

*"Working for quality
and diversity in
British broadcasting"*



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COMMUNICATION AND QUESTIONNAIRE FROM THE EU COMMISSION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING, March 2008

A Response from the Voice of the Listener & Viewer (VLV)

Voice of the Listener & Viewer (VLV) is an association of listeners and viewers based in the United Kingdom, which is free from political, sectarian or commercial ties, and represents the citizen and consumer interests. Its aims include:

- **Safeguarding the quality, diversity and editorial independence of broadcast programmes;**
- **The continued provision of a wide choice of high quality programmes and content on radio, television and new media; and**
- **Promoting informed citizenship through the provision of impartial news and information by broadcasters.**

Main Points

- 1. The overriding issue in the UK is the BBC's position. Although other broadcasters (notably Channel 4) have benefitted from transmission subsidies, the licence fee system means that funds derived from the public intervention in broadcasting go overwhelmingly to the BBC.**
- 2. In the multi-channel, multi-platform and increasingly competitive environment, the UK government applies the reality check of a public approval test each time the BBC's statutory status is reviewed and the level of its licence fee fixed.**
- 3. Research evidence suggests that, while the public is increasingly cautious – sometimes sceptical – about the value it is getting, there is still broad support for the BBC – at current licence fee levels. Reflecting public opinion VLV does not wish to see licence-payers' money diverted into products and services which can be provided from other sources.**
- 4. VLV would not, however, support formulae which are designed to prevent the BBC using 'over-funding' to compete with commercial players. These could actually be a straight-jacket hampering the BBC's fulfilment of its public service role. We would refer the Commission to the answers given by our umbrella grouping EURALVA [the European Alliance of Listener & Viewer Associations] to sections 2.1.1 and 2.2.4 in the Commission's Questionnaire.**

5. Public support rests on a consensus around the BBC's role in producing high quality and varied programming, which contributes to empowered citizenship, national identity and cultural diversity. It is generally recognized that the BBC influences the rest of the media in many positive ways, setting benchmarks for quality choice.
6. With the licence fee now testing acceptability levels and the BBC expanding its range of services to meet new platform possibilities, thereby absorbing more public funds, it is natural that an increasingly sharp focus is being placed on the level and the scope of state support. In a society where social and community values are situated alongside a free-market economic consensus, questions are inevitably asked about the merits of particular services, whether they should receive public funding support and what, if they do, will be the impact on the business models of other players who need to thrive if there is to be a pluralistic media ecology.
7. As EURALVA points out in its reply to this question, the EU Commission has tended (by using the subsidiarity doctrine) to give individual member states substantial leeway in striking their own balance between free market principles and socio-cultural need (which are contained within what the EU calls "general economic interest"). This approach (by the Commission) derives from the Amsterdam Protocol and is reflected in the body of case law set by the Commission's own adjudications over a decade.
8. The Commission's approach to state aid closely matches that of the U.K. regulators. Under a government requirement in the current BBC Charter, the BBC Trust must conduct a Public Value Test [PVT] before any significant change is made to existing services. In addition, for new services the BBC Trust is required to conduct a Market Impact Assessment [MIA] in which OFCOM, the external regulator, participates. In its own response to the Commission, EURALVA recommends that tests similar to those applied by the UK regulators might be used across the EU. [Questionnaire 2.6.3]
9. Empirically, an important test of the new arrangements was roll-out of the BBC's iPlayer. VLV welcomes the fact that this was approved by both Ofcom and the BBC Trust. Although consequences for other market players did follow, the determining principle – gratifyingly - for regulators was that of extending platform access, on a free and universal basis, to material for which audiences had already paid. The regulators endorsed a public interest in adapting the BBC content offer to the new digital environment. The regulators did impose two conditions, however: (1) Microsoft should not have a monopoly on iPlayer's interface with other formats, and (2) special programming restrictions should be imposed to protect certain categories of music rights holders, such as contemporary classical music groups.
10. VLV notes also the European regulatory judgements affecting the BBC with respect to 24-Hour News, the BBC's Digital Channels (2002) and the Digital Educational Curriculum (2003) all of which were considered to be legitimized by the "general economic interests" specified in the EU Treaty. On 24-Hour News, the Commission noted that – notwithstanding complaints from BSkyB – another 24-hour news supplier Bloomberg had managed to increase substantially its UK audience share.
11. On the Digital Educational Curriculum, however, VLV has serious concerns. (a)The Commission's judgement was accompanied by negative observations (i) criticising the failure to give adequately full advance notification (ii) expressing concern about the lack of clarity enabling commercial providers of educational software to assess the impact of the BBC's plans and (iii) requiring any funding above the £150 million original aid to be notified to the Commission in a separate request.

