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1. Please provide your contact details below.

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2. Do you represent an SGEI provider?

No

If yes, what kind(s) of SGEI(s) do you provide and in which sector?

3. Do you represent a local authority?

No

If yes, what kind(s) of SGEI(s) have you entrusted, if any?

4. Are you working for an organisation representing SGEI users?

No

5. Do you belong to the academic community?

No

6. Are you representing another kind of stakeholder?

Yes

If yes, please give details:

The Association of Commercial Television in Europe (ACT) is a trade association representing the interests of the commercial broadcasting sector in Europe. Formed in 1989, the ACT has thirty member companies active in 34 European countries. Our members are operating several hundred free-to-air and pay-tv channels and distributing several hundred channels and new services. The ACT members encompass several business models ranging from free-to-air television broadcasters and pay-TV players to digital platform operators and multimedia groups. By offering a wide range of choice and variety to the viewer, commercial broadcasters are a leading source of entertainment and information to millions of European citizens.

In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its [Code of Conduct](#).

If you are a **registered organisation**, please indicate the name and address of your organisation and your register ID number on the first page of your contribution:

Register of interest representatives identification number : 18574111503-28

Your contribution will then be considered as representing the views of your organisation.

If your organisation is not registered, you have the opportunity to [register now](#). Then turn to this page to submit your contribution as a registered organisation.

Responses from organisations not registered will be published separately.

SECTION A: QUESTIONS CONCERNING THE NOTION OF SGEI

1. Is it clear to you which activities may be considered as an SGEI?

Yes

If not, please explain why, possibly by giving concrete examples:

2. Do you know any services which have been qualified as SGEIs by public authorities?

Yes

If yes, can you please describe them and indicate the public service obligations related to this SGEI?

Usually, public authorities qualify public broadcasters as SGEI. However, it is difficult to indicate their public service obligations as most Member States are using a very wide definition of the public broadcasters' remit, giving the latter the right to fill out this remit themselves. As a consequence, Member States only define some unspecific rules; public broadcasters usually shall serve the democratic, social and cultural needs of society, and the need to preserve media pluralism. The fulfillment of this unspecific remit is, in some Member States controlled by the public broadcasters' bodies themselves. The idea behind this concept is that public broadcasters should be independent from direct state control. Several examples show that the societal bodies which are foreseen to control public broadcasters are not independent. For instance, in 2009 the administrative council of the second nationwide public television channel in Germany, ZDF, did not renew the labour contract of the editor-in-chief. Previous to this non-renewal, a prime minister sitting in this council announced this step. Academic research shows that the majority of the members sitting in this council are appointed by political parties.¹ In other Member States the public broadcaster's chairman is directly appointed by the Head of State, which is the case in France.

As a consequence it is impossible to indicate concrete public service obligations of public broadcasters as in many Member States the public broadcasting's remit has been defined in the above mentioned rather unspecific way, which means that the lack of effective and independent control over public broadcasters leads to the absence of any meaningful definition of the public broadcasting's obligations.

This situation puts the public broadcasters' competitors – the commercial broadcasting operators – and, increasingly, print and online media businesses - in a position which differs from any other industry: From all sectors where SGEI have been approved the broadcasting sector is the only one where these services cannot be supervised by state administration. Unfortunately, the internal structure of most public broadcasters makes it impossible to state that they fulfil any service of general interest at all. Furthermore, due to the lack of transparency it is impossible to prove the presence or absence of overcompensation, in accordance with European state aid rules.

SECTION B: QUESTIONS CONCERNING THE NOTION OF STATE AID

The Treaty rules, as they have been interpreted by EU case law, define the notion of State aid, as well as the conditions under which State aid rules apply to SGEI.

¹ Doerr, Dieter: Die Mitwirkung des Verwaltungsrats bei der Bestellung des ZDF-Chefredakteurs und das Problem der Gremienzusammensetzung, Kommunikation & Recht 09/2009
< <http://www.kommunikationundrecht.de/nachrichten/pages/ablagecontent/dok215.pdf> >

3. Have you encountered difficulties in applying the conditions of Article 107(1) of the [Treaty on the Functioning of the European Union](#) (TFEU)?

