Response of the Netherlands to the draft Broadcasting Communication of the European Commission

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 is apparent that DG Competition of the Commission tried to meet the needs of the member states as laid down in the common position paper. In the multilateral meeting of 5 December 2008 however, a majority of member states was still critical about the draft Broadcasting Communication. The key argument was that the draft overly interfered with the competence of member states to define, organize and finance public service broadcasting. The Dutch government shares this opinion.

The current Broadcasting Communication is, on balance, a flexible instrument which presents the principles applicable to publicly funded public service broadcasting. In contrast, the draft for a revised Communication contains detailed criteria and examples for evaluation which leave member states little room to design procedures that fit in with national systems. In particular the Dutch authorities oppose an obligation for a broad and independent market impact assessment before approving new media services of public service broadcasters. This part of the draft inappropriately assumes that new services of public service broadcasters need more far reaching regulation than traditional radio and television. As a result, the draft fails to recognize fully that as radio, television, internet and mobile networks converge, public service broadcasters will need to use all electronic media to fulfil their role in society. The Dutch authorities question whether there is a legal basis in the Treaty (including the Amsterdam Protocol) to call for such a broad ex ante market impact assessment.

In sum, the Dutch authorities feel there is ample reason for improving the draft Broadcasting Communication. In particular, it urges the Commission to rethink the level of detail in the ex ante evaluation of new media activities. Below the Dutch authorities list and substantiate the specific problems and suggest concrete text proposals.

2. Paragraphs which need improvement

2.1 Paragraph 51 'Remit of the public broadcaster in the digital age'

In the position paper (point 5) the member states state: "In line with the principle of technological and platform neutrality, the BC should acknowledge that in the digital media landscape the public service remit can include all electronic content. A flexible definition should allow member states to entrust public service broadcasters with a remit that could include a diversity of programmes on digital radio and television and which could include the possibility to make full use of new forms of distribution, such as the internet and mobile

telecommunication networks. Thus, it should be made clear that the means of distribution are not relevant in classifying a public service activity."

The Dutch authorities appreciate the Commission's effort to include the principle of technology neutrality. They feel however that non-linear audiovisual services are still treated differently from linear audiovisual services. This makes the draft inconsistent with the new Audiovisual Services Directive[1] and could hamper digital development of public service broadcasters.

The Dutch authorities therefore suggest the following amendment in paragraph 51:

51. Public service broadcasters shall be able to use the opportunities offered by digitization and the diversification of distribution platforms on a technology-neutral basis to the benefit of society. In order to guarantee the fundamental role of public service media in the new digital environment, public service broadcasters may provide audiovisual media content in the form of linear services **as well as in the form of non-linear services** over new distribution platforms, **catering for the general public as well as special interests** provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.

2.2 Paragraphs 52, 53 and 54 'Services paid for by end users'

In the position paper (point 11) the member states state: "The BC should not exclude the possibility for public service broadcasters to offer pay services as part of the public remit. This can be necessary to ensure appropriate and secure funding of public service media in the digital media landscape, especially in smaller language markets within the EU."

The Dutch authorities appreciate the fact that the draft Communication recognizes the possibility for member states to include pay services as part of the public service remit. However the explanation given in paragraphs 53 and 54 is unclear and confuses a number of issues.

In paragraph 53 the explanation on universality is only partially correct and does not sufficiently take into account its definition as laid down in the recent BUPA case[2] (see points 186 and 187): "As regards the universal nature of the PMI services (…), the concept of universal service, within the meaning of Community law, does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory". "Accordingly, the fact that the SGEI obligations in question have only limited territorial or material application or that the services concerned are enjoyed by only a

[1] Directive 2007/65/EC of the European Parliament and of the Council 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 (OJ L 332 of 18 December 2007).

[2] Case T-289/03.

relatively limited group of users does not necessarily call in question the universal nature of an SGEI mission within the meaning of Community law."

Moreover the Amsterdam Protocol leaves it up to member states to decide about the methods of funding. Paid services should be treated as an alternative or extra source of income, next to government funds and advertising.

Attention should also be paid in this regard to the recent TV2/Denmark judgement of the Court of First Instance[3]:
"The possibility open to member states to define broadcasting SGEIs broadly, so as to cover the broadcasting of full-spectrum programming, cannot be called into question by the fact that the public service broadcaster also engages in commercial activities, in particular the sale of advertising space." (point 107) "Calling such activities into question would be tantamount to making the very definition of the broadcasting SGEI dependent on its method of financing. An SGEI is defined, *ex hypothesi*, in relation to general interest which it is designed to satisfy and not in relation to the means of ensuring its provision. As the Commission points out in point 36 of the Communication on broadcasting, 'the question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services'." (point 108)

The Dutch authorities therefore take the view that this chapter should not start, as stated in paragraph 53, with the assumption "that the direct payment for a service may negatively affect the universality". Instead, the starting point should be, as stated in paragraph 54, "that the provision of public services to satisfy the needs of those parts of the society with special interests may necessitate additional resources. In that case a member state may choose not to impose the burden of financing of such a public service on the whole population, but only on those interested in accessing the service."

