

European Commission

For the attention of the State Aid
Registry
Reference: HT. 963
1049 Bruxelles

DR/Danish Broadcast
Corporation
Emil Holms Kanal 20
DK-0999
T +45 3520 3040
www.dr.dk

BELGIUM

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DR's reply to the Commission's consultation on the revision of the Broadcasting Communication - second draft

DR fully supports the EBU's reply to the Commissions consultation on the second draft revised Broadcasting communication, but would also like to comment on certain provisions of the second draft communication as well.

First of all, DR welcomes the reintroduction of par. 62 of the current communication (par. 42 in the second draft) regarding smaller Member States. Moreover, DR welcomes the recognition of the principle of technological neutrality in the second draft as it is stated in par. 47: "...the definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services *on all distribution platforms*", and furthermore in par. 81: "public service broadcasters may use State aid to provide audiovisual services over *new distribution platforms*...". Also the need to recognize the editorial independence of public service broadcasters is fortunately to be found in the second draft (par. 47, 86).

However, despite the above listed improvements made to the second draft, DR still has some concerns about and critique of several of the draft's provisions, such as

- 1) existing aid as opposed to new aid (par. 31),
- 2) definition of the public service remit (par. 48),
- 3) diversification of public broadcasting services (par. 83, 85),
- 4) ex-ante market impact assessment (par. 94-90),
- 5) net cost principle and overcompensation (par. 72, 73-76),
- 6) proportionality and market behaviour (par. 92, 96, 94).

Ad 1) existing aid as opposed to new aid (par. 31)

Par. 31 in the second draft communication introduces a modified definition of new state aid as opposed to existing aid: "...whether subsequent modifications are either severable from original measures and therefore, new aid..." The second draft refers to severability as the main criterion for distinguishing existing aid from new aid, which is not in accordance with existing case-law and art. 4 Regulation No. 794/2004.

The Court of First Instance stated in the Gibraltar-judgement that the main criterion for distinguishing existing and new aid is the affect, the alteration has on the substance of the original aid scheme: "Accordingly, it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme."¹

As Advocate-General Trabucchi pointed out in his opinion in *Van der Hulst*, modifications are substantial if the main elements of the system have been changed, such the nature of the advantage, the purpose pursued with the measure, the legal basis for the fee, the beneficiaries or the source of the financing.²

In this regard, art. 4 Regulation No. 794/2004³ states: "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."

It is therefore irrelevant if an alteration to an existing aid scheme is severable or not, if the modification itself is not substantive, respective of only formal or administrative nature.

It is only in the case of the alteration affecting the substance of the existing scheme that the criterion of severability becomes important, as a substantive

¹ Judgement of the Court of First Instance of April 30, 2001 in joined cases T-195/01 and T-207/01, par. 111.

² Cf. Opinion of Mr Advocate- General Trabucchi delivered on 4 December 1974, in Case 51/74, *van der Hulst*, [1975] ECR, p. 79.

³ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140 , 30.04.2004, p. 1.

alteration, which is severable from the existing aid scheme only itself is treated as new aid, while a non severable, but substantive modification causes that the whole aid scheme will be treated as new aid.

As these principles were rightly stated in the first draft communication DR suggests that par. 36 of the first draft communication is reintroduced: "...(2) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (3) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure as a whole is transformed into new aid."

Ad 2) definition of the public service remit (par. 48)

Par. 48 in the second draft defines the following situation as manifest error: "Moreover, a manifest error could occur where State aid is used to finance activities which do not *add clear value for citizens* while leading to disproportionate distortions of competition and cross-border trade." The concept of "clear added value" can also be found in par. 88 and 90.

It follows from the Amsterdam Treaty⁴ that the definition of services of general economic interest falls within the competence of Member States. These are to be defined in relation to the democratic, social and cultural needs of each society and to the need to preserve media pluralism and are with other words closely linked to each states cultural inheritance, thus a national matter. The element of "added clear value" is not only very vague, but also foreign to the concept of services of general economic interest.

