



EUROPEAN COMMISSION

Brussels, 24.04.2007  
C (2007) 1761 FINAL

**PUBLIC VERSION  
WORKING LANGUAGE**

**This document is made available for  
information purposes only.**

**Subject: State aid E 3/2005 (ex- CP 2/2003, CP 232/2002, CP 43/2003, CP 243/2004 and CP 195/2004) – Financing of public service broadcasters in Germany**

Dear Sir,

The Commission has the honour to inform you that the commitments given by Germany in the context of the present procedure remove the Commission's concerns about the incompatibility of the current financing regime. Consequently, the Commission decided to close the present investigation.

## **1. PROCEDURE**

- (1) Since 2002, the Commission received a number of complaints against various aspects of the financing regime for public service broadcasters in Germany (see below for a more detailed a description of the complainants' allegations: para. (67) *et seq.*). After a further exchange of correspondence between the Commission and Germany, the Commission informed Germany in March 2005 that it had come to the preliminary conclusion that the financing regime for public service broadcasters in Germany was incompatible with the EC Treaty (see below for a more detailed description of the Commission's preliminary findings: para. (74) *et seq.*).
- (2) Germany submitted its comments to these preliminary conclusions in May 2005 and submitted, following a further request for information sent by the Commission in February 2006, additional information in April 2006 (see below for a more detailed description of the arguments and additional information submitted by Germany: para. (78) *et seq.*).
- (3) Also, the various complainants come forward in the further procedure with their views and arguments (see below for a more detailed description of the arguments and additional information submitted by the complainants: para. (115) *et seq.*).

- (4) In July 2006, an agreement could be reached on the cornerstones of the future financing regime which eventually led to an agreement of the required changes for the future and the submission of commitments by Germany in December 2006 to amend the current financing regime (see below for a more detailed description of the commitments given by Germany: para. (322) *et seq.*).

## 2. DESCRIPTION

### 2.1. Description of the financing regime for public service broadcasters in Germany

#### 2.1.1. General remarks and historical overview

- (5) Article 5 of the German Constitution ("*Grundgesetz*") enshrines the freedom of broadcasting. This requires according to the case law of the German Constitutional Court that the basic provision of broadcasting services (so-called „*Grundversorgung*“) shall be ensured by public service broadcasting. This also implies adequate financial means allowing public service broadcasters to provide this “*Grundversorgung*” and the related “*Bestands- und Entwicklungsgarantie*” of public service broadcasting.
- (6) The German Constitution confers on the Länder legislative competence in matters of radio and television broadcasting. Consequently, the public service broadcasting regime and its financing is laid down in Germany in a number of acts which are adopted by the Länder. These acts comprise Treaties applicable to both public and private broadcasters (Interstate Treaty on broadcasting “*Rundfunkstaatsvertrag*”<sup>1</sup>), those that are applicable to all public service broadcasters (Interstate Treaty on the Broadcasting Licence Fee “*Rundfunkgebührenstaatsvertrag*” and an Interstate Treaty on the Financing of Public Service Broadcasting “*Rundfunkfinanzierungsstaatsvertrag*”), those applicable to ARD and ZDF (“*ARD Staatsvertrag*” and “*ZDF Staatsvertrag*”) as well as those applicable to the individual regional broadcasters (for instance “*WDR-Gesetz*”).
- (7) Historically, the first legal framework conditions for public service broadcasting were adopted by the Länder after the Second World War, between 1948 and 1955. The relevant laws governed the establishment of the first public service broadcasters as well as their public service mission and its financing.
- (8) In 1950, the regional broadcasters formed the association of public service broadcasters in Germany („*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland*“, ARD). The association was

---

<sup>1</sup> It contains provisions regarding general principles applicable to television programmes, the transmission of events of major importance for society , advertising and sponsoring. Furthermore, the RStV stipulates the general framework conditions under which private broadcasters can carry out their activities (these rules concern licensing and procedural rules, rules ensuring plurality of opinion, organisation of media supervision and financing of special tasks, programming principles, transmission time for third parties, funding and advertising, data protection, revision, finable offences and allocation of transmission capacities.) as well as public service broadcasters. As regards public service broadcasters, the RStV stipulates the public service mandate and the possibility for public service broadcasters to offer additional programmes, its financing and rules on advertisement.

accompanied by a Television Act of 1953 which regulated the details of the co-operation between the individual broadcasting corporations.

- (9) In 1961, the Länder established a second TV channel, the ZDF.
- (10) Following a judgement by the Constitutional Court, which ruled that media and broadcasting matters, including the financial aspects, were the competence of the Länder (and not the Federal State), the Länder adopted 1968/1969 an Interstate Treaty on the licence fee. As a consequence, the licence fee was no longer collected by the Post on behalf of the public service broadcasters (based on a federal law "*Fernmeldeanlagen-gesetz*"), but by the public service broadcasters themselves (based on Länder legislation). Public service broadcasters established a joint body „*Gebühreneinzugszentrale*“ (GEZ) which collected the licence fee on behalf of the individual broadcasting corporations as from 1976 onwards.
- (11) Following the first commercial TV operators in Germany in the beginning of the 80ies, the Länder established a comprehensive legal framework laying down the conditions for public and private broadcasters, the so-called „*duale Rundfunkordnung*“ (First Interstate Treaty on Broadcasting).
- (12) Following German re-unification, the Länder adopted the „*Staatsvertrag über den Rundfunk im vereinten Deutschland*“ 1991 which harmonised the rules for public service broadcasting in Germany and incorporated the broadcasters of former Eastern Germany into the existing financing regime for public service broadcasting.
- (13) Since 1991, the Interstate Treaty on Broadcasting was amended several times. The amendments concern in particular:
  - the level of the licence fee<sup>2</sup>;
  - the procedure to determine the financial needs of public service broadcasters (so-called „KEF-procedure“<sup>3</sup>);
  - the possibility for public service broadcaster to offer new media services<sup>4</sup>, as well as the
  - the possibility granted to public service broadcasters to distribute existing programmes via digital technology and to offer additional digital channels.<sup>5</sup>

---

<sup>2</sup> In the last ten years, the licence fee was increased on several occasions: in 1996 from 23.8 DM to 28.25 DM (i.e. by 19%), in 2000 to 31.58 DM (i.e. by 12%) and in 2004 to €17.03 (i.e. by 5%).

<sup>3</sup> Amendments introduced through the 3rd Amendment to the Interstate Treaty on Broadcasting which entered into force in 1997. The changes introduced following a judgment by the Constitutional Court in 1994 concern the methods for determining the licence fee level and the increased independence of the Commission determining the financial needs of public service broadcasters, KEF.

<sup>4</sup> In the 4<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting which entered into force in 2000, ARD and ZDF were allowed to offer media services with primarily programme-related content. Furthermore, the 7<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting which entered into force on 1<sup>st</sup> April 2004 introduced self-commitments of public service broadcasters to further substantiate the public service mission and changed the previous formulation referring to “primarily programme related media offers” into “programme-related media offers” with the intention of establishing a stricter link of the new media offer to the relevant programmes.

<sup>5</sup> Amendments introduced through the 4<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting which entered into force in 2001.

(14) The most recent amendments, which were communicated to the Commission and entered into force after the Article 17 letter as sent in March 2005 (8<sup>th</sup> and 9<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting<sup>6</sup>) concerned mostly the definition of the public service remit:

- requiring that additional digital channels have their focus on information, education and culture (introduced through the 8<sup>th</sup> Amendment);
  - replacing the possibility to offer "*media services*" with the possibility to offer "*telemedia*" (introduced through the 9<sup>th</sup> Amendment).
- as well as financial aspects:
- control of self-commitments which have an impact on the financial situation of public service broadcasters by the KEF (introduced through 8<sup>th</sup> Amendment);
  - limitation of public service broadcasters' possibility to take up loans (introduced through 8<sup>th</sup> Amendment).

2.1.2. *Definition of public service tasks*

(15) The scope of the public service tasks is partly laid down by law (mainly in the Interstate treaty on broadcasting) and partly left to the public service broadcasters (mainly through guidelines and self-commitments).

(16) Pursuant to the general Interstate Treaty on Broadcasting ("*Rundfunkstaatsvertrag*", RStV), public service broadcasters have the task ("*Pflichtaufgabe*") to act as a medium and factor for individual and public opinion shaping through the production and distribution of radio and television programmes (§ 11 (1) first sentence RStV). Public service broadcasting has to provide in its offers and programmes an overview of the international, European, national and regional events in all areas of life. It shall contribute to international understanding, European integration and cohesion on the federal and regional level. Its programme shall serve information, education, advise and entertainment purposes. It shall offer in particular cultural programmes. Public service broadcasting needs to respect principles of impartiality and objectivity and shall take into account the plurality of opinion and ensure a balanced programme offer.

