

European Commission
Directorate-General for Competition
State aid Registry
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Subject: Observations by CLT-UFA and RTL Nederland on the draft communication of the Commission on the application of the state aid rules to public service broadcasting

Dear Sirs,

1. INTRODUCTION

- 1.1 CLT-UFA and RTL Nederland (**CLT-UFA/RTL**) welcome the opportunity to comment on the draft communication on the application of the state aid rules to public service broadcasting (the **Revised Communication**). CLT-UFA is a subsidiary of RTL Group and licence holder for the Dutch channels of RTL (RTL 4, RTL 5, RTL 7 and RTL 8). CLT-UFA is the largest commercial broadcaster in the Netherlands, where it operates four channels (RTL 4, RTL 5, RTL 7 and RTL 8). Commercial broadcasters contribute significantly to the plurality of media and the provision of information, culture and entertainment.
- 1.2 CLT-UFA/RTL are not opposed to public funding for public broadcasters and understand that public broadcasting can fulfil a social and cultural need in society. Public funding should however not confer an advantage on public broadcasters in a way that causes unwarranted distortions of competition (be it with commercial broadcasters, newspapers, innovative SMEs in the media sector, internet providers and others). This principle is also embedded in the Protocol on the system of public broadcasting in the Member States attached to the Treaty establishing the European Community (the **Protocol**). This Protocol states:
- The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of the Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest [...].¹
- 1.3 Commissioner Kroes has indicated that public broadcasters must be able to fulfil their role in society now and in the future and must be able to create public value. However, there should be a clear role for the public

¹ OJ [1997] C 340/109.

broadcasters to give clarity in the way state aid is invested and the market impact of the state aid on the new media should be understood².

1.4 In the current Revised Communication the Commission tries to reconcile these two elements. CLT-UFA/RTL welcome the Revised Communication as an improvement, but have some concerns regarding the current draft. In its response, CLT-UFA/RTL will deal with the following three issues:

- (i) The public service remit;
- (ii) The principle of proportionality; and
- (iii) Effective control by the Member State.

2. THE PUBLIC SERVICE REMIT

2.1 In this section, CLT-UFA/RTL will discuss three points relating to the public service remit. First, the way in which the public service remit should be defined, i.e. should it be a precise definition or a general definition to allow more flexibility, is discussed. Second, CLT-UFA/RTL will look at market developments and the way in which this affects the public broadcasters. Lastly, CLT-UFA/RTL will discuss the entrustment of the remit to a specific public broadcaster.

(a) Defining the public service remit

2.2 The Protocol states that the public service remit should be “conferred, defined and organised by each Member State”. However, to enable the Commission to control the grant of state aid, the public service remit should be as clear and precise as possible. This was also confirmed by Commissioner Kroes. The Revised Communication also recognises the need for a precise definition of the remit:

The definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. Without a clear and precise definition of the obligation imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.³

2.3 This statement is supported by other statements from the Revised Communication such as: “the terms of the public service remit should be precise, so that the Member States’ authorities can effectively monitor compliance” (paragraph 49) and “the above-described assessment by the Commission requires a clear and precise definition of the public service remit” (paragraph 76).

2.4 These statements are however undermined by the statement made in paragraph 50:

At the same time, given the specific nature of the broadcasting sector, a definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered [...] legitimate under Article 86(2).⁴

² Speech by Neelie Kroes, *The way ahead for the Broadcasting Communication*, Broadcasting conference, Strasbourg, 17 July 2008.

³ Paragraph 48 of the Revised Communication.

⁴ Paragraph 50 of the Revised Communication.