(b) These ambiguities, fuelled an unremitting campaign by commercial players, resulted in a decision by the BBC Trust to withdraw the JAM service in February 2007 - despite education being one of the BBC's six core public purposes and that the JAM proposition had been scrutinized in advance by both the Department for Culture Media and Sport and by the European Commission.

12. The BBC's major publishing presence through its commercial arm, BBC Worldwide, was undeniably an aggravating factor in the JAM debate. It triggered concerns about public money being funnelled, non-transparently, to support the offer of BBC products in the commercial market. For the Commission this was an entry point into a range of questions around the boundaries between a public service broadcaster's primary publicly funded role and its add-on activities which – in the BBC case – add some 10% to total revenues.

13. The larger and more lucrative the potential market, the more watchful – understandably – commercial competitors are likely to be. So investing money in a Gaelic media service was much less likely to generate complaints than educational support materials, roll-out of the iPlayer or 24-hour news.

14. This is the background against which the Questionnaire contains a series of questions [2.5.1 to 2.7.4] reflecting the concerns, especially of commercial players, about transparency and 'over-compensation' – which means recipients of state funds being allowed to keep a more than reasonable margin after the actual costs of a public service have been covered.

15. VLV's view is that

- **Public funds should be used only to sustain public service functions**
- **A modest management margin is permissible**
- **Security and continuity are as important as are levels of funding**
- **The public interest requires clear discrete accounting separately identifying funds for public service and for commercial activities.**
- **Incremental services – such as on-demand content, programme schedule and archive or catalogue information – should follow the principle of free universal access.**

RESPONSES TO THE COMMISSION'S QUESTIONS

1. GENERAL

1.1. A number of significant legal developments have taken place in the public broadcasting area since 2001, namely the adoption of the Audiovisual Media Services Directive, the adoption of the Decision and Framework on compensation payments as well as Commission decision-making practice. Do you think that the Broadcasting Communication should be up-dated in light of these developments? Alternatively, do you consider that these developments do not justify the adoption of a new text?

Generally speaking, VLV considers that the approach adopted by the Commission, both in its Communication on the application of State Aid rules to public service broadcasting, and in its

subsequent decision-making practice, has worked well. However, VLV considers that the Commission will need to up-date its approach because of the adoption of (i) **the Audiovisual Media Services Directive**; and (ii) **the Draft European Reform Treaty** which incorporates into the EU new legal obligations **with an enhanced emphasis on citizenship and socio-cultural obligations which derive from the European Convention on Human Rights**.

With regard to the adoption of the Decision and Framework on compensation payments, VLV's primary concern is with the programmes shown by both public service and commercial broadcasters, rather than with the detailed financial arrangements of any one institution. At the moment, there are proposals for UK State Aid to be used to subsidise public service broadcasters which have traditionally been commercially financed. At the moment, VLV has yet to be convinced of the need for a change in their funding arrangements.

1.2. How would you describe the current competitive situation of the various players in the audiovisual media sector? Where available, please provide the relevant data on for instance leading players, market shares, market share evolution in the broadcasting/advertising/other relevant markets.

In general, VLV considers that the current competitive situation has worked well, although we note that with the advent of digital broadcasting, four profound, and sometimes unwelcome changes, are staring to emerge.

(a) The advent of digital broadcasting has led to a substantial increase in the number of commercially-funded radio and television channels. This has mainly been why those public service broadcasters who were commercially funded (ITV, Channel Four Television and Five) have been losing audience share. Moreover today, advertisers can use the Internet and the socially-interactive telecommunication networks, as well as radio and television services, in order to market their products and services.