In addition, the mentioning of examples in paragraph 54, among which premium (football) content, is questionable. The Commission qualifies the final of the UEFA Champions' League on a pay-per-view or subscription basis as a commercial activity. It is unclear whether in this example the method of funding or the content is the decisive criterion. In any case, it is up to member states to define the public service remit (which can include sport) as well as the sources of funding (which can include direct payment by users). By stating that premium content on a pay-per-view basis cannot be financed through State aid, the Commission consequently jumps to the conclusion that this type of service of a public broadcaster is a so called *manifest error* (the role of the Commission is limited to control for manifest errors). However, the evaluation of a service very much depends on the specific circumstances in a member state, which should be taken into account by the Commission.

The Dutch authorities therefore suggest that paragraphs 53 and 54, as well as the last sentence of 52 be removed from the draft. The current paragraph 55 is sufficient and clear.

[3] Judgment of the Court of First instance of 22 October 2008 in Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04.

2.3 Paragraphs 59 to 62: 'The ex ante evaluation'

In the position paper the member states ask the Commission to take into account the following principles:

- Although similar in essence, the details of the remit, the organization and the financing of public service media cannot be harmonized across Europe, but should continue to reflect national needs, national culture and national constitutional law. Therefore the BC may include only a number of basic and flexible principles and can not create detailed rules on the basis of State aid measures taken within individual member states over the past years (point 2)
- The BC may underline that the public service remit is to respond to the democratic, social and cultural needs of society. The benchmark for public services lies in criteria such as diversity, independence, quality, accessibility and reach. The BC cannot limit the public service remit to services which are not available on the market, neither by criteria with regard to *content* nor by rules concerning the entrustment *procedure* (point 4)
- The BC may acknowledge that the public service remit is fulfilled by the *totality* of programmes and services which public broadcasters offer and can not be broken up into independent parts. This also means that 'old' and 'new' media services are inextricably linked (point 6)
- In line with the present communication the BC should require the member states to ensure that there is a clear and adequate definition and entrustment of the public service remit. The role of the Commission is to control for *manifest errors*. It should be made clear that the form of the legal act and the choice of procedure for entrustment is for the individual member states to decide (point 7)
- The BC may require member states to have procedures demonstrating how public service media meet the democratic, social and cultural needs of their respective societies. However, any inclusion or suggestion on the use of criteria concerning the public service character of activities goes beyond the Community's competence (point 8)
- The BC may invite the member states to consult on the public service remit, but should not limit member state's options for ex ante evaluation by requiring them to perform a broad, independent, market impact assessment before approving any (new) activities of public service media (point 9)

The Dutch authorities feel that the Commission has insufficiently taken into account these principles in this part of the draft. This is substantiated below.

Flexibility

First, the draft contains too detailed criteria and obligations that go beyond recent case practice on state aid and public service broadcasting. Even if the draft were to remain close to case practice, a revised Broadcasting Communication can not translate measures which were negotiated in individual cases between the Commission and certain member states into a solution for all member states (*one size fits all*).

The obligations in the draft even go beyond the 2005 Community framework for state aid in the form of public service compensation[4]. This framework does not require the member states to perform a broad market impact assessment beforehand. It only asks for a public consultation in which, in particular, the user should be heard. Compared to the general framework for SGEI the detailed criteria in the draft Broadcasting Communication leaves member states less room to design procedures according to national needs and cultures. This is remarkable, since the Amsterdam Protocol stresses subsidiarity in the field of public service broadcasting.

No separation of services
Second, the ex ante evaluation proposed in the draft tends to break down the overall offer of the public service broadcaster into independent parts. According to the Dutch authorities, this is not a viable option. The public service broadcaster offers public content in various forms via various networks: general radio and television channels, digital special interest channels, on-demand audiovisual media services, websites, etc. In the digital media landscape such 'old' and 'new' media activities are inextricably linked. The notion of a broad, prior market impact assessment for new media activities fails to acknowledge this connection and could hamper digital innovation and audience reach of public service broadcasters. Moreover, the Dutch authorities would argue that the distinction between the public service broadcaster and commercial media is not always apparent in each single activity (programme, website, digital special interest channel, mobile service). Rather, the value of public service broadcasting lies in the range, diversity and quality of its overall offer.