- 2.5 In paragraph 48, the Commission states that a "clear and precise" definition is necessary to be able to carry out its tasks and that it cannot grant any exemption if there is no clear and precise definition. In paragraph 50, the Commission contradicts this statement by stating that a general description that the public broadcaster should provide a wide range of programming and a balanced and varied offer is sufficient. CLT-UFA/RTL are of the opinion that a clear and precise definition should be required. This would not only enable the Commission to exercise its duties under the Treaty, but would also give legal certainty to private market participants.
- 2.6 The increased legal certainty for private market participants is very important as this will allow them to understand in which services they will be subject to competition from public broadcasters. This allows the private market participants to make investment decisions with this information in mind. Making profitable investment decisions becomes much more difficult if the public broadcaster, who bears almost no financial risk, can decide on its own what services it will offer. Unclear remits could therefore lead to a reduction in innovation.
- 2.7 A clear and precise public service remit will furthermore increase the possibilities for private enforcement and allows the Member States to effectively control the functioning of the public broadcaster (see section 4 below). These arguments clearly lead to the conclusion that the public service remit should be clear and precise. The Revised Communication should be consistent in this regard.
- (b) Market developments**
- 2.8 In the Revised Communication, the Commission goes into the market developments. The Commission reiterates that there is a rapid evolution of media services. It is of the opinion that public broadcasters should be able to exploit the opportunities offered by these new media services, subject to appropriate safeguards. The Commission then specifically goes into the possibility of payments for services at the point of consumption (i.e. by end-users).
- 2.9 CLT-UFA/RTL are of the opinion that this again signals the importance of a clear and precise definition of the public service remit. Public broadcasters receive state funding to offset the costs of discharging the public service obligation they have. If the public service remit is very broad this could give public broadcasters a competitive advantage in other media services. If public broadcasters would be able to invest in new innovative services with state funding this might reduce private spending in innovative new services/features.
- 2.10 With the introduction of new services, the public broadcasters will expand beyond their traditional services. Private market participants may already be active in these markets. The new, state-funded, services may therefore seriously harm competition. CLT-UFA/RTL are not of the opinion that public broadcasters should never be allowed to operate new media services. However, if public broadcasters are allowed to expand their services a "public value test" (e.g. like the test applied by the BBC) should be satisfied before the introduction of new services.
- 2.11 In the Revised Communication the Commission seems to include a public value test in the "appropriate safeguards" explained in paragraph 56 and beyond. In these paragraphs the Revised Communication introduces the term "significant new service". Before the introduction of a significant new service the Member State should consider whether the service meets the social and cultural needs of society and take account of the potential effects on trading conditions. In essence the Member State should conduct a balancing test before allowing the introduction of a significant new service. CLT-UFA/RTL support such a public value test, but wishes to make some observations in relation to the test included in the Revised Communication.

- 2.12 The Revised Communication indicates some factors that should be taken into account to decide whether the service meets the social and cultural needs of society and does not affect trading conditions. Although the factors included by the Commission are relevant, the Commission does not present a bright line test as it for instance includes factors like: “distinctive features”, “the balanced and varied offer”, “added value”, “potential crowding-out of private initiatives”, “potential effect on neighbouring market”, etc. These factors require a subjective view and therefore reduce legal certainty. CLT-UFA/RTL recognise that these tests can never be entirely objective, but it could include clearer (i.e. “easier to apply”) rules on when services are allowed.⁵ CLT-UFA/RTL would therefore welcome any initiative of the Commission to increase the clarity of this significant new product test.
- 2.13 The Revised Communication furthermore indicates that an independent body (referred to in paragraph 62) should conduct the assessment and interested third parties shall be given the right to make observations regarding the expansion of the remit. The structure of the process is however not clear. The Communication and the state aid enforcement would gain a lot if it is explained in more detail what a proper control procedure should look like (e.g. safeguards the parties, etc.)
- 2.14 Another point that is unclear whether the independent body gives a (public) recommendation or whether it can decide on the extension of the remit. CLT-UFA/RTL believe that the decision should be adopted by the independent body to ensure the exclusion of, sometimes short-term, political considerations from the decision and that the decision should be made publicly available. These changes should be reflected in the Revised Communication.

(c) Entrustment of the public service remit

- 2.15 Paragraph 67 gives the Member States the opportunity to allow the public broadcaster to start operating a new service before the change has been included in the formal entrustment act and after the extension of the scope, as described above, has been approved. CLT-UFA/RTL find this statement difficult to reconcile with the conditions of Article 86(2) as repeated by the Commission in paragraph 42 of the Revised Communication. CLT-UFA/RTL also believe there is no need to deviate from the Treaty in this regard as public broadcasters are already given the possibility of testing the new service before it is included in the entrustment act and can therefore continue the development of the new service if necessary.
- 2.16 Allowing the public broadcasters to expand their activities before they are formally included in the entrustment act also reduces legal certainty. The public broadcaster could start the service the day after the decision (which decision might not be publicly available). However, not all market participants may approve and some may wish to challenge the decision. In addition, private market participants might have invested in the same technology. Their investment is probably worth much less if the public broadcaster enters the market. For these reasons, CLT-UFA/RTL believe that there is no reason to allow public broadcasters to start offering new services before they are included in the entrustment act.

⁵ I.e. the test could for instance state that public broadcasters cannot invest in a service that is similar (and does not provide any added value) to services already offered by private market participants or that a new service similar to a service already offered by a private market participants cannot be supported by advertising.

