



VPRT Position

**on the proposed amendment to the Communication on the
application of state-aid rules to public service broadcasting**

("Broadcasting Communication", 2001/C 320/04)

Overview of the VPRT position

1) Support for the EU Commission

→ A **revision** of the Communication is **urgently required**. The EU Commission is responsible for ensuring compliance with competition law and therefore also able to draw up guidelines for publicly-funded broadcasting.

→ A **precise definition of the remit** by Member States is the key to fair competition. This is the only way for Member States, or in case of complaint, the EU Commission, to **effectively control** the use of state funds in accordance with the remit and thereby **prevent cross-subsidisation and overcompensation**.

→ In its role as **guardian of EC competition law**, the EU Commission is able to release Member States from undertaking statutory entrustment in the event that new offerings are launched onto the market, provided that an *ex ante* evaluation (Public Value Test - PVT) is carried out. **In-depth detail** is therefore **justified** in this case.

→ In a democracy, **independent control** should be **a matter of course**. Only external control can also guarantee structural independence. In the event that **control** is exercised by an **internal body**, such independence must be ensured by way of **procedural rules** to exclude exertion of any undue influence on the controlling body by the company/management it controls.

→ Prior to commencing new activities, i.e. before extending the remit of publicly-funded broadcasting companies, a **market analysis** must be carried out to ensure that competition will not be unreasonably distorted to the detriment of commercial offerings. As guardian of EC competition law, the EU Commission may determine the relevant criteria, even in the broadcasting sector.

→ Monitoring **compliance with market principles** is one of the EU Commission's primary assignments. Apart from effective controls by the responsible controlling bodies, a major contribution to effectively preventing distortions of competition can also be made by **granting competitors a right to file complaints with an independent complaints body** and introducing appropriate **sanctions** in the event of breaches by public broadcasters.

2) VPRT requests

→ **Transparency**: only by **allocating costs to cost or profit centres** is it possible to effectively control the application of resources and prevent both overcompensation and cross-subsidisation.

→ **Ex ante evaluation (PVT)**: a passage should be included, according to which Member States must stipulate a reasonable period for the submission of third-party opinions. It must also be ensured that third parties are actually made aware that an *ex ante* evaluation is to take place and that their comments are in fact incorporated into the decision-making process.

→ **PVT also necessary for pilot projects**: pilot projects should also undergo an *ex ante* evaluation process since these could prejudice a subsequent three-step test.

→ **Scepticism vis-à-vis public pay-offerings**: the VPRT views pay-services for publicly-funded broadcasters with scepticism. These should not serve to dilute their main programming by promoting orientation towards specific target groups and increasing fragmentation. The introduction of publicly-financed pay-offerings must be considered on a case-by-case basis.

→ **10% surplus appears too high**: without the relevant transparency in relation to costs and the application of resources (see above), a surplus holds a considerable risk of overcompensation and/or cross-subsidisation.

→ **Effective control**: the VPRT suggests that a passage be included according to which **minority interests** must be reviewed by the responsible national controlling bodies in order to avoid cross-subsidisation.

A. Preamble

The German Association of Commercial Broadcasters and Audiovisual Services, (VPRT¹) takes the view that the revised guidelines proposed by the EU Commission for assessing whether the financing of public service broadcasters is compatible with both Art. 86 para. 2 EC Treaty (ECT) and the Treaty of Amsterdam Protocol, the so-called "Broadcasting Communication", are both meaningful and capable of improving legal certainty for all those concerned. Revision of the Communication, which dates from 2001, is essential in view of the decisions meanwhile issued by the Commission and in order to conform with European Court of Justice decisions.

The Communication sets out the decision-making parameters which the Commission is to consider in making future judgments. It summarises the conclusions reached by previous case law, which would anyway have to be taken into consideration by the Commission and is therefore useful to Member States, as well as to public service and commercial broadcasters, in evaluating new facts and circumstances in terms of the law governing state aid. It can help to reduce the number of disputes involving state financing for public service broadcasting.

Upon joining the EU, Member States make a commitment to its system of a social market economy, one of the basic principles being freedom of competition. To avoid unnecessary impairment of this principle or any obstruction of intra-Community trade, Member States are only allowed to finance companies out of public funds in the exceptional cases clearly defined under state-aid law, and only under certain conditions.

