

**THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION ON THE
FUTURE FRAMEWORK FOR STATE FUNDING OF PUBLIC SERVICE
BROADCASTING**

**COMMENTS ON BEHALF OF RADIO TELEFÍS ÉIREANN (RTÉ)
DUBLIN, IRELAND**

1. **GENERAL**

1. RTÉ welcomes the opportunity given to industry stakeholders to voice their opinion on the review of the Commission Communication on the application of state aid rules to public service broadcasting.¹ RTÉ is of the opinion that this is the appropriate moment for such review in light of the significant developments in media markets and technologies, EU legislation² and the Commission's decision making practice over the last seven years.
2. As an introductory remark, RTÉ notes that in recent years the Commission has concentrated much attention on the functioning and past funding practices of public service broadcasting in the EU, based on the application of state aid rules as laid down in the current Broadcasting Communication. RTÉ appreciates the appropriateness of some of the Commission's actions in this field and it refers to the significant improvements that have been made in the laws governing the functioning and funding of public service broadcasting across the EU, including those in Ireland. Following these important fundamental changes to public service broadcasting all across the EU, RTÉ feels that the Commission should now indeed focus on the future of public service broadcasting in the EU.
3. Public service broadcasting plays a very important role in the European media model by promoting media plurality and a varied and balanced spectrum of views and cultures, all of which are an essential prerequisite for modern democracies. It is essential that public service broadcasting continues to be

¹ OJ C 320, 15.11.2001, p. 1 (hereafter the *Broadcasting Communication*).

² The Commission mentions in particular: (i) the Commission Decision of 28 November 2005 on the application of Article 86(2) EC to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (hereafter the *Decision on Public Service Compensation*), OJ L 312, 2.11.2005, p. 67; (ii) the Community Framework for state aid in the form of public service compensation (hereafter the *Framework on Public Service Compensation*), OJ C 297, 29.11.2005, p. 4; (iii) Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (hereafter the *Audiovisual Media Directive*), OJ L 332, 18.12.2007, p. 27; and (iv) Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (hereafter the *Transparency Directive*), OJ L 318, 17.11.2006, p. 17.

able to play that role in the future. A key issue in this regard is the development of new technologies, which is an opportunity for public service broadcasting but a great challenge at the same time. Public service broadcasting should be able to adapt rapidly to the fast-changing environment in order not to miss the opportunities offered to the public at large by new media. Public service broadcasting should be able to reach the general public by way of new media services and over new communication infrastructures such that all the services it provides are available in a meaningful way.

4. In light of the above, a revision of the Broadcasting Communication should, in RTÉ's view, therefore first and foremost aim at enhancing the functioning of public service broadcasting by allowing adequate and flexible financing without unnecessary and bureaucratic mechanisms. Member States need to preserve a wide discretion in defining public service broadcasting and must be able to grant appropriate funding for such public service mission in a rapidly changing media environment.
5. In this regard, it is key for the Commission to take into account that public service broadcasters and commercial broadcasters cannot be set on the same footing, as some commercial broadcasters argue over and over again. Public service broadcasters often have obligations to broadcast a wide range of programmes, which are far more expensive than the programmes of commercial broadcasters (for example extensive coverage of elections and other public events, coverage of nationally important but sometimes low audience sporting occasions) and at the same time often attract smaller audiences (for example the provision of programmes on national and European culture, documentaries, programmes in minority languages, parliamentary coverage). Moreover, such programmes are less interesting for advertisers compared to the programmes of commercial broadcasters, which are free to focus on the more profitable parts of markets. RTÉ believes that such fundamental differences should be well reflected in the Commission's policies.
6. The advertising market in Ireland was worth €1.8 billion approximately in 2007.³ The total television advertising represented 20.5% of this. This compares to a reported figure of approximately 40% for TV in the United Kingdom. Press is the dominant medium with a reported share of 61% of all advertising revenue. Within Television, the number of channels has grown significantly over recent years with the arrival of two new indigenous channels along with an increasing number of channels based in the United Kingdom but providing Irish advertising "windows" for the Irish market and which are available on cable and satellite. The increased number of channels in recent years has contributed to a reduction in viewing shares of RTÉ. RTÉ's two television services account for 38.1% of all adult viewing nationally in 2007 compared with 53% in 1997.