(17) Public service broadcaster can – in accompanying its programmes ("*programmbegleitend*") - offer print media and media services with programme-related ("*programmbezogen*") content (cf. § 11 (1) second sentence RStV). As regards print media, public service broadcasters are allowed to give information about the broadcaster itself and the framework conditions governing its programme activities, their programmes and reproduce programme content always provided that there is a continued relation to the programme and that it

---

<sup>6</sup> The amendments introduced through the 8<sup>th</sup> and 9<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting entered into force on 1st April 2005 and 1<sup>st</sup> March 2007.

supports the core programme activity.<sup>7</sup> The same considerations apply to media services while taking into account the specific features of new media services.<sup>8</sup>

- (18) With the 9<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting, the Länder replaced the term “*media service*” by “*telemedia*”. It is clarified that the scope of “*telemedia*” would not be limited to broadcasting in the traditional sense, but cover all services which are included in the constitutional concept of broadcasting (reference is made in the explanatory memorandum to BVerfGE 74, 297 (350) and BVerfGE 83, 238 (302)). Covered by the thus interpreted concept of broadcasting are traditional broadcasting, live streaming (i.e. additional parallel/contemporaneous transmission of traditional broadcasting programmes over the Internet) and web-casting (exclusive transmission of broadcasting programmes over the Internet). The explanatory memorandum to the Amendment to the Interstate Treaty on Broadcasting contains a list of examples of *telemedia*, such as traffic-, weather- and stock exchange data, news groups, chat rooms, e-press, TV and radio text, *teleshopping* and also *telegames*<sup>9</sup>, video on demand to the extent it is not already television broadcasting within the meaning of the Television without Frontiers Directive (also taking into account recent jurisprudence in the Mediakabel case), online services which provide access to data such as internet search machines as well as the commercial distribution of information via electronic mail such as advertisement mails.
- (19) Pursuant to § 11 (4) RStV, public service broadcasters were asked to further develop the public service task in statutes or guidelines which are to be published. Public service broadcasters need to submit a report every two years (for the first time on 1st October 2004) about the fulfilment of their public service mission, the quality and quantity of offers and programmes as well as the envisaged projects. In accordance with these requirements, the guidelines adopted by public service broadcasters in 2004 (“*Leitlinien für die Programmgestaltung der ARD*” and “*Programmperspektiven des ZDF 2004 – 2006*”) contain statements on envisaged focus of activity, quantitative statements for certain programme genres and in some cases announcement of concrete programmes. These guidelines also contain

---

<sup>7</sup> In this respect, Germany had explained in the phase preceding the Article 17 letter that new media services allowed under this provision were ancillary activities supporting the main task („*unterstützende Randbetätigung der Erfüllung des Programmauftrags*”). Furthermore, Germany had explained that the constitutional concept of broadcasting was evolutionary, also allowing public service broadcasters to adapt to new technological developments. The explicit inclusion of new media services into the Interstate Treaty on Broadcasting served as a mere clarification and intended through the introduction of the required programme link a limitation of these services.

<sup>8</sup> Cf. Explanatory memorandum to the 7<sup>th</sup> Amendment to the Interstate Treaty on broadcasting, no 4 (1).

<sup>9</sup> The previous definition of “*media service*” as contained in § 2 (2) No 4 of the Interstate Treaty on Media Services (“*Mediendienstestaatsvertrag*”) did not – according to the explanatory memorandum to that law - cover *tele-shopping* and *tele-games*.

statements regarding the public service broadcasters' additional channels<sup>10</sup> as well as their online activities.<sup>11</sup>

- (20) § 19 RStV (as last amended by the 8<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting) gives an overview of the broadcasting programmes of ARD and ZDF. It clarifies that ARD and ZDF organise each one general (full coverage) TV programme ("*Fernsehvollprogramm*"). The number of programmes organised by the regional broadcasters within the ARD are limited to the number of channels which existed as of 1<sup>st</sup> April 2004.
- (21) Furthermore, ARD and ZDF are allowed to offer jointly a television programme with a focus on culture (*Sat3* in cooperation with the ORF and the SR) and two thematic channels (*Phoenix* and *Kinderkanal*). They take part in a European Culture Channel (*ARTE*). These programmes will be distributed via satellite; distribution over other platforms is regulated by regional laws.
- (22) ARD and ZDF are allowed to distribute their programme also via digital technology and to organise – exclusively on the digital platform – three additional channels for each ARD and ZDF with a focus on culture, education and information.
- (23) On the other hand, § 13 RStV prohibits public service broadcasters to offer programmes against remuneration.

### 2.1.3. Control

- (24) The fulfilment of the public service mission is subject to internal and external control. The Broadcasting Council ("*Fernsehrat*"/"*Rundfunkrat*") is one of the internal control bodies of the public service broadcasters which consist of representatives of the various groups of German society.<sup>12</sup> It approves the budget as determined by the Administrative Council (see on this aspect below, para. (36)) and elects the Director of the public service broadcasters ("*Intendant*"). It establishes the programme guidelines and advises the "*Intendant*" in programme-related questions. It also checks that public service broadcasters respect their programme guidelines as well as the respect of the public service broadcasters' self-commitments.

---

<sup>10</sup> For instance, the ARD "*Leitlinien*" state that the additional digital channels were to be understood as a complementary service which would give viewers access to already existing programme material in a different more user-friendly way/format. Similarly, the ZDF "*Programmperspektiven*" explain that the additional digital offer is mainly based on existing programme material.

<sup>11</sup> To some extent, these guidelines contain certain principles for online activities (e.g. as regards the programme-link) and in some cases limitations (e.g. no local and regional information services such as events calendar, restaurant guides). Also, public service broadcasters have given the commitment – subject to the control of the KEF - that expenditure related to online offers will be limited to 0.75% of the ARD/ZDF general budget.

<sup>12</sup> For instance, the ZDF "*Fernsehrat*" consists of 77 representatives, including representatives of the Länder, the Federal State, representatives of the various political parties and confessional groups. In addition, following proposals from the various organisations, the Minister President appoints representatives of *inter alia* the trade union associations, trade associations, agricultural and environmental associations, representatives of the association of press editors and the association of journalists.

- (25) In addition to these internal control mechanisms, the public service broadcasters need to inform the Parliaments of the Länder every two years submitting a report about the financial situation and the fulfilment of the public service mission. They also have to submit a report to the Länder on the fulfilment of their public service remit.
- (26) Also, the KEF ("*Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten*")<sup>13</sup>, when assessing the financial needs of public service broadcasters needs to check – while respecting the programme autonomy of public service broadcasters – whether the programme decisions remain within the public service remit. Third parties can lodge complaints with the internal control bodies and ultimately with the respective Land exercising a limited legal supervision of the activities of public service broadcasters ("*Rechtsaufsicht*"). Against the decision of the respective Land, third parties have the possibility to introduce actions before the national courts.

#### 2.1.4. *Financing of public service broadcasters*

##### 2.1.4.1. Licence fee financing

###### (a) Legal provisions

- (27) The financing guarantee as enshrined in the German Basic Law is reflected in § 12 RStV which stipulates that public service broadcasting shall be funded in such a way that it is able to meet its constitutional and statutory tasks. The funding shall be sufficient to safeguard the existence and further development of public service broadcasting (so-called "*Bestands- und Entwicklungsgarantie*"). This provision gives public service broadcasters a direct claim against the State to ensure sufficient funding.
- (28) Pursuant to § 13 RStV, public service broadcasting shall finance itself through television and radio licence fees, income from television and radio advertisement and other income; the main source of income shall be the television and radio licence fee.
- (29) In accordance with § 14 RStV, the financial needs of public service broadcasters will be determined based on submissions from the public service broadcasters assessed by the independent Commission for the determination of the financial needs of public service broadcasters ("*Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten*", KEF). The revenues necessary to cover the recognised net costs of the public service broadcasters will determine the licence fee level which is fixed in accordance with the provisions of the Interstate Treaty on the Financing of Broadcasting ("*Rundfunkfinanzierungsstaatsvertrag*", RFinStV).
- (30) The RFinStV contains provisions governing the organisation of the KEF and the procedure for determining the financial needs of public service broadcasters. The KEF consists of 16 independent experts who are appointed by the Minister Presidents for a duration of five years. There is one representative for each Land

---

<sup>13</sup> Its main task is to determine the financial needs of public service broadcasters serving as the basis for the Länder to set the licence fee level. The details of its competences in this respect are explained in more detail below in para. (30).

comprising experts, some of which come from courts of auditors; expertise is required in various areas such as accounting, investments, media affairs. The KEF has the task to assess the financial needs as declared by the public service broadcasters. This assessment also includes the evaluation to what extent the programme decisions remain within the public service remit as well as the potential for increased efficiency. The assessment of the financial needs of public service broadcasters is based on the needs for maintaining existing programme offers (“*Bestandsbedarf*”) as well as the needs for further development (“*Entwicklungsbedarf*”). The determination of the financial needs is based on the general price developments/indices as well as more specifically the price development in the media sector. The financial needs of public service broadcasters are determined taking into account the principles of efficiency and thriftiness (“*Grundsätze von Wirtschaftlichkeit und Sparsamkeit*”). The 8<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting also asks the KEF, when determining the financial needs of public service broadcasters, to take into account the general economic development as well as the development of public budgets.

- (31) Furthermore, the KEF is asked to control that public service broadcasters have respected those self commitments which have a financial impact (such as the self-commitment to limit online spending to 0.75% of the public service broadcaster's overall budget).<sup>14</sup> Public service broadcaster's possibility to take up loans is limited to loans for the acquisition, extension or improvement of facilities. This provision is to be understood as a general prohibition of loan financing and the KEF has therefore asked the ZDF to break even during the current licence fee period and avoid taking up new loans.<sup>15</sup>
- (32) Every two years, the KEF reports about the financial situation of public service broadcasters and proposes – where necessary – increases in the licence fee level. The licence fee level will be fixed in the RFinStV, following the proposal of the KEF, by decision of the Länder and subsequent adoption by the Länder Parliaments. The RFinStV also regulates the distribution of the revenues from the licence fee between the various broadcasting corporations.<sup>16</sup>
- (33) Finally, the Interstate Treaty on the Broadcasting Licence Fee (“*Rundfunkgebührenstaatsvertrag*”, RGebStV) regulates the duty to pay the licence fee, including the collection procedure. The possession of a serviceable radio or television set (“*Rundfunkempfangsgerät*”) renders the holder liable to pay the general licence fee (“*Grundgebühr*”) as well as a television licence fee for each television set (“*Fernsehgebühr*”).