According to Art. 16 of the EC Treaty, both the Community and its Member States must, in the context of their relevant competence within the scope of application of this Treaty, ensure that the principles and conditions required to operate services of general economic interest are defined in such a way that they are able to fulfil their assignments. This constitutes recognition of the fact that discretionary power to structure such services lies with the Member States.

Although the provisions of the EC Treaty relating to state-aid law are essentially also applicable to services of general economic interest, Art. 86 of the EC Treaty does, within narrow limits, allow for exceptions to state-aid legislation. These are however subject to the condition that any such exception does not prejudice the development of trading activities to such an extent that the interests of the Community are adversely affected.

In the case of the dual broadcasting system, both the Amsterdam Protocol and the Broadcasting Communication closely define the delicate relations between these two aspects.

In its capacity as guardian of the treaties, the EU Commission makes its clear in its Communication that the broadcasting sector must also be measured in terms of EC state-aid law. In the past, the Communication has already made it possible for the EU Commission

¹ The VPRT represents approx. 160 members in the sectors of commercial television and radio, as well as teleshopping and telemedia companies in Germany, see www.vprt.de

to apply consistent decision-making practice in the course of numerous state-aid proceedings in the broadcasting sector, thereby increasing legal certainty for all those involved.

Today, the underlying principles of this "Broadcasting Communication" dating from 2001 still provide a good basis for creating fair competition. However, market developments, legislation (AVMS Directive) and case law (Altmark, SIC, TV2) call for urgent amendment of the Broadcasting Communication.

The VPRT therefore supports the basic policy behind the European Commission's initiative, but does however see a need for clarification in the case of some specific issues.

B. VPRT's Position in Detail

To a large extent, the draft adopts the parameters laid down by the EU Commission in its decision, "State Aid No. E 3/2005-Germany/Financing of public service broadcasting companies in Germany", the so-called state-aid compromise. It encourages the Member States to exercise their responsibility for structuring the broadcasting system and define national standards to determine its remit, create transparent application of resources and ensure both independent control, fulfilment of the remit and the proportionality of its financing. As guardian of the treaties, the Commission confines itself to reviewing manifest errors in defining the remit and establishing whether the control mechanisms mentioned above effectively prevent overcompensation and/or cross-subsidisation.

I. State Aid

1) Licence fees should be measured in line with state-aid legislation

Since the ECJ and ECI decisions in the Altmark², GEZ³ and now the TV2 Denmark⁴ cases, it may be deemed beyond dispute that licence fees must be measured in line with state-aid legislation.

The VPRT therefore welcomes the fact that the EU Commission makes reference to this under point no. 25 ff.

2) Old/new aid (points 29 - 36) – further differentiation required

The VPRT misses more detailed input on the part of the EU Commission with regard to the special aspects of financing broadcasting activities in a digital world. Until now, the remit entrusted to publicly-funded broadcasting has been to provide the population with television and radio programmes. To this end, broadcasting companies have received licence fees. Due to the growing significance of the internet at a consumer level, publicly-funded broadcasting also expanded its activities into this area, initially without any legal mandate.

On the basis of copyright law, it is, in the opinion of the VPRT, in fact justifiable that live-streaming of television or radio programmes in the internet, i.e. unedited, simultaneous

² ECJ, decision of 24 March 2003, case C-280/00

³ ECJ, decision of 13 December 2007, case C-337/06

⁴ EC, decision of 22 October 2008 - T-309/04

broadcasting, is deemed to be covered by the remit and therefore also classified as old state aid.

On-demand offerings made available regardless of transmission schedules, such as web channels, mediatheques and mobile services, are, for the purpose of copyright law, considered new forms of use. They must also be remunerated accordingly and registered as a cost factor with the commission for determining the financial needs of public service broadcasters in Germany (KEF). Offerings of this kind deviate significantly from the original remit of providing TV and radio programmes based on a transmission schedule and transform broadcasters into widely-diversified multimedia providers on a new statutory base. Entrustment and financing of such new offerings took place after the EC Treaty came into force. In the opinion of the VPRT, financing of these new offerings should therefore be consistently classified as **new aid** and notified to the Commission accordingly.

VPRT request: The EU Commission should make it clear that offerings which fundamentally change the nature of a publicly-funded broadcaster constitute new aid and must be notified accordingly.