³ IAPI Adspend

7. It is likely that there will be more channels selling advertising in the television advertising market by way of cable and satellite platforms. Broadband penetration in Ireland is comparatively low by European standards. It is likely that the internet advertising revenue to be generated will increase significantly as broadband penetration increases. The tendency to view television in a non-traditional context such as IPTV, mobile etc., will grow over the coming years.

2. Questions

2.1 COHERENCE WITH THE COMMISSION DECISION AND FRAMEWORK ON PUBLIC SERVICE COMPENSATION

8. In question 2.1.1, the Commission asks interested parties to comment on the inclusion of the requirements of the Decision and Framework on Public Service Compensation in the revised Broadcasting Communication.
9. Whilst recognising that some requirements laid down in these instruments may be applied to public service broadcasting, RTÉ considers that the distinct nature of public service broadcasting certainly does not allow for a one-to-one application of all of these requirements, as will be explained below.
10. First, RTÉ notes in this regard that public service broadcasting activities are not merely Services of General Economic Interest (*SGEI*), which have been defined as “*economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention*”.⁴ Whereas Member States normally grant special or exclusive rights for SGEI in order to address pure market deficiencies, public service broadcasting is not only aimed at addressing market deficiencies (although it may do so as well) but also serves non-economic values. The Amsterdam Protocol⁵ describes these values as the “*democratic, social and cultural needs of each society and [...] the need to preserve media pluralism.*”
11. The special nature of media and broadcasting is also recognised by the Community Institutions themselves in several pieces of Community legislation. The Audiovisual Media Services Directive, for instance, explicitly states in its Recital 3 that audiovisual media services are as much cultural services as they are economic services. The text of the Recital refers to their growing importance for societies, democracy (in particular by ensuring freedom of information, diversity of opinion and media pluralism), education and culture.⁶

⁴ Service of General Economic Interest – Opinion Prepared by the State Aid Group of the Economic Advisory Group for Competition Policy, 29 June 2006, http://ec.europa.eu/comm/competition/state_aid/legislation/sgei.pdf, p. 1.

⁵ Protocol to the Treaty of Amsterdam on the system of public broadcasting in the Member States (hereafter the *Amsterdam Protocol*), OJ C 340, 10.11.97, p. 109.

⁶ RTÉ also notes in this regard that in the field of merger control in EU competition law, Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings

12. Moreover, the Council of Europe has also considered that it would not be appropriate to simply apply the principles of competition law to public service broadcasters.⁷ The Council's Group of Specialists on Public Service Broadcasting in the Information Society has noted in an expert report that: *"The methods used to regulate the provision of electricity, shipbuilding, foodstuffs and the like are not necessarily well-suited to the area of sustaining and developing cultural diversity and democratic citizenship. It seems that public service media are currently being pressed into the generic mould of competition regulation."*
13. Therefore, RTÉ takes the view that public service broadcasting cannot be put on the same footing as commercial broadcasting or other SGEIs since its missions and funding models are unique.
14. In RTÉ's view, as a result of its unique characteristics, the funding of public service broadcasting cannot be fully based on the rules laid down in the generally applicable Decision and Framework on Public Service Compensation. An attempt to include public service broadcasting in these instruments would require a number of exceptions to the general principles mentioned in these instruments as a consequence of which they would become far less accessible than they are now. RTÉ considers that a specific Community instrument such as a Broadcasting Communication remains the appropriate instrument for the Commission to use in its analysis of public service broadcasting financing.
15. For example, RTÉ considers that the method of calculating the public service costs should remain as described in paragraphs 55 and 56 of the Broadcasting Communication, in which the Commission has taken the specific characteristics of public service broadcasting well into account. In light of the fact that Member States may consider the whole programming of public service broadcasters as covered by the public service remit, while at the same time allowing for its commercial exploitation, those paragraphs correctly allow for costs that are entirely incurred to support the public service activities (while also benefiting commercial opportunities arising from the activities) not to be apportioned between the two and to be entirely allocated to public service activities. RTÉ considers that the method of cost calculation in public service broadcasting cannot be based on the proportionate attribution of such costs between the public service activity and the exploitation of the resulting commercial opportunity, as provided for in Article 5(2) (c) of the Decision on Public Service Compensation. The particular nature of broadcasting is such