(b) Second, it is no longer possible to regard the television market as straightforward competition between commercial and public service broadcasters. A growing trend among the major broadcasting companies is brand diversification. For many commercial companies, such as BSkyB, television is now but one arm of an integrated multimedia strategy in which competition takes place across media as well as within a given communications medium, such as television broadcasting.

(c) Changes in the digital advertising market are also affecting the behaviour of television viewers. For instance, recent research by BARB in the UK has shown that although the audience share per TV channel has fallen, the number of advertisements watched by each viewer has actually increased. Within this context, a growing difference is starting to emerge in Europe between those public service broadcasters, such as the BBC in the UK, which receives all its funds from State Aid, and those which also depend on the sale of airtime for their funds. VLV has yet to be convinced that it would be beneficial to siphon off revenues from the television licence fee to subsidise ITV and Channel Four.

(d) As the number of digital channels grows, increased competition between channels for advertising revenues is starting to highlight a growing divide between the programming strategies of public service broadcasters and those of commercial broadcasters. The role of the former is to deliver programmes to viewers, whereas that of the latter is increasingly becoming different - and more focused - namely one of delivering certain socioeconomic categories of viewers to advertisers and programme sponsors. Since the arrival of digital broadcasting the programming

strategy of both ITV and Channel 4 has been to target certain sections of the audience with high spending power, and to ignore those, such as the poor and the old, with low spending power.

1.3 In your view, what are the likely developments and where do you see the major challenges for the sector in the future? Do you consider that the current rules will remain valid in the light of the developments or do you believe that adaptations will be necessary?

VLV has indicated above, that with the advent of digital technology, the selection by the European Commission of the relevant market for decisions about State Aid will become increasingly complex. Moreover, although the Audiovisual Media Services Directive extends the provisions of the Television without Frontiers Directive to cover VoD Services, it does not include all VoD services within its purview, since many VoD services will not meet the six criteria required by the Directive.¹ Other VoD services (and possibly all pay VoD services) may well be regulated by the e-Commerce Directive (2000/31/EC). **As a result, the Commission may have to accept that there will always be imperfect competition in the VoD market.**

Nearly all the free access VoD services in the UK are provided by public service broadcasters to enable their viewers to catch up with, or to watch again, television programmes that have previously been broadcast. Thus since these VoD services are offered to users free of charge, they cannot be considered to be providing unfair competition to VoD pay-services. Moreover, a rival pay service would not have access to the rights in the broadcast programmes which are on offer. Even worse, they might not want to provide their subscribers with access to them as they did not consider them to be commercially profitable. Indeed, a close examination of the issue of competition, from a viewer's perspective, reveals that it is not inter-service, or more precisely inter-catalogue, competition that is important to viewers, but the ability to access any particular television programme. **What most viewers want is programme choice, at a time of their own choosing, which is different from inter-service competition.**

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

(a) Copyright Issues

The EU's State Aid rules allow public service broadcasters to be both producers and broadcasters of programmes, although the aid can only be deployed within the national market. This means that the BBC can only use its licence fee revenues to purchase the domestic content rights for a programme which it intends to produce. If it subsequently wishes to license the programme to be broadcast in another Member State, then it has to use non-State-aid funds, such as those invested by BBC World, to purchase the constituent rights for non-domestic territories.

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

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

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

national or regional election. Similarly, a Polish citizen living in the United Kingdom could keep abreast of the social changes that are taking place in Poland by watching a VoD service from the Polish public service broadcaster.

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

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

The Audiovisual Media Services Directive has raised a second issue concerning the future application of State aid by public service broadcasters. Although the Audiovisual Media Services Directive continues to ban surreptitious advertising, for the first time it has allowed Member States to permit the introduction, in certain circumstances, of product placement. In some cases, it will even be possible for broadcasters, including public service broadcasters, to include product placement in their programmes without even notifying viewers of its presence.² The UK has not yet stated whether they will allow the BBC to include product placement within their programmes, but given the current UK Government's *laissez-faire* approach to cultural matters, it may well do so.

