



**VDZ**

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**Broadcasting and Competition Rules in the Future EU Constitution  
– A View from the Private Media Sector –**

The Convention on the Future of Europe currently is discussing the first draft Articles of the future Constitution of the European Union. We, the media associations which have signed this position paper, welcome, as a matter of principle, this important step towards greater visibility and transparency of the European Union and towards more legal certainty and efficiency in the Union's rules and decision-making processes. A well-drafted and understandable EU Constitution, which builds on the achievements of the *acquis communautaire*, will be beneficial for citizens and economic agents alike.

With this paper, we want to address an issue which may be debated among members of the Convention in the forthcoming weeks following some submissions you may have received already: the treatment of broadcasting in the future EU Constitution. In view of the both societal and economic importance of broadcasting, we consider this to be an issue of crucial interest for the proper functioning of the democratic, dynamic and prosperous society that the Union and its Member States strive to be under the new EU Constitution. However, we call upon the members of the Convention to deal with this issue with utmost caution.

It is our firm belief that every media system must clearly balance public and economic interests. We therefore call upon the members of the Convention to take the following points into account in their further work, in as far as it impacts on media and competition.

## Introduction: Competition and Media – the Current Legal Position

Competition law already provides adequate scope in Article 86.2 and 87 for protection of services of general economic interests. This is a delicate and subtle balance achieved over many years by the national and EU institutions, and its preservation is of the utmost importance. We would therefore caution against Convention members being persuaded of the value of seemingly innocuous drafting changes in this area as such changes can have serious and far reaching effects on businesses and consumers across the Internal Market.

There is a real need for the institutions to fulfil the tasks already assigned to them: for Member States to define a clear and precise public service mission for those broadcasters to whom they grant public funding and to implement the Financial Transparency Directive as it applies to public broadcasting.

These obligations are particularly important as they would empower the European Commission to carry out its function as guardian of the Treaties, and could guarantee not only legal certainty for all operators, whether public or private broadcasters or other media players seeking to enter broadcasting or related markets. The Commission's obligations in this area are clearly spelt out in the Court of First Instance ruling, *Telecinco v Commission*, 1998, Case T-95/96, requiring the Commission to apply the rules on state aid funding to public broadcasters "in a diligent and impartial manner".

This legal certainty is essential for the sustainability of the dual system in broadcasting as well as for the creation, in the words of the EU's Lisbon Agenda, of a competitive, dynamic and knowledge-based environment in new media.

### 1. Growing Similarity between Public and Commercial Broadcasters

We recognise the historical role played and still to be played by public broadcasters, and have no intention to question their current status under national law. We still agree with the findings of the high-level group on audio-visual policy 1998, chaired then by Commissioner Oreja, that public service broadcasting "*has an important role to play in promoting cultural diversity in each country, in providing educational programming, in objectively informing public opinion, in guaranteeing pluralism and in supplying, democratically and free-of-charge, quality entertainment*". However, the development of the broadcasting sector requires in our view a careful reflection about the need for a special treatment of public broadcasters under EU law:

- **Public and commercial broadcasters offer increasingly similar content:** It is today by no means only the public broadcasters which provide news and cultural information and quality entertainment. *Au contraire*, if you take the weekly programme in your TV guide in whatever EU Member State you choose, you will hardly notice any difference between the offerings of public and commercial broadcasters. You will find information services, political debates, educational quiz, game and learning shows, talk shows, movies, TV soaps etc. both on public and commercial TV stations, and most of the time in increasingly similar formats. This demonstrates that public and commercial broadcasters today compete on the same market and for very similar audiences.
- **Public and commercial broadcasters fulfil increasingly similar social and market functions:** The introduction of commercial broadcasting in the EU Member States has

considerably widened the number of TV stations and the choice of programmes. Nowadays, commercial broadcasters contribute widely to delivering information services to the public, to cultural diversity and media pluralism, i.e., to fundamental functions of democratic society. Therefore, diverse content and alternatives for viewers' choice as well as media pluralism in the broadcasting sector are a joint result of the offerings of public and commercial broadcasters. Indeed, commercial broadcasters' fulfilment of similar or identical public services functions is frequently imposed by European and/or national law, though of course without the corollary of public funding. To recall a phrase used by the European Commission in its 2001 Communication on the application of State aid rules to public service broadcasting with regard to the Amsterdam Protocol: *"It should be noted that commercial broadcasters [...] also play a role in achieving the objectives of the Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes."*

## 2. Privileges of Public Broadcasters

In spite of the increasing similarity between public and commercial broadcaster, public broadcasters continue to enjoy, often without any legitimate reason, a special and even privileged status in all EU Member States:

