do you consider that the dispositions listed in the service Decision and Structure of general economic interest (see the general description in explanation memorandum, in particular the 10% ceiling on the yearly surplus) could be incorporated into a new Broadcasting Communication?*

Any surplus should be disclosed at the earliest opportunity and either subtracted from subsequent funding or its future spend clearly identified and justified. Persistent surpluses must be considered as evidence of over-compensation and should be investigated. Independent scrutiny of public finances should be considered best practice.

- 2.6.4 *What should the limits/safeguards aimed at avoiding possible distortions in competition be (for example, should the use of the 10% margin be left at the discretion of the public service broadcasting organization within the scope of their public service duties or should it be reserved for specific objectives so that they could be used solely for prearranged objectives/projects? In the event of consistent surpluses should the Member State re-evaluate the financial needs of the public service broadcasting organization)?*

As stated above, all surpluses should be clearly earmarked for core public service activities as defined by their remits. Consistent surpluses should lead to automatic review of the public financing.

- 2.6.5 *Do you consider that the rules at present defined in the Broadcasting Communication could, in any way, act as a deterrent to efficiency gains on the part of public service broadcasting organizations? In the affirmative, how could the situation be resolved? Which mechanisms currently in force in your country could be cited as good examples?*

The current Communication provides no incentive to PSBs to be efficient. Fixing limits on costs, or an obligation to reduce costs if public service objectives are not realised would increase efficiency.

- 2.6.6 *In what circumstances, and in which conditions, do you consider that public service broadcasting organizations could be authorized to maintain a profit margin?*

If the remit is right in the first place there should be no scope for profit. Public finance should match the remit. As stated above,

surpluses, or “profits” should lead to a decrease in public funding in future years.

2.7. Proportionality test - exclusion of market distortions unnecessary to the fulfilment of the public service mission

2.7.1 *What are the mechanisms available in your country through which private operators can raise the issue of alleged anti-competitive practices on the part of public service broadcasting organizations? Indicate whether, in your opinion, these mechanisms ensure sufficient and effective control. Is a fall in revenues due to attested anti-competitive behaviour (for example, a price reduction) taken into consideration when determining whether or not overcompensation of public service broadcasting organizations has taken place?*

The Communication could usefully establish basic best practice criteria to deliver effective complaints procedures and adequate redress.

2.7.2 *With regard to possible anticompetitive behaviour on the part of public service broadcasting organizations (and particularly in what regards price reduction allegations), do you consider that the Broadcasting Communication should make it compulsory for public service broadcasting organizations to respect market conditions with regards to commercial activities in line with the practice of the Commission’s decision taking, including adequate control mechanisms?*

Yes. Undercutting the market has seriously distorting effects and should be prohibited. The problem will be how to establish market prices but the Communication should establish best practice criteria which create conditions to prevent problems in the first place.

In Belgium, even though price undercutting often occurs this is rarely taken into account. On the contrary, if certain minima of net revenues generated by analogue television sponsorship and radio publicity are not met by the VRT, the Flemish Government pays an additional amount, irrespective of all other commercial revenue generated by the VRT (for example on the websites or via the organization of events). The VRT has thus an interest in undercutting prices for analogue television sponsorship and radio publicity as well to cross-refer such revenue to commercial revenues from on-line activities by selling joint offers.

In Portugal, lower revenues certainly exist because the influence of RTP in the media sector and advertising market in Portugal is disproportionate to its intended goal of public service.

In Poland, there needs to be a thorough understanding of this issue within the competition or broadcasting regulator, where currently there is not. Any current attempts to change this situation by the current government are being named by members of the National Broadcasting Council as "repaying the ruling party's debts to the commercial media".

- 2.7.3 *Do you consider that the methodology for detecting price reduction practices should be clarified, and possibly also include other tests which should be used as an alternative to the current methodology as defined by the Broadcasting Communication? Describe the tests carried out in your country pertaining to price behaviour on the part of public service broadcasting organizations and which can be recommended as examples of good practice.*

The current methodology needs updating and specific criteria for detecting price reduction practices should be established.