II. Definition of the Remit – Legal Certainty for all Market Participants

1) General (point no. 41 ff.)

Special legitimation is required before offerings can be financed by the community of licence fee payers. There should be a clear distinction between activities belonging to the precisely-defined remit which are to be financed by licence fees and those which do not form part of the remit in its narrower sense and may not therefore be financed via licence fees. The EU Commission accepts that competence for defining the structure of their broadcasting systems essentially lies with the Member States. They may not however widen this mandate to the extent that intra-Community competition and trade are disrupted. Public financing for offerings which clearly do not serve the same democratic, social and cultural needs of a society may, as manifest errors, be correctly declared incompatible with EC state-aid law by the EU Commission.

A clear definition of the remit simplifies control on the part of national supervisory bodies and authorities. In the case of the EU Commission, a precise definition of the remit provides a basis for reviewing whether it may grant exemption from state-aid legislation pursuant to Article 86 no. 2. Competitors are provided with planning certainty.

The VPRT supports the statements made by the EU Commission regarding the necessity for a formal and precise definition of the public service remit.

2) Definition of the remit for media services and (digital) niche channels (point no. 51 ff.)

The VPRT shares the opinion of the EU Commission, the German federal states and the public service broadcasters that public service broadcasting must also be able to develop further in this digital age. Such development may not however take place on an automatic basis and certainly not be determined solely by the broadcasting companies themselves. In a market economy, any expansion of public service broadcasting activities into new mar-

kets which is financed out of licence fees must on the contrary be substantiated by society's social, democratic and cultural needs. Otherwise, any impairment of competition inherent in such public financing cannot be justified. Any expansion of activities may not lead to competitors being prevented from entering the market or undue distortion of the competitive situation.

Germany as an example

In Germany, expansionist tendencies on the part of public service broadcasters have been evident for some time, especially in the case of "new markets", i.e. with focus on the sectors of telemedia and new digital thematic channels (including mobile services). Since the close of the VPRT State Aid Proceedings in April 2007, new services have constantly been launched or existing services extended and new co-operation agreements entered into – even though the underlying law as set out in the Interstate Broadcasting Treaty has not changed in any way. These include for instance,

- the expansion of existing digital channels into news channels, the creation of more digital thematic channels, such as "EinsPlus", "EinsFestival", "ZDF-Familienkanal",
- a huge increase in internet programmes (so-called web channels for various musical niches) in spite of the existing legal limit on the number of channels, the expansion of existing and creation of new online offerings, such as the envisaged "kikaninchen.de",
- bundling or launching certain multi-spectrum internet portals in the form of so-called mediatheques or
- far-reaching online co-operation between public broadcasters and publishing companies⁵.

The above activities lead to a situation in which commercial offerings, such as

- news channels,
- web channels,
- video-on-demand portals (e.g. showing films and documentaries), as well as
- news agencies supplying audiovisual or similar input

are either unable to develop the relevant market or find their economic existence to be in jeopardy. Furthermore, these developments underscore the urge on the part of public broadcasting companies to capture markets and commercialise their brands. In view of current developments (e.g. the descriptions meanwhile available for the offerings kikaninchen.de, KIKAplus and the NDR Mediatheque), there are, in the opinion of the VPRT, clear signs that this expansion is by-passing the principles defined by the EU Commission in the wake of the VPRT State Aid Proceedings and as a result, key elements, such as the three-step test – or an upgraded version in the form of a general Public Value Test – are essentially being devalued.

The VPRT is not convinced that the 12th Amendment to the German Interstate Broadcasting Treaty will put an end to this expansionism, which is undoubtedly questionable from the point of view of state-aid legislation. Initial three-step tests that have been brought

⁵ Cf. also VPRT press release <http://www.vprt.de/index.html/de/press/article/id/147/or/2/>; for more information on this subject: Spiegel-Online dated 11 March 2008, www.spiegel-online.de/kultur/gesellschaft/0,1518,druck-540674.html or on co-operation between the ARD programme "Tagesschau in 100 Sekunden" broadcast by NDR and the news portal "zoomer.de" operated by the Georg von Holtzbrinck publishing group.

