



Brussels, 8 May 2009

Position on the

Commission's consultation on the second draft revised Broadcasting Communication

Introduction

The following text expresses the joint positions of the European Federation of Journalists (EFJ) and the European Region of UNI-MEI Global Union (EURO-MEI) in response to the Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting (hereafter "the Broadcasting Communication"). The EFJ, the European group of the International Federation of Journalists, represents trade unions and associations of journalists in all media sectors across Europe. UNI-MEI Global Union represents unions and guild affiliating creators, technical and administrative staff in the media, entertainment and arts. We represent journalists and media workers in both public and commercial broadcasting.

General

Over the past months – actually over the period of consultation for the revision of the broadcasting Communication of 2001- the decline of journalism and media has been dramatically accelerating as a result of the economic downturn. Media markets are collapsing. The flight of advertising to the Internet and a new generation of users who have less time for newspapers and traditional television have caused panic in the media industry which is cutting jobs and slashing costs at the expense of quality programmes. However, the media crisis we are witnessing in every country of Europe has been for years in the making and predates the recent recession.

This is not a short-term crisis: traditional media already collapsed in the United States and there is little doubt, sooner rather than later, that Europe, too, will face the consequences of market restructuring. We already saw in April first steps made by the world's biggest public broadcaster, the BBC, to merge some of its services for local programmes with private media. This unprecedented development may mark the beginning of further major and challenging changes in media.

The Broadcasting Communication aims at revisiting legal framework for public funding by taking into account technological, legal and market developments. For the reasons that we just mentioned, we believe that creative thinking may be needed and that public authorities need to fully endorse their responsibility towards sustainable, independent and quality media.

The importance of public service media, their democratic, social and cultural value for each society, are recognised in the Amsterdam Protocol. We believe that the Commission needs to continue to take into account not only the dynamic reality of the nature of broadcasting to apply the state rules in recognition of those new realities, but we also consider that the democratic values of media need a broad range of public support. This means for example that a 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, organising and entrusting public service organisations.

We welcome several aspects of the second draft revised broadcasting communication, in particular the recognition of the need to guarantee the editorial independence of public service broadcasters and the enhanced recognition of the principle of technological neutrality. We also welcome that the Commission is underlining the need to address the concerns and specific situation of small Member States.

However, we remain opposed to other aspects of the second draft. In particular we are concerned with the provisions with respect to the public remit, entrustment and supervision. Below we want to state again our view on these issues and respond to the Commission's draft proposal in more detail.

Public Service Remit and Media Pluralism

Public service broadcasters must be enabled to fulfil their public service missions in the digital environment and evolve with the same dynamic as other players in the audiovisual sector. This is important not only for the public but also for the journalists and media workers who are in charge of creating quality programmes in the digital environment. It is important to underline that the means of distribution are not relevant for clarifying the permissible scope of public service broadcasting activities. The crucial criteria is the content which has to respond to the democratic, social and cultural needs of society, independently from the platform where it is distributed. New services have to respond to the same criteria as traditional TV programmes.

Further, we believe that new services should not be evaluated solely by their impact on commercial competitors and should not be regulated solely according to economic/market criteria. At worst, such an approach could lead to a situation in which free market principles are the automatic default position and in which public service broadcasting always needs to justify itself as an exception. We take the opposite view that public service broadcasting in line with the Amsterdam Protocol is self-justifying and should not be required to provide evidence of its level of impact on commercial competitors.

Finally we would like to underline that in the future the availability of public service broadcasting and new public audiovisual media services on all distribution platforms

is a condition for these contents to remain public services, because of the need to give citizens universal access: the Internet as well as mobile platforms have to be open for public services if we want to preserve Europe's unique dual broadcasting system. This view is also expressed in the Recommendation of the Committee of Ministers of the Council of Europe on the remit of public service media in the information society (2007).

We agree with the fact that the balance between public and private media is part of the European audiovisual market. However, given the current situation of convergence we believe that the text should also mention, in addition to the print media and private audiovisual media services providers, the contribution of other online services to media pluralism (paragraph 16).

Regarding the definition of the remit, the only obligation for Member States under Article 86(2)EC is to provide a clear definition of the remit. Consequently, to ensure consistency with the case-law, the draft Broadcasting Communication should refer to a "clear" definition of the remit, instead of a "precise" definition. The current Broadcasting Communication states that "the definition of the public service mandate should be as precise as possible" (paragraph 37).