In this context, the Commission's role is limited to checking for manifest errors; with other words it is not for the Commission to decide whether a programme is to be provided as service of general economic interest, nor to question the nature or the quality of the product. Thus, it is not for the Commission to decide if a certain service adds clear value for citizens, but whether the service in question meets the requirements of the public service remit as defined by Member States. By including

⁴ The Amsterdam Protocol states that "The provisions of the 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..."

the element of “added clear value”, the second draft communication goes beyond manifest error and limits Member States well-established discretion when determining the scope of the public service remit.

In addition, the question of competition distortion must not to be confused with the question whether a certain service falls within the public service remit as defined by Member States. Par. 48 confuses two separate stages of legal reasoning: the definition of the remit, the assessment of market distortion and of its effect on Community interest. It is only if a certain service falls within the public service remit that the question of competition distortion becomes relevant. Consequently, distortion of competition is irrelevant for the question of determining whether a service may be included in the public service remit.

Therefore, DR is of the opinion that the last sentence of par. 48 should be deleted.

Ad 3) diversification of public broadcasting services (par. 83, 85)

DR finds that par. 83, stating that “the element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit” is directly conflicting with the case-law of the Court of First Instance.

The Court of First Instance (hereinafter: CFI) has made it clear in the *SIC*-case⁵ and the *TV2 Denmark*-case⁶ that the definition of public service cannot be made dependant on its method of financing: “The possibility open to member states to define broadcasting SGEIs broadly, so as to cover the broadcasting of full-spectrum programming, cannot be called into question by the fact that the public service broadcaster also engages in commercial activities, in particular the sale of advertising space. Calling such activities into question would be tantamount to making the very definition of the broadcasting SGEI dependent on its method of financing. An SGEI is defined, *ex hypothesi*, in relation to the general interest which it is designed to satisfy and not in relation to the means of ensuring its provision. As the Commission points out in point 36 of the Communication on broadcasting, ‘the question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services’.”⁷

⁵ Judgement of the Court of First Instance of June 26th 2008 in case T-442/03.

⁶ Judgement of the Court of First Instance of October 22nd 2008 in joined cases T-309/04, T-317/04, T-329/04 and T-336/04.

⁷ *Ibid*, par. 203 (SIC) and par. 107-108 (TV2 Denmark).

Consequently, the element of remuneration is irrelevant when assessing whether a service is consistent with the remit as defined by Member States and should therefore be removed from par. 83.

In addition, par. 83 states the following: "Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society *without leading to disproportionate effects on competition and cross-border trade*, Member States may entrust public service broadcasters with such a service as part of their public service remit."

The question of competition distortion must - as already explained - not to be confused with the question whether a certain service may be included in the public service remit, as these are two different stages of legal reasoning. Distortion of competition is irrelevant for the question of determining whether a service may be included in the public service remit.

DR suggests therefore the following wording of par. 83:" Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society Member States may entrust public service broadcasters with such a service as part of their public service remit."

Furthermore, the second draft contains in par. 85 a negative definition of new services, as "the *simultaneous* distribution of content already available on one distribution platform...on new platforms...is not considered to be "new" services."

As already stated above, the remit of public service is only to be defined in relation to the democratic, social and cultural needs of each society and to the need to preserve media pluralism and regardless of the chosen distribution platform. In this context, the point of time at which the service in question is broadcasted is of no relevance to the definition of the public service remit. A public service broadcaster's activity covered by the national public service mandate does not become a "new" activity and thus, is no longer covered by the public service mandate simply because it is broadcasted on a second platform at a different time than the first distribution.

DR therefore suggests deleting the word "simultaneous" from par. 85.

Ad 4) ex-ante market impact assessment (par. 84-90)

The second draft communication still contains an obligation for Member States ("Member States *shall* consider") to carry out an ex-ante market impact assessment before launching new services (par. 84-90).

DR's position in regard to the ex-ante market impact assessment remains unchanged, meaning that DR strongly opposes the introduction of the same for the following reasons:

First of all, DR questions the legal basis for introducing an ex-ante market impact assessment obligation including an obligation to conduct an open public consultation. In general, Member States have in respect to public funding of public services to comply with the rules set out in art. 86 (2) and 87. These provisions do not require an ex-ante market impact assessment for new services under an existing state aid scheme. The same applies to the Amsterdam Protocol, which interprets art. 86 and 87 of the EC Treaty and is not requiring Member States to carry out a broad market impact assessment either.