forward already show that the seven-day limit for online offerings provided for in the Interstate Treaty is not to be deemed a criterion. Even following adoption of the Interstate Treaty by the minister presidents, the VPRT is still missing any clear demarcation in terms of programme profile among the three new digital thematic channels operated by ARD or ZDF's three digital channels. Duplication has not been excluded, but must be feared as a real possibility. Moreover, contrary to the undertakings contained in the state-aid compromise, the EinsFestival channel and the ZDF-Familienkanal have been submitted and licensed as mixed schedule (Vollprogramm) instead of niche programmes, without providing the necessary definition of each channel profile in concrete terms, particularly with regard to entertainment. Although according to the undertakings made by the German Federal Republic, entertainment should not form part of new digital thematic channels, the federal states tolerate ZDF's use of an advertising claim such as, "ZDFdokukanal starts the new year with programme highlights for the entire family."⁶

By virtue of the interconnected programme links in the telemedia sector, this will also result in unlimited expansion of the range of publicly-funded telemedia - to the detriment of the competition.

VPRT's request: A clear definition of the remit which defines the activities of publicly-funded broadcasting companies precisely and reliably, including their timescale, is essential, particularly in the sensitive area of new services which, for commercial economic enterprises, are fraught with risks.

3) Pay-services (points 52-55)

Owing to a lack of socio-economic justification, the VPRT takes a critical view of public service activities expanding into the pay sector, since public service offerings should generally be broadcast on a free-to-air basis. At the present time, German legislation also explicitly prohibits public stations from broadcasting pay-offerings (Sec. 13 Interstate Broadcasting Treaty). Furthermore, we see neither any social value added, nor a need for additional public service (pay) offerings. The diversity already available via classic and new transmission paths does not call for supplementary public services. In Germany, a pay-model could further encourage the tendency among public service broadcasters to "dilute" their full-service programme range, as already experienced as a result of creating or restructuring digital add-on channels. In the opinion of the VPRT, there is above all a considerable risk that additional niche channels will be created, e.g. for "minority sports", to serve as "overflow basins" for sporting events which find no slot in the full-service offering. This will not only distort competition for commercial sports stations, but also sidestep the obligation of public service broadcasters to sublicense unused sports rights. The same applies to offerings for specific target groups, such as children, art, theatre etc., which could then possibly be ousted from the main programmes into niche channels.

The expansion of publicly-funded services, either on a pay basis or financed purely out of licence fees, must on all accounts be preceded by a market analysis. There will of course be instances in which pay-offerings from public service broadcasters are less detrimental to commercial offerings than a new service provided free of charge.

⁶ ZDF press release dated 23.12.2008 <http://www.presseportal.de/pm/7840/1325852/mail>

The introduction of pay-services on the part of public stations would also have an added negative impact on media budgets, both in the case of licence-fee payers⁷ and potential customers of, for instance, commercial pay-TV offerings.

If pay-services are permitted, it must be ensured that revenue from these pay-offerings is accounted for in a transparent manner and costs allocated to the appropriate cost centre (see above).

VPRT's request: The VPRT takes a critical view of public service broadcasters being allowed to offer pay-services. Any introduction of publicly-funded pay-offerings must be preceded by a market test. Costs must be allocated according to cost centres.

III. *Ex ante* Evaluations – Public Value Test – Three-Step Test (point no. 56 ff.)

Although the VPRT regrets that the EU Commission does not classify those new public service offerings which also have an overall impact on financing as new state aid, but merely intends to subject them to an *ex ante* evaluation, it nevertheless welcomes the fact that in the draft Communication presented by the EU Commission, the parameters for ongoing development of public service broadcasting arising from the Amsterdam Protocol have been more closely defined for the Member States and at the same time, it is stressed that the EC Treaty, i.e. EC law governing state aid, must be upheld. Providing guidelines of this kind for Member States will reduce collisions with European state-aid legislation.

The EU Commission also correctly emphasises the fact that it is the responsibility of the Member States, and not the broadcasting companies, to define the remit of public service broadcasting. As a rule, this should be based on legislation. In exceptional cases, the EU Commission accepts that the remit of broadcasters may be extended or changed in the form of new or significantly modified offerings, even without amendments to the legislation, provided however that a certain procedure is adhered to, namely the so-called three-step test or Public Value Test (PVT). This makes it easier for Member States to keep abreast of the dynamic media market.

1) New, modified offering

Member States must initially evaluate whether a new service satisfies the same democratic, social and cultural needs of each society (public value), taking into account any consequences for the competition and intra-Community trade (EC competition law). In this case, the Member States, not the broadcasting companies themselves, must define whether an offering or service is new.