- In the majority of the EU Member States, public broadcasters receive **public funding**, guaranteed by legislation and/or raised under the authority of the state. This public funding has continuously been increased. The public fee levied, for instance, in Germany and Italy saw a growth of 10 per cent over the past five years alone. It should be noted that in most EU Member States, this public funding can be complemented by commercial income earned in particular from advertising and sponsorship. Moreover, public broadcasters often also receive additional funding on top of their normal budget. In reality, all existing reserves and their continued annual growth show most of the time that funding is and remains clearly excessive. In other Member States, e.g., Spain, there is the opposite situation: public broadcasters do receive public funding but are encouraged by governments, in particular by the Finance Ministry, to increase the proportion of revenue they earn on the advertising and other commercial markets, thereby increasing market distortion.
- Public broadcasters also have additional **benefits**, such as e.g. free cable access, an exemption from the payment for intellectual property rights, exemptions from taxation, a reduced tax regime on sponsored programmes, sponsored income and advertising, free provision of technical services, and income from TV programme listing. Such advantages are often not taken into account when determining the level of public funds allocated to the public broadcasters.
- In addition to their special public funding, public broadcasters often also receive **special regulatory treatment** in areas where they compete with commercial broadcasters. To give a recent example: the new German Inter-State Treaty on protection of minors in the media (covering broadcasting and online media), which entered into force on 1 April 2003, applies to commercial broadcasters, but in essential parts not to public broadcasters. A further example for special regulatory treatment is the EU Directive on the reuse and commercial exploitation of public sector information which has just gone through the first reading in the European Parliament. In spite of their public service status, public

service broadcasters have been exempted from the public sector obligations of this new Directive, namely to make their information available on a non-discriminatory basis and under the conditions of fair competition.

Within convergent media markets, a privileged treatment of public broadcasters can lead to considerable distortions of competition to the detriment of private broadcasters and other media players. This is particularly felt whenever public broadcasters make use of their privileges to **expand** in other segments of the market:

- **Public broadcasters are expanding into the online sector and into e-commerce:** In the past years, an online presence has become an important part of the activities of public broadcasters. However, when public broadcasters expand into fields which are outside their public service remit, such as e-commerce, web search engine services, online games or online advertising, there is a danger that they make use of their public funds to distort competition to the detriment of commercial internet offerings and online publishing. Broadcasters, publishers and new media content providers currently see a clear threat of losing considerable online market share to the public broadcasters because of these developments. National laws as to the presence of public broadcasters in these new markets may vary. However, what is clear is that cross-subsidisation from public money granted to fulfil a broadcasting remit should not be permitted in these new markets. This underlines the need for clear accounting separation and for full implementation of the Financial Transparency Directive.
- **Public broadcasters are expanding into the TV production business:** It is certainly part of the public service broadcasters' mandate to be active in the production of TV film and TV series. It is certainly also legitimate that public service broadcasters outsource their production activities into private subsidiaries. However, distortions of competition may arise whenever such subsidiaries do not compete on equal terms on the production market, for example whenever the public funding of their parent companies enables them to make business decisions which a reasonable private investor would not make. In these cases, public service broadcasters do not only act outside their public service remit, but even operate openly against it. To drive commercial production companies from the market is detrimental to the European cultural industry and even may reduce cultural diversity in Europe.
- **Public broadcasters are expanding into cross-border digital satellite television:** The definition of the public service remit under which public service broadcasters are entitled to operate is clearly a competence of the EU Member States; as a result, this remit is always a national one. Nevertheless, public service broadcasters are becoming increasingly active in cross-border broadcasting. Certainly, such activities would be beyond criticism if their aim was simply to reach some expatriates which would like to continue to watch the TV channels of their home country from abroad. However, there is a danger of distortions arising in the Internal Market. A national commercial broadcaster who wishes to move to a transfrontier business model would need to clear all rights for those countries covered by its service, or to encrypt for those territories for which the rights were not cleared. Public operators should be bound by exactly the same rules. In particular, serious problems of competition may arise whenever public service broadcasters become active with content for which commercial broadcasters have acquired the exclusive rights for a country or a number of countries from the same language area, e.g. for football matches or for movies. In these cases, it must be ensured that public broadcasters do not interfere in the acquired rights of other broadcasters. And that "extra-territorial activities" of pub-

lic service broadcasters can always only be the exception rather than the rule, in view of their national remit.

It should be noted that the expansionary trends of the public service broadcasters are felt by their commercial competitors particularly in these days. The downturn in the advertising markets has made broadcasting a more difficult business than ever before for companies which must rely exclusively on the quality and profitability of their content, without public funding.

