

**THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON THE
FUTURE FRAMEWORK FOR STATE FUNDING OF PUBLIC SERVICE
BROADCASTING**

DRAFT COMMUNICATION – NOVEMBER 2008

**COMMENTS ON BEHALF OF RADIO TELEFÍS ÉIREANN (RTÉ)
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INTRODUCTION

1. The Commission in paragraph 10 of its draft Communication has rightly identified that public service broadcasting is not comparable to a public service in any other economic sector. The fact that public service broadcasters (PSBs) provide so much information and content to a wide sector of the population and thereby play a significant part in the democratic, social and cultural needs of each society is the central concern in this consultation process. The Commission's draft Broadcasting Communication, once finalised, will be an important reference point in the demarcation between each society's particular expression of how broadcasting is to be structured in accordance with national political systems and the requirements of economic regulation under the Treaty.
2. This submission will focus on a select number of issues that arise from the draft Communication. Its particular emphasis is to identify for further consideration some key proposals where RTÉ believes that the balance between the democratic, social, cultural and political imperatives of each Member State and their citizens are not given due weight in establishing a new set of rules for state funding of public service broadcasting.

EX-ANTE EVALUATIONS AND MARKET ASSESSMENTS

3. Positively the Commission in paragraph 51 of the draft Communication accepts that PSBs can embrace technological advances that mean that audiovisual content can be delivered over a wide variety of platforms in a digital format. However, it appears that the Commission wants to fetter PSBs with an automatic regulatory regime for non-linear or on-demand services. The whole point of digitalisation (in a technological sense) is that it offers the ability to provide material to the public in a way that suits them rather than being stuck to a rigid form of analogue delivery. Paragraph 51, as drafted, while stating the obvious that on-demand services can be part of the service remit provided that they do not have disproportionate effects on the market, suggests or implies that those services provided in this way will presumptively have such disproportionate effects. RTÉ would suggest that the Commission's position here goes too far and that the text as a whole needs to confirm that services provided by PSBs outside the direct realm of broadcasting and which are ancillary to or are derived from those broadcast services, do not presumptively distort competition.

4. Paragraphs 56 to 64 set out a relatively strict procedural regime for the introduction of new services by PSBs or the alteration of existing ones. In particular, paragraph 61 includes a requirement for Member States to automatically assess the distortive impact of new services, including an assessment of the impact on commercial broadcasters. This approach suggests that Member States must treat the definition of the public service remit as one requiring formal analysis of the impact of such a service on market interests. This approach does not accord with the law as set out by the Court of First Instance in the TV2/Denmark case. In particular, it seems clear from the decision of the Court that making the definition of the public service dependent on what is offered by commercial operators is unlawful. The Commission in paragraph 26 of the draft Communication states that the effect of state intervention, not its purpose, is the decisive element in any assessment of state aid under Article 87(1) of the Treaty. A corollary of this, surely, is that the effect of Commission intervention, rather than its purpose, is the decisive element in any assessment of whether any proposed Commission action trammels upon the entitlement of Member States with respect to the organisation of their public service broadcasting systems.
5. In paragraph 47 of the draft Communication the Commission indicates that it is not for the Commission to decide whether a programme is to be provided as a service of general economic interest. The same logic can equally be applied to the offerings of PSBs as a whole and the result of the proposals is that different regulatory regimes will apply to the wide variety of services provided by PSBs (particularly in the new media area). This is a form of fragmentation which would be an unwelcome development and RTÉ would urge the Commission to think further about this.
6. It might also be noted that what the Commission now proposes is substantially different to what is currently contained in paragraph 60 of the current Broadcasting Communication (under the heading of proportionality). In particular, this states that:-
7. “The analysis of the affects of State aid or competition and development of trade will inevitably have to be based on the specific characteristics of each situation. The actual competitive structure and other characteristics of each of the markets cannot be described in the present communication, as they are generally quite different from each other”.
8. There seems to be no evidential basis for the Commission moving from the relatively flexible approach currently adopted to one where each Member State is required to embrace the ex-ante and market assessment requirements and procedures for new public services. The proposals clearly weaken the ability of Member States to retain existing public service broadcasting structures or mould them to their own particular needs in the future. In fact, the consultation itself is in effect a process where the Commission would seek to prorogate its jurisdiction through the agency of Member States and thereby claim legality for what are in effect new powers. This, it is submitted, is not possible as the Commission can not be invested with additional powers

outside the Treaty. Additionally, the ability of Member States to organise their public service broadcasting systems is, at the very least, a matter of subsidiarity, and, could even be said to be an area where the Treaty gives no role at all to the European Institutions.

9. In its March 2008 submission (paragraphs 24 to 28) RTÉ said that an onerous or heavy ex-ante procedure would restrict the possibility of PSBs to engage expeditiously in rapidly evolving new media services and that it would be sufficient for national legislation to allow for ex post assessment at the request of an interested party. RTÉ would invite the Commission to look at this critical issue again. RTÉ suggests that it is possible to provide that there is a presumption that a new service is compliant and that an ex-ante procedure would only come in to play for the most significant services and where interested parties have produced initial evidence concerning possible disproportionate distortions of the market.