Bearing in mind (a) The growing disparity in programming policy between the roles of commercial broadcasters and public service broadcasters; (b) the fact that public service broadcasters are only entitled to benefit from State Aid because of the democratic, social and cultural benefits that they offer to their citizens, and (c) the fact that article 3f(1) of the Audiovisual Media Services Directive prohibits product placement, **VLV considers that it is now appropriate for the Commission to make it clear that the production or transmission by public service broadcasters of programmes containing product placement would be an abuse of StateAid.**

2. COMPATIBILITY ASSESSMENT UNDER ARTICLE 86 (2) EC TREATY, IN COMBINATION WITH THE BROADCASTING COMMUNICATION

2.1. Coherence with the Commission Decision and Framework on public service compensation

2.1.1. VLV does not consider that the requirements laid down in the Decision and Framework on public service compensation should be included in the revised Broadcasting Communication. The current system works very well.

2.2. Definition of the public service remit

2.2.1. VLV considers that in many ways the BBC's current Charter is an improvement on the old one. However, it doubts whether the responsibilities placed on the BBC to be responsible for the roll-out of digital terrestrial television, and the consequent switch-off of analogue services, is a proper use of State Aid. It also questions whether the financial and administrative assistance which is granted to old and disabled viewers from the television licence fee is an abuse of the Commission's State Aid rules

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

The basic philosophy of public service broadcasting lies in a social contract between the individual listener and viewer and society itself. In the UK, the State taxes the individual television viewer in order to establish a communication institution which assists in establishing a common philosophy of citizenship. As the Commission noted in article 6 of its 2001 Communication on the application of State Aid rules to public service broadcasting:

“Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.”³

VLV therefore considers that the European Union now needs to define the remit of public service broadcasters more precisely, possibly along the lines of the public value test established by the BBC in the UK. The Commission therefore needs to find a way of moving beyond the application of the principle of subsidiarity, and thus of allowing each Member State to define its own public service remit, to an approach which seeks to establish certain minimum standards for each public service remit throughout Europe.

VLV would also refer the Commission, on this and several subsequent points, to the answers given by EURALVA [the European Alliance of Listener & Viewer Associations]- the umbrella grouping of which VLV is an active member

2.2.2. Do you consider that the distinction between public service and other activities should be further clarified? In the affirmative, which measures could provide such clarification (e.g. establishment by the Member State of an illustrative list of commercial activities not covered by the public service remit?)?

Although VLV has indicated the Commission should establish certain minimum standards for State-aided public service broadcasters, it is not simply proposing the imposition of top-down, standards on individual Member States.

VLV proposes instead that the Commission should establish a consultative process similar to that which recently took place in the UK over the renewal of the BBC Charter.

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

2.2.3. In the current Broadcasting Communication, activities other than TV programmes in the traditional sense can be part of the public service remit provided they serve the same democratic, social and cultural needs of society. Does this provision sufficiently clarify the permissible scope of such public service activities? Why? In the negative, do you consider that further clarifications should be provided in a revised Broadcasting Communication?

³ 2001/C 320/04, paragraph 6.

VLV considers that

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

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

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

2.2.4. Do you consider that the general approach in the recent decision-making practice of the Commission (i.e. determination of the public service remit based on an ex ante evaluation for new media activities) could be incorporated into a revised Broadcasting Communication?

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

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

2.2.5. Should a revised Broadcasting Communication further clarify the scope of an ex ante evaluation of the public service remit by Member States?

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

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

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

2.2.7. Should a revised Broadcasting Communication contain the basic principles as regards the procedural and substantive aspects of such an evaluation (such as for instance the involvement of third parties or the possible evaluation criteria, including for instance the contribution to clearly identified objectives, citizen needs, available offers on the market, additional costs, impact on competition)?

Please see our answers to questions 2.2.1 and after.

2.2.8. In view of the fact that the determination of the public service character of such activities may be determined in various ways, to what extent should a revised Broadcasting Communication set out possible different options?

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

2.3. Entrustment and Supervision

2.3.1. You are invited to explain in which way entrustment is granted in your country. Is the procedure leading to the entrustment subject to public consultation? To what extent is the broadcaster's remit laid down in legally binding acts of entrustment? To what extent is the implementation and determination of the exact scope of activities left to public service broadcasters? Are any such "implementing measures" publicly available?

