

OBSERVATIONS OF VESTRA ON THE DRAFT COMMUNICATION OF THE COMMISSION ON THE APPLICATION OF THE STATE AID RULES TO PUBLIC SERVICE BROADCASTING (PUBLISHED ON 4 NOVEMBER 2008)

1. VESTRA, the *Vereniging voor Satelliet Televisie en Radio Programma Aanbieders*, the association for Dutch commercial television broadcasters, welcomes the opportunity to comment upon the Revised Broadcasting Communication. The members of VESTRA, RTL Nederland (RTL 4, 5, 7, 8), SBS Broadcasting (SBS 6, Net 5, Veronica), Jetix Nederland (Jetix), Discovery Networks (Discovery Channel, Animal Planet), MTV Networks (MTV, TMF, Nickelodeon, Comedy Central) and Eurosport (Eurosport, Eurosport 2) represent the majority of commercial television channels that are available in the Netherlands.
2. VESTRA has submitted comments during the public consultation of the Commission on 10 January 2008, where it has given detailed comments on the Commission's intention to codify and consolidate the experience with the application of the state rules in the area of public broadcasting. VESTRA refers to these comments but wishes to add the following observations.
3. VESTRA has noted that the draft for the Revised Broadcasting Communication bears witness of the fact that the Commission is willing and able to withstand the opposition organised by a number of member states against what they perceive as an overly interventionist application of the state aid rules. VESTRA endorses in general the approach advocated by the Commission in the draft. Indeed, regardless of the cultural, social and political aspects involved in public broadcasting, public funding should not lead to unwarranted and disproportionate distortions of competition and there is no reason why the Commission, as guardian of the treaties, should abstain from its statutory role in this sector.
4. In fact, recent developments have shown that it is possible to reconcile the interests of both public and commercial broadcasters, as was for example the case in the recently closed investigation into the definition of the public service remit as regards new services of German broadcasters ARD and ZDF. Whilst VESTRA does not necessarily embrace this particular case as exemplary, it is to be welcomed that Germany as well as other member states recognize the need to take due account of possible unacceptable market distortions of their public broadcasting system, in particular with regard to new activities from public broadcasters.
5. Whilst VESTRA endorses the general approach of the Revised Broadcasting Communication, there are a number of elements that require further attention as regards the definition of the public remit and the proportionality of reserves.

The public service remit

6. One of the criteria of the *Altmark*-judgment requires a clear and precise definition of the public service remit, as only the public funding of the net costs of that remit may be covered by the exception of Article 86 (2) EC. This is confirmed in the Revised Broadcasting Communication, where the Commission expects that the definition of the public service mandate by the Member States should be as precise as possible and “...*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.*”
7. The importance of this principle lies in its formal, procedural character: it is not the contents of the remit that are prescribed here, but the way in which it is formulated so as to allow the Commission to verify whether member states have observed the principles of the Treaty when applying their discretionary margin in accordance with the public broadcasting protocol to the Treaty of Amsterdam. This distinction is systematically ignored by member states who claim that the Commission tries to define their public service remit when it simply reminds them of their responsibilities under the EC Treaty as interpreted by the European Courts.
8. Yet, the Commission seems to contradict this principle where it states in para. 50 of the Revised Broadcasting Communication that the specific nature of the broadcasting sector allows for a “...*a definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer*”. In view of the supervisory role of the Commission under Article 86 (2) EC, such a suggestion for the contents of a public service remit seems out of place. Moreover, this suggestion is not a clear and precise definition, as the Commission elsewhere in the Revised Broadcasting Communication requires. VESTRA would therefore like to suggest the Commission to consistently and explicitly require member states to apply clear and precise remits definitions.
9. Such a precise remit is also necessary to ensure the proper application of the “appropriate safeguards” as discussed as from para. 56 in relation to the introduction of any “significant new service”, i.e. the introduction of an *ex ante* test, involving all interested parties and administered by an independent body (referred to in paragraph 62). VESTRA agrees with the Commission that such a change, if indeed acceptable under the *ex ante* test, must be reflected in an amendment of the public service remit.

Proportionality of compensation - reserves

10. The Revised Communication states that the Commission will consider whether any distortion of competition arises from the public service compensation, but goes on to state as a matter of policy that reserves of up to 10% of their annual budgeted expenses can be considered acceptable (paragraph 94). Whilst it may well be that in particular cases this percentage could be acceptable, VESTRA fails to see on what ground a more general “*de minimis*” rule of this kind could be considered appropriate. The need for a case-by-case examination is particularly relevant with regard to reserves in excess of the 10 % *de minimis* threshold set by the Commission. The use



of excess reserves for tasks that are part of the public service remit or for major technological reserves (para. 96) does not seem appropriate. Such investments should be reflected in amendment of the public service remit on the basis of an ex ante market test.

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André Kreuzen

Chairman VESTRA