We welcome the recognition of platform neutrality in the definition of "significant new services" (paragraph 85) and we agree that "public service broadcasters should be able to use the opportunities offered by digitalisation" (paragraph 81).

Concerning "significant new services", we welcome the recognition of platform neutrality and the fact that the distribution of content through various platforms cannot be considered as several "new" services (paragraph 85)

With respect to pay services, the signatories would like to underline that in general public service broadcasting services should be universally accessible and free at the point of use. From our viewpoint, there needs to be a special justification for pay services as part of a public service remit. Such a justification can be that the pay service is an additional service (for example digital archives), which cannot be provided within in the current financing situation. In any case the fees need to be reasonable and should cover the costs of the service. Obviously, all existing or new pay services need to fulfil the democratic, social and cultural needs of each society and preserve media pluralism just as for any other elements of the public service remit. Each existing and future pay service may be admitted within the public service remit because of different criteria than we mentioned in the example of the online catch-up service.

We would like to reiterate that we do not think that it would be helpful to automatically define pay services as purely commercial services. Therefore pay services should not be excluded for public broadcasters or considered exclusively for services which are not offered on the market. In our view the new draft text is much clearer. However, the second sentence of paragraph 83 raises concerns regarding the status of pay services. Our position is that the presence of a direct remuneration element is irrelevant when assessing whether a service is consistent with the remit as defined by Member States.

Recognition of Quality and Editorial Independence

We welcome this major improvement to the previous versions of the text. The “safeguard of editorial independence” and the requirements of quality and balanced programming are among the major concerns of media professionals, in particular in the online environment (paragraphs 47 and 86).

However, in relation with this explicit mention of editorial independence in the current draft communication, we insist that members States should also be required to fully enforce the independence of public broadcasters through “appropriate mechanisms” mentioned in paragraph 86. As various studies and reports have pointed out, many EU member states simply fail to fulfil these criteria.

Entrustment and Supervision

The Broadcasting Communication should require member states to ensure that there is a clear and adequate definition and entrustment of the public service remit. The role of the European Commission is limited to the control for manifest errors. In its second draft revised broadcasting communication, the Commission maintains a uniform requirement for *ex-ante* assessment of significant new services for all public services in all EU Member States.

In our view, a requirement to perform specific *ex-ante* assessments is not compatible with the established competence of Member States to define the public service remit. The Amsterdam Protocol is very clear on this aspect and the Commission should respect the subsidiarity principle. It is the key principle guiding the distribution of competences between Member States and the EU in regulating public service broadcasting. Further we want to underline that in our view a requirement for an *ex-ante* impact assessment procedure goes far beyond the requirements laid down in Articles 87 and 86(2) of the EC treaty. 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.

The Commission already has the tool of “manifest error” to verify if necessary whether a Member State did cover purely commercial services when updating the public service remit. This *ex-post* measure ensures that the public service remit can evolve and respects the dynamic definition of broadcasting. *Ex-ante* measures would threaten innovation and development of new public audiovisual media services and can not be imposed to all public broadcasters in a harmonised way at EU level. The Commission commits here in our view the biggest mistake in its broadcasting communication: The business of broadcasting is about experimenting and developing, and public broadcasters should be allowed to freely do so.

Public service broadcasters enjoy editorial independence. This is very important to ensure quality programming and objective information services free from political pressure or interference. We believe that an *ex-ante* evaluation for new media

service would open up possibilities to interfere with the editorial independence of public service broadcasters.

Since the situation varies widely in different broadcasters and in different countries, we consider that a single *ex ante* procedure is not an appropriate mechanism in all Member States (paragraphs 84-90). For this reason, we support the wording of paragraph 86, which clearly leaves to Member States the choice of “appropriate mechanisms to ensure the consistency” of PSB.

Funding and Transparency

Regarding overcompensation we would like to express once again our opposition to any overly restrictive approach to overcompensation by which surpluses from public service activities would automatically have to be returned to the state, or by which public service broadcasters were restricted in their ability to channel profits from their commercial activities into the development of their public service activities, both in terms of programming and in terms of technology. We believe the approach to overcompensation is in danger of assuming that a free market approach is the default position and that public service broadcasting is an exemption, which has to be restricted or specially justified.