

European Commission
Directorate-General for Competition
State aid Registry
HT 963
B-1049 Brussels
BELGIUM

Amsterdam, 10 March 2008

Ref: FV/TN

Subject: Consultation review Broadcasting Communication

Dear Madam, Sir,

The Dutch Newspaper Publishers' Association (NDP) represents the interests of all the newspaper publishing companies in the Netherlands. All together our members publish 30 independent newspapers. Our members do not only offer content in printed media, but are also increasingly active in the online world.

The primary goal of the NDP is to create the conditions for an economic healthy press in the Netherlands, through which a pluriform offer of newspaper content (as well in print as electronic) can be realised.

In this letter the NDP would like to give its view on state aid to public service broadcasting and answer where possible the questionnaire of your Commission on the review of the Broadcasting Communication.

1. GENERAL

In general the NDP is of the opinion that excessive funding and overcompensation of public broadcasting organisations distort competition, not only within the Dutch broadcasting sector, but also on the market for traditional and new media services. The NDP supported in 2003 the complaint of the Dutch commercial broadcasting organisations concerning the state aid granted to the Dutch public broadcasting system. As publishers are also active on the market for new media services, and invest a lot of money in internet, the NDP filed in 2003 in addition to the complaint of the commercial broadcasters a complaint especially with respect to this market (see annex).

1.1. A number of significant legal developments have taken place in the public broadcasting area since 2001, namely the adoption of the Audiovisual Media Services Directive, the adoption of the Decision and Framework on compensation payments as well as Commission decision-making practice. Do you think that the Broadcasting Communication should be up-dated in light of these developments? Alternatively, do you consider that these developments do not justify the adoption of a new text?

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As the Broadcasting Communication was written already seven years ago, the NDP welcomes the evaluation of the Communication in the light of the different legal and technical developments.

Any changes in the Broadcasting Communication that will lead to more transparency and legal certainty, and at the same time will create a level-playing-field for all media, can be encouraged.

1.2. How would you describe the current competitive situation of the various players in the audiovisual media sector? Where available, please provide the relevant data on for instance leading players, market shares, market share evolution in the broadcasting/advertising/other relevant markets.

Since the start of television broadcasting in the beginning of the 20th century, the media landscape has changed significantly. Where state-interference at first was legitimated by the fear for the power of this new medium and because of scarcity in the air, nowadays there are lots of media through which a citizen can be informed, educated and entertained. The question can be asked whether member states, such as The Netherlands, have taken this changed media-landscape sufficiently into account in their media-policy.

In the Netherlands there are currently three big players on the audiovisual market: the Dutch public broadcasting organisation, RTL Netherlands and SBS Netherlands. The in 2006 newly introduced tv-station Talpa didn't survive commercially, and was taken over by RTL Netherlands in June 2007. Publishers are mostly not reckoned to the audiovisual media sector, but some publishing companies own shares in television companies, and also they offer increasingly audiovisual content on the internet (mostly video-on-demand). For exact market shares on the media market, the NDP would like to refer to the Dutch Media Authority, who since 2001 has been analysing the media concentrations and financial and economic developments in the press, television and radio sectors in the Netherlands. The latest report 'Concentration and pluralism of the Dutch media 2006' was published in September 2007 and is available (in Dutch) on www.mediamonitor.nl.

The general portal of Netherlands Public Broadcasting (NPO) is <http://portal.omroep.nl/>.

Through this website one can enter theme-sites, such as the general news site <http://www.nos.nl/nosjournaal/voorpagina/index.html> and the sports-site with sports news (text and audiovisual) <http://www.nos.nl/nosstudiosport/voorpagina/index.html>. Headlines of the news are also offered by NPO on <http://headlines.nos.nl/>.

Still a popular news site of the NPO is <http://teletekst.nos.nl/>. The information on this site is a copy of the Teletext service on television. On the internet page of Teletekst online-advertisements for commercial parties are being placed. The website <http://portal.omroep.nl/nederland4> offers thematic channels (politics, culture).