Partially

If yes or partially, on which specific condition(s)?

- Economic activity: **No**
- Effect on trade: **No**
- Economic advantage **No**
- Selectivity: **No**
- Transfer of State resources: **Yes**

4. Could you give some concrete examples?

The Broadcasting Communication states that there are mainly two elements of the Treaty on the Functioning of the European Union containing rules on State aid to public broadcasting: Article 106 and the so-called “Amsterdam Protocol”.

- Article 106 (2): *“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.”*

- Amsterdam Protocol: *“The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfillment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.”*

The explanation on concrete application of these rules was set by the European Commission in the Broadcasting Communication adopted on July 2nd, 2009. These rules were adopted after a two years-long consultation process, in which the EU Member States actively took part.

The Broadcasting Communication should lead to the effective establishment of the following principles:

1. Clear and meaningful definition of the public service remit by a legal act;
2. Market impact assessment prior to an extension of the remit with effective right to participation from all the stakeholders, namely competitors for advertising income.

3. Transparency: separation of public and commercial activities as well as cost allocation to profit centres, where the public service expenses are clearly differentiated from the commercial/complementary activities

4. Independent and effective control mechanism for ex-ante evaluation of activities as well as for the supervision of entrustment and proportionality of public compensation for public services through evaluation of the financial behaviour by independent external auditors

5. Sanctions for breach of competition rules, and for lack of fulfillment of the framework

However, as the deadline for implementation of the Communication approaches, there is evidence that one of the main new safeguards for competition is simply ignored in some Member States: the establishment of an ex-ante test before setting new public broadcasting services. In the few Member States where the ex-ante evaluation has already been introduced, the evaluation is not being taken seriously.

Examples:

Germany: Under the German media law all existing new public broadcasting services had to be evaluated before end August 2010. Every one of the almost 40 new public broadcasting online services tested passed the ex ante evaluation. In most cases the evaluation which has been conducted by the public broadcasting's in-house councils denied any market impact on commercial operators.

The German Association of Private Broadcasting, VPRT, is currently analysing the outcome of the German Three-Step-Test and will publish its analysis in autumn 2010.²

Another example of the lack of Germany's political will to follow indications set by the EU state funding of public broadcasting can also be found in that the public broadcasting sector still qualifies the funding received via the public broadcasting licence paid by citizens as "non-state funding", in contradiction with the rules set by decisions of the European Commission and of the European Court of Justice, and in the Broadcasting Communication.

Belgium/Flanders: Flanders decided not to test existing new services (=new public broadcasting services which have been launched after the discussion about the review of the Broadcasting Communication began in 2007). As the Flemish public broadcaster launched a bundle of new services just before the new law which introduced the ex-ante evaluation entered into force, the new rules are avoided by this practice.

Conclusion:

The ACT believes that the existing legal framework is sufficient. However, on Member State level there is still an unacceptable degree of uncertainty in the application of State aid rules in the broadcasting sector. The broadcasting sector should be more aligned to the SGEI framework; the Public Broadcasting Industry should not be seen different from

² < <http://www.vprt.de/index.html/de/press/article/id/231/or/2/> >

other SGEI.

The ACT calls on the European Commission to show a strong political will to apply the state aid rules and to control the implementation of the Broadcasting Communication, which is a particular set of principles and rules applying the SGEI framework to the Broadcasting sector, with a certain number of favourable adjustments, some of them barely justified by the specificities of the sector (v.g. cost allocation, ways to determine overcompensation, possibility to retain an extra 10% of the budgeted costs). There is no current process for the Commission to regularly evaluate *ex ante* test, and national deviations from the rules included in the 2009 Communication.

SECTION C: APPLICATION OF THE ALTMARK RULING

In its judgment in the case of Altmark Trans GmbH, the European Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 107(1) of the TFEU provided that four cumulative conditions are met.