The entrustment process, on the whole, works well in the UK. The reasons and background are explained in VLV's answer to the next question (2.3.2)

2.3.2. Please explain the mechanisms to supervise public service broadcasters in your country. What is your experience of the existing supervision mechanisms? Do you consider that there are sufficient possibilities for third parties to take action against alleged infringements/non-fulfilment of public service (and other) obligations in your country?

a. The BBC Position

Under its new Charter, the BBC has now been divided into an outward-looking BBC Trust, which is meant to be accountable to the public, and which would have "service contracts" with each of the main BBC broadcasting channels. On the other hand, the Director-General of the BBC, who is *not* a member of the Trust, would remain as the editor-in-chief of the BBC. Moreover, it was the BBC Trust, not the BBC Management - formally known as the BBC Executive Board - which was ultimately, and in legal title, designated as the British Broadcasting Corporation; and thus it is the Trust which owns the copyright in all the BBC's programmes. Thus although the BBC Trust theoretically supervises the BBC Executive Board, and is 'senior' to it, the Trust also has an arms-length contractual relationship with the Executive Board, which is a separate body with its own statutory status.

b. Other UK Broadcasters with Public Service obligations

ITV, Channel 4 and Five, which do not receive State Aid, are also designated by Ofcom as public service television broadcasters, under the provisions of Chapter 4 of the 2003 Communications Act. However, the public service duties of these channels, as defined within the Act (s.265) offer UK viewers far fewer programming guarantees than the BBC Charter. Moreover, the 2003 Act

encourages these broadcasters to establish their own statements of programme policy, and to monitor it by means of a co-regulatory procedure.

c. Observation on Accountability and Redress Mechanisms

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

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

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

(iii) The possibility of a citizen, or a group of listeners or viewers such as VLV, presenting evidence to the relevant supervisory body for the public service broadcaster, in order to seek a change in the policy of the supervisory body.

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

2.3.3. Do you consider that the Broadcasting Communication should contain further clarifications about the circumstances in which an additional act of entrustment (i.e. in addition to the general provisions laid down by law) is necessary or are the current rules sufficient?

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

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

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

2.3.4. Do you consider that the Broadcasting Communication should contain further clarifications in order to ensure increased effectiveness of supervision of public service broadcasters? What are in your view the advantages or possible drawbacks of control authorities, independent from the entrusted undertaking (as referred to in the Broadcasting Communication), as opposed to other control mechanisms? Do you consider that effective supervision needs to include sanctioning mechanisms, and if so, which ones?

a. General Observations

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

public service obligations. However, the Commission also considered that such a body would only seem to be effective if its authority was independent from the entrusted undertaking.⁴

In VLV's view, however, both internal supervision and external supervision have their merits, for in order to be effective, any supervision needs to be firm but fair, and to be able to effect subtle changes in editorial policy, as well as major changes within the internal structure of the broadcasting organisation.

Two aspects are critical in effecting change. These are (a) the personal relations between the Chairman of the Supervisory Body and the Chief Executive Officer of the public service broadcaster, and (b) the location of the control of the flow of State Aid to the broadcaster.

b. The UK Experience

The difficulties in finding an appropriate solution to the problem of ensuring increased effectiveness in the supervision of public service broadcasters can be seen from a close study of the recent changes made by the UK government to the supervision of the BBC. As explained above, although the BBC Trust theoretically supervises the BBC Executive Board, and is 'senior' to it, the Trust also has an arms-length contractual relationship with the Executive Board, which is a separate body with its own statutory status. According to statute, the BBC Trust funds the Executive Board to produce programmes on various platforms, in specified genres, and to exercise editorial and quality control over that content – of which the Trust remains, in law, the ultimate owner, publisher and copyright holder.

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

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

2.3.5. Should there be specific complaints procedures at national level where private operators could raise issues related to the scope of the public service broadcasters' activities? If so, what form should they take?

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

EURALVA's response to this question gives the reasoning behind this view

⁴ 2001/ C320/04, article 42.

The UK Experience

The UK has established what it calls a “market-impact assessment”[MIA] procedure for any new public services which the BBC wishes to establish with its public funds; the BBC Trust is jointly responsible for this with OFCOM, the regulator. In addition for any significant changes to existing services the BBC alone is required to conduct a public value test [PVT]. In the MIA procedure Ofcom formally notifies the BBC Trust if its view differs from the BBC’s.