(the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1, provides in Article 20(4) that, notwithstanding the sole jurisdiction of the Commission to review concentrations with a Community dimension, "*Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by [the EC Merger Regulation].*" The legitimate interests referred to are "*public security, plurality of the media and prudential rules.*"

⁷ Report prepared for the Council of Europe's Group of Specialists on Public Service Broadcasting in the Information Society, February 2006, [http://www.coe.int/t/e/human_rights/media/1_Intergovernmental_Co-operation/MC-S-PSB/hinf\(2006\)003_en.pdf](http://www.coe.int/t/e/human_rights/media/1_Intergovernmental_Co-operation/MC-S-PSB/hinf(2006)003_en.pdf), p. 46.

that the full costs of making a programme must be incurred in order to deliver it to the public service *schedule*. The necessity to incur these costs is in no way affected by the presence or absence of supplementary opportunities for commercial exploitation. This is a clear example of a requirement of the Decision that cannot be transposed one-to-one to public service broadcasting.

16. However, this does not mean that inspiration cannot be drawn from the Decision and Framework on Public Service Compensation at all to clarify certain aspects of public service broadcasting's funding. This is, for example, true in relation to the possibility of retaining a surplus exceeding 10% of the compensation amount at the end of an accounting period in case of a variation in costs (as reflected in Point 21 of the Framework on Public Service Compensation). This principle could be applied to public service broadcasting, since net costs in public service broadcasting also vary significantly each year, for example, as a consequence of the fluctuations in advertising revenue in the case of a dual funded broadcaster (RTÉ is funded 55% by commercial income, most of which arises from the sale of advertising time). In practice, fluctuations in the cost of coverage of non-annual political, cultural and sporting events and the necessity to provide for capital replacement in a rapidly changing technological environment may make it very difficult to operate within a fixed annual percentage of compensation. In addition accounting standards require a particular regime in the preparation of annual accounts which could result in the application of any fixed guideline having arbitrary and unintended effects. This is dealt with further below.
17. In conclusion, RTÉ is of the opinion that a Community Broadcasting Communication specifically targeted at public service broadcasting is the most appropriate instrument for the Commission to analyse state funding of public service broadcasting, although some inspiration may be drawn from the Decision and Framework on Public Service Compensation.

2.2 Definition of the public service remit

18. RTÉ's remit is (most significantly) set out in legislation from 1960, updated at various times since. The Irish government is about to publish legislation which will further clarify the remit of RTÉ.

Public service at EU level

19. In its questions 2.2.2 and 2.2.3, the Commission asks for comments on the necessity of additional clarifications in relation to the public service remit and other activities of public service broadcasters.
20. RTÉ wishes to note from the outset that in light of the democratic, social and cultural aspects of public service broadcasting, the Commission should fully respect the Member States' wide discretion in defining the public service, as confirmed by the Amsterdam Protocol. The Commission has correctly accepted in the current Broadcasting Communication that the public service remit might include certain activities that are not programmes in the traditional

sense such as on-line information services to the extent that they are addressing the same democratic, social and cultural needs of the society.

21. Current technological developments more than ever show the need for Member States to be able to impose a wide public service remit including new media services. Public service broadcasting must be able to reach the general public via means other than standard television over traditional communication networks. The Commission's role should continue to be limited to verifying whether the definition by the Member State of the public service remit does not amount to a manifest error.⁸ RTÉ is not in favour of any change in the division of powers between the Commission and the Member States in this regard.
22. In this context, the definition of audiovisual media services in the Audiovisual Media Services Directive as covering mass media in all its functions (informing, educating, entertaining) and formats (on demand or 'television-like' since both aim at the same audience)⁹ provides a useful source of inspiration for Member States by taking into account the increasing variety of mass media communications over different communications networks.
23. However, it is also clear from the Directive that it does not cover all activities, which Member States may wish to include in the public service remit of public service broadcasters. These activities include radio services, stand-alone text based services¹⁰ and possibly other (on-line) activities.¹¹ Member States should be able to extend their public service obligations to related fields of broadcasting that, although possibly at present not deemed a prerequisite for a complete broadcasting service, may become so in the near future.