- Firstly, the recipient undertaking must actually have clearly defined public service obligations to discharge.
 - Secondly, the parameters for the calculation of the compensation at stake must be established in advance in an objective and transparent manner.
 - Thirdly, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit.
 - Fourthly, where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation needed must be established on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.
5. Have you encountered difficulties in the application of the Altmark conditions, especially in respect of the 4th one?

Yes

If yes, please explain these difficulties. If possible, please give concrete examples:

As a rule, the Case Law has always shown us that the main difficulty in relation to SGEI does not relate to the Altmark ruling, namely because it's very easy and clear cut to establish that the 2nd or the 4th criterion are missing thus leading to qualify the funding in question as State aid. Most problems seem to arise from the compatibility assessment under art. 86, because, on the contrary to the Altmark ruling, there is no market behaviour criterion such as the 4th Altmark criterion: in fact, market conform behaviour should be present in the art. 86 compatibility assessment, for determining whether a

funding system is distorting the competition market.: public service should only qualify those kinds of behaviour which the market investor would not develop. We shall come back to this subject ahead.

6. Are you aware of examples where the Altmark ruling has been applied by national courts or national public authorities?

Yes

If yes, you are welcome to provide information:

SECTION D: CONDITIONS OF THE DECISION AND THE FRAMEWORK

In order to provide legal certainty in the financing of SGEI, while ensuring a level playing field between all undertakings in the single market, the Commission adopted in 2005 the "SGEI Package", to define under which conditions public service compensation that constitute State aid can still be granted for the fulfilment of public service missions. In particular, the Decision defines the conditions under which public service compensation is compatible and is exempted from notification to the Commission, while the Framework explains how the Commission will assess all remaining public service compensation that has to be notified to the Commission.

These conditions consist in the existence of an act of entrustment containing a precise and correct definition of the service of general economic interest, the definition of the parameters to establish the appropriate amount of the compensation, the absence of overcompensation and the safeguards to avoid any overcompensation.

D.1: ENTRUSTMENT

QUESTIONS REGARDING THE ACT OF ENTRUSTMENT:

7. Are you aware of the legal instruments (contracts, laws, concessions, etc.) that have been used to entrust SGEI to SGEI providers in your sector/region?

Yes

If yes, you are welcome to provide information on these forms of legal acts:

For the broadcasting sector, usually the Member States' Broadcasting Acts as well as Public Service contracts, Statutes or Guidelines.

8. Do you know if the act of entrustment, or any other relevant legal basis relevant for your sector/region, gives a precise and correct definition of the service of general economic interest to be provided?

Partially

If no or partially, please explain and provide example(s):

As mentioned above, it is difficult to indicate their public service obligations as most Member States are using a very wide definition of the public broadcasters' remit, giving the latter the right to fill out this remit themselves.

As a consequence, Member States only define some unspecific rules; public broadcasters usually shall serve the democratic, social and cultural needs of society, and the need to preserve media pluralism. The fulfillment of this unspecific remit should be controlled by the public broadcasters' bodies themselves and quantified objectives are very seldom established, whereas quality controls are often very subjective and difficult to implement.

The idea behind this concept is that public broadcasters should be independent from direct state control.

As a consequence it is impossible to indicate concrete public service obligations of public broadcasters as in many Member States the public broadcasting's remit has been defined in the above mentioned rather unspecific way, which means that the lack of effective and independent control over public broadcasters leads to the absence of any meaningful definition of the public broadcasting's obligations.

This situation puts the public broadcasters' competitors – the commercial broadcasting operators – in a position which differs from any other industry: From all sectors where SGEI have been approved the broadcasting sector is the only one where these services cannot be controlled by state administration. Unfortunately, the internal structure of most public broadcasters makes it impossible to state that they fulfil any service of general interest at all. Furthermore, due to the lack of transparency it is impossible for the commercial broadcasting sector to prove overcompensation. This makes the public broadcasting sector a state within a state and leads to the impression that the public broadcasting sector does not need to follow European state aid rules.