A communication - which has no binding legal effect - is not the appropriate legal instrument to impose new (procedural) obligations on Member States, which did not already exist at the time of the publishing of the draft communication. Therefore, the only obligations Member States have in regard to existing state aid are the ones as stipulated in art. 86-88.

Secondly, as already stated above, it falls within the competence of Member States to define the public service remit. This applies both to already existing services and new services. The requirement of a prior assessment based on an open public consultation in regard to the definition of the public service remit goes beyond the control for manifest error and limits Member States' competences. The Commission has no competence to impose a particular procedural path - neither an ex-ante market impact assessment nor an open public consultation - for a new public service remit or the expansion of an already existing public service remit.

Furthermore, the ex-ante assessment of every new service goes beyond the existing requirements as laid down in art. 86 (2) and 87 EC Treaty. There is no comparable procedure imposed for already existing public service remits, meaning that Member States' discretion to define public service remit according to the draft communication varies in scope - depending of the services qualification as "new" or "old".

This contradicts the broad discretion of defining the public service remit which Member States enjoy according to the Amsterdam Protocol and which has recently been confirmed by the CFI in the TV2-judgement. This discretion applies to the totality of the services offered by a public service broadcaster and thus, to already existing and future services, which are not yet part of the public service remit. It cannot vary in scope, just because a service did not already exist at the time of the publishing of the new communication.

Thirdly, the assessment requirements for the market impact assessment and the inclusion of the commercial market by means of an open public consultation (par. 88) do not correspond with the TV2-judgment, where the CFI clarified the relation between the competence of Member States to define the public service remit and the reference to the activities of commercial broadcasters.⁸ Thus, neither the impact which a (new) service might have on the commercial market nor the market's evaluation of this service are relevant criteria when defining the public service remit. The validity of including new services into the public service remit is to be solely assessed on the basis of the nature, content and satisfaction of democratic, social and cultural needs of the relevant society by the service.

Fourthly, the requirement of an ex-ante market impact assessment including the obligation to conduct an open public consultation as a basis for the assessment will not only result in considerable extra costs for the public broadcaster, but also cause an increased administrative burden. As a consequence, the launch of new services will considerably be slowed down, as it e.g. happened in the course of the public value test of BBC's on-demand proposals as BBC Trust received over 10.000 responses.⁹ Furthermore, an ex-ante market impact assessment including an open public consultation will only increase costs for developing new services and thus, will in the end obstruct the public broadcaster's willingness and possibilities to fulfill the public service remits by taking advantage of new technologies.

Fifthly, the preposition in par. 88 that - in the case of predominantly negative effects on the market - the State funding of the service in question only would be proportionate if it has a "clear added value to society, also in view of the existing overall public service offer" is conflicting with the principle of subsidiarity. As already mentioned above, the concept of "clear added value" compared to the

⁸ Ibid., par. 123.

⁹ http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/decisions/on_demand/decision.pdf.

existing offer of the same or other public service broadcasters is foreign to the concept of services of general economic interest and it is neither for the Commission nor for Community law by means of a communication to introduce that concept. It falls into the competence of Member States to assess whether a service has *public value* in regard to the democratic, social and cultural needs of each society regardless of other offers on the market, and herewith will fall within the public service remit. The Commission's role is limited to only checking for manifest errors.

In sum, it is DR's opinion that any market impact assessment obligation as regarding the definition of the public service remit should be deleted from the second draft communication.

Ad 5) net cost principle and overcompensation (par. 72, 73-76)

According to par. 72 the Commission considers that in situations, where a public service broadcaster is not profit-oriented and does not perform any other activity than the provision of the public service, it is no reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission.

In the Altmark-judgement¹⁰, the European Court of Justice defined four conditions under which public service compensation does not constitute State aid within the meaning of art. 87. According to the third Altmark-condition "the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts *and a reasonable profit* for discharging those obligations."¹¹

The Altmark-conditions apply to any assessment of whether a certain State funding of a public service broadcaster can be qualified State aid within the meaning of art. 86-88, notwithstanding if the public service broadcaster operates profit-oriented or not. The presumption in par. 72 on the profit margin disregards recent case-law and therefore should be deleted from the second draft communication.

