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SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

EEA EFTA POSITION ON THE DRAFT COMMUNICATION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING

Executive Summary

In this paper the EEA EFTA States present the following observations and recommendations:

- The EEA EFTA States welcome the Commission's initiative to revise the Broadcasting Communication (BC). However, the basic principles of the BC from 2001 are still adequate. When taking into account services on new media platforms and new case law, the new Communication should therefore respect the principles of the Amsterdam protocol, and notably the principle of subsidiarity.
- The BC should establish the main principles related to the definition of the remit, entrustment, monitoring and transparent funding of public broadcasting. In respect to the specific material and institutional arrangements, the EEA EFTA States recommend that the BC should focus on identifying *best practices*, rather than on providing detailed requirements.
- The EEA EFTA States share the view of the Commission that pay services, under certain conditions, might form a part of the public service remit.
- The EEA EFTA States question the legal basis for establishing a "public value test". The BC shall not specify any assessment measures; only state the general principle of an assessment when new services are intended to be taken up by the Public Broadcaster. Member states shall, in order to consider the effects of the services on the market and to minimize possible distortions of competition, assess the consequences of the envisaged new service by an evaluation procedure based on an open public consultation.
- New public services might serve the democratic, social and cultural needs of society and at the same time have some effect on competition. How to strike the balance between these effects is in essence a political decision

that should be taken at the national level. For the sake of legal certainty, this should be clarified in the BC.

- **The choice of remedies to ensure that public service obligations are respected may have implications for the principle of editorial independence. The decision on such remedies must be taken at the national level.**
- **The BC should include the principle of technology neutrality.**

1. Introduction

1. The EEA EFTA States refer to the first draft Communication from the Commission on the application of State aid rules to public service broadcasting dated 4 November 2008 and submitted to public consultation until 15 January 2009.

2. General remarks

2. The EEA EFTA States welcome the Commission's initiative to revise the Broadcasting Communication (BC). The EEA EFTA States do, however, support the general approach of the position paper submitted by 19 Member States to Commissioner Kroes on 26 September 2008.

3. Since the adoption of the original Broadcasting Communication (hereinafter: BC) in 2001¹, the broadcasting sector has seen important developments, i.e. the transition from analogue to digital production and distribution and the growth of non-linear services. In parallel, the regulatory landscape has changed due to the adoption of the Audiovisual Media Services Directive etc. In light of these market and legal developments, the EEA EFTA States welcome the Commission's initiative to revise the BC.

4. In spite of the remarkable changes in the media landscape over the last years, public service broadcasting has in general managed to maintain and renew its important role as a source of information, provider of news and entertainment and an arena for public debate etc. Given the essential role of the sector, the EEA EFTA States appreciate the Commission's decision to make the BC subject to a broad public consultation.

5. The EEA EFTA States find that the basic principles of the present BC related to the definition of the public service remit, entrustment and monitoring in general still are relevant and adequate.

6. Any revision of the BC should be based on the principles of the Amsterdam Protocol, and notably the principle of subsidiarity. The main elements of the Protocol are that it falls within the competence of each state to define the public service remit and to decide upon the financing of public service broadcasting, in so far as it does not affect trading conditions or competition in a way that is contrary to community interests.

¹ From 15 November 2001, as published in OJ C 320/04p. 5.

7. A number of aspects of modern public service broadcasting weigh in favour of retaining the subsidiarity principle of the Protocol. The prime justification for public service broadcasting is that it serves the democratic, social and cultural needs of society. The meaning of this concept cannot be fully determined beyond the national context.

8. Furthermore, to be able to fulfil its remit, public service broadcasters must enjoy full editorial independence. The organisation and financing of public service broadcasting must be designed in a way that protects and promotes the independence of the public service broadcaster. Which specific institutional and procedural arrangements are best suited to promote editorial independence needs to be assessed individually, and will depend on issues such as how the ownership of the broadcaster is organized, the “culture” of political interventions in each country, national and regional administrative and legal traditions etc.

9. In addition, institutional and procedural arrangements need to be adapted to the size of each state. Regulatory mechanisms and institutions that might be suitable in the densely populated or large Member States such as the UK or France may be completely inadequate for states like Iceland with a small population that do not have the financial, human and administrative resources which larger Member States dispose of, or with different cultural or linguistic identities such as Belgium.

10. Finally, the regulatory framework must enable the broadcasters to act in order to preserve their relevance to a large audience. Technological developments and increasing competition in every broadcasting market imply that the regulatory framework of public service broadcasting must foster innovation and provide the broadcaster with the necessary flexibility to adapt to a rapidly changing environment.

11. The EEA EFTA States find that all these aspects of modern public service broadcasting point in the same direction: The scope for pan-European harmonisation is limited. This is also reflected in the Amsterdam Protocol, which highlights the principle of subsidiarity with respect to public service broadcasting policy.

12. However, the EEA EFTA States recognize the need to provide commercial broadcasters with a degree of legal certainty and to apply regulatory measures that safeguard that funds are not being spent in a way that distorts competition and is thus contrary to community interest. Consequently, the BC should establish the main principles related to the definition of the remit, entrustment, monitoring and transparent funding. However, in respect to the specific material and institutional arrangements, the EEA EFTA States strongly believe that the BC should focus on identifying *best practices*, rather than on providing detailed requirements.

