

ABOUT YOU

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1. Please provide your contact details below.

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2. Do you represent an SGEI provider?

Yes No

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

ARD and ZDF provide public service media content to the German public.

3. Do you represent a local authority?

Yes No

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

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

Yes No

5. Do you belong to the academic community?

Yes No

6. Are you representing another kind of stakeholder?

Yes No

If yes, please give details:

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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:

ARD-Verbindungsbüro Brüssel: 6774178922-55
Zweites Deutsches Fernsehen: 3209361971-85

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

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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 No Partially

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

The European Commission itself, in its Greenpaper on Services of General Interest acknowledges that terminological differences, semantic confusion and different traditions in the Member States have led to many misunderstandings in the discussion at European level as regards the term “Services of General Interest”. In the Member States different terms and definitions are used in the context of services of general interest, thus reflecting different historical, economic, cultural and political developments.

ARD and ZDF are well aware, that the term «services of general economic interest» as used in Articles 16 and 106 (2) of the TFEU is not defined in the Treaty or in secondary legislation. While the European Commission when using the term SGEI usually refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion, this has not

really clarified once and for all which activities may be considered an SGEI and more importantly which rules and regulations for SGEI should be applicable to a specific service.

Public service broadcasting, the service supplied by ARD and ZDF is a fitting example; how the vast number of services supplied throughout Europe to fulfil numerous public interests of often highly different societies cannot easily be categorized and submitted to a set of standard rules. Public service broadcasting's specificity is recognised in the Amsterdam Protocol on Public service broadcasting and by sector specific regulation in regard to the application of State aid rules to Public service broadcasting.

While the European Commission as well as the General Court and the Court of Justice have consistently considered Public service broadcasting as a Service of General Economic Interest, the fact that the European Commission itself clearly states that "Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector" (Broadcasting Communication, paras 9 to 11) gives an indication that the broad field of public services does not lend itself easily to generalised definitions. Just as Public service broadcasting justly deserves to be covered by sector specific regulation, due to its special role for democratic, social and cultural needs of each society and for the need to preserve media pluralism, other public service sectors will clearly find it difficult to unambiguously subsume their services under one definition and one set of rules applicable for SGEI.

This is reaffirmed by the judgement of the General Court in the BUPA Case (T-289/03) where it is stated in para 164:

"It must be made clear that in Community law and for the purposes of applying the EC Treaty competition rules, there is no clear and precise regulatory definition of the concept of an SGEI mission and 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 106 (2) TFEU."

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

Yes No **N/A X**

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

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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.

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

Yes No **Partially X** N/A

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

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

4. Could you give some concrete examples?

Economic activity:

ARD and ZDF would welcome a clarification in regard to the distinction between Services of General Interest and Services of General Economic Interest. In addition, more guidance on how the abovementioned differentiation matters in regard to the application of State aid regulations would be considered helpful. To mention a concrete example, the General Court in its SIC judgement (T-442/03) para. 153 has held:

“Although the public service of broadcasting is considered to be an SGEI and not a service of general non-economic interest, it must none the less be pointed out that that classification as an SGEI is explained more by the de facto impact of Public service broadcasting on the otherwise competitive and commercial broadcasting sector, than by an alleged commercial dimension to broadcasting”.

This illustrates how there is a need to better accommodate non-economic considerations in the application of State aid rules.

Effect on trade:

While the European Commission in its decision practice recognises in a very small number of cases that not all economic activity has an effect on trade between Member States (c.f. Germany - Leisure Pool Dorsten (N 258/00. 21.12.2000), Ireland – Capital allowances for hospitals (N 543/2001 28.06.2002), Spain – Aid for the installation of service areas on Tenerife (NN 29/02 08.05.2003)) it remains unclear from the existing decision making practice in cases regarding Public service broadcasting, if instances might occur, where with regard to Public service broadcasting activities serving small language communities a cross-boarder effect on trade might be considered negligible or non-existent. The existing decision making practice in the field of Public service broadcasting allows no clear conclusions as arguments regarding effect on trade are not clearly separated from deliberations regarding the distortion of competition.

Economic advantage:

ARD and ZDF remain unconvinced, that the public funding it receives to fulfil the public service tasks described above constitutes an economic advantage. This is due to the fact – as stated in the German position in the State aid procedure E 3/2005 that the licence fee funding is limited to what is necessary to fulfil the public service task and the conviction that the funding regime satisfies the conditions established by the Court in its “Altmark”-ruling. In the view of ARD and ZDF there is a clear definition of public service obligations imposed on public service broadcasters (first condition), the KEF procedure according to which the financial needs of public service broadcasters are determined is based on ex ante established transparent and objective parameters (second condition), the licence fee revenues at the disposal of public service broadcasters do not exceed public service costs, excluding overcompensation (third condition) and the KEF procedure provides the necessary safeguards enabling the determination of costs of a well-run undertaking (fourth condition). Thus ARD and ZDF would strongly advocate that the European Commission examines closely its application of the Altmark-Criteria, in particular the 2nd and 4th condition.