The total budget for Netherlands Public Broadcasting (NPO) in 2008 is 738,5 million euros. Netherlands Public Broadcasting (NPO) wants to spend 27 million euros on internet activities in 2008. Newspaper publishers can only invest in internet projects by allocating (parts of) their profits to such activities.

All the above mentioned kind of information, especially news, is also being offered by publishers on the internet. So generally speaking public broadcasters 'compete' for the

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same public as publishers.

Newspaper publishers have to obtain their advertising-revenues in competition with tv- and radio commercials, and more and more in competition with internet-advertisements. In the light of this the NDP would like to point out that the Dutch public broadcasting is allowed to exploit advertising on tv, radio and internet. Responsible for advertising space is STER, the marketing and selling organisation of the public broadcasting organisation. The NDP has several times put serious question marks to the existence of this organisation.

For the generating of reach (the costs of producing and distributing programmes) the Dutch public broadcasting organisations are paid through public means. On top of that they generate advertising income. Therefore the advertising tariffs of the STER can be relatively (not to say artificially) low. The relatively low price-setting of the public broadcasting with regard to the tariffs that newspapers have to practise for their print advertisements are a proof of that. For newspapers advertising-revenues are after all not 'extra' income, but a primary source of income. Newspapers are depending on the advertising market. The relatively low price-setting of the advertising-tariffs of the public broadcasting leads to unfair competition with newspapers. Besides this it has a price oppressing effect on the market as a whole, by which newspapers also suffer.

1.3. In your view, what are the likely developments and where do you see the major challenges for the sector in the future? Do you consider that the current rules will remain valid in the light of the developments or do you believe that adaptations will be necessary?

The NDP sees that the market for online news and information and for new media services is growing. This digital market is even more competitive than the 'offline' market. Therefore on this market it is of even more importance that a level playing field for all stakeholders is being guaranteed and unfair competition with public broadcasting should be prevented.

2. COMPATIBILITY ASSESSMENT UNDER ARTICLE 86 (2) EC TREATY, IN COMBINATION WITH THE BROADCASTING COMMUNICATION

2.1. Coherence with the Commission Decision and Framework on public service compensation

2.1.1. Do you consider that (at least some of) the requirements laid down in the Decision and Framework on public service compensation should be included in the revised Broadcasting Communication or not? Please explain why.

The Decision and Framework contain conditions under which public service compensation payments are or can be regarded as compatible with the common market, and in particular Article 86 (2) EC Treaty. The NDP understands from the explanatory memorandum that these contain a number of elements which are not mentioned in the current Broadcasting

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Communication. Defining the public service remit after wide consultations, requirement of separate accounts and regular checks on overcompensation are examples of elements that could be mentioned in the Broadcasting Communication. The NDP sees at this point no objections to include these elements in the Communication.

2.2. Definition of the public service remit

2.2.1. You are invited to provide information on the definition of the public service remit in your country, in particular as regards new media activities.

The current remit of the Netherlands Public Broadcasting is being described in article 13c of the Dutch Media Act:

“Section 13c

1. The tasks of public broadcasting shall be:

(a) to provide a varied and high-quality range of programme services for general broadcasting purposes at national, regional and local level in the fields of information, culture, education and entertainment and to transmit them, or cause them to be transmitted, on open networks;

(b) to perform all the activities relating to programme service provision and transmission required for that purpose;

(c) to provide and transmit programme services intended for countries and regions outside the Netherlands and for Dutch people residing outside the territory of the Netherlands.

2. Public broadcasting programme services shall provide a balanced picture of society and of people’s current interests and views pertaining to society, culture, religion and belief, and:

(a) shall be accessible to the entire population in the area for which the programmes are intended;

(b) shall contribute to the development and dissemination of the socio-cultural diversity of the Netherlands;

(c) shall be independent of commercial influences and, subject to the provisions laid down by or pursuant to the law, of government influence; and

(d) shall be aimed at a broad audience and at population and age groups of varying size and composition.