---

<sup>14</sup> In the 15<sup>th</sup> KEF report, the KEF concluded that ARD and ZDF had respected their commitments to limit online spending to max. 0.75% of their budget (cf. para. 270 of the 15<sup>th</sup> KEF report, Vol. 1).

<sup>15</sup> According to the 15<sup>th</sup> KEF report, ARD and ZDF did not plan any loan financing for the licence fee period 2005-2008. In the past, the KEF had only exceptionally accepted loan financing (for instance in relation to DAB; see 12<sup>th</sup> report, para. 229).

<sup>16</sup> For instance, following the 8<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting the revenues from the television licence fee will be divided between ARD and ZDF with ARD receiving approximately 61% (reduced from previously 62%) and the ZDF approximately 39% (increased from previously 38%).



- (34) With the 8<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting, the level of the licence fee as stipulated in the RGebStV was increased to a basic monthly fee of € 5.52 and a monthly television fee of €11.51, or in total to €17.03 per month.
- (35) The broadcasting corporations have created a joint body, the GEZ, which collects the licence fee on behalf of the broadcasting corporations. The obligation to pay the licence fee is laid down in an administrative act (“*Rundfunkgebührenbescheid*”) and can – in case of non-payment – be obtained through administrative enforcement procedures (“*Verwaltungszwangsvollstreckungsverfahren*”). Any infringement of the obligation to pay the licence fee is an administrative offence (“*Ordnungswidrigkeit*”).
- (36) The determination of the public service broadcaster’s financial needs and the subsequent use of the available financial means is subject to internal and external control. The Broadcasting Council (“*Fernsehrat*”) approves the public service broadcaster’s budget as well as the annual accounts. The administration of ARD and ZDF is also subject to the control of the Administrative Council (“*Verwaltungsrat*”) which finally adopts the budget and the annual accounts. Furthermore, and as mentioned above, public service broadcasters need to inform the Parliament about their financial situation. Also, the financial performance of public service broadcasters is subject to the control of the Courts of Auditors which check the execution of the budget in line with the principles of efficiency and thriftiness.

(b) Financial situation of public service broadcasters

- (37) For the period 2005 -2008, public service broadcasters ARD and ZDF dispose of (estimated) revenues amounting to €23.8 billion and €7.7 billion respectively, or €5.95 billion p.a. and €1.9 billion p.a. respectively. In that same period, licence fee revenues perceived by the ARD amounted to approximately 86.4% of total revenues (or approximately €20.6 billion), with advertisement amounting to 6% and other revenues to 7.6%. For the ZDF, licence fee revenues represented approximately 86.1% of total revenues (or approximately € 6.6 billion), advertisement to 6.1% and other revenues to 7.8%.<sup>17</sup>
- (38) More particularly, public service broadcasters have recognised expenditure for online activities for the period 2005-2008 of €172.5 million for the ARD and € 41.4 million for the ZDF. The maximum amount allowed for that period – respecting the 0.75% ceiling - (including additional financial resources available for public service broadcasters through cost savings in other areas) would amount to approximately €180 million for the ARD and around 57.5 million for the ZDF. ARD and ZDF together could therefore spend on online activities about € 240 million over the four year period until 2008 or on average about €60 million p.a..
- (39) As regards additional digital channels, ARD und ZDF had submitted financial needs for the period 2005-2008 of €45.3 million and €57.4 million respectively. This corresponds to 0.2% and 0.7% of ARD’s and ZDF’s budget.<sup>18</sup>

<sup>17</sup> Cf. 15<sup>th</sup> KEF report, Vol. 1, para. 35 and 40.

<sup>18</sup> Cf. 15<sup>th</sup> KEF report, Vol. 1, para. 293.

- (40) According to Germany, the budgets of public service broadcasters identify a sports rights budget subject to the internal control mechanisms. For the period 2001 – 2004, the ARD had a budget of €805 million of which only €789 million were used (the rest being transferred to the next licence fee period). For the period 2005 – 2008, the budget amounts to €894 million. As regards the ZDF, the sports budget for the period 2001 – 2004 amounted to €670 million, of which €638 million were used (the rest being transferred to the next licence fee period). For the period 2005 – 2008, the sports budget of the ZDF amounts to €761 million. This means that for the period 2001 – 2004, both public service broadcasters together had on average annual spendings for sports rights/transmissions of approximately €356 million (€197 for ARD and €159 for ZDF). The share of the sports budget compared to the public service broadcasters' overall budget is, as regards the licence fee period 2005 – 2008, 3,8 % for the ARD, and 9,9 % for the ZDF.<sup>19</sup>

#### 2.1.4.2. Special tax treatment of commercial activities of public service broadcasters

- (41) Public service broadcasters are organised as public bodies (“*juristische Person de öffentlichen Rechts*”) and more particular as “*Anstalten*”) and as such are not subject to taxation. However, to the extent that such public bodies carry out commercial activities, such activities (“*Betriebe gewerblicher Art*” or *BgA*<sup>20</sup>) are taxable pursuant to. § 1 (1) No 6 KStG (law on corporate taxes “*Körperschaftsteuergesetz*”). The German tax authorities have defined a number of *BgAs*, such as advertisement, “*Kostenbeteiligung Dritter*” (contribution to costs by third parties), commercial exploitation of programme material and studios, “*Verpachtung von Anlagevermögen*” (lease of assets) and “*Sendestandortmitbenutzung*”.
- (42) *BgAs* are taxed on their profits pursuant to § 7 (1) KStG. When determining the taxable profits all such costs caused by the relevant activity can be deducted from the relevant revenues. However, to the extent that public service broadcasters incur costs both in relation to activities exempted from tax and in relation to taxable activities (so-called “*gemischt veranlasste Kosten*” or joint costs) the question of cost allocation arises. According to German tax law, costs which are directly caused by the relevant commercial activity can be deducted. Other joint costs are not normally attributed to the commercial activity if they are primarily caused by the tax exempted activity. However, such joint costs may be attributed to the commercial activity provided that there is an objective allocation key.
- (43) To the extent the attribution of commonly caused costs raises difficulties, the tax authorities are allowed, pursuant to § 162 AO (“*Abgabenordnung*”), to use estimates. According to the relevant case law regarding the interpretation of this provision, tax authorities can have recourse to estimates where the determination of the tax base is impossible or unreasonable. In cases where the legislator has foreseen difficulties in the determination of the tax base, the legislator has

---

<sup>19</sup> The higher share for the ZDF is explained by the fact that while the sports budget is similar to that of the ARD, its overall budget is significantly lower than the overall budget of the ARD.

<sup>20</sup> Pursuant to § 4 KStG „*Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts*“ within the meaning of § 1 (1) No 6 are defined as all entities which are engaged in non negligible economic activity with the purpose of generating revenues; profit making purpose is not necessary.

specified in addition to the general principle laid down in § 162 AO that taxable profits could be determined through estimates reflecting the usual profit in a given sector.<sup>21</sup>

- (44) The tax authorities have evaluated in the past the reasonableness of deductible costs for the various commercial activities (*BgAs*) of public service broadcasters and have established generally used estimates for the taxable profit for the various activities, expressed as a percentage of turnover. These assumed taxable profits are in most cases laid down in administrative circulars.
- (45) As regards the public service broadcasters' advertisement activities, the determination of the taxable profit has been laid down by law enshrining a previously established administrative practice. Since 2001, § 8 (1) 2 KStG stipulates that the profit of advertisement activities of public service broadcasters is assumed to be 16% of the relevant turnover. This provision already existed before, but only for the ZDF (since 1977). For the ARD, there was a different model of cost allocation, the so-called "1:4/1:7"-model. According to this model which was fixed in an administrative order ("*Verwaltungserlass*") in 1980 (formalising an already previously existing model), ARD was allowed to deduct from its advertisement revenues for each minute of advertisement 4/7 minutes of the TV/radio programme surrounding the advertisement slot ("*Werberahmenprogramm*")<sup>22</sup>. However, both provisions/models were initially based on the estimated taxable profit of 16% of turnover from the sale of advertisement. Only when, due to the sharp decrease in advertisement revenues the model applicable to the ARD led to huge assumed losses with the consequence of the ARD not being liable to taxes (whereas the ZDF had to pay taxes), it was decided to regulate the taxation of advertisement revenues by ARD and ZDF based on the same provision.
- (46) For other commercial activities assumed profits have been fixed in a similar way, following detailed evaluations carried out by the tax authorities: for the contribution to costs by third parties ("*Kostenbeteiligungen Dritter*"), tax authorities estimated an assumed profit of 16% of revenues, for the exploitation of programme material an assumed profit of 25% was fixed and for the lease of assets ("*Verpachtung von Anlagevermögen*"), the sale of CDs and DVDs and other merchandising activities, the assumed profit was fixed at 40% of revenues. Other activities such as making available transmission facilities ("*Senderstandortmitbenutzung*") are on the other hand subject to the general tax rules (i.e. based on the actually determined profit generated by this activity).