- 2.7.4 *Do you consider that the Broadcasting Communication should contain clarifications concerning the public financing of the broadcasting rights of big sporting events? In the affirmative and in your opinion, what additional clarifications should be included in the Broadcasting Communication and in which manner these would specifically answer the potential competition issues ensuing from state financing? Alternatively, do you consider that potentially negative effects on competition ensuing from the acquisition of such rights by public service broadcasting organizations would be adequately covered by anti-trust regulations?*

Yes, further clarification is necessary. The current situation of rights acquisition by members of the EBU distorts competition.

2.8 Other issues

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

Yes but this should be updated to take into account the negative impact of public funding of expansion into new media services.

- 2.8.2 *What do you consider as typical difficulties of smaller Member States and in which manner should do these be taken into account?*

The most obvious difficulty is the size of market in terms of economies of scale but also in terms of language.

In smaller Member States, it is particularly important to clearly define the scope of the public service remit. Because the relevant markets in smaller Member States are smaller, the competition and markets

are distorted even more easily than in larger Member States. The scope of the public service offering should be adapted to the population in a particular country and language area. For example the Finnish public broadcaster Yleisradio Oy has four television channels. The private sector operators in Finland regard that as a large number of television channels compared to the population in Finland. If the same ratio was applied for example in the UK, there would be approximately fifty public service television channels in the UK!

3. FINAL REMARKS

3.1. *We invite you to explain what, in your opinion, would be the impact of possible alterations to current rules on, for example, the development of innovative services and, in more general terms, employment and the growth of the media sector, consumer choice, audiovisual media, and other media services', quality and availability, media pluralism and cultural diversity.*

3.1.1 - Clear remits matched by appropriate funding

The most important alteration will be new rules to ensure that publicly funded broadcasters operate to a clear remit, appropriate funding and do not exceed their public service objectives. This will mean that they stick to their mission and desist from competing with the private sector in each and every sector and platform.

3.1.2 - Put an end to mixed funding

As have been proven on the television market, mixed funding systems do not deliver successful public service broadcasting: they inevitably bring pressures to bear on the editorial processes of the broadcaster in order to deliver audience, and they also materially disadvantage unsubsidised competitors. PSBs should not be permitted (or encouraged) to pursue forms of supplementary revenue for new media services either, particularly on the internet, where the effect would be to introduce unfair competition to the detriment of commercial companies trading in the same market without the benefit of a public subsidy⁵.

3.1.3 - Define the public interest

Attempts in the past to define public service broadcasting have been extremely broad and flexible, the most liberal being that it is 'what the PSB does'. With growing concern about the impact and operation of many of the PSBs' commercial activities, and in the light of the ongoing EU consultation, it would be beneficial to all parties if the Commission

⁵ In 1986 the Peacock Committee concluded that it would be unsafe for the BBC to be funded – even in part – by the sale of commercial airtime. In a much more fragmented marketplace that conclusion is even more valid.

were able more closely to define the essential elements of the output which justify receipt of state aid. Conversely, it would be a useful exercise to identify those elements which fall outside such justification.

The public interest can of course be argued for many of the activities of a broadly-based public service broadcaster. However, the totality of the public interest also includes the very real and essential benefits of pluralism and diversity, both of which can easily be threatened by dominant players, however well intentioned.

It is essential to re-define (and thereafter monitor) the extent to which PSBs online activities are properly and necessarily an extension of their public service obligations, and therefore legitimate recipients of the state aid. Within that context, it must further be assessed how far even such seemingly legitimate activities are actually or potentially distorting the commercial basis of the wider market for Internet services.

- 3.2. *To what extent do you expect that the above mentioned additional clarifications will create new administrative burdens and conformity costs?*

This seems improbable in any shape or form.

- 3.3. *Do you consider that the above-mentioned additional clarifications would give rise to a better regulatory framework?*

Of course and as stated above are urgently required to restore order to the market.

- 3.4. *Explain whether or not you believe that the positive impact of the additional clarifications mentioned in this questionnaire is greater than the negative impact.*

Incontrovertibly!

*On behalf of the Members of the European Publishers Council
10 March 2008*

Annex 1

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