3. Public broadcasting may perform the tasks referred to in subsection 1, inter alia, by providing and disseminating programme material in ways other than those referred to in subsection 1 (a).”

The NDP is of the opinion that the current Media Act lacks a clear definition of the public service remit.

On Friday 15th of February 2008 the Dutch council of ministers approved with sending the proposal for a new Media Act to the Dutch parliament. This new act is also named ‘Multimedia Act’. All forms of electronic and digital services will be part of the remit of the Dutch public broadcasting organisation at the moment the new Media Act will enter into force (expectation is end of 2008). New media services will not anymore be considered

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as additional tasks, but as a part of the main task. The Dutch government hopes that the new description of the public service remit will take away the comments of the European Commission.

The NDP is worried that this new law will even lead to more unfair competition on the internet and on the market for new media services in general.

2.2.2. Do you consider that the distinction between public service and other activities should be further clarified? In the affirmative, which measures could provide such clarification (e.g. establishment by the Member State of an illustrative list of commercial activities not covered by the public service remit?)?

The public service remit is as stated above defined in the Dutch law. All kind of clarification of the rules for the distinction that will lead to more legal certainty and prevent unfair competition is welcome.

On national level, the NDP is of the opinion that STER-advertising (STER=Radio and Television Advertising Foundation for public broadcasting) and digital thematic channels should not be covered by the public service remit.

2.2.3. In the current Broadcasting Communication, activities other than TV programmes in the traditional sense can be part of the public service remit provided that they serve the same democratic, social and cultural needs of society. Does this provision sufficiently clarify the permissible scope of such public service activities? Why? In the negative, do you consider that further clarifications should be provided in a revised Broadcasting Communication?

In the report of the Netherlands Scientific Council for Government Policy (in Dutch called the WRR) 'Focus on Functions. Challenges for a Sustainable Media Policy' this distinguished advisory council pleads for new media policy in the light of the rapidly changing media landscape. The council has developed a functional approach to the media landscape as an alternative for what has been tried so far. This approach sees the media landscape as a cluster of six social and democratic functions:

- news services
- background to current affairs and opinion forming
- entertainment
- arts and culture
- specialized information and
- advertising and public relations

According to the Council, developments in the media should be seen and be evaluated in the light of these functions and their impact on society, rather than just at the level of the different media and their various infrastructures.

What the NDP supports in this approach is that the private, commercial sector of the media landscape is regarded as important as the public sector. Also commercial parties can serve the public interest. This functional approach does of course not imply government involvement in policy-making with respect to content.

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The NDP is in favour of a broad and coherent media-policy. So by determining the scope of the public service remit, one should take into account the whole media-landscape and its players, and must not tend to a tunnel-vision which is only focused on public broadcasting.

2.2.4. Do you consider that the general approach in the recent decision-making practice of the Commission (i.e. determination of the public service remit based on an ex ante evaluation for new media activities) could be incorporated into a revised Broadcasting Communication?

In the light of the above mentioned functional approach an ex ante evaluation for new media activities of public broadcasting organisations is absolutely appropriate.

2.2.6. Which services or categories of services should in your view be subject to an ex ante evaluation?

All (see 2.2.3), but especially new media services, as this is the market where public broadcasting organisations directly compete with publishers.

2.2.7. Should a revised Broadcasting Communication contain the basic principles as regards the procedural and substantive aspects of such an evaluation (such as for instance the involvement of third parties or the possible evaluation criteria, including for instance the contribution to clearly identified objectives, citizen needs, available offers on the market, additional costs, impact on competition)?

Although member states should maintain a certain discretionary power with regard to this evaluation, it seems not illogical to the NDP, indeed rather appropriate, that member states should always take into account the available offers on the market, the impact on competition and the function that commercial parties like publishers fulfil, before deciding to give support to activities of public broadcasting organisations in general.