In Germany, the 12th Amendment to the Interstate Broadcasting Treaty (RÄndStV) envisages that each broadcasting company will define the criteria in the form of guidelines and statutes. It is already foreseeable that the terms "new" and "significantly modified" will be differently interpreted, even among the various ARD companies and at ZDF. This will result in the possibility of identical offerings being launched onto the market, sometimes with

⁷ €17.98 per month from 2009.

and sometimes without a test – depending on the structure of the internal guidelines and statutes of each broadcaster.

VPRT's request: The Broadcasting Communication should ensure that **standard criteria** apply to new or modified offerings on the part of broadcasting companies. Such criteria should therefore require definition by law.

2) Third-party involvement and transparency

In order to evaluate whether a new or significantly modified offering complies with the criteria set out in the Treaty of Amsterdam Protocol, the EU Commission provides for the **involvement of third parties**. It assumes that third parties are able to submit their opinion on the issues of public value and market impact. **Access to the relevant information** is however of considerable importance in enabling third parties to submit a well-founded opinion. The right to a fair hearing, which is granted under the EC's Fundamental Rights Charter and the European Convention on Human Rights, requires that a **reasonable period** be set for submitting such opinion.

There is currently some disagreement **in Germany** as to whether third parties should be heard solely on the issue of market impact or, as provided for under point no. 59 of the Draft Communication, also with regard to "public value". Moreover, initial experience with evaluation procedures presented prior to the effective date of the 12th RÄndStV shows there is no guarantee of third parties being made immediately aware that a PVT has been initiated, with the result that the already very limited statutory period of six weeks is shortened even further.

In the case of the NDR evaluation procedure for its NDR Mediatheque⁸ and the MDR procedures for both Kikaninchen⁹ and the children's mediatheque Ki.Kaplus¹⁰, this was complicated by that fact that the relevant period extended over Christmas and New Year, even though the MDR projects had for instance been under internal consideration since October 2008.

VPRT's request: The VPRT is of the opinion that the forthcoming Communication should include a clause according to which Member States must ensure that the **periods allowed for submission of third-party opinions are reasonable**. Furthermore, the VPRT calls upon the EU Commission to critically monitor the seriousness of third-party involvement with respect to the **transparency of the information and the actual involvement** of such parties into the decision-making process.

4) Evaluation of public value and market impact

The VPRT welcomes the fact that, based on its responsibility to safeguard EC competition law (Articles 86, 87), the EU Commission has, under points 60, 61 of the Draft Communication, elaborated on application of the criteria set out by the Amsterdam Protocol for determining the added public value of a service or offering and its potential impact in the

⁸ <http://www1.ndr.de/unternehmen/organisation/rundfunkrat/vorlagerundfunkratnovember100.pdf>

⁹ <http://www.mdr.de/DL/5957242.pdf>

¹⁰ <http://www.mdr.de/DL/5957224.pdf>

marketplace. This again provides the Member States with additional legal certainty when considering whether new or significantly modified offerings are compatible with the EC Treaty.

5) Independent bodies (point no. 62)

In particular, the VPRT welcomes the fact that the EU Commission has made it clear that in the case of publicly-funded broadcasting companies, any bodies or supervisory authorities entrusted with *ex ante* evaluations must be independent of the company's management. This will certainly not involve keeping detailed minutes of talks between the management and members of these bodies. Third parties which, in preparing their opinion, use data taken from their own trade secrets to underscore potential barriers to market entry or distortions of competition must rest assured that this data will not leave the relevant committee.

In a functioning democracy, it should be taken for granted that any and all controls are carried out impartially and independently.

However, press releases issued by bodies representing specific public broadcasters prior to the Broadcasting Communication tend to indicate identification with the broadcasting company rather than a critical confrontation with its management. The VPRT would like to encourage such bodies to take this opportunity to strengthen their role and contribute towards improving the competitive situation in Germany.

The VPRT is eager to learn about the structure of the future parameters relating to the independence of such bodies and the specific procedures involved. As yet, the guidelines and/or statutes intended to ensure their independence are still unknown to the VPRT. The VPRT would have preferred a clear ruling on independence to be included in the wording of the Amendment to the German Interstate Broadcasting Treaty.