#### 2.1.4.3. Financial guarantee and "*Anstaltslast*"

- (47) In accordance with the jurisprudence of the German Constitutional Court, the State is under an obligation to guarantee the existence and further development of public service broadcasting. This "financing guarantee" gives public service

---

<sup>21</sup> See for instance § 64 AO regarding "*Verwertung unentgeltlich erworbenen Altmaterials*".

<sup>22</sup> This model was based on the consideration of how much "*Werberahmenprogramm*" the ARD would need to sell one minute of advertisement.

broadcasters a direct claim against the State to receive the financial means necessary to fulfil its public service mission.<sup>23</sup>

- (48) Also, this financial guarantee implies an obligation of the relevant Land to avoid the bankruptcy of public service broadcasters and if necessary to take over the public service broadcaster's liability.<sup>24</sup> The exemption from bankruptcy proceedings is also explicitly stipulated in the relevant legal acts governing the individual broadcasting corporations.<sup>25</sup>
- (49) Furthermore, public service broadcasters are organised as "Anstalt" benefiting from the general principles of the "Anstaltslast". These principles imply that the State is the guarantor to provide the "Anstalt" with the necessary financial means and to cover possible deficits.

## 2.2. Description of broadcasting market in Germany

- (50) The ARD is an association of nine regional broadcasting corporations established in 1953. It transmits a country-wide programme (so-called "Erstes Deutsches Fernsehen"), the member broadcasting corporations transmit in their relevant region their own programmes (so-called "Dritte Programme"). The ZDF which was established in 1961 transmits the second country-wide programme (the so-called "Zweites Deutsches Fernsehen").
- (51) ARD and ZDF also jointly transmit two thematic channels, *Kinderkanal* (children's channel) and *Phoenix* (events and documentary channel) both since 1997. Together with the Austrian and Swiss public service broadcasters (ORF and SRG), ARD and ZDF transmit the cultural satellite channel 3sat (since 1984). ARD and ZDF also co-operate with the French public service broadcaster concerning the transmission of the European culture channel ARTE since 1992. In addition to these channels, ARD and ZDF are entitled to offer each three additional digital channels. The public service offer consists of approximately 51.8% main programmes (i.e. 5% each country-wide programmes for ARD and ZDF and 41.7% for regional programmes offered by the regional broadcasting corporations), 18.7% for thematic channels (*Phoenix* and *Kinderkanal* amounting to 8.7% and 3sat, ARTE and BR-alpha amounting to 10.1%) and 29.5% of additional digital channels.<sup>26</sup>
- (52) Based on the information contained in the latest KEF report<sup>27</sup>, the public service broadcaster's offer of different programme genres can be illustrated as follows:<sup>28</sup>

---

<sup>23</sup> Cf. Decision of the Constitutional Court, BVerfGE 90, 60 (91).

<sup>24</sup> Cf. Decision of the Constitutional Court BVerfGE 89, 144.

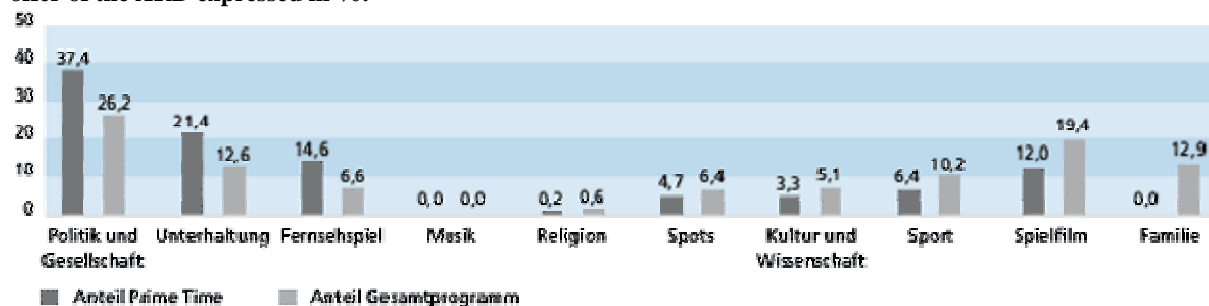
<sup>25</sup> Cf. for instance § 32 of the ZDF Interstate Treaty which stipulates the inadmissibility of insolvency proceedings concerning the ZDF assets ("*Unzulässigkeit eines Insolvenzverfahrens über das Vermögen des ZDF...*") or § 1 WDR Gesetz (WDR Law).

<sup>26</sup> Cf. 15<sup>th</sup> KEF report, Vol. 2, para. 330.

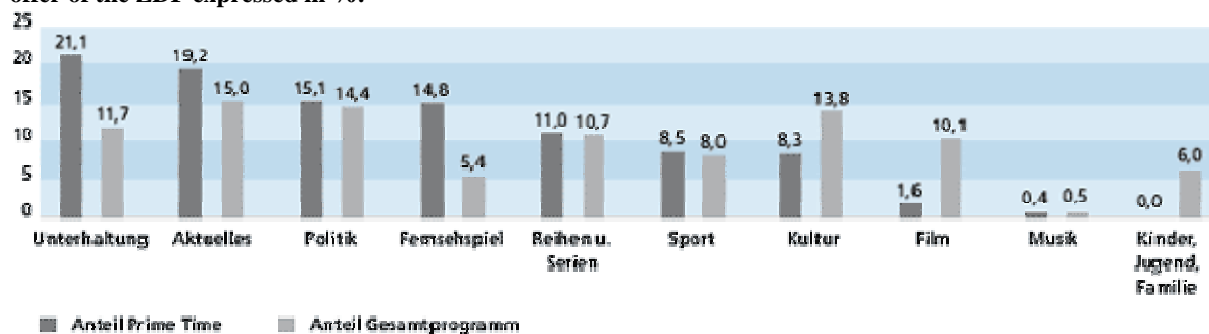
<sup>27</sup> Cf. 15<sup>th</sup> KEF report, Vol. 2, in particular para. 363-365.

<sup>28</sup> It is noted that there is no common and consistent categorisation of programme genres so that the direct comparison between ARD and ZDF as well as we a direct comparison between the broadcasters'

**Table 1: Share of different programme genres during prime time and in relation to entire programme offer of the ARD expressed in %:**

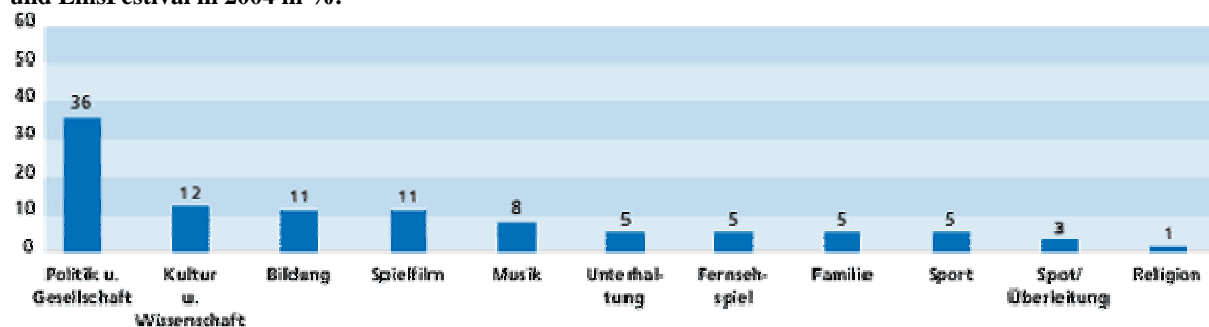


**Table 2: Share of different programme genres during prime time and in relation to entire programme offer of the ZDF expressed in %:**



(53) When looking at the offers on the three additional digital channels of ARD and ZDF, the picture is as follows:

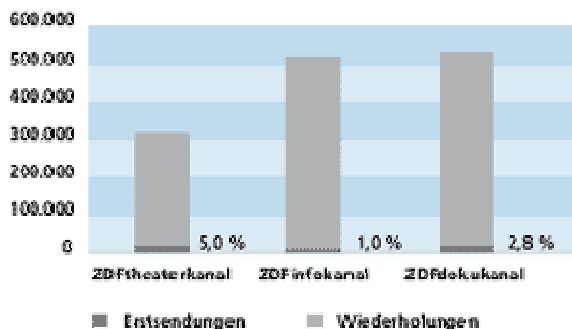
**Table 3: Share of the various programme genres in relation to the digital offer of EinsMuXx, EinsExtra und EinsFestival in 2004 in %:**



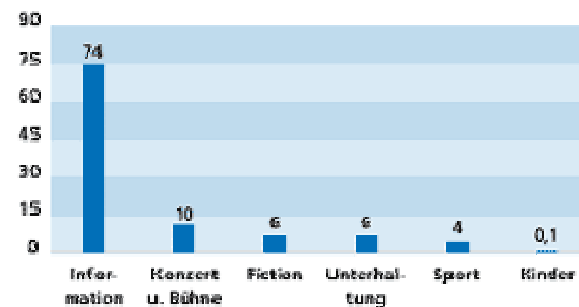
**Table 4: Share of the various programme genres in relation to the digital offer of ZDF in 2004 in %:**

general TV offer and their offer over additional digital channels is not possible. However, the above graphs give a certain indication of the programme genres and their weight within the public service broadcasters' programme.