2.3. Entrustment and Supervision

2.3.1. You are invited to explain in which way entrustment is granted in your country. Is the procedure leading to the entrustment subject to public consultation? To what extent is the broadcaster's remit laid down in legally binding acts of entrustment? To what extent is the implementation and determination of the exact scope of activities left to public service broadcasters? Are any such "implementing measures" publicly available?

The broadcaster's remit is laid down in the Media Act (see 2.2.). Changes in the Media Act have to have the approval of the Dutch Parliament (house of representatives and senate). According to the newly proposed Media Act the public broadcasting organisation is obliged to sign an agreement with the minister of Culture for five years about its policy and targets. Every year the public broadcasting organisations has to report about the obtained results. In 2007 this agreement was for the first time signed.

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2.3.2. Please explain the mechanisms to supervise public service broadcasters in your country. What is your experience of the existing supervision mechanisms? Do you consider that there are sufficient possibilities for third parties to take action against alleged infringements/non-fulfilment of public service (and other) obligations in your country?

The Dutch Media Authority (Commissariaat voor de Media) supervises the implementation of the media law regarding public as well as commercial television and cable operators. The Commission allocates broadcasting time to national, regional and local public media and gives licenses to commercial stations.

See for more information 2.7.1.

2.3.5. Should there be specific complaints procedures at national level where private operators could raise issues related to the scope of the public service broadcasters' activities? If so, what form should they take?

Specific complaints procedures at national level where private operators could raise issues related to the scope of the public service broadcaster's activities are welcomed by the NDP.

2.4. Dual Funding of public service broadcasters

2.4.1. What is – in your view - the expected impact of (partly) State-funded pay services on competition?

2.4.2. Should pay-services always be considered as purely commercial activities or are there instances in which they could be regarded as part of the public service remit? For instance, do you consider that pay-services as part of the public service remit should in this respect be limited to services which are not offered on the market? Or do you think that pay-services could be regarded as part of the public service remit under certain conditions? In

the affirmative, please specify which. For instance, should the conditions include elements such as specific public service objectives, specific citizen needs, existence of other similar offers on the market, inadequacy of existing public service obligations or inadequacy of existing funding to meet particular citizen needs?

Pay-services can off course compete with activities of other commercial parties. Therefore these kind of activities should be very restricted and may never lead to unfair competition.

2.5. Transparency requirements

2.5.1. To what extent are commercial activities carried out by the public service broadcaster itself in your country? Is there a structural or functional separation between public service and commercial activities?

Public service broadcasters are among other things allowed to advertise, sell merchandise like cd's and dvd's on their website, and to exploit their copyright (for example the tv-

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listings).

The current Media Act makes a distinction between four categories: activities with regard to their main task (the public service remit), additional tasks (that are linked to the main task, although this category will in future disappear), additional activities (which cannot be financed by public means) and activities for the members of the broadcasting organisation.

2.5.3. Do you consider that the rules for cost allocation as set out in the current Broadcasting Communication could be improved in light of experience in your country? If so, please give possible examples of good practice. Or do you consider that the current rules are sufficient?

Yes, the NDP is of the opinion that the rules for cost allocation can be improved. An example of no good practice are the negotiations between NDP and the Dutch Public Broadcasting about the tv-listings, that publishers want to publish in their newspapers. The Dutch Public Broadcasting Organisation has established a special legal body for exploiting the tv-listings, but NDP never got any insight into the structure of costs. Finally we agreed to disagree about this issue and we were forced to settle for a price that could not be rationalized by the Public Broadcasting Organisation.

2.6. Proportionality test – Exclusion of overcompensation

2.6.1. Do you consider that the Broadcasting Communication should include a requirement for Member States to clearly lay down the parameters for determining the compensation amount?

Yes, the NDP would support clear parameters for determining the compensation amount.

2.7. Proportionality test – exclusion of market distortions not necessary for the fulfilment of the public service mission

2.7.1. What are the available mechanisms in your country under which private operators could challenge alleged anti-competitive behaviour of public service broadcasters? Please indicate whether you consider that these mechanisms ensure a sufficient and effective control. Are lower revenues due to demonstrated anti-competitive behaviour (e.g. price undercutting) taken into account when determining whether or not the public service broadcasters have been overcompensated?