Transfer of State resources:

ARD and ZDF also have encountered difficulties with the application of the criterium “transfer of State resources”. In the State aid case E 3/2005, Germany explained that revenues from the licence fee do not involve any State resources. They are paid by the holders of radio and TV reception devices directly to the public service broadcaster. These funds at no point in time become part of the state budget. It remains thus unclear, how the European Commission reconciles its differing position with the case law in *PreussenElektra* (C-379/98) and *Pearle* (C-345-/02).

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 No Partially N/A

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

As mentioned above in the answer to question 4, the current Commission practice in regard to the application of the Altmark-Criteria poses difficulties for ARD and ZDF. As a matter of fact – since Public service broadcasting is exempt from the Community Framework for State aid in the form of public service compensation and the Commission Decision does not apply due to the fact that ARD and ZDF exceed the limits for exemption from notification, they can be considered the main area of concern with regard to applying non-sector specific rules to Services of General Economic Interest.

In this respect, ARD and ZDF are convinced, that the Altmark criteria should be adapted to the specificity of each individual SGEI. Recent case-law – especially from the field of Public service broadcasting – fuels the demand that the Commission should review its current practice of automatically ruling out the application of the 2nd and 4th Altmark criteria to Public service broadcasting in favour of a more in depth analysis of individual circumstances, which might well lead to the actual fulfilment of the Altmark criteria.

More specifically, with regard to the second Altmark condition, the General Court held that the determination of the licence fee income payable to TV2 in the media agreements may be viewed as evidence of objectivity and transparency (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04 paragraph 225).

It also held that careful examination of the setting of the amount of the licence fee could lead to the conclusion of compliance with the fourth Altmark condition (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 232).

It should be also noted that, regarding the requirement for a tender procedure, the General Court stressed, that “that specific status for public service broadcasting is, moreover, the basis for the freedom accorded by the Amsterdam Protocol to Member States in the award of broadcasting SGEIs”, which justified the fact that Member States cannot be required to have recourse to competitive tendering (judgement of 26 June 2008, SIC, case T442/03, para 154).

In view of this latest case-law from Luxemburg ARD and ZDF believe, that the Commission’s approach on the exegesis of the 4th Altmark criterion should be reviewed. This is also backed up by the General Court’s judgement in the BUPA (judgement of 12 February 2008, BUPA, case T-289/03) which essentially states that while Altmark provides useful guidance on how to assess national schemes designed to compensate costs linked to the fulfilment of SGEI obligations, it does not fit in each and every case and therefore has to be modified accordingly.

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

Yes No **N/A X**

If yes, you are welcome to provide information:

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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 X No

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

To benefit from the derogation under Article 106 TFEU for their Public service broadcasting organisations, Member States are required to clearly define the public service remit in an entrustment act. Detailed guidance on what is required specifically, is given in the European Commissions recently revised Broadcasting Communication (c.f. para 43 – 52). Germany uses legal acts, statutes and guidelines by the broadcasting organisation and an ex-ante evaluation procedure to define the broadcasting remit and entrust the respective public service obligations.

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?

Yes **X** No Partially N/A

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

XX

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: Yes No **N/A X**

- the undertaking(s) and territory concerned: Yes No **N/A X**

- the nature of any exclusive or special rights assigned to the undertakings:

Yes No **N/A X**

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

Yes No **N/A X**

- the arrangements for avoiding and repaying any overcompensation:

Yes No **N/A X**

ARD and ZDF would like to point out, that – while generally applicable to Public service broadcasting – the existence of the Broadcasting Communication as “lex specialis” results in Art. 4 of the Decision not being used in the broadcasting sector. Nevertheless the Broadcasting Communication makes similar or identical requirements and the legal act pertaining to ARD and ZDF’s public service obligation (e.g. the broadcasting remit laid down in the 12th Interstate Treaty on Broadcasting) specify the nature of the public service obligation, name the undertakings and territory concerned, lay down parameters for calculating, controlling and reviewing the compensation and make arrangements for avoiding overcompensation.

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

Yes ? **No X**

If yes, please explain why and provide concrete examples:

XX

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

Yes **No X** N/A

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

XX

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

Yes No Partially **N/A X**

If yes, please explain why, possibly by giving concrete example s:

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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 **No X** Partially N/A

If yes, could you describe these difficulties?

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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?