Market interests
Third, the reasoning, criteria and examples of ex ante evaluation intervene with the competence of member states to define the remit of a public service broadcaster. The Dutch authorities refer to the recent ruling of the Court of First Instance in the TV2/Denmark case[5]. In point 123 the CFI notes: "To accept that argument and thereby to make the definition of the broadcasting SGEI dependent – through a comparative analysis of programming – on the range of programming offered by the commercial broadcasters would have the effect of depriving the member states of their power to define the public service. In fact, the definition of the SGEI would depend, in the final analysis, on commercial operators and their decisions as to whether or not to broadcast certain programmes. As TV2 A/S rightly submits, when the member states define the remit of public service broadcasting, they cannot be constrained by the activities of the commercial television channels."

A mandatory ex ante assessment, which in practice could determine to a large extent the public task by the impact a service of the public service broadcasters may have on the commercial offer, is not consistent with the CFI judgment which rejects the definition of the remit by reference to the activities of the commercial operators.

Furthermore the Dutch authorities feel that market distortion is first and foremost prevented by proper *entrustment* of the public service remit, *monitoring* of actual delivery, and *proportionality and transparency of funding* of the public service broadcaster. See chapter

[4] Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).
[5] See footnote 3.

6.3.3.4. ("Market distortions") in the Commission's draft which deals with respecting market principles (undercutting prices or overbidding for programme rights).

The Netherlands and most other member states follow the principle that public service broadcasters have a wide and independent remit. Activities undertaken by public service broadcasters in fulfilment of their public service remit must meet the criteria inherent in that, such as diversity, independence, quality, accessibility and reach. The Dutch authorities do not call into question the necessity of transparency and a clear public task. As it is worded in point 22 of the Commission communication on services of general interest[6]: "in every case, for the exception provided for by Article 86 (2) EC to apply, the public service mission needs to be clearly defined and must be explicitly entrusted through an act of public authority (including contracts) … This obligation is necessary to ensure legal certainty as well as transparency vis-à-vis the citizens and is indispensable for the Commission to carry out its proportionality assessment."

The Dutch authorities do not call into question the necessity of transparency in relation to third parties and the need to take their interests into account. In the Dutch system all third parties, including commercial parties active on the market, have the right to bring forward their interests and viewpoints, before the government decides which activities the public service broadcaster may engage in.[7] The proposed decision and the final decision, as well as the grounds for the decision, are made publicly available. This means that the interests of third parties are heard and weighed, but this does not mean that the overall offer of the public service broadcaster is a derivative of the commercial market offers.

Administrative aspects

Fourth, an elaborate ex ante evaluation of new services will entail considerable costs and increased administrative burden. Especially in the smaller member states and in member states where public service broadcasters work on a tight budget, the costs of ex ante evaluation will be disproportional to the aim.

In the multilateral meeting on 5 December, the Commission said that it hoped that a market impact assessment on the national level will reduce complaints at the European level. However, the Dutch authorities think that the level of detail in the draft is liable to lead to more complaints, both at the national level and the European level. Moreover, the Commission can not delegate its powers to check for manifest errors to member states.

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[6] Communication from the Commission on services of general interest in Europe (OJ 2001 C 17, p. 4, 'the communication on services of general interest').

[7] Every five years the Minister of Education, Culture and Science grants *prior approval* to all activities outlined in the public broadcasting policy plan. For any new activities introduced subsequent to that point, the public service broadcaster must request interim approval upon submitting its budget. Two *autonomous bodies*, the Council for Culture and the Media Authority, advise the Minister on this matter. The assessment criteria are set down in the Media Act, which requires (1) diversity (a balanced mix of information, culture, education and entertainment from different perspectives, for audiences both large and small), (2) editorial independence, (3) professional quality, (4) accessibility and (5) reach among various target audiences. *Third parties* have the opportunity to present their reactions and points of view in the decision-making process. The public broadcasting policy plan and the draft decision by the minister are made public. Objections can be lodged against the Minister's decision, under the terms of the General Administrative Law Act.

Legal aspects

Fifth, the Dutch authorities question the legal basis for the broad independent and detailed ex ante evaluation as proposed in the draft. The Amsterdam Protocol interprets the Treaty provisions as giving more latitude to member states and not as requiring member states to carry out a broad market impact assessment for new activities of public service broadcasters. Moreover the compatibility of aid, especially where it concerns existing aid, can not be called into question because no ex ante assessment has been carried out by member states.

Also the Treaty itself does not require member states to conduct a broad market impact assessment beforehand. Articles 87 and 86 (2), do not require ex ante assessment of new services. In Community law and for the purposes of applying the EC Treaty competition rules, there is no clear and precise regulatory definition of the concepts of an SGEI mission. There is also no established legal concept definitively fixing the conditions that must be satisfied before a member state can properly invoke the existence and protection of an SGEI mission (either within the meaning of the first Altmark condition or within the meaning of Article 86 (2) EC). See the BUPA case (point 165).