Another consequence of the public broadcasting sector's specificity lays in the system of dual funding: The Amsterdam Protocol has foreseen that the system choice of funding public broadcasting shall be to the competence of Member States "*insofar as such funding is granted to broadcasting organisations for the fulfillment of the public service remit as conferred*"

Many Member States have chosen the dual funding system, where public broadcasters receive public money on the one hand, and get advertising revenue on the other hand. However, at the same time, advertising income is the main source of revenue for commercial broadcasters which re-finance their offers via advertising and play a major role in enhancing media pluralism in Europe.

But at the same time, the Amsterdam protocol specifies that this choice of funding is limited “*insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest*”.

The ACT believes that the market distortion of the TV advertising market cannot be in the common interest and cannot be justified in a way that this commercial part of the public broadcasters’ activity falls under the protection of SGEI rules nor under the Amsterdam Protocol. Therefore, the TV advertising market distortion by public broadcasters should be seen as manifest error, not in line with European State Aid rules.

9. Do the legal instruments, of which you may be aware, contain all the elements required by Article 4 of the Decision, such as:

- the nature and duration of the public service obligations: No x
- the undertaking(s) and territory concerned: No x
- the nature of any exclusive or special rights assigned to the undertakings:

Yes

- the parameters for calculating, controlling and reviewing the compensation:

No

- the arrangements for avoiding and repaying any overcompensation:

No

10. Have some of these elements raised difficulties in your opinion?

Yes

If yes, please explain why and provide concrete examples:

The main problem is that public broadcasting accounts often lack transparency. So it is difficult to assess if the amount of state funding received can be considered as compensation, or adequate compensation.

The implementation of the Financial Transparency Directive and the revised Broadcasting Communication did not resolve this problem.

Due to the principle that public broadcasters should be independent from direct state control mentioned above, it should be the duty of independent broadcasting councils representing the society to control the public broadcasters’ accounts and to publish the results. However, this does never happen in reality, and when it does it is done with considerable delays.

11. Have you encountered difficulties concerning the notion of act of entrustment in the sense of State aid and internal market rules?

No

If yes, please explain why, possibly by giving concrete examples:

12. Do you consider that the entrustment of local SGEI, in particular those of a social character, has raised specific difficulties?

N/A

If yes, please explain why, possibly by giving concrete examples:

D.2: COMPENSATION

D) QUESTIONS REGARDING THE CALCULATION OF COSTS AND REVENUES RELATED TO AN SGEI

13. Have you faced difficulties with the calculation of costs and revenues related to an SGEI?

Yes

If yes, could you describe these difficulties?

As mentioned above, the main problem is that public broadcasting accounts often lack transparency. So it is impossible to compare the costs incurred by the public broadcasting entity and the costs “which a typical undertaking, well run and adequately equipped” would incur, in terms of applying the Altmark ruling. Assuming this difficulty leads to qualification of a certain funding as State Aid than for an art. 86 compatibility assessment, it is therefore rather difficult to assess if the amount of state funding received can be considered as compensation, or adequate compensation.

The implementation of the Financial Transparency Directive and the revised Broadcasting Communication did not resolve the problem. We must bear in mind that the Broadcasting sector is very specific and therefore there is a recent Commission Communication from July 2009 adapting the SGEI principles to this sector.

Due to the principle that public broadcasters should be independent from direct state control mentioned above, it should be the duty of independent broadcasting councils representing the society to control the public broadcasters’ accounts and to publish the results. However, this does never happen.

Conclusion:

SGEI Framework is clearly the correct framework for Broadcasting Public Service undertakings, and there is nothing to indicate that rules must be different, namely on what concerns the issue of **cost allocation**: for the system to be compatible with EC competition law, there must always be a requirement that separate accounting obligation leads to the implementation of an **analytical accounting system**, perfectly capable of establishing a distinction between Public Service Costs and Commercial Service Costs: this should become a minimum Standard for undertakings that are currently rendering Public Service as well as exploiting commercial activities or opportunities in relation to Public Service. Preferably, commercial activities should be carried out by different entities (Structural separation) as a means to avoid any default of the accounting system.

