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CEEP opinion on the Draft Communication on the Application of State Aid Rules to Public Service Broadcasting

The purpose of public funding is to enable public service broadcasters to offer broad, distinctive programming, in terms of diversity, quality and impartiality. Publicly-funded broadcasters play an essential role for society and are a vital component of the European broadcasting landscape. Their importance is recognized in the Amsterdam Protocol, which states that public service broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism

The stability and sustainability of the funding of public service broadcasting is crucial for maintaining the same amount of programming of high quality and diversity, also in times of economic downturn. Strong funding and a strong brand for public service broadcasting are assets which society should value and protect in the long term.

The CEEP welcomes the improvements made to the second draft. For instance, the CEEP welcomes the fact that there are no uniform criteria for assessing the public value which remains the competence of Member States. With regard to the market impact assessment, the second draft rightly recognizes the fact that even if a new service would have an important impact on the market the relevant criterion is the public character of the service. Another example of an improvement is the reference to the difficulties of small Member States which is a step towards recognizing the diversity of situations in Europe, and the need to consider the particularities and difficulties of each country.

The CEEP considers that the revised Broadcasting Communication should remain a flexible instrument which allows Member States to continue to reflect their national needs, culture and constitutional law when defining, organizing and entrusting public service organizations. The 2001 Broadcasting Communication was a flexible instrument which allowed a case-by-case analysis, and any revised Communication should continue to lay down principles which respect the discretion of Member States in relation to the definition, entrustment and overall organization of public service broadcasting.

The CEEP still has a number of concerns, and in particular with regard to a uniform requirement of a prior assessment of significant new services for all PSBs and in all Member States (paragraphs 84 to 90), and submits the following comments on specific paragraphs of the text.

Ex ante assessment of significant new services (paragraph 84 to 90)

The CEEP has concerns with regard to a uniform requirement of a prior assessment of significant new services for all PSBs and in all Member States. The CEEP believes that the situation varies widely in different countries, and that the imposition of a single *ex ante* procedure is not an appropriate mechanism for all Member States. The CEEP would therefore recommend that the Commission leaves the choice of the mechanism to Member States, as the second draft clearly stipulates in paragraph 86.

The CEEP further considers that a requirement for a prior assessment procedure goes far beyond the basic requirements of the EC Treaty and, especially, the requirements laid down in Articles 87 and 86(2) EC. In particular, Articles 87 and 86(2) EC do not expressly or implicitly require *ex ante* assessment of new services, and the Commission could not call into question the compatibility of aid simply because no *ex ante* assessment has been carried out by the Member States. The Amsterdam Protocol could not therefore be used as a legal basis for introducing a test - called the "Amsterdam test" by the Commission.

It is a matter of fact that in defining any SGEI, public authorities assess the public value content and nature of any such service, undertaking in practice an "ex ante" test. It would be more in line with Community Law to indicate that such a public value test should be undertaken, but leaving to MS room to fix its modalities..

Commercial services (paragraph 48)

With regard to the last sentence, the relevant criteria for regarding a service as a service of general economic interest is whether it meets the democratic, social, and cultural needs of the society (Amsterdam Protocol). It is for the Member States to decide what they consider to be services of general economic interest, and the Commission's role is limited to checking for manifest error. The notion is a negative one: the Commission should intervene in the competence of Member States only in cases where there is no doubt that the service is not related to the general interest which the Member States aim to fulfil.

Nevertheless, the criterion suggested by the last sentence, namely the "clear added value for citizens" is not consistent with the concept of manifest error and the limited role of the Commission in this respect, as well as the Amsterdam Protocol and the case-law of the European judiciary. As stated by the European judiciary in several cases, a service of general economic interest is defined in relation to the general interest which the Member State wishes to fulfil as laid down in the entrustment act. The concept of manifest error is strictly related to the general interest which Member States wish to attain, and not to any concept of "added value" compared to the existing offer of the same or other public service broadcasters. The CEEP considers that the second draft goes beyond checking for manifest error.