Ex ante evaluation

24. In questions 2.2.4 to 2.2.8, the Commission asks interested parties to comment on the necessity and characteristics of an *ex ante* evaluation of new media activities.
25. RTÉ is of the opinion that requiring a heavy *ex ante* evaluation procedure would restrict the possibility of public service broadcasters to engage expeditiously in rapidly evolving new media activities. Such procedure would cause delay in the development process and require evaluation at a moment when the role and effects of the new activities cannot be ascertained.

⁸ Para. 36 of the Broadcasting Communication.

⁹ Recitals 17 and 18 of the Audiovisual Media Services Directive.

¹⁰ Recital 22 of the Audiovisual Media Services Directive.

¹¹ See also the Commission Decision of 1 October 2003 in Case N 37/2003, BBC digital curriculum, paras. 40-44, where the Commission considered that an on-line service providing interactive learning materials to homes and schools for free was sufficiently defined as a SGEI by the Member State.

26. Moreover, requiring such an ex-ante evaluation would go beyond the powers of the Commission under the state aid rules and would add a further additional bureaucratic layer contrary to the EU's policies of simplification of legislation and deregulation.
27. Finally, RTÉ wants to point out that, in any event, an *ex ante* evaluation is not *necessary* in order to protect commercial broadcasters from any unwarranted extension of the public service remit. It would be sufficient for national legislation to allow for an *ex post* assessment at the request of an interested party to ascertain whether a new media activity carried out by public service broadcasters is justified. Such a procedure would be less burdensome and would nevertheless ensure that action is undertaken if third party rights are at issue.
28. If the Commission were to consider that, in certain cases, only an *ex ante* evaluation can provide sufficient legal certainty for commercial broadcasters, RTÉ believes that the least burdensome procedure should be used, i.e. a prior notification system rather than a prior authorisation system.

2.3 Entrustment and supervision

29. The legislation establishing RTÉ dates from 1960. The Irish government is about to publish legislation which will establish a fully fledged media regulator and further clarify the remit of RTÉ.

2.4 Dual funding

30. RTÉ welcomes the Commission's confirmation of this principle, vital in particular in smaller Member States such as Ireland where state funding would be expensive or insufficient to provide a quality service.
31. Certainly there are instances where works of significant cultural interest are made available on CD, DVD etc. These are "pay services" in that members of the public must pay a fee. Typically these publications are put in circulation in the hope of cost recovery rather than profit. On a more general level the issue of pay services is one where the state of technology and the expectations of citizens is such that it is difficult to express a view on how such activities might develop in the future and therefore RTÉ would urge the Commission not to adopt any guidelines at this point in time.

2.5 Transparency

32. The annual cost of providing and financing RTÉ's public service activities is substantially in excess of the amount of public funding received. Consequently RTÉ as a dual funded public service broadcaster is significantly dependent on revenue generated from the commercial exploitation of opportunities arising from its public service activities. RTÉ publishes audited financial statements which include an analysis of the revenues, costs and surplus/ (deficit) by channel, service and broadcasting genre and between public service and non

public service activities. This statement clearly shows the net deficit on RTÉ's public service activities and the revenue and costs of, and contribution generated by, its non-public service activities. Consequently RTÉ is able to deliver on transparency requirements without the need for structural separation.

33. Segment reporting of the type adopted by RTÉ provides sufficient transparency. Structural separation would give rise to significant administrative costs and operational inefficiencies. Further requirements would be particularly burdensome for smaller public service broadcasters in smaller Member States.
34. RTÉ considers that the current rules are sufficient. RTÉ has invested significant resources in the provision of segment information in conformity with the existing rules, objectively justified cost accounting principles and applicable accounting standards (IFRS).
35. The Transparency Directive provides sufficient clarification: it requires the maintenance of separate accounts by undertakings entrusted with SGEI.

2.6 Proportionality – No Overcompensation

Parameters to determine the compensation amount

36. Question 2.6.1 of the Consultation raises the issue of whether Member States should be required to lay down parameters to determine the compensation amount for the provision of the public service.
37. RTÉ is of the opinion that there is no need to lay down any further parameters for determining the compensation amount other than those set out in the current paragraphs 54 to 56 of the Broadcasting Communication. These paragraphs already provide for a number of details on the way in which the net public service cost should be identified in the accounts of the public service broadcasters. This should allow the Member States (and the Commission) to carry out the necessary checks in an adequate way.

