

The European Commission

Consultation 7.4.2009 – 8.5.2009

Revision of the Broadcasting Communication

The Federation of the Finnish Media Industry welcomes the opportunity to reply to the consultation on the Draft Communication on the application of State aid rules to public service broadcasting (hereinafter “the Draft”). As its reply, the Federation respectfully states the following:

Main messages

1. The Federation supports the very important revisions of the Broadcasting Communication that are set forth in the Draft. Attention is meritoriously drawn in the Draft to the competitive effects of public service as well as to the essential importance for media pluralism of competing private media programming. The direction of the revision is correct and an essential improvement compared with the Commission’s earlier, 2001, Communication, which in the present situation is inadequate to ensure that media can compete in the internal market.
2. The linkage between the negative competitive impacts of public service and a narrowing of the range of the programming offer and a weakening of media pluralism should be highlighted more clearly in the Communication than has been done in the Draft now presented. The State aid rules must be interpreted in the media market in a way that promotes everyone’s right to receive pluralistic communications, something that is included in freedom of expression.

The role of commercial media: point 16 in the Draft

In point 16 of the Draft, the Commission notes the role that the private media offer plays in, on the one hand, contributing to media pluralism and prompting a rich public cultural and political debate and, on the other, as public service broadcasting’s competitor, which will be the focus of the potential negative effects of State aid. It is aptly stated here that these effects can also impinge on newspapers and other print media. The Federation considers the competition configuration outlined in the Draft correct and essential from the perspective of interpreting the Communication.

The obligation on public service broadcasting to promote media pluralism is enshrined in the Amsterdam Protocol as well as in Article 11 of the Charter of Fundamental Rights of the European Union. Respect for pluralism has also been set, as a condition relating to regulation of

the media market, in an interpretation of Article 10 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. In order for the point of view of the media audience to be given appropriate emphasis in this context, the linkage between negative competition effects and, not only the development of new business models, but also all existing media offer must be highlighted more clearly. Indeed, point 16 should be complemented with a reference to media pluralism, for example as follows (proposed change in italics):

[...] Given that these operators are now competing with broadcasters on the internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models. State aid may also drive competitors out of the media market and thereby reduce the pluralism of the media offer to the detriment of the audience. As recalled by the Audiovisual Media Services Directive [...]

Definition of public service broadcasting remit: Chapter 6.1. of the Draft (points 43 – 49)

The Commission states in point 47 of the Draft that a qualitative definition of the public service mandate that entrusts a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered legitimate. Likewise stated in point 47 is that this can include also the mediation of audiovisual services through all technical distribution channels. However, something that is mentioned in the definition in point 48 as being in “manifest error” would be the financing of activities that do not bring clear added value for citizens and which at the same time causes unreasonable distortions of competition as well as distortions of cross-border trade.

What should be spoken of throughout Chapter 6.1. is, rather than the public service remit, more precisely the task of public service *broadcasting*. Even though it would be possible for broadcasting companies to use all technical distribution channels to mediate their programming, their public service mandate is to conduct broadcasting operations. Also activities that use new distribution channels must be associated with the broadcasting companies’ television and radio programming.

Because the mention in point 47 of a wide, balanced and varied broadcasting offer is very open, it would be essential to explicate the prerequisites for formulating a definition at least in such a way that the definition can not be made all encompassing in practice. This would be contrary to the Amsterdam Protocol and the general objectives of the Communication. For example, a definition in which a broadcasting company is assigned the task of providing a *full service*, which conceptually excludes nothing, can not be sufficiently clearly delimited. A definition that can likewise not be regarded as sufficient without additional qualifiers is one in which the public service broadcasting remit is to mediate a *varied and comprehensive* programming offer. In addition, a mention corresponding to the change outlined above in reference to point 16, of the demand concerning respect for pluralism, should be added to Chapter 6.1.

Pushing out competitors and jeopardising media pluralism to the detriment of the audience is the subject of a complaint by a Finnish news agency, currently pending in the Commission, concerning the news agency activities being pursued by a broadcasting company on electronic advertising panels in shopping centres. A manifest danger of pluralism being reduced exists also when, for example, broadcasting companies widen the scope of their activities into the market for regional and local news in text form.