It follows from point 22 of the Communication on service of general interest[8] and point 36 of the current Broadcasting Communication that the Commission's task when evaluating the system of public service broadcasting, and services of general economic interest in general for that matter, is to control for manifest errors. Given this limited role, the Dutch authorities do not see how the Commission can justify a mandatory and detailed market impact assessment on an EU-wide level, especially in the field of public service broadcasting.

The Amsterdam Protocol emphasizes the specificity of public service broadcasting in the member states by stating that it is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. Public service broadcasting is thus not like other services of general economic interest and the principle of subsidiarity is all the more important with regard to the definition of the public service broadcasting remit.

Considering the arguments above, the Dutch authorities have serious problems with paragraphs 58 to 64 of the draft entailing a detailed regulation of new services. This part of the draft involves a *requirement* on member states ("should consider", "shall assess"), a mandatory procedure carried out before the introduction of the service (*ex ante*), a clarification of what is considered a new service, a right for competitors to give their views, and an assessment carried out by an external body (independent of the management).

The Dutch authorities feel that these paragraphs can be adjusted to the satisfaction of all parties concerned. The Netherlands therefore has the following suggestions for compromise.

[8] See footnote 5.

Text proposal

The Dutch authorities suggest removing points 60[9] and 62 and rewriting point 61 to include one single and general obligation for member states with the following wording:

"61. In order to consider the potential effects of the services in question on the market, and to avoid undue distortions of competition, member states shall assess, **within the context of the overall offer of the public broadcaster, the consequences entailed by the envisaged new service, by an evaluation procedure based on open public consultation."**

3. Other paragraphs

The Dutch authorities think there are other parts of the draft which could also be improved:

- par. 58: in line with the principle of technological and platform neutrality remove the part between the brackets: '(e.g.: non linear or on demand rather than linear)'

- par. 64: following the proposed changes in the previous paragraphs remove the part: 'a thorough assessment at national level, carried out in an independent manner, taking into account'

- par. 66: In this paragraph the Commission asks for *parameters* for providing compensation. The term 'parameters' is not convenient in the case of public service broadcasting. Public funding of a public service broadcaster is generally designed to cover the foreseen needs over a longer time period, arrangements being made to match compensation with corresponding net cost. But quantitative parameters can not be fixed due to the complexity of broadcasting services. In other sectors this calculation does make sense as can be seen by the example of a private bus company considering an SGEI fixing a certain amount per ride. Moreover, parameters could prove to be a source of undue litigation and claims by third parties. Attention should also be paid to the TV2/Denmark case where the Court notes that the second (Altmark) condition leaves member states free to choose how to comply with it in practical terms" (point 227). A solution can be found in not using 'parameters' but the more general term 'conditions'.

- par. 89: here the Commission confuses the competence of member states to define the public task and the proportionality test regarding the funding of this task (test on overcompensation and cross-subsidization). The Dutch authorities suggest removing this paragraph.

- par. 100: the Dutch authorities oppose the maximum period (of 4 years) for which financial buffers can be maintained. The draft seems to suggest that member states should lower the

[9] Which is already covered in paragraph 57.

annual budget of the public service broadcaster when they maintain reserves four years in a row. Eventually, this would leave the public service broadcaster with (almost no) reserves which of course is not workable. The Dutch authorities suggest removing this paragraph.

- par. 102: again the Commission mentions the example of premium sport. This example is superfluous and focuses unnecessarily on premium sports content. Moreover it is not clear what is meant by "transparency concerning the general framework governing the acquisition, use and possible sublicensing of premium rights by public service broadcasters". What is meant by 'a general framework'? The acquisition of broadcasting rights of content is primarily a concern of the public service broadcaster. Each case can be assessed by the Media Authority on its own merits, taking into account the specificities of each case. The Dutch authorities suggest removing paragraph 102 and transferring the word 'consistently' in the seventh sentence from this paragraph to paragraph 105 ("or whether they are *consistently* overbidding for programme rights").

- par. 105 last sentence: at the beginning of this paragraph the Commission writes that the condition of respecting market principles (for example advertising prices and payments for programme rights) shall primarily be assessed at national level, taking into account the specificities of each case and each market. That is why it is not desirable to mention examples here, because examples will always be referred by the Commission or third parties, which eventually will leave less room for member states. The Dutch authorities suggest removing the examples in the last sentence.

4. A procedural request

The Dutch authorities request the Commission to present a second draft version of the Broadcasting Communication to be discussed at another multilateral state aid meeting after the consultation.