However, as long as the lack of transparency regarding the financial behaviour of public broadcasters persist, it is almost impossible for the commercial broadcasting sector to prove overcompensation.

Possible solutions

a) It would be helpful to think about independent control mechanism for the evaluation of the financial behaviour by independent external auditors like Court of Auditors. The Court of Auditors in the Member States are usually not under direct political control, in most Member States auditors have the legal status of judges. For instance, the Austrian Court of Auditors controlled the accounts of the Austrian public broadcaster ORF. The Court of Auditors decided to audit the public broadcaster on its own accord. The Austrian report has been published in January 2009.³ The same thing happened in France⁴, Spain⁵ and Portugal⁶; This is a form of control which complements the external independent audits, all of which must be made publicly available.

b) Another option would be a shift of the burden of proof regarding overcompensation

c) In order to apply the Altmark conditions, it would also be helpful if the Commission would admit the need of the separation of public and commercial activities as well as cost allocation to profit centers. The cost allocation should be broken down to the proportionate costs for the different platforms. The distinction for allocation purposes must be based in one simple and very practical criterion: **is this a cost that a commercial operator would voluntarily bear?** Or, in other words, **is there commercial demand for the product which generated the cost?**

This criterion must lead to a clear separation between acquisitions and investments for which there is a demand by commercial broadcasters, that is, a service or a product that every commercial broadcaster would search, in competition with the public broadcaster, because of not being a specific feature of public service.

Each public service undertaking should be therefore required to present separated accounts so that all the costs of acquisition of commercial programming can be qualified

³ < <http://www.wienerzeitung.at/Docs/2009/1/19/ORF-Bericht.pdf> >

⁴ <http://www.ccomptes.fr/fr/CC/documents/RPT/RPT-France-televisions.pdf>

⁵ <http://www.tcu.es/uploads/745%20Grupo%20RTVE.2002-2004.pdf>

⁶ http://www.tcontas.pt/pt/actos/rel_auditoria/2005/audit-dgtr-rel045-2005-2s.pdf

http://estadio.no.sapo.pt/auditoria_rtp.htm

as commercial costs, and only those programming acquisitions for which there is no commercial demand, because of not fulfilling, in principle, the legitimate aim of granting high audiences, should be qualified as public service costs.

At the end of each year, the Accounts would show a different map concerning, on one hand, commercial costs, to be compared with commercial income – this would allow an evaluation of the standalone commercial operation led by the public service undertaking.

This would allow any Audit and, in fact, any interested person or entity, to verify the absence of cross-subsidization between public funding and commercial operation, because the only costs that could be funded by the State would be those which are not in the market, that is, those that correspond to real Public Service obligations.

This would incentive Public Service Broadcasters to cater for real public service programming or to privilege internal and independent production, instead of competing against private broadcasters for the acquisition of the same contents and formats.

This would also allow the Commission to make a **new kind of proportionality test**: compare only between the commercial exploitation carried out by the public undertaking and a commercial efficient undertaking, to evaluate progress made and to be made by the former, to prevent any possibility of the undertaking supporting its commercial activity in public funding.

14. In particular, in case you represent an undertaking which carries out activities falling both inside and outside the scope of SGEI, do you have separate accounts?

N/A

15. Have you faced difficulties in separating the accounts?

N/A

If yes, you are welcome to give details:

16. Has guidance been provided to public service providers in order to allow for a proper allocation of costs and revenues and to avoid cross-subsidisation between SGEI and non-SGEI activities/funds?

Yes No Partially N/A

If yes, you are welcome to give details about the guidance provided:

17. Do you think that the variable and fixed costs referred to by the Decision and the Framework, are the appropriate categories to allocate costs between the different services?

Partially

If no, could you explain why?