Gesamtsendeleistung nach  
Erstsendungen und Wiederholungen



Anteil der einzelnen Ressorts an der Gesamtsendeleistung  
ZDFtheaterkanal, ZDFinfokanal und ZDFdekkanal in Prozent



(54) Based on other sources which give a comparative overview of the programme genres of both public and the main private operators in Germany, the picture is as follows:

**Table 5: Different programme genres in ARD/Das Erste, ZDF, RTL, SAT.1 und ProSieben in 2004 (2005) expressed as % of broadcasting time**

	ARD	ZDF	RTL	SAT.1	Pro7
<b>Information – which included <i>inter alia</i>:</b>	41,7 (43.0)	48,4 (48.8)	23,9 (25.2)	16,8 (17.7)	29,9 (27.7)
- News	18,3 (9.6)	19,2 (9.6)	7,3 (4.0)	3,4 (3.2)	1,7 (1.1)
- "Magazines"	20,8 (20.9)	26,4 (26.8)	2,3 (2.3)	12,6 (12.9)	21,2 (19.5)
<b>Sport<sup>29</sup></b>	9,6 (6.8)	7,5 (5.5)	2,2 (2.1)	0,6 (0.5)	-
Sport information	3,8 (2.6)	3,5 (2.6)	1,1 (0.9)	0,3 (0.2)	-
Sport transmission	5,8 (4.1)	4,0 (2.9)	1,2 (1.2)	0,3 (0.3)	-
<b>Non-fictional entertainment</b>	8,2 (6.9)	6,1 (5.6)	20,6 (19.9)	31,5 (31.7)	17,7 (20.8)
<b>Music</b>	1,6 (1.5)	1,6 (1.1)	1,7 (1.7)	0,6 (0.5)	1,7 (0.6)
<b>Children programme</b>	6,2 (5.7)	5,9 (5.0)	1,6 (1.4)	1,6 (0.2)	3,7 (2.4)
<b>Fiction</b>	28,7 (32.2)	26,7 (30.5)	24,7 (23.8)	23,1 (24.1)	27,0 (28.7)
<b>Other</b>	2,5 (2.4)	2,5 (2.3)	5,3 (5.4)	5,0 (4.7)	5,3 (5.4)
<b>Advertisement</b>	1,5 (1.4)	1,3 (1.3)	20,0 (20.5)	20,8 (20.5)	14,6 (14.5)

<sup>29</sup> The lower share of sports in the public service broadcasters' programme in 2005 compared to 2004 is explained by the fact that 2004 was a "sports year" with major sports events taking place.

Source: Krüger, Udo Michael: *Sparten, Sendungsformen und Inhalte im deutschen Fernsehangebot. Programmanalyse 2004 and 2005 von ARD/Das Erste, ZDF, RTL, SAT.1 und ProSieben. In: Media Perspektiven 4/2006*

- (55) Since 1984, private broadcasters have entered the market. The major broadcasting groups operating on the German freeTV market are *ProSiebenSAT.1 Media AG* (with freeTV channels ProSieben, Sat1, Kabel eins and n24) and *RTL* (with freeTV channels, RTL, n-tv and VOX). Other TV channels are DSF (*Deutsches Sportfernsehen*)<sup>30</sup>, Tele 5, VIVA, MTV.<sup>31</sup> In total, there are approximately 81 country wide TV programmes, with 21 offered by public service broadcasters and 60 programmes offered by private competitors.
- (56) In addition, there is Premiere as the main payTV operator on the German market, with more than 3 million subscribers and an annual turnover of approximately €1 billion (2005).<sup>32</sup>
- (57) There are also a number of foreign operators with programmes directed to the German-speaking audience such as National Geographic Deutschland, Discovery Channel, Nick Deutschland.<sup>33</sup> Also, cable distributors offer large proportions of foreign channels in their bouquets.<sup>34</sup>
- (58) In financial terms, the budget of ARD and ZDF amounts to approximately €7.9 billion p.a. or for the ARD and ZDF individually €5.95 billion p.a. and €1.9 billion, respectively. On the other hand, the public service broadcasters' major competitors in the free TV market have an annual turnover of approximately €2 billion (ProSiebenSat1 Media AG, financial data for 2006) and approximately €1.8 billion for RTL Television Germany (data for 2005).
- (59) The market shares of the main TV channels (free TV) are as follows:

**Table 6: Market shares (2005)**

Market shares of channels according to time slots <sup>1)</sup> viewers from 3 years; expressed in %								
	03.00-15.00		15.00-18.00		18.00-20.00		20.00-01.00	
	2004	2005	2004	2005	2004	2005	2004	2005
<b>“Das Erste” (ARD)</b>	12,6	12,0	12,8	11,7	14,9	13,6	15,1	14,9

<sup>30</sup> The DSF had apparently a turnover in 2006 of €108 million (source: epd medien).

<sup>31</sup> Source: KEK ("*Kommission zur Ermittlung der Konzentration im Medienbereich*") overview of market shares of private broadcasters on the German market for 2005.

<sup>32</sup> In addition to Premiere which is the leading payTV operator with around 3.4 million subscribers, companies which were initially only providing infrastructure or marketing sports rights such as Kabel Deutschland (about half a million subscribers) as well as Arena (with about 1 million subscribers), started offering payTV services; also originally freeTV operators are offering come payTV services.

<sup>33</sup> Cf. European Audiovisual Observatory for 2004.

<sup>34</sup> According to information from the European Audiovisual Observatory, *Kabel Deutschland* offered in 2004 around 40% foreign channels in their bouquets.

Market shares of channels according to time slots <sup>1)</sup> viewers from 3 years; expressed in %								
	03.00-15.00		15.00-18.00		18.00-20.00		20.00-01.00	
	2004	2005	2004	2005	2004	2005	2004	2005
<b>main/joint programme)</b>								
<b>ZDF</b>	10,6	10,5	12,3	13,7	16,4	16,0	15,2	14,4
<b>“Dritte” (programmes of regional broadcasters)</b>	9,8	9,7	12,5	11,8	16,9	16,5	15,3	15,0
<b>SAT.1</b>	11,4	12,0	14,6	15,3	9,1	11,2	8,9	9,1
<b>RTL</b>	15,3	14,5	14,0	13,9	12,9	12,3	13,4	12,7
<b>ProSieben</b>	7,9	7,9	6,4	5,8	5,6	5,2	7,1	6,8
<b>Others</b>	32,5	33,5	27,4	27,9	24,1	25,1	24,9	27,1

1) Market shares for 2005: January - November.

Source: AGF/GfK Fernsehforschung.

- (60) The above table shows that, during peak time (18:00 – 20:00), public service broadcasters had in 2005 a combined market share of approximately 46% counting only their main programme offers, excluding thematic and additional digital channels (the share is similar with 45% concerning the time between 20:00 and 1:00).
- (61) When looking at market shares throughout the day (for 2005), public service broadcasters ARD and ZDF have each 13.5% and the regional programmes ("Dritte Programme") another 13.6%, other joint productions or thematic channels of public service broadcasters (including *Phoenix*, *Kinderkanal*, 3sat and arte) reached about 3-4%, i.e. in total around 45%, whereas private broadcasters/channels belonging to the RTL group (RTL, RTL II, Super RTL, VOX and n-tv), and broadcasters/channels belonging to the ProSiebenSat1 group (Sat.1, ProSieben, kabel eins, N24 and 9live) had market shares of 25% (of which 13.2% for RTL alone) and 11 % (of which 6.7% for ProSieben alone) respectively.<sup>35</sup> Other private broadcasters had the following market shares: DSF 1.2%, Eurosport 0.9% Tele 5 0.4%, VIVA 0.5%, MTV 0.4% and Premiere around 2.3%.<sup>36</sup>
- (62) Given the very different dependence of public and private broadcasters on advertisement revenues, private broadcasters' market shares on the advertisement market were in 2005 for the RTL group and the ProSiebenSat1 group 43.5% each, whereas ARD and ZDF had a market share of only 4.3%.<sup>37</sup>

<sup>35</sup> See data for 2005 in *Media Perspektiven* 3/2006 as well as KEK overview for 2005.

<sup>36</sup> Source: KEK overview of market shares for 2005.

<sup>37</sup> Information from the KEK on the advertisement market in Germany.



- (63) In addition to the TV programme offer, public service broadcasters are entitled to offer new media services. Since the mid-90ies, public service broadcasters started their online offers.<sup>38</sup> Online offers comprise information about the public service broadcasters themselves and their programmes. The public service broadcasters' online services also comprise background information to programmes, access to archive material, to lesser extent video clips and download of TV programmes, discussion fora and newsletters, but also online games, online shops, data banks and online calculators, chats, links to external offers and services and mobile services. At least in the past, public service broadcasters also have co-operations for online services with third parties.<sup>39</sup>

### 2.3. Description of public service broadcaster's commercial activities

- (64) Public service broadcasters carry out their commercial activities mainly through commercial subsidiaries (see below) and to a lesser extent within the broadcasting corporation.<sup>40</sup>
- (65) As of 2003, public service broadcasters hold 139 majority participations.<sup>41</sup>
- (66) ARD and ZDF hold jointly the participations in *SportA* (acquisition and sale of sports rights). In addition, several of the broadcasting corporations within the ARD hold jointly participations in companies which acquire and sell rights/films and which produce and exploit film productions/programmes, such as *Degeto Film GmbH* and *Telepool GmbH*. Also, the regional broadcasting corporations hold, through their holding companies, participations in particular in the field of film production and related services. The biggest ARD held film production companies are *Bavaria Film*, *Studio Hamburg* and the *drefa holding*, which do not only produce films for their mother companies<sup>42</sup> but also at varying degrees for third parties<sup>43</sup>. Bavaria and Studio Hamburg are amongst the 10 biggest production companies in Germany.<sup>44</sup> Also, most regional broadcasters have subsidiaries for the sale of advertisement (“*Werbetöchter*”), marketing and

---

<sup>38</sup> In the 15<sup>th</sup> KEF report, there is a detailed description of the online services offered by public service broadcasters (cf. 15<sup>th</sup> KEF report, Vol. 2, para. 380 *et seq.*).

