

Draft Communication from the Commission on the application of State aid rules to Public Service Broadcasting – comments from Ireland.

Ireland was one of 19 member states which supported the common position paper sent to the Commission in September 2008 (Appendix 1). That paper proposed that there was only need for small changes in order to adapt the existing Broadcasting Communication to the technical developments of the modern age.

Since then Commission has produced a draft Communication. While much of the proposed Communication is appropriate, Ireland considers that there is only a need for small changes from the existing Communication, and that in this context there are a number of problems with the draft.

Fundamental principles around such issues as entrustment, proportionality, arms length commercial activity and overcompensation are addressed in the Communication and are of course appropriate. However, there are a number of areas where most Member States feel that the proposed Communication is over elaborate or incorrect in its analysis.

Ireland's framework for public service broadcasting was examined by the Competition DG over a number of years culminating in an agreement between Ireland and the Commission last year. A new framework for public service broadcasting was agreed and there are a number of measures that Ireland felt were appropriate in the Irish context – for instance a type of public value test.

Such agreements between Member States and the Commission reflect the specific conditions in each Member State – an approach based on subsidiarity. However, Ireland does not consider that the Commission should see the proposed Communication as an opportunity to list and consolidate all of the many specific decisions and agreements made with individual Member States over the years into a 'one-size fits all' document. Therefore, while there are some proposals in the Communication similar to what Ireland has undertaken to implement – but we are of the view that such proposals do not belong in a document that applies uniformly.

Ireland considers that the Communication must be amended on a number of counts.

The first is platform neutrality. The Communication must fully acknowledge the Audio Visual Media Services Directive must

be entirely platform neutral regarding Public Service Broadcasting. The Commission does not do this and it could be seen as attempting to consign Public Service Broadcasting to a certain place in history, based on a notion that the platforms of the future belong to the commercial sector in the first instance. No distinction between linear and non-linear should be set out and the specific notion of additional 'appropriate safeguards' in this context should be removed.

Secondly, the discussion of premium content is a concern. The notion of premium content suggests a commercial view of the sector with commercial business plans dictating the framework. This language and the references to football should be removed. All content can be Public Service Broadcasting content, depending on the decision of a Member State, except where there is manifest error. However, the Commission would appear to want to carve out certain types of broadcast content as the property of the private sector only, which would be deeply contrary to the Amsterdam protocol. In this regard Ireland proposes the deletion of the last sentence in paragraph 52 of the draft Communication, and the deletion of paragraphs 53 and 54.

Thirdly, the Communication should be silent on the issue of pay services. The Amsterdam Protocol makes it very clear that the method of funding Public Service Broadcasting is a matter for

Member States - whether general tax, licence fee, advertising or pay to view. While Ireland would agree that the use of pay services is not the normal way for public service broadcasting to be provided, it is incorrect to rule it out. To do so is to suggest that the paradigm or mode of public service broadcasting is fixed in time and cannot change.

Fourthly, Ireland has concerns in relation to the language around oversight. There is of course a need for oversight mechanisms. However the ex ante market impact assessment proposed is too prescriptive, and leaves little room for member States to design procedures according to national needs, custom and law . It is not correct to take models that may be chosen by some large Member States which have a lot of resources to allocate to oversight and apply it to all Member States – this does cross the line in relation to subsidiarity. It should be enough for the Communication to state that Member States are required to ensure that the use of public monies is overseen and that it is not abused. In many cases it may be appropriate that procedures are ex post. The Commission is entitled to check and investigate if the mechanisms in place in Member States are sufficient. It should not mandate a common approach. In this regard only the first sentence of paragraph 59 of the draft Communication is appropriate.

Many Member States question whether the idea of a market impact assessment is actually compatible with the Amsterdam protocol. The Protocol makes it clear that member States define the remit of public service broadcasters, but an ex ante market assessment approach almost suggests that the Public Service Broadcasting remit is in fact defined by the market.

Combined with the earlier proposals on non-linear services, the text proposed in paragraphs 60 and 61 mean it may be exceptionally onerous for Public Service Broadcasters to be innovative and free to develop. This may have negative impacts not just for broadcasting but also for the wider economy. Therefore, Ireland proposes the deletion of paragraphs 60 and 61.

Finally, Ireland has concerns with regard to the Commission proposal of a 10% cap on reserves built up by broadcasters. This proposal does not allow for subsidiarity and is a one size fits all approach. It ignores the fact that broadcasters come in different shapes and sizes, it ignores the fact that various accounting procedures apply in different countries and the notion that such reserves must be emptied after four years is contrary to any prudent approach to managing companies. Instead Member States should deal with the issue of

overcompensation and should ensure that unnecessary reserves are not built up – and the Commission is entitled to evaluate each different approach as it sees fit.