This is a valuable set of categories, but it is not sufficient: cost allocation to profit centers is essential, as it allows comparison of costs for each services / activities. See also answer D.2. Q 13 above.

18. Are any quality aspects taken into account for the calculation of the amount of compensation granted?

No

II) QUESTIONS REGARDING REASONABLE PROFIT

If you are aware of an example where an SGEI provider has received public service compensation,

19. Could you:

- please indicate whether this compensation included a reasonable profit?

Yes

- indicate whether the reasonable profit was calculated on the basis of the rate of return on own capital as provided for by the Decision and the Framework?

No

- If the reasonable profit was not calculated on the basis of the rate of return on own capital, please explain why a different type of rate was applied and give information about the chosen rate:

The revised Broadcasting Communication includes a measure allowing public broadcasters "to keep an amount in excess of 10% of the annual budgeted expenses of their public service mission". While this can be assimilated to a "reasonable profit", one should bear in mind that commercially-funded broadcasters dependent on their own resources (principally advertising and subscription) have no access to such "surplus at the end of a financial year". While there may be a case for public broadcasters enjoy the latter in accomplishing their remit, as soon as commercial activities are mixed to provide additional incomes, this is hardly sustainable. Commercially-funded TV broadcasters indeed have to compete against "protected operators", able to develop services in a much less risked manner. It is therefore a high priority to ensure separation of "commercial" and "public" activities within public broadcasters' entities. Moreover, overcompensation should be deducted from the licence fees: surplus at the end

of year N must be deducted from the licence fees at year N+1.
Quite to the contrary, having the possibility to calculate the 10% overcompensation to be retained above budgeted expenses has led to an increase of expenses, in order to benefit from more compensation on the following year.

20. Have you faced difficulties with identifying what a "reasonable" profit is?

No

If yes, please specify:

21. Do you know what the average rate of return on own capital in the relevant sector is?

Yes

If no, how have you identified the reasonable profit?

22. Has the calculation of the reasonable profit in your specific case taken account of the productivity gains achieved by the provider?

No

If yes, please explain and, where appropriate, provide examples where the calculation of the compensation has taken into account the efficiency of the provider

D.3: CONTROL OF THE OVER-COMPENSATION

23. Are you aware of the mechanisms controlling overcompensation implemented in your country?

Yes

If yes, has the absence of overcompensation been controlled by external auditors?

No

24. Have you encountered cases of overcompensation?

Yes

If yes, you are welcome to provide us with information about the reimbursement:

25. Have you faced difficulties with the rules on reimbursement of overcompensation?

Yes

If yes, in which cases and why?

The main problem is that public broadcasting accounts often lack transparency. So it is impossible to compare the costs incurred by the public broadcasting entity and the costs “which a typical undertaking, well run and adequately equipped” would incur. It is therefore rather difficult to assess if the amount of state funding received can be considered as compensation, or adequate compensation.

The implementation of the Financial Transparency Directive and the revised Broadcasting Communication did not resolve the problem.

Due to the principle that public broadcasters should be independent from direct state control mentioned above, it should be the duty of independent broadcasting councils representing the society to control the public broadcasters’ accounts and to publish the results. However, this does never happen in reality.

In addition, it is almost impossible for the commercial broadcasting sector to prove overcompensation due to the lack of account transparency for the public broadcasting sector, in many Member States the existing licence fee system has been classified as existing State aid.

According to Art 11 (2) [last sentence] of the COUNCIL REGULATION (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty it is not possible to recover existing State aid.⁷

However, this classification makes no sense: The 2009’s Revised Broadcasting Communication introduces an ex-ante evaluation for new public broadcasting online services, taking into account that also public broadcasting should be able to participate at the new online environment.

Considering that the Broadcasting Communication accepts that the public broadcasting sector is undertaking activities which are not covered any more by the definition of “broadcasting” under European law, it is illogical that these new activities still fall under the privilege of existing State aid under the procedural rules.

Conclusion:

As long as the lack of transparency regarding the financial behaviour of public broadcasters persist, it is almost impossible for the commercial broadcasting sector to prove overcompensation.