VPRT's request: The VPRT encourages the EU Commission to retain the statements ensuring the independence of the relevant bodies without any further amendments.

6) Rejection of evaluation procedure exemption for pilot projects

The VPRT takes a highly critical view of the possibility that pilot projects may be exempted from evaluation procedures. Each new offering must comply with the criteria set out in the Amsterdam Protocol and this must be verified without exception. Besides, experience shows that once (publicly-funded) offerings are on the market and used by the populace, they cannot be readily discontinued without considerable resistance from the general public. This means that a pilot project could pre-empt a decision based on a three-step test that may possibly follow.

VPRT's request: The VPRT therefore pleads in favour of deleting point no. 63. Pilot projects must also undergo an *ex ante* evaluation procedure.

IV. Entrustment and Control (point no. 65 ff.)

Under point no. 65 ff., the EU Commission supplements the existing Broadcasting Communication to include the findings of its own decision-making practice and case law¹¹. The absence of both overcompensation and cross-subsidisation of non-related activities cannot be ensured without effective control to determine whether a mandate has been fulfilled in the entrusted form.

As in the case of *ex ante* evaluation procedures, the EU Commission correctly prefers independent control of an external nature, as practiced by the *Länder* media authorities in monitoring Germany's commercial broadcasting sector. In the case of internal controls, Member States must ensure by way of procedural rules that decisions taken by the relevant bodies are independent of management influence. This should be a basic general principle for all administrative entities.

VPRT's requests: Points 65 – 70 are of essential importance to ensure effective control and maintain a balance between publicly-funded services of general interest and the objectives of European state-aid legislation. They should be retained without any amendments whatsoever.

V. Financing System

At a national level, the VPRT actively supports a stage-by-stage changeover in the financing structure of public service broadcasting to purely licence-fee financing. This would help to end the chase for the target groups served by commercial broadcasters. The VPRT takes a critical view of pay-financing, as this could lead to a greater tendency on the part of publicly-funded broadcasters to dilute their main programming even further and focus increasingly on creating stations aimed at niches and specific target groups.

VPRT's request: At a national level, the VPRT advocates purely licence-fee financing for public offerings.

VI. Transparency (point no. 76 ff.)

The VPRT welcomes the fact that the EU Commission has included additional standards relating to transparency. The wording of the draft calls for a structural and functional separation of costs. It is however unclear whether, as repeatedly requested by the VPRT, this entails a separation and allocation of costs according to cost centres and/or profit centres or merely separation of the costs of fulfilling the public service mission on the one hand and of conducting commercial activities on the other.

The use of licence fees and other income must be made transparent by providing a facility for allocating costs to clearly-defined cost centres or profit centres to ensure a group-wide overview. Arbitrary statements of costs according to public-service and commercial activi-

¹¹SIC v. EC COM,
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=de&newform=newform&jurtpi=jurtpi&docj=docj&typeord=ALL&affclose=affclose&umaff=T-442%2F03&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mts=&resmax=100&Submit=Suchen>

ties make it impossible for any controlling body to ascertain whether licence fees have been used in the context of the relevant remit or detect cases of overcompensation or cross-subsidisation. Even the 12th Amendment to the Interstate Broadcasting Treaty provides only elementary assistance in this respect.

Examples of current lack of transparency

- **Online offerings**

The committee for determining the financial needs of public service broadcasters in Germany (KEF) has repeatedly criticised the fact that public broadcasters submit highly-divergent quantifications for their online services. Whereas some broadcasters provide figures for almost every offering, others are hardly in a position to make any quantifiable statements whatsoever. This firstly makes it very difficult for the KEF to assimilate the information received from the public broadcasting companies into a collective framework and secondly, it limits the scope for arriving at any conclusions or generalisations in terms of content. Furthermore, there are considerable differences in the information supplied by individual public broadcasters on the vertical integration of their radio and television offerings. Above all, the provision of (in KEF terminology) rich-media offerings or interactive forms of communication is in some cases very diversely structured¹².

The lack of cost-centre or profit-centre accounting, e.g. charging the costs of rights, or technical, editorial and other costs to the broadcasting or online segment, hinders effective control of overcompensation and cross-subsidisation. Like the VPRT, the KEF also argues in favour of introducing group accounting to improve the auditability of flows of funds.

