

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

EEA EFTA POSITION ON THE SECOND DRAFT COMMUNICATION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING

Executive Summary

In this paper the EEA EFTA States present the following observations and recommendations:

- The EEA EFTA States welcome the Commission's decision to subject the Broadcasting Communication (BC) to a second broad public consultation.
- The EEA EFTA States maintain our fundamental position that the basic principles of the present BC related to the definition of the public service remit, entrustment and monitoring in general are still relevant and adequate, and that any revision of the BC should be based on the principles of the Amsterdam Protocol, and notably the principle of subsidiarity.
- We appreciate that the Commission has strengthened the principle of technology neutrality, focused more on the particular situation in smaller countries and included references to the principle of editorial independence.
- An ex ante mechanism should exclusively be applied to important and truly new services. The criteria for the market assessment must take into account the particular situation of smaller countries. Paragraph 88 should be redrafted in line with the terminology of the Amsterdam Protocol.

GENERAL REMARKS

1. The EEA EFTA States refer to the second draft Communication from the Commission on the application of State aid rules to public service broadcasting¹ dated 7 April 2009 and submitted to public consultation with a deadline for comments set at

¹ http://ec.europa.eu/competition/consultations/2009_broadcasting_review/broadcasting_review_en.pdf

8 May 2009. The EEA EFTA States appreciate the Commission's decision to subject the BC to a second broad public consultation.

2. The EEA EFTA States also refer to our comments on the hearing of the first draft of the BC. We maintain our fundamental position that any revision of the BC should be based on the principles of the Amsterdam Protocol, and notably the principle of subsidiarity. This is of particular importance to all material and procedural aspects related to the definition of the public service remit.

3. The EEA EFTA States note that we still find that the draft BC is too detailed and leaves too little discretion to the member states. The BC should reflect that the prime justification for public service broadcasting is that it serves the democratic, social and cultural needs of society and that the meaning of this concept cannot be fully determined beyond the national context.

4. Having said this, we appreciate the Commission's amendments to the BC which address many of the concerns raised by the EEA EFTA States and others.

THE SITUATION IN SMALLER STATES

5. Material and institutional arrangements on the national level should reflect the domestic administrative and legal traditions as well as the size of the country. Consequently, a "one size fits all-approach" is not desirable.

6. In our comments to the first draft, the EEA EFTA States pointed out that the BC should take into account the difficulties some smaller Member States may encounter when collecting the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher. We therefore suggested maintaining paragraph 62 of the present BC 2001 in the new communication and appreciate the reintroduction of such a paragraph (paragraph 42). We also appreciate the reference to the size of the market in the last sentence in paragraph 89, cf. paragraph 15 below.

TECHNOLOGY NEUTRALITY

7. It is essential that the BC firmly establishes that the remit of public service broadcasters may include audiovisual services on all distribution platforms, not merely traditional radio and television. The EEA EFTA States welcome the Commission's strengthening of focus on this aspect by including a number of references to the principle of technology neutrality.

EDITORIAL INDEPENDENCE

8. The first draft BC included no reference to the principle of editorial independence of public service broadcasters. In our comments to the first draft, the EEA EFTA States stressed that public service broadcasters, in order to be able to fulfil their remit, must enjoy full editorial independence. The choice of appropriate institutional and procedural arrangements in order to safeguard editorial independence must be assessed individually. The outcome of such an assessment will depend on the organisation of the ownership of the broadcaster, administrative and legal traditions, etc. We appreciate that the Commission has included several references (paragraphs 47 and 86) to the principle of editorial independence in the new draft. In our opinion, the practical implication of this is that the enforcement of state aid regulations,

particularly in respect to the definition of the public service remit and the design of the ex ante evaluation procedure for new services, should not be too detailed.

NEW AND EXISTING AID

9. The EEA EFTA States question the rephrasing of paragraph 31 (second version) concerning the procedural division of existing and new aid. As far as we can see, the main criterion in the implementing regulation and the relevant case law is that existing aid turns into new aid when a substantial modification would affect the actual substance of the scheme concerned, beyond pure administrative changes. In such a case the next question would therefore be whether the modifications are severable from the original measure. However, the amended wording seems to imply that severability is the main criterion for existing aid to change into new aid. As far as we can see, this would in practice lower the threshold for the duty to notify amendments beyond the implementing regulation.

EX ANTE EVALUATION OF NEW SERVICES

10. The new draft still includes a requirement for member states to establish an ex ante evaluation procedure for new services, cf. paragraph 88 and the following paragraphs. As stated in our comments on the first draft, the EEA EFTA States question the legal basis for establishing this as a mandatory requirement.

11. On a general basis the administrative burden of performing an ex ante test could represent an obstacle to the creative processes for the broadcaster concerned. A cumbersome procedure of public consultation may direct innovators of new services towards choosing a private, competing broadcaster. Consequently, we would like to stress the importance of maintaining the public service broadcaster's ability to adapt quickly and dynamically to changes in markets, technology or in the users preferences and expectations.

12. As regards the evaluation as such, it must be at the discretion of each Member State to define when a service qualifies as a "significant new service", based on an assessment of, inter alia, the characteristics of the domestic broadcasting market. The ex ante mechanism should exclusively be applied to important and truly new services.

13. We appreciate that the Commission in paragraph 85 clarifies that the simultaneous distribution of content already available on one platform on new platforms should not be considered a "new" service. We will recommend, however, that the word "simultaneous" is deleted, as we see no reason to limit this exception to linear services.

14. Further, we appreciate that the new draft is somewhat more open when it comes to determining whether a new service meets the "*democratic, social and cultural*" needs of society. As this concept must necessarily be determined within a national context, the assessment criteria must reflect the specific characteristics of the domestic broadcasting market and the social needs that the broadcaster is required to serve.

15. As regards the market assessment, the last sentence in paragraph 89 establishes that Member States shall be able to design a procedure which is proportionate to the market size and the market situation of the public service broadcaster. Our

interpretation of this is that the Commission recognizes the fact that the size of the market might influence the market assessment. This is important, as in markets of limited size, such as Iceland and Norway, the introduction of new services by the public service broadcaster may often have a detrimental effect on the potential demand for commercial services competing in the same relevant market.

16. The first draft BC provided no guidance on situations where the national authorities find that a new media service serves a social need and at the same time might distort competition. In paragraph 88 in the new draft, the Commission states that: *“In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it has a clear added value to society, also in view of the existing overall public service offer.”* The EEA EFTA States believe that it is essentially a political decision to balance such conflicting interests, a decision that furthermore should be made at the national level in line with the subsidiarity principle of the Amsterdam Protocol.

17. Further, the reference to “clear added value to society” might lead one to think that the public service broadcasters are not allowed to offer the same kind of services as their competitors. This may not be the intention, but can easily be the result, especially in small countries where negative effects on competition can often be observed. In addition, the inclusion of completely new terminology in the BC might be confusing. Consequently, we recommend that the Commission rely on the wording of the Amsterdam protocol, rather than the concept of “added value to society”.

18. If the Commission decides to maintain this sentence in paragraph 88, we recommend that the word “clear” be deleted, as the present wording does not reflect that the assessment of whether a new service has an added value to society is in essence qualitative. As the added value to society can never be established by reference to objective criteria, the BC should not implicitly require that the added value is determined beyond any doubt (cf. also paragraph 48 which contains a similar phrase).

19. Finally, we find the phrase *“... in view of the existing overall public service offer”* superfluous. It would seem to be redundant to assess the new service in light of the existing public service offer if an “added value to society” is already established.