Moreover, the Commission establishes in par. 73-76 certain presumptions on the level of reserves and over-compensation. As explained in greater detail in EBU's reply to the Commission, the communication should instead contain a case-by-case analysis for determining the appropriate level of capital and reserves for each

¹⁰ Judgement of the European Court of Justice of 24 July 2003 in case C-280/00.

¹¹ Ibid., par. 92.

public service broadcaster based on an economic analysis of the specific needs of the public service broadcaster in question, as it was highlighted by the Court of First Instance in the TV2-judgement.

DR joins the position as expressed in EBU's answer to the Commission.

Ad 6) proportionality and market behaviour (par. 92, 96, 94)

Par. 92 invites Member States "to ensure that public service broadcasters respect the principles of proportionality also with regard to the acquisition of premium sport rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters." This is not a situation which DR can recognise, as the current market developments and the increasing prices paid for premium sport rights have made it more and more difficult for DR to acquire these rights.

Therefore, the following is of more principle nature.

DR finds that there is no need, nor legal basis for imposing an obligation on Member States to introduce rules on national level that ensure the sub-license of unused exclusive premium rights, as in a situation as described in par. 92 the national and European competition rules (namely art. 81 and 82) apply. These already existing competition rules are sufficient and much better suited to resolve any potential conflict.

In this regard, DR also assumes that par. 96 does not impose additional obligations on Member States in relation to the already at national and European level existing competition and state aid rules. Public service broadcasters are subject to competition law - both when fulfilling their public service duties, but also when engaging in commercial activities. There is no need, nor legal basis for additional procedures securing that the public broadcaster does not engage in any anti-competitive behaviour falling out of the remit of national and European competition rules. This also applies to situations which fall within the remit of art. 86-88, such as overcompensation or cross-subsidisation.

Par. 94 names as an example for anti-competitive behaviour an action ("price undercutting") committed by the public service broadcaster which "depresses the prices of advertising or other non-public service activities...*below what can reasonably be considered to be market-conform...*"

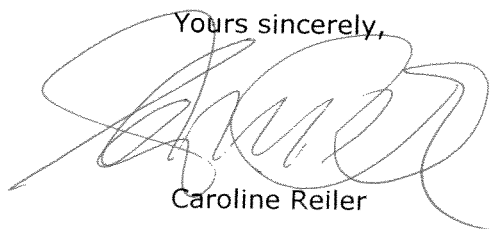
Anti-competitive behaviour is regulated in art. 81 and 82. The behaviour described in par. 96 - price undercutting, respective predatory pricing - may constitute abuse of a dominant position according to art. 82.¹²

The European Court of Justice has held that in order to establish abuse of a dominant position in form of predatory pricing it is necessary to show (i) that the alleged predator is selling at below average total costs, and (ii) whether by direct evidence or by means of presumption that it has the intention of eliminating a competitor.¹³

It is with other words the alleged predators' average total costs which are of importance when trying to establish predatory pricing. The concept of "what can reasonably be considered to be market-conform" is therefore not only a vague and insufficiently determined concept referring to the wrong criterion ("reasonably conform market" prices) for establishing abuse, but is also unknown in European competition law and thus, should be deleted from the second draft communication.

DR is of the opinion that par. 104 of the first draft communication should be reintroduced with the following wording. "...A public service broadcaster might be tempted to depress the prices of advertising or to offer other non-public service activities (such as commercial pay services) below *average total* cost so as to reduce the revenue of competitors, in so far as the resulting lower revenues are covered by the public compensation."

Yours sincerely,



Caroline Reiler
Head Legal and Strategy
Danish Broadcast Corporation

¹² Any use of State aid to finance commercial activities constitutes illegal cross-subsidiation within the meaning of art. 86-88, regardless the purpose (anti-competitive or not) which is pursued.

¹³ Judgement of the Court of Justice of 3 July 1991 in Case C-62/86, par. 70-72; Bellamy & Child, European Community Law of Competition, 6th edition [2008], pkt. 10.071.