- **Personnel management / Programming and operating expenses**

According to KEF, transparency must also be improved in the area of personnel management, particularly in the case of the current (varied) treatment of communal facilities. This calls for appropriate adjustments to the presentation of programming and operating expenses.¹³ The KEF has also identified a lack of transparency in the case of costs incurred for joint and digital channels, as well as in connection with third-party co-operation agreements.

- **Radio**

The revenue from radio advertising generated by each individual public station is stated neither in the KEF Report, nor in the ARD Yearbook.

- **Marketing**

It is not evident from any source how funds flow between marketers and public broadcasters, or how they are allocated to the relevant services. As a result, it is impossible to assess whether, and based on what criteria, funds flow back to public broadcasters, whether market prices are paid for production work or whether certain activities are cross-subsidised.

¹² http://www.kef-online.de/inhalte/bericht16/kef_16bericht.pdf; in the 16th KEF Report, points 45/46 and Supplementary Information 3 to the KEF press release on the increase in licence fees <http://www.kef-online.de/inhalte/presse/info3.html> .

¹³ See 16th KEF Report, point 132.

- **Co-operation**

The co-operation agreements between WDR and WAZ, as well as NDR and the Georg von Holtzbrinck Publishing Group ("Tagesschau in 100 Sekunden" and the news portal "zoomer.de") underscore the urge on the part of public broadcasting companies to capture markets and commercialise their brands¹⁴. As well as criticising the increasing uniformity of the news landscape, coupled with the elimination of local, regional news providers, commercial stations are unable to comprehend how flows of funds are organised between public service subsidiaries and the public service parent companies. It is therefore impossible to assess whether publishing companies receive content at market prices and whether subsidiaries are cross-subsidised. As yet, both the separation of costs and their allocation to cost centres, which would also enhance the transparency of the KEF report, have been lacking. The complaint regarding WAZ-WDR submitted to the legal supervisory authorities in July 2008 still remains unanswered.

Regrettably, neither the 12th Amendment to the Interstate Broadcasting Treaty nor the Draft Communication include standards for separating costs according to cost and/or profit centres, in spite of the VPRT's appeals.

VPRT's request: The VPRT calls upon the EU Commission to supplement point no. 86 ff. to the effect that separation is required not only according to commercial and non-commercial activities, but that **all costs must be allocated to either a cost centre or a profit centre.**

VII. Proportionality

With regard to proportionality, the EU Commission reviews, among other things, whether broadcasting companies conform with market conditions in individual cases while carrying out their commercial activities and whether there are any instances of overcompensation for contract work or cross-subsidisation of commercial activities.

1) Market impact assessment

The VPRT welcomes the fact that the EU Commission has included parameters for avoiding overcompensation in the Draft Communication. As guardian of the Treaties, in this case EC competition law, the EU Commission is obliged to monitor fair competition. It may therefore incorporate the criteria on which its market assessment is based into a Communication. This makes it clear to both market participants and the Member States which standards are to be applied by the EU Commission in the event of state-aid proceedings pursuant to Articles 86 and 87 of the EC Treaty.

For the purpose of assessing whether overcompensation has occurred, the EU Commission even makes allowance for a profit.

¹⁴ Cf. also VPRT press release <http://www.vprt.de/index.html/de/press/article/id/147/or/2/> and attachment: Spiegel-Online dated 11 March 2008, www.spiegel-online.de/kultur/gesellschaft/0,1518,druck-540674.html

2) Overcompensation – reservations regarding 10% surplus

The VPRT takes a critical view of the fact that under point no. 94 of its Draft Communication, the EU Commission makes allowance for reserves amounting to ten percent of the revenue generated by public service broadcasters. In Germany, this acceptable surplus would amount to some €850 million based on revenue of around €8.5 billion. Since at the present time, costs are not allocated according to cost centres and/or profit centres, there is no guarantee that this surplus will not be misappropriated and other activities cross-subsidised or overcompensated as a result.

VPRT's request: The creation of reserves should not be permitted unless it is guaranteed that costs are allocated to cost centres, thereby excluding any overcompensation or cross-subsidisation.

