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DG Competition  
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*Betreft* **Response of the Netherlands to the second draft  
Broadcasting Communication of the European  
Commission**

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## **1. Introductory remarks**

In September 2008, on behalf of 19 member states, and in reaction to the Commission consultation document, the Dutch Minister of Education, Culture and Science Mr. Plasterk, sent a common position paper to Commissioner Kroes about the revision of the Broadcasting Communication. The general conclusion of the position paper was that there would only need to be small changes in order to adapt the Communication to the technical developments of the digital age. It was apparent that DG Competition of the Commission tried to meet the needs of the member states as laid down in the common position paper. However, a majority of member states, including the Netherlands, was critical about the first draft communication. The draft contained many detailed criteria and examples which would leave member states little room to design procedures that fit in with national systems.

To the opinion of the Dutch authorities the second draft of the revised communication in many respects constitutes a significant improvement to the first draft. E.g. a lot of details and unclear examples in the text have been removed and there have been improvements in the text concerning the subjects of technology neutrality and pay services. In this regard, the Dutch authorities would like to thank the Commission for adopting a number of concrete text suggestions put forward by the Netherlands on earlier occasions.

Although the second draft constitutes a major improvement, the Dutch authorities do feel that there are still a number of issues that need further clarification, as well as

some remaining points of concern. These are outlined in section 2 of this reaction, accompanied, where appropriate, by concrete text suggestions.

## **2. Comments on specific paragraphs**

### **Nature of the aid (existing or new aid)**

#### **Paragraph 31**

The second draft considers “severability” as the main criterion for new aid, instead of “alteration of the substance of the aid”. This seems to be inconsistent with EC case law.

#### **Proposal:**

**Stick to the text of the first draft (par. 36).**

### **Definition of remit**

#### **Paragraph 48**

- ‘commercial prize-games’: it is not clear what constitutes a commercial prize game and whether the programme containing a prize-game is regarded as falling outside the remit, or whether the commercial revenue from the programme is considered to be a commercial activity.

- the last sentence is out of place. The disproportionate distortion of competition should not intervene in the stage when the public service remit is defined. Furthermore, the introduction of the new term “clear added value for citizens” leads to legal uncertainty.

#### **Proposals:**

- **Clarify what is meant by ‘commercial prize-games’**
- **Delete the last sentence (‘Moreover, ....section 6.3.5.’)**

## **Diversification of public broadcasting services**

### **Paragraph 83**

- The Commission seems to include an additional condition: pay services should remain "clearly distinctive from commercial activities". It is not clear to which activities the Commission refers: the commercial activities of the public service broadcaster or activities of commercial organisations.

Footnote 48: it is not clear what is meant by 'specialised premium content, which is not part of the general balanced and varied programming of a public service broadcaster'.

#### **Proposal:**

**For the sake of legal certainty the Dutch authorities would prefer if the Commission would not introduce new terms in this paragraph but would rather stick to the wording of the Amsterdam Protocol.**

**In case the Commission sticks to this sentence the Dutch authorities would request the Commission to clarify both the meaning of the phrase 'distinctive from commercial activities' as well as the meaning of footnote 48.**

### **Paragraph 85**

The term "simultaneous" (distribution of content) can be interpreted in different ways: is it limited to linear transmission at exactly the same time or can it be interpreted in a broader sense namely the same content on different platforms.

#### **Proposal:**

**For the sake of legal certainty replace the third sentence in par. 85 in "However, the principle of technology neutrality means that the distribution of the same content on a new distribution platform is not in itself a new service".**

## **Market Impact Assessment**

### **Paragraph 88**

- There are still some obligatory detailed criteria that the Dutch authorities feel are not in line with the principle of subsidiarity and the Amsterdam Protocol.

#### **Proposal:**

**Delete all the criteria for assessing the impact on the market, or at least, change “inter alia” into “for example”.**

- The Commission introduces a new last sentence with the new phrase “clear added value to society”. This leads to legal uncertainty and it might suggest that this is something distinct from the ‘democratic, social and cultural needs of society’ as mentioned in the Amsterdam Protocol.

#### **Proposal:**

**For the sake of legal certainty remove the reference to “clear added value to society” and stick to the terminology of the Amsterdam protocol, which uses the wording “democratic, social, and cultural needs of society”.**

## **Reserves**

### **Paragraph 75**

**Question: why is there an obligation for member states to lay down the *precise conditions* under which the general reserve of 10% may be used.**

### **Paragraph 79**

The Dutch authorities assume that this paragraph still allows for continuity of PSB reserves between financing periods. The text however leaves room for different interpretations, especially the sentence “any public service reserves existing at the end of the financing period (..) shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period”.

**Proposal:**

For the sake of legal certainty clarify that the sentence ‘any public service reserves existing at the end of the financing period (..) shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period’ still allows for continuity of reserves between financing periods.

De Permanente Vertegenwoordiger  
voor deze,

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Raad Economische Zaken