Yes X No Partially N/A

15. Have you faced difficulties in separating the accounts?

Yes **No X** Partially N/A

If yes, you are welcome to give details:

XX

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 **X** No Partially N/A

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

The Broadcasting Communication gives sector specific guidance on how to allocate costs and revenues in regard to public service activities and commercial activities of Public service broadcasters.

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?

Yes No Partially **N/A X**

If no, could you explain why?

Due to the sector specific regulation of the Broadcasting Communication, the Decision and Framework are not applicable in this context.

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

Yes **X** No N/A

II) QUESTIONS REGARDING REASONABLE PROFIT

Unlike other SGEI, the compensation in the broadcasting sector does not include a profit margin (c.f. Broadcasting Communication, para 71).

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 No **N/A X**

- 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?

Yes No **N/A X**

- 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:

XX

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

Yes No Partially **N/A X**

If yes, please specify:

XX

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

Yes No **N/A X**

If no, how have you identified the reasonable profit?

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

Yes No **N/A X**

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

XX

D.3: CONTROL OF THE OVER-COMPENSATION

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

Yes X No N/A

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

Yes X No

For more details c.f. answer to question 9 above.

24. Have you encountered cases of overcompensation?

Yes **No X** N/A

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

XX

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

Yes No Partially **N/A X**

If yes, in which cases and why?

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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?

Yes No Partially **N/A X**

If yes or partially, please explain why:

ARD and ZDF would like to point out, that here as well, sector specific regulations are laid down in the Broadcasting Communication.

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 X**

SECTION E: SPECIFIC CATEGORIES OF SGEI

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:

Yes **No X** Partially N/A

- Compensation granted to hospitals:

Yes No Partially **N/A X**

- Compensation to social housing undertakings:

Yes No Partially **N/A X**

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

Yes No Partially **N/A X**

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

Yes No Partially **N/A X**

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

Yes No Partially **N/A X**

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

Yes No Partially **N/A X**

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

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

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

Yes No Partially **N/A X**

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

XX

32. On the basis of your experience, have the ceilings met the needs of the specific categories? **N/A X**

Yes No Partially

Yes No Partially

Yes No Partially

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

XX

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

Yes No Partially **N/A X**

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:

XX

34. 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 X No N/A

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

As regards Public service broadcasting services, financial compensation for the production and dissemination of content is an essential element to ensure that citizens can reap the full benefits of the public service. Nevertheless, there are various other policy instruments necessary to ensure that audiences have access to Public service broadcaster's context. Mentioning Must-Carry obligations for broadcasting infrastructure

providers is to name but one. Other examples include consumer subsidies to enable take-up of new digital reception devices or standardisation of open – non- proprietary – technology.

SECTION F: COMPETITION AND INTRA-COMMUNITY TRADE

35. 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?

Yes No **Partially X** N/A

If no, please explain why:

ARD and ZDF do not question the principles on which the Decision and Framework on SGEI – and the respective regulation in the Broadcasting Communication specific to Public service broadcasting – are based. Especially with regard to preserve equal footing between SGEI providers and commercial providers, experience shows that complicated ex-ante procedures can lead to disadvantages for public service providers in highly competitive fast moving markets.

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

Yes X No N/A

If no, could you explain why?

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37. 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?

Yes No **Partially X** N/A

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

While ARD and ZDF would not argue that their presence on the broadcasting market does not affect intra-community trade, we would like to point to our answer to question 4 as a reminder, that especially in those cases where Public service broadcasters serve small language communities, cross-boarder effects on trade might be negligible or non-

existent. Thus, the question merits individual examination, in each specific case.

38. 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 **No X** Partially

If yes, please explain why and in which cases:

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

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

Yes **No X** N/A

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

Yes No **Partially X** N/A

41. 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 X No N/A

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

Yes No Partially **N/A X**

If no, could you explain why?

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

Yes No **Partially X** N/A

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

ARD and ZDF are sufficiently informed about the Decision and Framework. This is due to the fact, that they have closely followed any developments within the relevant institutions of the European Union on State aid and SGEI. Nevertheless, we would like to point out that a lot of effort from our side goes into following the respective legislative and judicial action and interpretation thereof in practice and science. A significant number of providers of SGEI are probably not in a position to guarantee a comparable level of monitoring.

SECTION H: MISCELLANEOUS

44. 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?

Yes No **Partially X** N/A

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

C.f. our above answer to question 35. Due to the role of the European Commission as guardian of the internal market and competition, any regulation stemming from this source has a natural bias towards economic questions. It is thus of utmost importance, to reaffirm at any given opportunity, the competence of Member States to define, entrust and finance these services according to Art. 14 TFEU and Protocol No. 26 and the General Court in its recent judicature, in particular the ruling in the TV2 Denmark and BUPA cases.

45. 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?

Yes **No X** Partially N/A

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

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46. Do you have any other comments?

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Thank you for answering all/part of this questionnaire.