The NDP would on a national level support a more sufficient and effective control.

The Dutch Media Authority, called ‘Commissariaat voor de Media’, upholds the rules which are formulated in the Dutch Media Act as well as in the regulations based on this act. This is done by the providing of information beforehand and by subsequent supervision. The activities of the Commissariaat focus on both public service and commercial

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broadcasters and on cable operators. The Commissariaat was founded on January 1st 1988, coinciding with the date of commencement of the Dutch Media Act. The Commissariaat is an independent administrative body situated in Hilversum.

The NDP filed in 2004 a complaint to the Media Authority with regard to a cooperation between the NOS (Netherlands Public Broadcasting Organisation) and the Dutch telecom operator KPN. The NOS was going to broadcast live the full program of the Olympic Games in Athens through the broadband portal of KPN (through so called 'live feeds'). The NDP objected to this because it competed unfairly with other online-content providers, such as publishers, who also would have liked to offer these live feeds. The Dutch parliament also asked questions about this live-reporting on the internet in cooperation with KPN. The live feeds were available on the publicly financed website of NOS, but were only accessible for broadband internet subscribers of KPN.

Public broadcasting organisations are obliged to report their additional activities to the Media Authority at the latest when they start with these activities. The Authority publishes all the reported activities in a special register, that is available on the internet. The Authority always controls afterwards whether the Media Act is being complied with. The Media Authority decided on 14 March 2005 that the activity fell under the public service remit and that it was allowed to use public means for this. The Authority acknowledged that the NOS and NDP-members are active on the same market with regard to providing news on the internet. The Authority also acknowledged that they compete with each other, but that in this case there was no unfair competition, because the NOS obtained the rights to broadcast the live feeds in negotiation with the International Olympic Committee (IOC). Furthermore the Authority was of the opinion that the choice for telecom provider KPN was the result of a selection on basis of objective and knowable criteria (other parties were also offered a chance to cooperate with NOS).

The NDP was disappointed with this decision, also because the decision (march 2005) came long after the criticised activity (august 2004), so nothing could be done about that.

In general it can be said that the decisions of the Media Authority over the recent years seem to lack a certain consistency.

The NDP would support more effective supervision which also includes sanctioning mechanisms, only as far as this contributes to a better level playing field.

2.7.2. As regards the possible anti-competitive behaviour of public service broadcasters (and in particular as regards allegations of price undercutting), do you consider that the Broadcasting Communication should include requirements for public service broadcasters to respect market conditions as regards their commercial activities in line with Commission decision-making practice, including appropriate control mechanisms?

Yes, as stated before, the NDP would welcome appropriate control mechanisms, as long as these contribute to a level playing field.

2.8. Other issues

2.8.1. Do you consider that the reference to the difficulties of smaller Member States is necessary?

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2.8.2. What would you consider to be typical difficulties of smaller Member States and how should these be taken into account?

Yes, the reference to smaller Member States is necessary. In a small country such as the Netherlands, the media market is also restricted by language, and therefore the competition between public broadcasting and other parties is already relatively strong.

3. FINAL REMARKS

As a final remark, the NDP would like to pay attention to the situation on the Dutch market where the government gives financial ad-hoc support to tv-programmes (as well public as commercial broadcasting). Various ministries sponsored tv-programmes to the total amount of 12 million euros.

These ad-hoc payments are additional to the public means public broadcasters already receive. The NDP is therefore of the opinion that these additional ad-hoc payments should be deducted on the structural aid as far as it concerns tv-programmes of public broadcasters. Rather than further distorting the level playing field between the public service broadcasting organisations and the newspaper industry, the government should contemplate promoting their policy-messages through advertising in newspapers.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'C.G.G. Spaan', written over a horizontal line.

Drs. C.G.G. Spaan
Chairman of the Dutch Newspaper Publishers' Association