Possible solutions

⁷ < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:083:0001:0009:EN:PDF> >

a) It would be helpful to think about independent control mechanism for the evaluation of the financial behaviour by independent external auditors like national Courts of Auditors. The Courts of Auditors in the Member States are usually not under direct political control, in most Member States auditors have the legal status of judges. For instance, the Austrian Court of Auditors scrutinised the accounts of the Austrian public broadcaster ORF. The Court of Auditors decided to audit the public broadcaster on its own accord. The Austrian report has been published in January 2009.⁸

b) Another option would be a shift of the burden of proof regarding overcompensation. If transparency of public broadcasters' financial behaviour is not guaranteed, the only way to safeguard commercial operators' rights is a shift of burden of proof for overcompensation.

c) It would also be helpful if the Commission would admit the need of the separation of public and commercial activities as well as cost allocation to profit centers. The cost allocation should be broken down to the proportionate costs for the different platforms.

26. Article 6 of the Decision provides that an overcompensation not exceeding 10% of the amount of the annual compensation (20% for social housing), may be carried forward to the next annual period and deducted from the amount of compensation payable in respect of that period. Have you faced difficulties with the application of this provision?

N/A

If yes or partially, please explain why:

D.4. MONITORING AND ANNUAL REPORTS

Article 7 of the Decision provides that underlying elements must be kept for at least 10 years to allow the Commission to check their conformity with the Decision.

27. Is such a reporting system in place in your Member State regarding the services with which you may be concerned, and if so, does it ensure that these obligations are fulfilled?

Yes No Partially N/A

SECTION E: SPECIFIC CATEGORIES OF SGEI

⁸ < <http://www.wienerzeitung.at/Docs/2009/1/19/ORF-Bericht.pdf> >

The Decision exempts from notification public service compensations below certain thresholds.

28. Please explain if you have faced difficulties with the classification of the compensations in the following categories :

- Compensation of less than EUR 30 million per year granted to undertakings with less than EUR 100 million turnover:

N/A

- Compensation granted to hospitals:

N/A

- Compensation to social housing undertakings:

N/A

- Compensation for air links to islands with less than 300 000 passengers per year:

N/A

- Compensation for maritime links to islands with less than 300 000 passengers per year:

N/A

- Compensation for airports with less than 1 000 000 passengers per year:

N/A

- Compensation for ports with less than 300 000 passengers per year:

N/A

29. What kinds of services have been financed through public service compensations in the hospital sector?

30. What kinds of services have been financed through public service compensations in the social housing sector?

31. N/A

32. Do you consider that the ceilings provided for by the Decision allow simplification while ensuring correct application?

33. N/A

If no, please explain why possibly by giving concrete examples:

34. On the basis of your experience, have the ceilings met the needs of the specific categories?

35. N/A

If no or partially, please explain which ceilings have not met the needs of the respective category and why:

36. Do you consider that the combined ceilings of EUR 30 million of compensation amount and the EUR 100 million turnover have raised difficulties?

37. N/A

If yes, please explain if the difficulties relate to the combination of these ceilings, to one, or to both of them, by providing concrete examples:

38. Are you aware of other instruments than public service compensations (for instance direct aid to users, direct provision of SGEI by the State, etc.), used by public authorities to foster public service activities?

Yes

If yes, please feel free to provide any information on these instruments and the areas in which they are used:

Public broadcasting is often partly funded by commercial means. One direct effect of purely commercial activities run by public broadcasters might indeed be unfair commercial advantage concerning programming production. Even more concerning is the effect on advertising prices: as public service broadcasters enjoy “dual fundings”, they can set artificially low prices for advertising spaces. As a consequence, commercially funded TV broadcasters are forced to follow this pricing policy. This has been noted by competition authorities on more than one occasion.. However, commercial broadcasters have to be very strict in terms of what they pay for

programming, because we don't have any form of recovering funds in case the investments turn out to be negative. Which is quite the opposite from public service broadcasters.