In addition, under this procedure, Ofcom - which is responsible for the oversight of all broadcasting and telecommunication activities in the UK – and the BBC Trust *jointly* consider whether any new BBC services would have an impact on the market. If there is disagreement, Ofcom formally advises the BBC Trust of its own position.

Prima facie, it must be assumed that assessments are made on UK and not EU-wide market data. It seems to VLV, however, that issues will arise around making impact assessments for a market which does not yet exist, but which it is in the EU’s purview to influence. As VLV noted above in its response to question 1b, it is no longer possible simply to regard the television market as straightforward competition between commercial and public service broadcasters. Brand diversification means that for many commercial companies, television is now but one arm of an integrated multimedia and multinational strategy in which competition takes place across media as well as within a given communications medium. If the public service broadcaster (whether the BBC or another) is launching an innovative service it may well create, and therefore have a major impact upon, a new ‘sub-market’. If the public service broadcaster is the second entrant into a new market, it is likely to have an impact on that market, because of the competition it offers to the first entrant.

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

2.4. Dual Funding of public service broadcasters

2.4.1. What is – in your view - the expected impact of (partly) State-funded pay-services on competition?

VLV does not have access to the data which is needed to estimate the impact of wholly or partly-funded services on competition. Nevertheless, VLV considers that all State-funded services should be free at the point of use, however they are financed. The introduction by public service broadcasters of pay-services or subscription services would undermine the principle of universal access (and probably remove those services from the regulatory field covered by the Audiovisual Media Services Directive). This, in VLV’s view, would not be desirable.

We note two other relevant points:

- (i) Rights owners may wish to license their programmes or sports events to pay-TV services before licensing them to free-to-air TV services.
- (ii) Article 3i of the Audiovisual Media Services Directive allows a Member State, such as the UK, to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which it regards as being of major importance for society, in such a way as to deprive a substantial proportion of its public from following that event.

VLV would therefore recommend to the Commission that it forbids the introduction of pay services by State aided broadcasters, whether they are wholly or partly funded. It should also

encourage each Member State to provide its public service broadcaster with sufficient funds to fulfil its public service remit with services that are free at the point of use.

2.4.2. Should pay-services always be considered as purely commercial activities or are there instances in which they could be regarded as part of the public service remit? For instance, do you consider that pay-services as part of the public service remit should in this respect be limited to services which are not offered on the market? Or do you think that pay-services could be regarded as part of the public service remit under certain conditions? In the affirmative, please specify which. For instance, should the conditions include elements such as specific public service objectives, specific citizen needs, existence of other similar offers on the market, inadequacy of existing public service obligations or inadequacy of existing funding to meet particular citizen needs?

VLV considers that any pay-services should not normally be considered part of the public service remit, but notes that, in some circumstances, it might be possible for a public service broadcaster to co-operate with a commercial broadcaster.

In the UK, for instance, the *Freeview* digital terrestrial platform, which is jointly owned by the public service broadcasters and commercial operators, offers both free-to-air services and pay-services. In this case, it is almost certain that the public service investment in the digital terrestrial platform is - because of its popularity and consequent capacity to draw users to the free access programme channels - subsidising the commercial operators who are also using the platform to attract paying customer-subscribers,

VLV observes that (i) the crucial element about this arrangement is that citizens' access to the digital platform itself is free, although they obviously have to pay to access the pay services located there and (ii) it would also be possible to envisage the development of a VoD service, in which the VoD catalogue contained both public service programmes to which citizens could have free access, and commercial programmes, for which consumers had to pay for access..

2.5. Transparency requirements

2.5.1. To what extent are commercial activities carried out by the public service broadcaster itself in your country? Is there a structural or functional separation between public service and commercial activities?

In relation to the general principles covering questions 2.5.1-4; 2.6.1-6; and 2.7.1-3, VLV does not have the detailed information, or the specialist methodology, which is necessary to draw the precise boundary between public service and commercial activities. Nor do we have the data that would be required to establish formulae which would put limits, or legitimate margins around State Aid.

So far as concerns the BBC's commercial activities, in terms of magazine publishing, books and worldwide programme sales, VLV understands that these are organized in BBC Worldwide – which is intended to be financially separate from the publicly funded parts of the BBC :a separation subject to transparency scrutiny and the application of UK and/or European law on competition and state subsidies.