Financial stability of public service broadcasting

38. In questions 2.6.2 and 2.6.3, the Commission queries whether the current requirements and limitations (in particular in relation to surpluses) of the Broadcasting Communication may prejudice the financial stability and pluri-annual development of public service broadcasters. In particular RTÉ considers that any framework for the limitation of surplus retention must take account of the operational realities of broadcasting including:
 - the impact of high cost of coverage of non annual political, cultural and sporting events,
 - the necessity to retain surpluses to provide for the increasing cost of infrastructure in a fast changing technological environment,

- accounting surpluses because of the mandatory requirements for the timing of reporting of programme expenditure (in the year of broadcast not the year of production) would frequently not represent an accurate measure of “over-compensation”,
 - the impact of the requirements of applicable accounting standards including those which provide for the recognition of surpluses which are in some cases not available for spending on the public service activity,
 - the unavailability of portion of surpluses due to accounting requirements for defined benefit pension schemes.
39. RTÉ considers, in this regard, that it would be useful for the Commission to consolidate some of the elements developed in its decisional practice in a new Communication and to provide for additional safeguards to protect the financial stability and development of public service broadcasting. As discussed below, the Commission’s policy in this field should allow for flexibility, not only when it comes to the definition of the public service remit, but also in the determination of the amount of compensation for that public service.

Adaptation to new technologies

40. First, RTÉ notes in this regard that public service broadcasters should be able to upgrade the quality of the service they provide and adapt themselves to new technologies.¹² It is essential for public service broadcasters to be able to receive or retain funds for the financing of additional investments beyond what is required to finance the existing net cost of the public service mission based on current technologies. Under applicable accounting standards (IFRS, GAAP) surpluses for a year are determined after allowing for depreciation on the cost of previously acquired capital equipment. In a fast changing technological environment the cost of new equipment will often significantly exceed the cost of the equipment which it replaces. Accordingly, broadcasters must be allowed to retain sufficient surpluses to provide for such replacement.
41. The cost of the introduction of new technologies may be very significant and may have to be spread over a number of years. Public service broadcasters should be able to invest in new technologies without the threat of the Commission marking the funds for these new technologies as illegal state aid.

Necessary funds to acquire sports rights

42. Moreover, other forms of pluri-annual investment such as the acquisition of sports rights (e.g. football rights) require flexibility and funding, possibly beyond the strict realm of the net public service costs in a given year. The sums that need to be offered in auctions of sports rights, to have any reasonable chance, are very difficult to predict and public service broadcasting

¹² See also the Commission Decision of 19 May 2004 in Case C 2/2003, Financing of TV2, paras. 125-126 where the Commission considered that funds transferred to TV2 (and used by it) for the digitalisation of its production equipment, did not result in overcompensation.

should be allowed to make appropriate bids in order not to make the participation of public service broadcasters in such auctions illusory. A necessary corollary of this of course is that public service broadcasters need to be able to build up appropriate funds for the acquisition of sports rights without the threat of the Commission considering such funds as illegal state aid.

Surpluses

43. As part of the necessary flexibility in this regard, public service broadcasters should be able to retain a surplus at the end of an accounting period in order to react to fluctuations in revenues and costs, as established in the decisional practice of the Commission.¹³
44. RTÉ considers that a 10% overall cap on such surpluses is too restrictive.¹⁴ RTÉ refers to Point 21 of the Framework on Public Service Compensation in this regard, which specifically provides that for an SGEI with significantly varying costs over time, a surplus in excess of 10% in certain years should be possible. This certainly applies in the case of public service broadcasting, as set out in the above. Applicable accounting standards (IFRS, GAAP) set down very specific rules as to the accounting period in which costs can be recognised. While many of the costs of covering major sporting events e.g. Olympics are incurred over a number of years, accounting standards require that the full cost is recognised only in the year in which coverage is transmitted. This combined with the cyclical nature of major sporting, political and cultural event coverage results in major year to year fluctuations in broadcasters operating costs. Dual funded broadcasters often (in RTÉ's case always) need funds derived from commercial revenue to fund public service programming. The production or commissioning of such programmes will typically have a time lag. Accounting standards require that all revenue is recognised in the year in which it is earned while requiring that the costs of a public service programme funded by such revenue cannot be recognised until it is transmitted, often in a subsequent financial year. This is not an exceptional occurrence and therefore any fixed guideline is not at all appropriate.