<sup>39</sup> Such as the co-operation between ZDF and T-Online as well as the co-operation with Jobs & Adverts AG for a job offer online services (“*WISO Stellenmarkt*”).

<sup>40</sup> For instance the commercial exploitation of programme material and the *Vermietung von Sendestandorten* carried out by the BR itself or advertisement carried out by ZDF.

<sup>41</sup> This number refers to the situation in 2003 and constitutes an increase from previously 120 participations which were mentioned in the 14<sup>th</sup> KEF report.

<sup>42</sup> Production of films for the public service broadcasters for distribution over its channels could still be regarded as part of the public service activities.

<sup>43</sup> For instance, based on the information submitted by Germany prior to the Article 17 letter, Bavaria Film and Studio Hamburg generated only 33% and 20% respectively of their annual turnover through productions for their mother companies.

<sup>44</sup> According to information from the KEK, Studio Hamburg had in 2005 a turnover of €570 million, Bavaria €280 million, whereas private production companies/groups like UFA had (in 2004) a turnover of approximately €300 million and Endemol Germany of approximately €100 million. Compared to the overall production volume, Bavaria and Studio Hamburg ranked 5<sup>th</sup> and 9<sup>th</sup>, respectively, with the UFA group ranking 1<sup>st</sup> and Endemol ranking third (figures for 2004).

sponsoring activities or the development of multimedia and online services. The ZDF has established the *ZDF Enterprises GmbH* for acquisition, production and commercial exploitation as well as participations (whereas the sale of advertisement is carried out within the ZDF).

### 3. INITIATION OF STATE AID INVESTIGATION

- (67) The concerns and allegations brought forward by complainants as well as the initial reaction of Germany can be summarised as follows:
- (68) An informal complaint was lodged in October 2002 against the financing of public service broadcaster's online activities which were allegedly not covered by the public service remit and which led to adverse effects on competition on the markets for online services (cf. complaint registered under CP 2/2003).
- (69) A further complaint was lodged in October 2002 against alleged State aid to film production companies of public service broadcasters (cf. complaint registered under CP 232/2002). According to the complainant, neither the legal framework nor the existing control mechanisms ensured that the financial transactions between public service broadcasters and their production companies were market conform. This allowed public service broadcaster to do investments in companies which did not yield adequate returns, to provide facilities to these companies without asking for an appropriate remuneration and to take over losses from these companies. This resulted in an unjustified advantage of public service broadcasters' film production subsidiaries to the detriment of their competitors on the market for film productions.
- (70) In April 2003, the association of private broadcasters in Germany (VPRT) lodged a general complaint against the financing regime of public service broadcasters (cf. complaint registered under CP 43/2003). The complainant alleged that the financing regime did not comply with the requirements of the Transparency Directive. As a consequence, it could not be excluded that the licence fee funding went beyond what was necessary for the fulfilment of the public service remit and could be used to finance purely commercial activities. The complainant expressed particular concerns about an allegedly uncontrolled expansion of public service broadcasters into new media services and harmful effects on competition due to the financing of allegedly extensive sports rights packages by public service broadcasters.
- (71) In March 2004, the Commission received a further complaint lodged by a cable operator (Kabel Baden-Württemberg, "Kabel B-W"), alleging that public service broadcasters would not charge market prices when providing access to transmission facilities and thus distort competition to other operators (these allegations were submitted in the context of the complaint against the financial support given to private broadcasters in the DVB-T Berlin Brandenburg case C 25/2004)<sup>45</sup>.

---

<sup>45</sup> In the final decision in the DVB-T Berlin-Brandenburg case of November 2005, the Commission explained that the Kabel BW complaint was being dealt with in the case on the general financing of public service broadcasters (State aid No E 3/2005) since it was related to the price setting behaviour of PSB as regards the use of their infrastructure.

- (72) In July and October/November 2004, the Commission received further complaints against alleged undue distortions of competition as regards the public service broadcaster's acquisition and use of sports rights (cf. the complaint lodged by Pro7Sat1 was registered under CP 243/2004 and the complaint lodged by Premiere was registered under CP 195/2004). The complainants alleged in particular that public service broadcasters acquired extensive sports rights packages, including exclusive as well as new media and payTV rights with public money without such rights being necessary for the fulfilment of the public service remit and without such rights being fully used by public service broadcasters, while allegedly refusing to grant sub-licenses to third parties.
- (73) In response to the Commission's requests for information, Germany expressed the opinion that the financing of public service broadcasters through licence fees did not constitute State aid and that the Transparency Directive was not applicable to public service broadcasters. It also refuted allegations of possible overcompensation and cross-subsidisation of commercial activities of public service broadcasters. Furthermore, the current regime guaranteed that public service broadcasters and their subsidiaries would act in a market-conform way. More particularly as regards allegations concerning the public service broadcasters' online activities as well as the acquisition of sport rights, Germany had taken the view that these activities were part of the public service remit and that as a consequence the financing of these activities was covered by Article 86 (2) EC Treaty.

#### 4. "ARTICLE 17 LETTER"

- (74) Based on the information submitted by the complainants as well as the German Government, the Commission carried out a first assessment under the EC State aid rules. Pursuant to Article 17 of the Procedural Regulation, it informed Germany of the preliminary view that the existing financing regime was no longer compatible with the EC Treaty (so-called "Article 17-letter" dated 3<sup>rd</sup> March 2005) and invited Germany to submit comments.
- (75) The Commission considered that the unlimited State guarantee as well as the licence fee funding of public service broadcasters as well as potentially the tax treatment of public service broadcasters' commercial activities would constitute State aid. The Commission expressed concerns about the absence of a sufficiently clear definition and adequate entrustment of the public service remit (in particular as regards new media activities and additional digital channels), excluding activities which would be regarded as "*manifest errors*" (in particular as regards the inclusion of commercial activities as well as "*mobile services*") and, as a consequence, also expressed doubts about an effective control of the public service broadcasters' fulfilment of their public service obligations. The Commission also considered that the legal framework did not contain satisfactory mechanisms which would guarantee that the State funding was limited to what was necessary for the fulfilment of the public service remit. In this context, the Commission also expressed concerns about the lack of sufficient safeguards ensuring that commercial activities were carried out by public service broadcasters in full respect of market principles. Finally, DG COMP expressed doubts as regards the public service broadcaster's acquisition and (non-)use of extensive sports rights packages.

- (76) Based on the preliminary assessment as summarised above the Commission indicated measures which could dispel the Commission's doubts:
- Further clarification of the public service remit as regards new media services as well as additional digital channels, including the exclusion of such services which could not be regarded as services of general economic interest.
  - Clear entrustment of public service broadcasters, in particular as regards new media services and additional digital channels as well as an effective *ex post* control.
  - Clear distinction between services of general economic interest and purely commercial activities as well as the introduction of separate accounting in accordance with the Transparency Directive.
  - Measures guaranteeing that commercial activities of public service broadcasters would not benefit from State measures, including licence fee funding, but also by way of a special tax treatment or the unlimited guarantee.
  - Measures ensuring that as regards commercial activities public service broadcasters act in a market conform way. This implied that the financial relationship between public service broadcasters and their commercial subsidiaries is transparent and in line with the principle of the market investor. Furthermore, the financial relationship between public service broadcasters and their commercial subsidiaries must respect the arm's length principle. Finally, public service broadcasters should be made subject to the obligation as regards their commercial activities to act in a market conform way. The respect of these principles should be subject to regular control.
- (77) As regards the financing of sports rights the Commission asked Germany to submit its comments to the preliminary assessment of the Commission and possibly come forward with proposals for measures which would exclude the allegedly disproportionate effects on competition.

## **5. SUBMISSIONS BY GERMANY FOLLOWING THE ARTICLE 17 LETTER**

- (78) By letter dated 6<sup>th</sup> May 2005<sup>46</sup>, the German Government submitted its observations on the Commission's preliminary views and also submitted a number of proposals to address the concerns identified by the Commission. It also submitted the text of the 8<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting which had entered into force following the "Article 17 letter" (i.e. 1<sup>st</sup> April 2005).
- (79) Following meetings between the Commission and the German authorities in March and July 2005, the Commission sent a further request for information on 10<sup>th</sup> February 2006<sup>47</sup> to which the German authorities responded by letter of 13<sup>th</sup> April 2006<sup>48</sup>. Later, they also submitted the 9<sup>th</sup> Amendment to the Interstate Treaty on broadcasting as agreed by the Länder in November 2005 and entered into force on 1<sup>st</sup> March 2007.
- (80) The views of the German authorities on the various aspects raised by DG COMP in the Article 17 letter can be summarised as follows:

---

<sup>46</sup> Registered by the Commission under A/33786.

<sup>47</sup> Registered as D/51257.

<sup>48</sup> Registered by the Commission under A/32930.