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

2.5.3. *Do you consider that the rules for cost allocation as set out in the current Broadcasting Communication could be improved in light of experience in your country? If so, please give possible examples of good practice. Or do you consider that the current rules are sufficient?*

2.5.4. *Against the background of your answers to the previous questions (2.5.1, 2.5.2, 2.5.3, do you consider that a revised Broadcasting Communication should contain further clarifications of transparency requirements?*

2.6. Proportionality test – Exclusion of overcompensation

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

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

Otherwise, please see our response to question 2.5.1.

2.6.2. *Do you consider that the requirements currently laid down in the Broadcasting Communication allow sufficient financial stability for public service broadcasters? Or do you think that the current rules excessively limit pluri-annual financial planning of public service broadcasting?*

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

2.6.3. *Under what circumstances could it be justified for public service broadcasters to keep a surplus at the end of a financial year? Do you consider that the related provisions in the service of general economic interest Decision and Framework (cf. the overview in the explanatory memorandum and in particular the 10% cap on annual surplus) could be incorporated into the new Broadcasting Communication?*

As noted above, in our replies to questions 2.5.1 and 2.6.1, VLV considers that public service broadcasters should receive sufficient State funds in order to fulfil their public service remit. These could vary significantly from year to year, depending on developments in the democratic, social and cultural needs of the State concerned. **VLV therefore considers that it would be inappropriate for the Commission to include the *ex-ante* and prescriptive provisions related to the Decision and Framework into the new Broadcasting Communication.**

2.6.4. *What should be the safeguards/limits in order to avoid possible undue distortions of competition (e.g. should the 10% margin remain at the public service broadcaster's free disposal within the limits of its public service tasks or should it be earmarked for particular purposes so that reserves may only be used for predetermined purposes/projects? Should there be a re-evaluation by the Member State of the public service broadcaster's financial needs in case of consistent surpluses)?*

See VLV's answer to questions 2.5.1 and 2.6.3.

2.6.5. *Do you consider that the current rules laid down in the Broadcasting Communication could possibly act as a disincentive for public service broadcasters to achieve efficiency gains? If so, how could this situation be remedied? What are the mechanisms in place in your country which could be referred to as a good example?*

To the best of our knowledge, the current rules are not a disincentive to efficiency gains..

2.6.6. *In what circumstances and under which conditions would you consider that public service broadcasters could be allowed to keep a profit margin?*

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

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

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

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

2.7.2. *As regards the possible anti-competitive behaviour of public service broadcasters (and in particular as regards allegations of price undercutting), do you consider that the Broadcasting Communication should include requirements for public service broadcasters to respect market conditions as regards their commercial activities in line with Commission decision-making practice, including appropriate control mechanisms?*

VLV does not condone anti-competitive behaviour by public service broadcasters. Their task is to fulfil their public service remit. See also, our answers to questions 2.5.1 and 2.6.1.

2.7.3. *Do you consider that the methodology for detecting price undercutting should be clarified, possibly also including other tests which could be used as an alternative to the methodology currently referred to in the Broadcasting Communication? Please make reference to tests applied in your country to the pricing behaviour of public service broadcasters and which could be used as an example of good practice.*

Please see our answers to questions 2.5.1 and 2.6.3.

2.7.4. *Do you consider that the Broadcasting Communication should contain clarifications as regards the public funding of premium sports rights? In the affirmative, what further requirements should in your view be included in the Broadcasting Communication and how would they specifically address potential competition concerns resulting from State funding? Alternatively, do you think that potentially adverse effects on competition due to the acquisition of such rights by public service broadcasters would be sufficiently addressed under the antitrust rules?*

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

2.8. *Other issues*

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

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

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

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

3. FINAL REMARKS

3.1. *You are invited to explain what would be in your view the impact of the possible amendments to the current rules on for instance the development of innovative services and in more general terms employment and growth in the media sector, consumer choice, the quality and availability of audiovisual media and other media services, media pluralism and cultural diversity.*

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

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

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

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

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

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

3.4. Please explain whether or not you consider that the positive impacts of possible additional clarifications along the lines outlined in this questionnaire outweigh the negative impacts.

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

End