¹³ Commission Decision of 19 May 2004 in Case C 2/2003, Financing of TV2, paras. 112-113; Commission Decision of 22 June 2006 in Case C 2/2004, Ad hoc financing measures of Dutch public service broadcasters, para. 147ff; Commission Decision of 24 April 2007 in Case E 3/2005, Financing of public service broadcasters in Germany, para. 281. The necessity to provide for a 'buffer' for fluctuations in revenue is particularly acute in the case of public service broadcasters which are financed through advertising revenue (such as RTÉ).

¹⁴ Note that in the Commission Decision of 22 March 2006, Aide à la création de la chaîne corse Via Stella, para. 50, the Commission accepted a provision of French law, which considered the compensation to be excessive in the case of a surplus above 15% in three consecutive years. In the Commission Decision of 7 June 2005, Chaîne française d'information internationale, paras. 52 and 58, the Commission accepted that the broadcaster in question only needed to refund surpluses exceeding 15% on average over two years.

45. Moreover, RTÉ considers that public service broadcasters should be able to carry such surpluses over to the next year and not have them deducted from the public service compensation for the following year.¹⁵
46. Finally, it is important for the Commission to take into account the fact that certain accounting “surpluses” are not at the disposal of the public service broadcasters and should therefore not be counted as surpluses at all. For instance, accounting standards (IFRS, GAAP) require the recognition of actuarial surpluses on defined benefit pension schemes in the accounts of the sponsoring employer. While such surpluses contribute to the broadcaster’s reported surplus they are not in fact available to fund its public service activities.
47. In relation to any possible safeguards as referred to by the Commission in question 2.6.4 in relation to surpluses, RTÉ is of the opinion that, due to the many cost accounting requirements already imposed on public service broadcasting, additional safeguards, on the use of surpluses should not be imposed. These would diminish the necessary flexibility of public service broadcasting policies and create a further bureaucratic burden and which would be disproportionate.

Efficiency gains

48. In question 2.6.5, the Commission asks stakeholders to consider whether the current rules of the Broadcasting Communication could act as a disincentive for efficiency gains.
49. RTÉ wishes to point out that various Member States currently give incentives to and impose obligations on public service broadcasters to achieve efficiency gains. In light of the Member States’ right to organise the public service remit and their right to compensate the costs associated with the services provided within the public service remit, Member States are also best placed to ensure that public service broadcasting funding yields the highest result in light of the public service mission of the public service broadcasters.

2.7 Proportionality – no unnecessary market distortions

50. RTÉ considers it not to be a task of the Commission to assess whether public service broadcasters operate efficiently. Member States themselves have every interest in ensuring that public service broadcasters spend state funding in the most efficient way. RTÉ does not see why the current Broadcasting Communication would act as a disincentive for efficiency gains.

¹⁵ This was accepted in Commission Decision of 19 May 2004 in Case C 2/2003, Financing of TV2, para. 113; Commission Decision of 22 June 2006 in Case C 2/2004, Ad hoc financing measures of Dutch public service broadcasters, para. 147 and Commission Decision of 24 April 2007 in Case E 3/2005, Financing of public service broadcasters in Germany, para. 281.

51. Irish Competition Legislation (the Competition Act 2002), based on Articles 81 and 82 EC Treaty, are available to private broadcasters to challenge alleged anti-competitive behaviour of public service broadcasters.

A requirement to accept market conditions

52. In question 2.7.2, the Commission asks for comment on the necessity of a requirement in the revised Broadcasting Communication for public service broadcasters to respect market conditions as regards their commercial activities.
53. RTÉ wishes to point out in this regard that it is clear from Article 86(2) EC Treaty that public service broadcasters are subject to the rules on competition contained in the EC Treaty, except to the extent that the application of these rules would obstruct their public service task. Public service broadcasters are also subject to various other legal instruments such as the Transparency Directive. There is therefore no need to provide separately in the revised Broadcasting Communication that public service providers in their commercial activities should respect market conditions.

The test for price undercutting

54. In question 2.7.3, the Commission asks public service broadcasters to comment on the methodology for detecting price undercutting by public service broadcasters.
55. RTÉ considers that the current test in the Broadcasting Communication is adequate and has shown its usefulness in the Commission's decisional practice.¹⁶ Due to the different market characteristics in various Member States, as well as the differences between public service broadcasters, it is not possible to give further details for the application of this test in the revised Broadcasting Communication. The application of the test depends on the particular circumstances of a case.