## 5.1. State aid qualification

### 5.1.1. *Licence fee funding does not constitute State aid within the meaning of Article 87 (1) EC Treaty*

- (81) Germany argues that the licence fee financing does not constitute State aid in favour of public service broadcasters. Firstly, revenues from the licence fee did not involve any State resources. Secondly, the licence fee financing did not give public service broadcasters a financial benefit within the meaning of Article 87 (1) EC Treaty as interpreted by the Court in its “*Altmark*” ruling.
- (82) The licence fee revenues were paid by the holders of radio and TV sets directly to the public service broadcasters (therefore not involving State resources) and were neither controlled by nor imputable to the State.<sup>49</sup> In light of case law in *PreussenElektra* and *Pearle* and contrary to the Commission's preliminary conclusions in this respect, the State aid character of the licence fee funding could not be simply based on the compulsory character of the fee, nor the fact that the collection of the fee was governed by public law, nor the fact that the recipient of the licence fee is a public body and that the use of the licence fee revenues by that body are subject to budgetary provisions and the control of Courts of Auditors.
- (83) Furthermore, Germany contests the existence of a financial advantage since the licence fee funding was limited to what necessary to fulfil the public service task and since the funding regime satisfied the conditions established by the Court in its “*Altmark*”-ruling: There was 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 were determined was based on ex ante established transparent and objective parameters (second condition), the licence fee revenues at the disposal of public service broadcasters did not exceed public service costs, excluding overcompensation (third condition) and the KEF procedure would provide the necessary safeguards enabling the determination of costs of a well-run undertaking (fourth condition). As regards in particular the fourth condition, Germany also considers that the Commission did not demonstrate that the recognised financial needs of public service broadcasters exceeded those of a well-run undertaking and that it therefore failed to provide the necessary proof of the existence of an advantage. Also, the fourth condition would have to be interpreted in light of the *Chronopost* jurisprudence<sup>50</sup> so that the Commission could not simply rely on the hypothetical costs of private broadcasters since they did not bear the same public service obligations.

### 5.1.2. *Special tax treatment of commercial activities does not provide public service broadcasters with a financial advantage*

- (84) Germany is of the view that the tax treatment of public service broadcaster's commercial activities does not provide them with a fiscal advantage. Where the determination of the taxable profit is not possible – in particular because of

---

<sup>49</sup> In this respect, Germany makes reference to Court cases C-303/88, *Italy v Commission*, para. 11, C-482/99, *Stardust Marine*, para. 24, C-126/01, *GEMO*, para. 24 and C-345/02, *Pearle*, para. 35.

<sup>50</sup> Cf. Judgment of the Court of 3 July 2003, Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost*.

problems related to the allocation of costs between the public service and the commercial activities of public service broadcasters – it resulted from the general principles of the German tax laws that the tax base could be estimated. On this basis, the tax authorities had developed general principles for determining the profits of public service broadcasters and as a result fixed profits for the different commercial activities which were taken over by legal provisions, administrative notices or simply administrative practice. Public service broadcasters are subject to regular control by the tax authorities. Should any such control reveal that the assumed profits did not longer correspond to the initial assumptions, this could trigger an adaptation of the taxation practice.

- (85) Finally, Germany argues that rather than being an advantage, the current taxation of commercial activities of public service broadcasters constituted a disadvantage since public service broadcasters were not allowed to deduct higher than assumed costs. Therefore, and contrary to private broadcasters, public service broadcasters would also be subject to taxes even if the commercial activities generated losses.<sup>51</sup>

*5.1.3. State guarantee does not provide public service broadcasters with a sizeable benefit*

- (86) Germany considers that the guarantee linked to the organisational status of public service broadcasters does not provide them with a sizeable benefit and in particular does not favour public service broadcasters' commercial activities. In this respect, Germany stressed on the one hand the very limited use of external funding by public service broadcasters and the fact that no such funding would be used for commercial activities.<sup>52</sup> On the other hand, Germany explains that commercial subsidiaries would neither directly nor indirectly benefit from the guarantee, since the guarantee is linked to the organisational status of the broadcasting corporations and since commercial subsidiaries, when taking up loans, were evaluated on their own merits.

## **5.2. Compatibility under Article 86 (2) EC Treaty**

*5.2.1. Definition of public service mission*

- (87) Germany considered that the definition of the public service mission of public service broadcasters is sufficiently precise not only as regards the traditional broadcasting activities, but also as regards new offers such as new media services and additional digital channels.

---

<sup>51</sup> This conclusion is, according to the German authorities, corroborated by a comparative ratio of the tax burden to the overall turnover of private and public broadcasters: according to the German authorities the "tax burden ratio" ("*Steuerlastquote*") of public broadcasters was in 2002/2003 about 9% whereas the ration for the RTL group was at 1.9%/2.1% and for ProSiebenSat1 at 0.4%/0.7%.

<sup>52</sup> In this respect, the German authorities stressed that public service broadcasters were not normally allowed to have recourse to external funding, an exception being major projects, exceeding a value of €25 million (in such cases, the KEF would not recognise these investment costs as part of the public service costs, but instead the depreciation costs as well as interest payments). To illustrate the limited scope of external debt, Germany refers to interest payments by the ARD (all broadcasting corporations included) for the period 2005-2008 of €20 million (cf. 14<sup>th</sup> KEF report),

- (88) More particularly as regards the additional digital channels, Germany considered that the changes introduced by the 8th Amendment to the Interstate Treaty which required for additional digital channels to have their focus on culture, information and education combined with the public service broadcasters' existing programme guidelines explaining the scope of digital offers as well as the envisaged digital concept to be developed by public service broadcasters and which would be incorporated in the public service broadcasters' self-commitments satisfied the requirements for a clear public service definition.
- (89) As regards more specifically new media offers, Germany did not share the Commissions preliminary concerns about the lack of clarity in the current definition. The required link to the TV programme ("*programmbezogen*" and "*programmbegleitend*") was in most cases obvious and did not raise problems.<sup>53</sup> Furthermore, the concepts of programme accompanying and programme related would be further clarified in self-commitments of public service broadcasters.
- (90) Germany considered that – contrary to the doubts expressed by the Commission – the public service broadcasters' online activities (such as online games, chat rooms, links to external service providers, etc.) were covered by the public service remit, excluding however activities such as e-advertisement and e-sponsoring as well as e-commerce for third party products and services, paid-for downloads or games.
- (91) Germany also opposed the preliminary conclusion of the Commission that „mobile services“ could not be regarded as services of general economic interest. Germany argued that “mobile services” constituted only a different form of distributing content within the meaning of the technology-neutral guarantee of development of public service broadcasters. The fact that public service broadcasters as well as users concluded agreements and contracts with mobile operators did not affect the public service character of the content delivered. In addition, "mobile services" offered as part of the public service remit were non-exclusive and with no programme-specific payment. On the other hand, licence agreements with mobile operators, allowing them to use programme material for their own portals were regarded as a commercial activity.

#### 5.2.2. *Entrustment and control*

- (92) Germany considered that the possibility given to public service broadcasters to offer new media services and to operate additional digital channels as laid down in the Interstate Treaty was sufficient as an act of entrustment.
- (93) Furthermore, the control exercised by internal control bodies and ultimately the Länder was adequate and sufficient. Germany emphasised that control by the Broadcasting Council of each public service broadcaster ("*Rundfunkrat*") ensured an independent and efficient control, given that the members of the Council were representatives from all parts of society and further given that these members were not bound by any instructions.

---

<sup>53</sup> Such a link was present when the media offer referred to programme offers, where new offers were based on sources and material used for TV programmes and where they served to support, deepen and accompany the TV offers in terms of themes and content covered by TV programmes.

- (94) Furthermore, the Länder could ask public service broadcasters to stop any infringement of the legal requirements in the context of the legality control ("*Rechtsaufsicht*"), while not being allowed to interfere with programme decisions. The fulfilment of the public service mission was also subject to the Control of the Länder Parliaments when discussing the reports about the financial situation of public service broadcasters, including the public service broadcaster's performance under the public service missions.
- (95) Finally, private competitors would have the possibility to take action against public service broadcasters either through the complaint procedure (with the internal control bodies of public service broadcasters and later the "*Rechtsaufsicht*") or before national courts.

### 5.2.3. *Proportionality*

- (96) Germany considers that the existing legal framework as well as the control exercised by the KEF and other control bodies such as Courts of Auditors, accountants and tax authorities ensured that public service broadcasters would not be overcompensated and commercial activities not be cross-subsidised.
- (97) The KEF ensured in particular that purely commercial activities would not be financed by licence fee revenues. On the other hand, there was no explicit and categorical prohibition for public service broadcasters to take over losses from commercial subsidiaries since there might be circumstances in which this could be in line with normal market behaviour. When determining the financial needs of public service broadcasters, the KEF would deduct from the public service costs commercial revenues. Normally, the KEF would take into account only the actual (and envisaged) profits transferred from the subsidiary to the public service broadcaster. However, where the KEF considered that the profits as estimated by public service broadcasters are too prudent, the KEF would increase the expected profits thus diminishing the financial needs of public service broadcasters. Where necessary, the KEF would also take into account retention of earnings ("*Gewinnthesaurierung*") over and above the profits actually distributed.
- (98) Germany considered that there was a regular and exhaustive *ex post* control carried out by the KEF comparing the estimates (which were the basis for the determination of the expected future financial needs of public service broadcasters) with the actual developments. Where necessary, the KEF would make corrections (e.g. reductions in the recognised financial needs for the next period). Any surplus recorded at the end of a given licence fee period would have to be deducted from the financial needs for the next licence fee period and could not be used for additional programme projects. Furthermore, public service broadcasters were no longer allowed to carry over deficits from one licence fee period to the other.
- (99) Germany explained, however, that the examination of possible overcompensation did not take place on an annual basis but only at the end of a licence fee period. Requiring an *ex post* control for individual years would not respect the logic of the German system which was based on a detailed *ex ante* evaluation. The *ex post* control of the budget was not done by the KEF but by auditing firms and internal control bodies.