3. THE PRINCIPLE OF PROPORTIONALITY

- 3.1 The Revised Communication states that the Commission will consider whether any distortion of competition arises from the public service compensation (paragraph 88). In its assessment, the Commission will balance any positive effects against any negative effects on competition. The Commission does however not give any more guidance on how it will conduct this test. CLT-UFA/RTL believe that the test should be made more predictable by including some general principles as this will increase legal certainty.
- 3.2 Although the test should be made more predictable, the Commission does specifically mention that it will assess whether there are sufficient guarantees to avoid overcompensation and cross-subsidisation. CLT-UFA/RTL agree with the Commission that these elements should be included in any assessment of the Commission. The element of overcompensation will be discussed separately below.
- (a) Overcompensation**
- 3.3 The most important change with regard to the assessment of overcompensation is probably the fact that the Commission has allowed public broadcasters the right to maintain reserves of up to 10% of their annual budgeted expenses (paragraph 94). The question is however whether it is necessary to allow public broadcasters to maintain reserves or whether this will only restrict competition.
- 3.4 The amount of compensation is set for the duration of the entrustment period and is based on the amount indicated to be necessary to fulfil the obligations. The public broadcaster therefore bears no (or at most only limited) financial risk in the fulfilment of the public service obligation. It should therefore not be necessary to keep reserves of up to 10% of the total annual budget. CLT-UFA/RTL are not aware of any bankruptcies of public broadcasters in the last decades. The fact that reserves have not been necessary in the past shows that either the public broadcasters do not need extra funding or that the Government will provide extra funding in times of economic downturn.⁶ Either option however leads to the conclusion that it should not be necessary to allow public broadcasters to keep reserves in the future.
- 3.5 As stated above, CLT-UFA/RTL believe that no reserves are necessary. If reserves would be considered to be necessary because of the additional risk involved in offering new media services, the reserves should in any event not be as high as 10% as this has no relation to the risk borne by the public broadcaster. If reserves are allowed, the Commission furthermore leaves it up to the Member States to determine under what circumstances the reserves can be used. It is therefore possible that the public broadcaster is able to spend (part of) the reserves every year. This could lead to an increase in the annual budget of the public broadcaster with a maximum of 10%. It is clear that such an increase in the budget is unjustified and should be scrutinised (ex ante) by an independent authority, as this can seriously harm competition.
- 3.6 In the Revised Communication, the Commission provides some examples of when the reserves can be used (see paragraph 96). These examples can, according to CLT-UFA/RTL, in any case not lead to funding from the reserves. Investments which are foreseen should be included in the general public service compensation. Such investments should not be funded from reserves. Reserves should only be used to help the public broadcaster

⁶ If the Government has to step in this should be the preferred option as this aid would have to be labelled restructuring aid and there would therefore have to be a restructuring plan. According to CLT-UFA/RTL this should be the preferred option to ensure the future viability of the public broadcaster.

to offset short-term cost increases or a short-term reduction in revenue which endangers the existence of the public broadcaster. If reserves can be used for investments foreseen they are in essence just an increase in the budget and should therefore be included in the budget.

4. EFFECTIVE CONTROL BY THE MEMBER STATE

4.1 Member States have to control the way in which the public broadcasters discharge the public service obligation and use of public funding by the public broadcasters. The two control mechanisms, which should nevertheless be coherent, are discussed separately below.

(a) Control on the discharge of the public service obligation

4.2 The Commission states that it is up to the Member States to ensure effective supervision of the fulfilment of the public service obligation. The Commission furthermore only states that the supervisory body should be independent from the public service broadcaster and that the body should be able to impose "appropriate remedies". CLT-UFA/RTL believe that the Commission should at least indicate what remedies the independent body should be able to take (for instance monetary sanctions, what obligations and directives should be possible, etc.), what its standard of review should be (full assessment/ jurisdiction) and what the role of third parties in this process is.

(b) Control on the use of public funding

4.3 In this case the Member States are also left free to choose the most appropriate and effective control mechanisms although coherence with the control on the discharge is required. The Commission largely gives the same general guidance as with the control on the discharge. CLT-UFA/RTL therefore wish to repeat their observations made in paragraph 4.2 above, i.e. the Commission should give a better description of the procedure and the role of third parties in this procedure.

4.4 Providing effective control on the use of public funding would be easier if there is a structural separation between public service and non-public service activities. This is also recognised by the Commission in the Revised Communication (paragraph 86). Such structural separation would make cross-subsidisation easier to detect and ensures correct transfer prices. CLT-UFA/ RTL therefore fully support the Commission in its efforts to promote structural separation between public service and non-public service activities.

4.5 In addition, the Commission states that an in-depth review should be conducted at least every four years. This period is in the view of CLT-UFA/RTL too long. The controlled spending of public funding is crucial to preserve competition and innovation in the broadcasting sector. An in-depth review should therefore not only be conducted after four years, but should be conducted every year or at least every two years.

Kind regards,
RTL Nederland