3) Supervisory mechanisms – financing control

The VPRT welcomes the passage referring to the necessity for regular controls. Controls on the part of the relevant bodies, the commission for determining the financial needs of public service broadcasters in Germany (KEF) and the courts of auditors at federal state level, for which provision is made under existing law, are carried out at regular intervals, as required by the EU Commission. As already stated, controls still fail to be effective due to the impossibility of retracing the application of resources (transparency). Even following adoption of the 12th Amendment to the Interstate Broadcasting Treaty, control of the very numerous minority interests held by public broadcasting companies is also still lacking.

VPRT's request: The VPRT suggests that a passage be included to the effect that, in order to prevent cross-subsidisation, minority interests must also be audited by the responsible national controlling bodies.

4) Market distortion – control and sanctions

Under Articles 86, 87 EC Treaty, it is one of the primary responsibilities of the EU Commission to prevent market distortions and trade barriers (point no. 102).

a) Premium rights

The VPRT welcomes the fact that the EU Commission lists activities, such as the acquisition of **premium rights**, which are liable to distort the market for audiovisual media services.

Situation in Germany

Still unresolved is the problem of sub-licensing in the field of premium sports rights. The possibility of dedicating one of their additional digital thematic digital channels to serve as a "collecting tank" for sports rights is increasing the incentive for public service broadcasters to continue acquiring unlimited premium rights. It is an established fact that younger viewers can be reached via sports broadcasts, approximately one quarter of the market share in the 14-49 year-old segment being attributable to sport. It is therefore of particular importance that in this sector, competitive distortion should be prevented in the marketplace by enlarging programming space on additional digital thematic channels, whereby intervention in the competitive situation would be financed by licence fees. In view of the costs of approx. €600,000 per hour of programming (ARD) calculated by the KEF, publicly-

funded digital channels would not even come remotely near to complying with their set budgets, even if "only" the "overflow-basin" phase of major events were taken into account. Besides, additional distribution channels present an enormous threat to the role of commercial TV-channels as co-operation and sub-licensing partners, also and especially in the sector of "smaller" sporting events. This likewise applies to current programming co-operation arrangements in the pay-TV field.

The so-called "Sport Policy Paper" prepared by the public broadcasters has still not been made available to the VPRT. The remarks relating to the sports rights sector also apply to the sector of fictional entertainment, notably in the case of licenceware for feature films and series.

b) Market principles

The VPRT welcomes the fact that under point no. 104, the EU Commission refers to the ECJ's Altmark decision and, by stating examples such as price-dumping (point no. 105), makes it clear that even the commercial activities undertaken by public service companies must comply with market principles. This principle is also reflected in the state-aid compromise. The evaluation criteria listed under point no. 106 define the Altmark criteria more closely in relation to the broadcasting sector, providing legal certainty for public broadcasting companies, the *Länder* and for competitors with regard to which yardsticks must be applied to evaluate market conformity.

"Ceterum censeo" – once again, the prerequisite for evaluating whether market principles are being adhered to is that cost allocation must be transparent.

Due to the lack of such transparency, the VPRT filed a legal supervision complaint in July 2008 with the responsible state chancellery in North Rhine-Westphalia regarding the co-operation between WAZ and WDR. A reply is still outstanding.

Similarly, it has not yet been possible to prove suspected price-dumping in the radio advertising sector due to a lack of transparency.

c) Control, sanctions, third-party right to file complaints

In Germany, an effective mechanism against distortion of competition is still lacking, even following adoption of the 12th Amendment to the Interstate Broadcasting Treaty.

As yet, the option of filing a legal supervision complaint has shown itself to be a blunt weapon, not being bound by any time limits. Furthermore, a breach of fair competition rules would at the most lead to restrictions or a ban on the activities of a publicly-funded broadcasting company. Sanctions, such as those provided for under federal state media legislation in the event of breaches by commercial stations in the form of regulatory offences and significant fines, must not be feared by public service broadcasters. National legislation offers no incentive for publicly-funded broadcasting companies to comply with competition law.

VPRT's request: The statements on market distortions define the Altmark criteria more closely for the broadcasting sector and should remain. The VPRT welcomes the fact that in order to prevent competitive distortion, the EC Commission urges Member States to make it obligatory for competitors to be given a right to file a complaint and sanctions to be imposed in the event of breaches by public broadcasting companies.

Finally, the VPRT would like to assure Commissioner Kroes of its explicit support and approval in revising the Broadcasting Communication and hopes very much that the Commission will continue to pursue this constructive approach.

Berlin, February 2009