Existing or new aid (paragraph 31)

The second draft refers to severability as the main criterion for distinguishing alteration of

existing aid (paragraph 31). However, the main criterion is whether the alteration affects the actual substance of the scheme. This is made clear in the Gibraltar case (referred to in paragraph 30) and in Article 4 of the implementing regulation 794/2004:

"For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market."

If the modifications are not of a formal nature, the subsequent question is whether the modification is severable so that only the modification as such would be regarded as new aid and notified, or whether it cannot be separated so that the whole scheme is considered to be new aid. Thus, the severability of the modification is only a secondary criterion which ensures that even a substantive alteration cannot affect the whole scheme provided that it is severable from the latter. These principles were rightly stated in the first draft (paragraph 36), and should be re-introduced in the final version of the revised Broadcasting Communication.

Reserves and control of over-compensation (paragraphs 73 to 76)

The concept of "compensation" or "net costs" includes reserves, since these are indispensable for the existence and proper functioning of a company. CEEP considers the possibility to keep a general reserve of 10% as sufficiently flexible, providing room of manoeuvre for PSBs in running their business.

But this notion of reserves should not be mixed up with the notion of working capital or own resources, necessary to deliver in a proper way the public remit. It would be essential to provide comfort as to the possibility to increase these capital resources without undue difficulties, by considering them under 86.2 instead of the normal 87/88 exercise. Otherwise, any capital injection might be regarded as a restructuring aid, thus preventing PSBs to receive further aid for a 10 year period under the one-time principle.

Should the Commission find it appropriate to give guidance on the level of reserves at the disposal of public service broadcasting organizations (as it does by installing a 10% threshold), this should not be regarded as a presumption of over-compensation resulting in a duty for Member States to recover the amount from public service organizations. Consequently, the last sentence of paragraph 73 needs to be deleted.

In particular, the public service organization should be able to build up and keep an adequate level of own capital which is not allocated to general or special projects. Public service broadcasters should be allowed to use part of the reserves and savings from previous years to build up and maintain an appropriate level of own capital (as can any other company on the market). Such own capital is necessary to guarantee the existence and functioning of the public service organization in the mid-term and, consequently, to fulfil the public service mission.

Net cost and compensation (paragraph 71)

Paragraph 71 should take into account the interpretation of the Court of First Instance, which stated that "all programming developed within the framework of a broadcasting SGEI defined in broad and qualitative terms and therefore all the costs incurred by a broadcaster entrusted with that SGEI can be financed by the State" (TV2/Danmark, paragraph 111). In addition, the definition of the net cost and compensation should be consistent with the general Framework on SGEI, and the revised Broadcasting Communication should clearly define it as "what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations" (paragraph 14 of the Framework on services of general economic interest).

Reasonable profit (paragraph 72)

With regard to reasonable profit, the CEEP continues to believe that the draft Broadcasting Communication disregards the Commission's past practice and recent case-law. The third *Altmark* criterion includes a reasonable profit margin and would apply to determining whether State funding granted to any broadcaster, even if not profit-oriented or constrained, is State aid. This is also consistent with the Commission's approach regarding services of general interest in other sectors (paragraph 15 of the Community Framework for State aid in the form of public service compensation, OJ 2005 C 297/4). (See also the CEEP contribution to the Commission's second public consultation, January 2009, paragraphs 71 to 73.)

Choice of funding and disproportionate effects on competition (paragraph 59)

In paragraph 59, the CEEP recommends that the Commission should reintroduce the clarification in the current text that "The test is of a "negative" nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the interests of the Community." In this context, it should be stressed that the test in Article 86(2) EC is not the same as the test carried out under Article 87(1) EC: the Commission should respect the discretion of Member States and refrain from restricting or otherwise preventing Member States from defining and providing services of general economic interest.