### 3. EU Constitution Must Ensure Fair Competition between Public and Commercial Media

In view of the above situation, the private sector asks the Convention to ensure that the current legal balance between the recognition of public service broadcasting and the efficiency of EU state aid control will not be changed in the future EU Constitution. In particular, we would ask the Convention to consider the following three points in their further work:

- First, we acknowledge that there exists today a broad and cross-sectoral reference to services of general interest under Article 36 of the EU Charter of Fundamental Rights, which – equivalent to the wording of the current Article 16 of the EC Treaty – states that “the Union recognises and respects access to services of general interest as provided by national law and practices ... in order to promote the social and territorial cohesion of the Union”. **We would suggest that in theory following the inclusion of the Charter in the Constitution – which we support –, Article 36 of the Charter would give such a guarantee to the existence of services of general economic interest if at the same time the present Article 16 of the EC Treaty could be dropped.** However in practice we do not have any objection to general declarations of principle such as Article 16 so long as it is applied to operators with genuine and meaningful public service missions, not just to those operators who happen to be publicly-owned
- Second, even against a background of evolving European Court case law on state compensation for public service obligations, it should remain clear that public funding of public broadcasting qualifies as “state aid” under EU law, in order to ensure that it continues to come under the scrutiny of the EU Commission and therefore continues to have to be justified by the special national public service remit in each individual case. This is the only way to ensure that the funding privileges of the public broadcasters do not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest. We assume – and this has not been called into question anywhere in the Convention – that **Article 87 of the EC Treaty is incorporated as such – without any amendments – in the EU Constitution.** We would agree with this policy, given that the decisions of the Court and Commission in all services of general interest, not just broadcasting, demonstrate that this text guarantees Member States’ freedom to provide services of general interest.
- Third, another important instrument is the **interpretative 1997 Protocol N° 32 on the System of Public Broadcasting**, which was annexed to the EC Treaty during the Amsterdam Intergovernmental Conference. We endorse the objective of this Protocol, namely to explicitly recognise the importance of broadcasting for the democratic, social and cultural needs of each society as well as the important need to preserve media plu-

ralism. However, we take the view that not only the public broadcasters contribute to achieving this objective but that the private sector also makes a vital contribution.

#### **4. Conclusion**

In our view, there is no legal purpose in a Protocol on state aid and broadcasting, as existing Commission and Court of Justice practice allows for adequate account to be taken of properly defined public service missions. The Protocol confirms, at a political level, that Member States do not want the EU to harmonise in the broadcasting sector as it has done in other public service sectors, preferring to retain competence over definition and financing. However, this is not in contradiction, as the Court has confirmed, with the fact that the Commission maintains its powers as regards the application of competition and state aid rules. Certainly, there is a danger that the Protocol is so widely interpreted as to create the impression that public broadcasters have a general justification for distorting competition in the media markets. This would seriously undermine the delicate balance achieved during previous intergovernmental conferences between the respect for the role of public broadcasting and the need for a continued applicability of competition rules.

Indeed, a democratic society needs both public and private broadcasting, and therefore a dual system of broadcasting at national level should be guaranteed. A dual system of broadcasting at national level can only function if there is a clear delimitation of tasks and financing methods, allowing for transparency and fair competition in the broadcasting markets. While Member States should remain competent to decide on the tasks and financing of public broadcasters, it has to be ensured that all Member States duly implement the EU Financial Transparency Directive into national law and apply it, as intended, also to public broadcasting.

In particular the 1997 Protocol can be neither ignored, nor seen in isolation. Member States need to fulfil their obligation – which already exists under EU law, and is restated in the Protocol – properly to define the public service obligations of those operators to whom they choose to grant public funding. This obligation is either not fulfilled at all, or is fulfilled in such a general way as to be meaningless in practice. It is also, as we mention above, essential that Member States properly implement the EU Financial Transparency Directive in such a way as to guarantee the separate accounting which is essential for any meaningful scrutiny of the proportionality of aid.

We recognise that this paper raises complex issues, many of which may not be formally on the agenda of the Convention. However, we would be very happy to explain our concerns in more detail, and would certainly request that Convention consults with public and commercial broadcasters alike, should any such issues be raised in the Convention.

### **On the signatories of this joint paper**

The **Verband Privater Rundfunk und Telekommunikation e.V. (VPRT)** represents around 160 companies operating in the field of commercial television, radio, multi-media and telecommunication in Germany.

The **Bundesverband Informationswirtschaft, Telekommunikation und Neue Medien e.V. (BITKOM)** is Germany's most important association at federal level of companies in the information economy, telecommunications and the new media. BITKOM represents 1.300 companies, some 700 of which are direct members. These include almost all of the leading players in the industry, as well as more than 600 smaller, medium-sized and new businesses.

The **Bundesverband Deutscher Zeitungsverleger e.V. (BDZV)** is the leading organisation of newspaper publishers in the Federal Republic of Germany. In its 11 regional associations, there are 320 newspapers with a total circulation of 20.6 million copies sold, as well as 14 weekly newspapers with over 1 million issues sold.

The **Verband Deutscher Zeitschriftenverleger e.V. (VDZ)** is the roof organisation of German magazine publishers. Founded in 1929, it unites 400 publishing houses which, altogether, publish 3.000 magazines.

Please note that a parallel version of this paper has been signed by the following EU-wide trade associations, which have worked in close cooperation with the associations mentioned above: Association of Commercial Television (ACT), International Communications Round Table (ICRT), European Newspapers Association (ENPA), European Publishers Council (EPC) and Association of European Radios (AER).