The need for additional requirements for the acquisition of sports rights

56. In question 2.7.4, the Commission asks whether any additional requirements or clarifications should be introduced in respect of the public funding of premium sports rights. RTÉ wishes to point out that the Commission has recognised that sports can be part of the public service mission and can therefore be financed as part of the public service compensation.¹⁷ This means that the Commission's assessment of the funding of such rights should be no different to its assessment of any other part of the public service.

¹⁶ See the detailed analysis made by the Commission in Commission Decision of 22 June 2006 in Case C 2/2004, Ad hoc financing measures of Dutch public service broadcasters, para. 158ff and Commission Decision of 19 May 2004 in Case C 2/2003, Financing of TV2, para. 140ff.

¹⁷ Commission Decision of 24 April 2007 in Case E 3/2005, Financing of public service broadcasters in Germany, para. 291.

57. RTÉ sees no need for the imposition of requirements on public service broadcasters in relation to “potential competition concerns” concerning the acquisition of sports rights, which the Commission does not further specify in its questionnaire. It is hard to see why requirements should be imposed if there is not a clearly perceived need for such requirements. RTÉ considers that the general application of competition rules suffices in this regard.
58. RTÉ notes however that in the exceptional circumstance that public service broadcasters do not use acquired sports rights, RTÉ could accept a requirement to sub-licence¹⁸ such unused rights to third parties.

2.8 Other issues

59. In its questions in section 2.8 of the Consultation, the Commission asks whether it is necessary to keep a reference to the difficulties facing smaller Member States in the Broadcasting Communication and what these difficulties are. As a public service broadcaster from a small Member State, RTÉ wishes to emphasise that there are a number of specific issues that smaller Member States are confronted with and which in RTÉ’s view should be taken into account when applying state aid rules to public service broadcasters.
60. Such specific issues include: (i) the competition from and availability of, in smaller Member States, broadcasters (both public and commercial) from larger Member States or from larger linguistic communities such as, in the case of Ireland, those broadcasters operating in the United Kingdom; (ii) adequate public funding for a public service broadcaster may be inadequate or extremely burdensome for the national budget of smaller Member States; and (iii) the more limited scope of public service broadcasting in smaller Member States means that such public service broadcasters have more difficulties to deal with excessive regulation and administration.
61. RTÉ is of the opinion that the fact that para. 62 of the Broadcasting Communication has never been explicitly invoked, does not mean that the Commission should not keep the possibility open in a revised Communication to take the size of Member States and the audience of a public service broadcaster into account in its state aid policy.

2.8.1 Conclusion

62. Finally, the Commission asks the respondents to the Consultation to consider the impact of any possible amendments to the current rules on innovation, the economy, and media plurality, as well as the administrative burdens and compliance costs involved.

¹⁸ Commission Decision of 24 April 2007 in Case E 3/2005, Financing of public service broadcasters in Germany, para. 321.

63. RTÉ is of the opinion that the current Broadcasting Communication has served its purpose well. It has enabled the Commission to address certain past practices in EU publicly funded broadcasting that were in need of reform.
64. Over the past few decades, public service broadcasting has played an important part in innovation in the broadcasting sector and has made an essential contribution to the quality and pluralism of audiovisual media to the overall benefit of the EU economy and even to the proper functioning of EU democracies. Public service broadcasters can only continue this role if they can adapt themselves to the rapidly evolving technologies in a flexible way.
65. Therefore, as set out above, a revision of the Broadcasting Communication should, in RTÉ's view, first and foremost aim at enhancing the functioning of public service broadcasting by allowing adequate and flexible financing without unnecessary and bureaucratic mechanisms. Member States have a wide discretion to define public service broadcasting and need to be able to grant appropriate funding for such public service mission in a rapidly changing media environment.
66. RTÉ is concerned about any further requirements the Commission may wish to impose on public service broadcasters, which are already under significant administrative obligations both as a result of their own Member State's regulations as well as a result of Community obligations imposed in this field. By revising the Broadcasting Communication, the Commission should therefore aim at reducing bureaucracy and keep the administrative burden and compliance costs to the strictest minimum necessary.

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