3. Definition of public service broadcasting – pay services

13. The role of the Commission with respect to the definition of the public service remit is limited to checking for manifest error. In section 6.1.1 of the draft BC, the Commission accounts for its views on pay services. Universal access has always been a key feature of public service broadcasting. However, the new media platforms like the Internet and mobile television challenge this principle. A relevant example might be a catch-up service on the Internet where the public service broadcaster might require the user to cover costs related to the clearance of rights. In some instances, the owners of the intellectual property rights (IPR) will demand remuneration related to each individual download. If pay services were to be excluded from the remit, it

would leave the public service broadcaster with two options. One would be to withdraw the service from the market. The other would be to offer the catch-up service as a commercial, profit-based service. Both alternatives result in the public's access to public service content being restricted.

14. Consequently, the possibility to offer pay services as a part of the remit is an important prerequisite for public service broadcasters to be able to develop services on new media platforms. Such services are very important i.e. to reach a younger audience who are using the new media in different ways than the older generation who are more loyal to the traditional public broadcasting services. Based on these considerations, the EEA EFTA States support the Commission's position with respect to pay services.

4. Public value test

15. As it falls within the competence of each state to define the public service remit, it would necessarily follow that this competence also extends to the choice of procedural mechanisms in order to assess whether or not the conditions for the public service remit are met. Consequently, we question the legal basis for establishing a public value test as a mandatory requirement.

16. Having said that, the EEA EFTA States recognize that it might be desirable to establish a mechanism on a national level that would ensure that new public services actually fulfil the social needs of society. Although it is vital in itself to ensure that new services serve such interests, a public value test mechanism may also have other positive effects. One might be that such a mechanism may serve to stimulate the broadcasters focus on its own "raison d'être", another to promote the overall justification of its activities.

17. A public value test must be based on national legal and administrative traditions. Furthermore, the assessment criteria must reflect the specific characteristics of the domestic broadcasting market and the social needs that the broadcaster is required to serve. It should not be up to the Commission to promote specific assessment procedures.

18. Consequently, we welcome the Commission's statement in paragraph 59 "*that it is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of significant new services with the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems.*" We do, however, find that the wording of some of the following paragraphs is not consistent with this statement.

19. Paragraph 60 contains a detailed description of the distinct features that the member state *should* consider to establish whether a new media service serves the democratic, social and cultural needs of society. The next paragraph contains similar details on the criteria to apply in the assessment of the market impact of a new service. These paragraphs seem to leave little room for national authorities to "take into account the specificities of their national broadcasting systems".

20. The EEA EFTA States therefore suggest removing points 60 and 62 and to rewrite point 61 to include one single and general obligation for Member States to secure public value of activities of Public Service Broadcasters, and evaluate significant new services before authorizing in order to avoid undue distortions of

competition. This would, in the view of the EEA EFTA States, also be more in line with the spirit of the first sentence of paragraph 59 in the BC.

21. The EEA EFTA States note that the Commission provides no guidance on situations where the national authorities find that a new media service serves a social need and at the same time might distort competition. In small countries such as Iceland, Liechtenstein and Norway, where the number of market players is limited, this is probably not merely a theoretical possibility. Some might even argue that whenever a public service broadcaster introduces a new service, this is bound to have a distortive effect on competition. In countries with small size or low population density where it is difficult to maintain several broadcasters alive, the introduction of new services by the public service broadcaster might often have a detrimental effect on the potential demand for commercial services competing in the same relevant market. How to strike the balance between these different effects is in essence a political decision. This decision should be made at the national level in line with the subsidiarity principle of the Amsterdam Protocol. For the sake of legal certainty, this should be clarified in the BC.

22. Furthermore, the communication should take into account the difficulty some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher. This may certainly apply to the EEA EFTA States. We therefore suggest maintaining paragraph 62 of the old BC 2001 in the new communication.

5. Entrustment and supervision

23. The public service remit should be entrusted by means of an official act. The core of this concept must be that the remit is *de facto* binding for the broadcasters. The EEA EFTA states also see a need for an efficient monitoring of the fulfilment of the remit. The choice of formal instrument for the entrustment, as well as for the structure, of the monitoring body should, however, be left to the individual state, in line with the principle of procedural autonomy.

24. In paragraph 69 the Commission states that the monitoring body should have the power to impose remedies (e.g. binding obligations, appropriate sanctions). The very existence of formal sanctions might be perceived as a violation of the principle of editorial independence. For this reason many states have preferred to rely on transparency and public debate, rather than on formal sanctions, to ensure that public service obligations are fulfilled. We find it essential that the choice of appropriate remedies is based on national, legal, political and administrative traditions. Consequently, the EEA EFTA States recommend that the paragraph be rephrased in order to clarify that it falls within the competence of the individual state to decide which practical steps should be taken to ensure that public service obligations are respected.

6. Technology neutrality

25. The EEA EFTA States appreciate the Commission's effort to include the principle of technology neutrality in line with the requirement in the AVMS Directive. The non-linear audiovisual services are still treated differently to linear audiovisual services in the proposal. We therefore propose to make the following amendments to paragraph 51 in the proposal:

“In order to guarantee the fundamental role of the public service media in the new digital environment, public service broadcasters may provide audiovisual media content in the form of linear services *as well as in the form of non-linear services over new distribution platforms, catering for the general public as well as* special interests provided that they address the democratic, social and cultural needs for the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.”

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