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**Reply by ARD/ZDF on the Questionnaire of the European Commission concerning
the Review of the Directive on the Re-Use of Public Sector Information
(PSI Directive)**

ARD and ZDF, the two public service broadcasting organisations in Germany, are grateful for the opportunity to participate in the European Commission's public consultation concerning the review of the PSI Directive.

ARD and ZDF will limit their reply to the question of a possible extension of the scope of the Directive. Public service broadcasters have been excluded from the scope of the Directive for different legal and practical reasons. As the situation for broadcasters remains unchanged, the exclusion from the scope is still adequate and justified. The application of the PSI directive to public service broadcasters would be at odds with the existing systems and would have no or only very little effect.

1. Since almost all of our material is covered by third-party intellectual property rights and would therefore remain outside the scope of that Directive, including PSB within the scope would have little effect.

Almost all information and data held by public service broadcasters are subjected to copyright protection. Given that third-party rights (e.g. music rights) are an integrated part of virtually all broadcast material, not only of acquired or commissioned productions, but also of programme material produced entirely by the public service broadcasters themselves, this would effectively exclude nearly all broadcast material held by public service broadcasters that could be potentially suitable for the re-use intended by the PSI Directive. Thus, copyright obligations make it practically impossible to leave data/information or content to third parties for re-use under the Directive. At the same time, efforts to clear all this material protected by copyright for third party re-use as well as the accompanying administrative work would be much too burdensome and costly and would cause serious difficulties in view of the complexity of copyright clearance for such re-use. Any such burdens would by far outweigh respective benefits

2. As editorial freedom and the confidentiality of sources must be respected, public service broadcasters cannot be obliged to provide access to (unpublished) journalistic material

The fundamental principle of the freedom of expression and information preserves as one core value the editorial freedom. Public service broadcasters have to decide on the basis of various considerations and, in particular, in the light of protection and confidentiality of journalistic sources, whether or not to make their content and related material available to third parties. An obligation to give access to all material, including that being non-published, would seriously jeopardize editorial freedom and the principle of protection of sources.

In addition, information and/or data held by public service broadcasters for example in their archives, are an immediate resource of programme-making and are used on a daily basis. Therefore, this cannot be left to third parties for commercial re-use.

3. According to European state aid rules, public service broadcasters have to respect, when licensing the content, the market price level

The PSI Directive determines the licensing of public sector information only on grounds of administrative costs. If this principle was to be applied to public service broadcasters' content, this would considerably devalue their programme property which would be detrimental to their (editorial) competitiveness vis à vis other actors and thus unacceptable.

In addition, already today, third parties can acquire broadcast material from public service broadcasters on a market price level. If the PSI rules were to be applied and thus only administrative costs would need to be considered as favoring of third parties by State aid. Furthermore, public service broadcasters are not allowed to license content under market price level. If they were to have to do so, one would have to clarify how this could be reconciled with the rules of financial transparency and market conformity in commercial exploitation as set out in the Commission's broadcasting communication of 2009.

4. Public service broadcasters' remits include already an obligation to give access to its content

Public service broadcasters already have as part of their public service remit the task of ensuring that citizens have the widest possible access to a broad range of content. Dissemination to the public benefits from technological progress and is no longer limited to (traditional) linear radio and television services but also includes non-linear audiovisual media services and other online services.

Setting out in the PSI Directive the conditions under which public service broadcasters have to give access to their content would therefore interfere and overlap with the definition of the public service remit, which - according to the Amsterdam Protocol - falls within the exclusive competence of the Member States.

5. The nature of Public service broadcasting

ARD or ZDF are not governed by the State nor financed by public sources deriving from the State. Their organisation and funding are independent from the State in order to safeguard the fulfilment of their public service remits based on programming and administrative autonomy as well as editorial independence. In other Member States the nature of public service broadcaster is very similar. Therefore, public service broadcasters are fundamentally different from the public sector bodies, as defined in Article 1 of the PSI Directive.

6. Additional arguments

Nevertheless, ARD and ZDF support non-commercial open data projects. ARD for example cooperates in the field of science, research or culture with third parties in view of building up data banks or portals for public, non-commercial access and use.

Finally, ARD and ZDF are convinced that, should information or data held by public service broadcasters fall under "freedom-of-information-act-like" legislation, they would not automatically become subject to the rules of the PSI directive. Legislation in the former sense is mainly constituted as a civic claim against the state or government/public bodies in order to enable people in their full citizenry rights. Its purpose is not commercial, but political. Legislation in the latter sense is provided for economic purposes driving new market activities. The purposes of and intentions behind those instruments significantly differ from each other and should not be confused. In particular, misuse of freedom-of-information-legislation for mere economic purposes of commercial actors should be prevented.

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