SECTION F: COMPETITION AND INTRA-COMMUNITY TRADE

39. According to your experience, the principles on which the Decision and Framework are based (in particular the act of entrustment and the absence of overcompensation) have been appropriate to preserve an equal footing between SGEI providers and commercial providers and to avoid distortions of competition and intra-Community trade?

No

If no, please explain why:

The principles referred to are also present in the Broadcasting Communication. They constitute essential requirements to avoid distortions of competition in the various EU Member States. However, the rules set by the Broadcasting Communication are, in the best cases, partially applied by EU Member States, or, in the worst cases, merely ignored: the situation of the German and Flemish market described earlier provides a very good illustration of the lack of political will in implementing these principles.

40. In your sector/region, are public services provided by various public service providers?

No

If no, could you explain why?

41. Do you consider that in your sector/region, the provision of public services does not affect at all, or in any significant way, intra-Community trade?

N/A

If yes, please explain why. You are welcome to provide concrete examples to substantiate your views:

42. Do you consider that the State aid rules on public service compensations may in certain cases have the effect of foreclosing the market or led to other distortions of competition?

Yes

If yes, please explain why and in which cases:

The existing rules on State to public broadcasting should lead to fair competition. Unfortunately, as mentioned above, they are not taken seriously by the Member States and therefore not enforced in a meaningful way. In addition, there is no management efficiency criterion, and the frequently asked questions on the application of State aid rules to SGEI assume that there is no need for management efficiency (question 6.10). Competing against an undertaking which doesn't have to be efficient, and is able to recover all the accumulated deficits is on itself a distortion of competition.

SECTION G: ACTIONS FOR THE CORRECT IMPLEMENTATION OF THE DECISION AND FRAMEWORK

43. Are you aware of any guidance paper on the implementation of the Decision and Framework prepared by the authorities in your country?

N/A

44. Do you find useful the Commission staff working document on the [frequently asked questions on the application of State aid rules to SGEI](#)?

Yes

45. Are you aware of the existence of the [Interactive Information Service](#) through which questions regarding the application of Community rules to SGEI/SSGI can be answered?

Yes

In instances where you submitted a question to the [Interactive Information Service](#), were you satisfied with the service provided?

N/A

If no, could you explain why?

46. Do you consider that the Decision and Framework are sufficiently known and correctly implemented?

No

If no, please indicate which stakeholders are not sufficiently informed. In your opinion, why is that?

Some National Independent Regulators and Governments are still not sufficiently informed about the SGEI framework or tend to disregard some of its specificities, the latter may do it in order to benefit public service broadcasters.

SECTION H: MISCELLANEOUS

47. According to your experience, have the Decision and the Framework succeeded in striking the appropriate balance between the accomplishment of the public service mission and a level playing field between businesses and across Member States in the single market?

No

If no, please explain why, by providing concrete examples:

The main rules for the broadcasting sector are stipulated in the Broadcasting Communication. These rules could be more extensive, but they already constitute one further step forward towards fair competition in the broadcasting markets. However, if the rules set in the Broadcasting Communication are ignored, or deficiently applied, fair competition will be a more elusive goal than ever..

All EU Member States without exception and without distinction between bigger and smaller Member States need to comply not only with the Broadcasting Communication but with the whole European Treaties.

One reason behind the revision of the Broadcasting Communication was to encourage Member States to put in place structures to allow for legitimate issues raised by other stakeholders to be dealt with at national level in the first instance rather than forcing businesses to file complaints to the European Commission.

If Member States believe that the public broadcasting sector does not have to apply European competition law and therefore do not implement the Broadcasting Communication in a meaningful way, this goal will never be achieved.

48. Do you consider that there are cases where the application of Community rules to SGEI has raised difficulties which were not covered by the previous questions?

No

If yes or partially, could you explain which rules have raised these difficulties and why, by providing concrete examples?

49. Do you have any other comments?

Thank you for answering all/part of this questionnaire.