The changes can be formulated in, for example, point 48 as follows (proposed change in italics):

[...] The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet - in the wording of the Amsterdam Protocol - the “democratic, social and cultural needs of each society”. That would normally be the position in the case of advertising, e-commerce, teleshopping, commercial prize-games, sponsoring or merchandising, for example. *The definition is in manifest error also if it does not exclude any functions or programming contents.* 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 (see also point 6.3.5.). *A situation that can be regarded as a disproportionate distortion of competition is one where, for example, State aid leads to competitors of broadcasting companies being driven out of the market in a way that jeopardises the pluralism of the media offer.*

Diversification of public broadcasting services: points 81 and 83 – 85 of the Draft

The technical neutrality of the public service remit is emphasised in points 81 and 84 of the Draft. The Commission states that also new forms of service provided by public service broadcasting companies over new distribution platforms must meet the same demands of the Amsterdam Protocol with respect to democratic, social and cultural needs and not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

In point 81, there should be a more precise mention of audiovisual public service broadcasting services rather than of audiovisual services. As already mentioned in the foregoing, activities over also new distribution platforms must be associated with public service broadcasters’ television and radio programming.

Also in all the points now under discussion, it would be necessary to take more clearly into account the demand with respect to media pluralism that is enshrined in both the Amsterdam Protocol and Article 11 of the Charter of Fundamental Rights of the European Union. If points 16 and 48 of the Draft are changed in the way proposed in the foregoing, they will undoubtedly guide interpretation of points 81 and 84 in the desired direction. For the sake of clarity, however, points 81, 83 and 84 should have the following text added (point 84 as an example, proposed change in italics):

[...] the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition *as well as on the pluralism of the media offered the audience.*

The word *significant* should also be deleted from points 84 and 85 as a precondition for the evaluation procedure for new services. Because the significance of new services can be evaluated with sufficient precision only through the prior evaluation procedure based on open public consultation as proposed in the Communication, they can not be excluded from the evaluation in advance by significance criteria.

Evaluation of market impacts: point 88 of the Draft

In point 88 of the Draft, attention is correctly paid to evaluation of impacts on the market. It is important to take into consideration the existing and potential offer competing with public service as well as the totality of the available public service offer. However, also in this context it would be preferable to make a connection to the public service obligation to promote and not to reduce the pluralism of the media offer (proposed change in italics):

[...] 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 pluralism of the media offer as well as* the existing overall public service offer.

Open consultation and independence of assessment: points 87 and 89 in the Draft

The open consultation referred to in point 87 and the demand made in point 89 that assessment of market impacts be independent are important guarantees that public service will be implemented in a way that serves the public interest and makes competition possible. It would be important in the Communication to safeguard not only the independence of assessment itself, but also oversight of the actual public service remit, i.e. the independence from broadcasting companies of the solutions arrived at on the basis of assessment. Oversight of the public service remit should be implemented in all cases before a service is expanded or a new one inaugurated and not just retrospectively through a complaints mechanism.

It would be of essential importance to ensure that oversight of the public service remit is not entrusted to broadcasting companies' own bodies in the Member States. In Finland, a parliamentary working group that deliberated a restructuring of the broadcasting system has, for example, proposed that oversight be conducted by the Supervisory Board of the Finnish Broadcasting Company, i.e. the same body that decides the objectives and key contents of the company's operations. The possibility of circumventing the demand for independence by separating the roles of different bodies within a broadcasting company should be excluded sufficiently clearly in the wording of the Communication.

The wording of point 89 ought to be clarified in this respect, for example as follows (proposed change in italics):

Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. *Nor may the organ that exercises oversight belong to the broadcasting company's own constituent bodies or participate in decision making concerning the company's activities.* Member States shall be able to design [...]

Federation of the Finnish Media Industry

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Federation of the Finnish Media Industry (Finnmedia / Viestinnän Keskusliitto VKL) is an umbrella organisation for the media sector and printing industry. Its task is to promote the conditions essential for the effective operation of the sector with the aim of ensuring a diverse range of mass media services for the Finns. The Federation represents about 800 companies with some 25,000 employees. The companies represented have an approximately 80% share of the mass media market in Finland. The Federation's members are the Finnish Periodical Publishers' Association, the Federation of the Printing Industry in Finland, the Finnish Newspapers Association, the Finnish Book Publishers' Association, the Association of Finnish Broadcasters, and the Association of Finnish Television Broadcasters.

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