RESERVES

10. In relation to the issue of potential provision of over-compensation by Member States to PSBs, the Commission in paragraphs 94 to 96 has proposed one particular control mechanism that would operate as an automatic fetter on the freedom of public service broadcasters and Member States to organise and fund public service broadcasting according to their particular needs. In particular, it would act to inhibit broadcasters from being adequately funded to discharge their public service obligations in conditions where event coverage programming and contributions from commercial revenue are cyclical in nature. The Commission's proposal to incorporate, as a rule, a basic limit of 10% of annual budgeted expenses as a reserve for financing public service activities regardless of individual circumstances or absent individual consideration in a given case, is not justified and should not be part of the text or should, at the very least receive further in-depth consideration.
11. At a general level the application of a fixed percentage of annual budgeted expenses as an exceptional fund is arbitrary in that it fails to take account of the operational reality of delivering the public service in this area. In particular, it does not allow for:-
 - (1) the requirement for a public service broadcaster to provide coverage of non-annual special events which either generate no commercial revenue or where the commercial revenue generated is considerably less than the cost of coverage of the event, or
 - (2) where the PSB is significantly dependent on a contribution from commercial activities to deliver its public service, it is inevitably exposed to significant fluctuations of its commercial revenue stream; it is, nevertheless, expected to deliver the public service.

12. In both cases prudent financial management requires the building up of funds sufficient to discharge on-going obligations. This is particularly so as annual public funding is not increased to deal with these situations. The application of the rule as proposed will focus on past financial results rather than on current or future operational requirements and this will be to the detriment of public service broadcasters.
13. “Reserves” in any event do not necessarily represent funds available to sustain the delivery of public service broadcasting services and can often be illiquid. For example, reserves may include:
 - Actuarial surpluses on employer sponsored Defined Benefit Pension Schemes as measured under applicable accounting standards (these funds are held in trust and not available for use by the PSB);
 - programme inventories for future transmission (these arise from inherent timing differences between production and broadcasting and can not be used to fund revenue fluctuations or special events coverage);
 - fixed and intangible assets.
14. The Commission’s proposal of a basic limit on retained reserves of a maximum 10% of annual budgeted expenses is clearly a rigid yardstick by which the issue of over-compensation is to be judged (leaving aside the limited “exceptional” capital items referred to in paragraphs 95 and 96 of the draft Communication). But the matter goes further than that. The imposition of a rule such as this which can operate in an arbitrary fashion, wrongfully supplants the entitlement and competence of Member States to organise and fund their public service broadcasters in accordance with their own national and cultural needs. Rather it imposes a regime which assumes that funding is automatically or will likely distort trading conditions or competition in a way contrary to the common interest (as per the Amsterdam Protocol). This is “putting the cart before the horse” and is not in accordance with the Treaty.
15. The above submission also has relevance to the issue of reserves as referred to in paragraphs 98 to 100 insofar as the Commission has deemed “reserves” of themselves to be a matter for separate and specific control.

FINANCIAL REVIEW

16. At paragraph 100 the Commission proposes to introduce a rule that public service broadcasters should be subject to an in-depth review after a period which is said should not exceed four years. RTÉ believes that any review of this nature should occur only every five years at most. Requiring this type of review over a relatively short period increases costs, is burdensome and is a disproportionate measure. By way of comparison, it is quite common under the provisions of various EU Directives for Member States to be required to furnish a report on the workings of the particular directive on a five yearly basis. For example, under Directive 2003/88/EC concerning the organisation

of working time, the relevant report must be furnished to the Commission every five years.

PREMIUM RIGHTS

17. Paragraph 102 of the draft Communication specifically suggests that PSBs buy rights to premium events such as sports' rights, do not use them and refuse to sub-licence such rights where unused. The text of paragraph 102 also suggests that PSBs consistently overbid private competitors for premium rights. The text goes on to invite Member States to "enhance transparency" concerning how PSBs acquire, use and sub-licence premium rights. No evidential basis for the assertions of the Commission is included in the draft. In these circumstances a suggestion to Member States to establish particular national rules to deal with the matters as outlined seems inappropriate (and does not appear to have a legal basis) and should not be included in the absence of substantial justification for specific treatment within a new Broadcasting Communication.

DIFFICULTIES FACING SMALLER MEMBER STATES

18. The Commission consulted on whether it is necessary to keep a reference in a new Broadcasting Communication to the difficulties facing smaller Member States and it also asked those responding to identify the difficulties. RTÉ in its response (paragraph 60) referred to three particular issues: (1) the availability in a smaller Member State of broadcasts from other Member States or from larger linguistic communities, (2) the fact that adequate funding may not be available or burdensome and (3) the fact that public service broadcasters in these circumstances have more difficulties dealing with regulation and administration. The proposal to have significant ex-ante assessments is now another matter to be taken into account.
19. RTÉ would ask the Commission to consider again this issue in light of submissions to date and also in light of current economic circumstances.

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