- (100) In particular as regards the respect of market principles, the control exercised by the KEF was complemented by the control carried out by other bodies. For instance, auditing firms examined the respect of the principles of efficiency and thriftiness as well as whether the financial transactions within a holding company are market conform (reference to § 53HGrG<sup>54</sup>). Also, the tax authorities examined the financial relationship between the holding company and its subsidiaries, applying the arm's length principle (reference to § 193 AO "*Abgabenordnung*", Fiscal Code<sup>55</sup>). Should such control reveal cross-subsidies through an unjustified transfer of/allocation of profits /costs, this would be corrected by the tax authorities with the corresponding consequences under tax law.
- (101) Germany also stressed that the financial needs as submitted by the public service broadcasters were examined by the KEF and often reduced quite substantially, in particular in view of identified efficiency potentials.
- (102) Furthermore, Germany pointed out that the current control to what extent public service broadcasters act in an efficient way („*Wirtschaftlichkeitsprüfung*”) ensured already today the respect of market principles and – more specifically - that returns on investments in other companies would be adequate. In addition, the participations of public service broadcasters were regularly subject to the control of the KEF as well as the Courts of Auditors. However, Germany pointed out that it was for the Courts of Auditors themselves to decide within the context of their constitutional independence about the exact scope of their control activities. In this context, they decide upon the focus, the regularity and the density of such examinations.
- (103) Finally, Germany refuted allegations about overcompensation and disproportionate effects on competition due to the acquisition of in particular premium sports rights.
- (104) Germany argues that the financing of exclusive rights was part of the public service remit which included the offer of an attractive and distinctive programme. Exclusive rights were necessary for public service broadcasters to build and protect a brand (“*publizistische Profilierung*”), to make the programme distinctive from other offers and to bind the audience to public service broadcasters' programme. Also, sports rights were often not offered on a non-exclusive basis.
- (105) Furthermore, Germany pointed out that ARD and ZDF would mostly use acquired rights themselves. Germany refutes allegations that rights remained unused. As regards the Olympic Games, Germany explains that what is acquired are not broadcasted hours but the overall events; even if public service broadcasters had shown only a selection of all available events, the rights could not be regarded as unused. Where exceptionally, such rights were not used, they would be offered to third parties under normal market conditions. This would already result from the

---

<sup>54</sup> This provision of the federal law on budgetary principles and part of the chapter on rights of public entities towards private undertakings in which they hold participations states that the public entity may ask for an assessment by the accountant of *inter alia* the development of the profitability and liquidity of the undertaking, the causes of loss-making activities.

<sup>55</sup> This provision concerns the admissibility of the examination of the circumstances relevant for the determination of the tax burden (“*Zulässigkeit der Aussenprüfung*”).

general principle of efficiency and thriftiness („*Gebot der Wirtschaftlichkeit und Sparsamkeit*“).

- (106) Even though it was true that payTV rights could not be used by the public service broadcasters themselves, a sub-licensing of such rights for e.g. live events was not adequate because of the competitive relationship between freeTV and payTV. The value of sports rights was linked to the possibility of live transmission. A parallel transmission by a payTV operator would abolish exclusivity. Despite these considerations of principle, Germany explains that in some instances rights for deferred or live transmission were offered to private operators, without however having reached a final agreement, mainly because both freeTV and payTV operators were primarily interested in acquiring such rights on an exclusivity basis. However, obligations towards the initial rights holders (such as IOC or UEFA) did not allow for such sub-licenses. Germany also refers to situations in which public service broadcasters had offered even exclusive rights (for instance for games of the EURO 2004 which took place in parallel to those shown on public TV) without however having reached a final agreement with third parties.
- (107) Germany also refutes allegations about excessive prices: there were no proofs or indications that the market would be distorted by excessive prices being paid by public service broadcasters, rather the contrary was the case. It is also stressed in this context that often it is not the higher bid which is decisive but the higher quality offered by the public service broadcaster as compared to private competitors.
- (108) In this context, Germany also refers to the KEF procedure ensuring that public service broadcasters' spending for sports rights would remain proportionate. Should spending for sports be excessive in relation to the financial needs for other parts of the programme activity of public service broadcasters, the KEF procedure would ensure that in these other areas less financial needs would be recognised for the next licence fee period with the result that in the next licence fee period public service broadcaster would dispose of less financial means.
- (109) As regards allegations about public service broadcasters emptying the market and an excessive weighing of sport transmissions on public TV, Germany pointed out that public service broadcasters would neither individually, nor through the EBU acquire all mass attractive sports rights.
- (110) The information submitted by Germany as regards the sports rights acquired by public service broadcasters gives the following picture:
- (111) Sports rights acquired by public service broadcasters comprised for instance the *DFB Pokal* (*Erstsenderechte*, primary rights until 2009), games of the national football team in Germany (primary rights for live transmission, 2002/2003 – 2004/2005 until 2009 and for 2006/2007 – 2007/2008 "*Erstziehungsrecht*" for ZDF for 5 games), Uefa Cup (until 2008) and the Uefa Cup finals (primary rights for live transmission for the period 2000-2006), the EURO 2004 (primary rights for live transmission) and the World Cup 2002, 2006 and 2010 (primary rights for live transmission for part of the games together with Premiere for payTV which held the rights for all games; as regards the WM 2006, primary rights for certain games were held by RTL), Olympic Summer Games (primary rights for live transmission 2000-2012 together with Eurosport), Olympic Winter Games

(primary rights for live transmission, for 2002 payTV rights sublicensed to Premiere and for 2006-2010 together with Eurosport), Tour de France (primary rights for live transmission 2000-2009).

- (112) On the other hand, other freeTV operators acquired rights for the Second Football League (certain rights held by DSF, with Premiere holding the rights for all games for payTV), the Uefa Cup Quarter finals and the Supercup (rights held for the period 2006/2007 – 2008/2009 held by Pro7/Sat.1), the Champions League (until 2006 rights held by RTL for the period 1998-2002 and by Sat.1 for the period 2003-2006), the rights for ski jumping (rights for the *Vierschanzentournee* until 2006/2007 held by RTL) and Formula One (rights held for the period 2003-2007 by RTL). Rights for other sports events (not part of the list submitted by Germany) are Icehockey Worldcup (until 2011 rights held by DSF), basketball (EM and WM 2005-2007 and 2006 respectively held by DSF), Tennis – Wimbledon (2005-2008 held by DSF), boxing (rights for Klitschko fights since 2006 held by RTL), handball (league 2003/2004 – 2005/2006 held by DSF and World cup 2005 for part of the games held by DSF).
- (113) Furthermore, the payTV operator Premiere acquired rights for live transmissions traditionally for the German Premier League (as well as the Second League, with public service broadcasters however holding primary rights for two games per season), the Champions League, Football World Cup (2002, 2006 and 2010) and Formula One (2000-2006). Rights of other sports events (not part of the list submitted by Germany) are the basketball league (until 2006/2007) and boxing (*Sauerland Boxstall*).
- (114) Germany considers that the distribution of sports rights between public service broadcasters and private broadcasters revealed that competition on the sports market was functioning properly. Consequently, Germany argues that there was no reason for the Commission to intervene with behavioural remedies.

## **6. SUBMISSIONS BY THE COMPLAINANTS FOLLOWING THE ARTICLE 17 LETTER**

### **6.1. Submission by the VPRT**

- (115) The VPRT submitted additional observations in July 2005, claiming in particular that the proposals announced by Germany in May 2005 were not sufficient to remedy the competition concerns. Further arguments were submitted in April 2006 in the context of the answer from Germany to the Commission's request for information of February 2006.
- (116) The VPRT's arguments can be summarised as follows.

#### *6.1.1. State aid qualification*

- (117) The complainant considers that the licence fee constitutes State aid and that the “*Altmark*” conditions were not fulfilled. Furthermore, the lump sum taxation of commercial activities (“*Pauschalbesteuerung*”) as well as the unlimited State guarantee constituted a financial advantage for public service broadcasters and in particular their commercial activities.

## 6.1.2. Compatibility assessment

### 6.1.2.1. Definition of public service mission

- (118) The complainant does not consider that the principle of technological neutrality would imply that the existing public service remit could be automatically extended to new services and the distribution of content on new platforms. The complainant argues that for instance the use of a mobile platform is not just a new distribution platform for the same content but implies the offer of new services. In order to be part of the public service remit, it would have to be demonstrated that the public service broadcaster's offer was necessary for the individual and public opinion shaping process because this purpose could not be achieved by other means. An assessment to that effect would have to be carried out for each individual service and should then be laid down in a specific legal basis (see also below on the question of entrustment).
- (119) Contrary to explanations given by the German Government, the complainant does not agree that chats, online games, online calculators, etc. are an integral part of the public service remit. Whether or not these services could be regarded as a service of general economic interest would have to be assessed for individual services, including an evaluation to what extent these services would serve the same democratic, social and cultural needs of society. Also, the complainant does not agree with the description given by the German Government that all current online offers would be programme-related. The complainant is also concerned about the extensive use of links to commercial internet sites as well as the scope of e-shops.
- (120) The complainant also expressed concerns about the extension of the public service remit following the modification in the 9<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting, which introduced the concept of "*telemedia*" which was – according to the complainant – wider in scope than the previous concept of "*media service*".

### 6.1.2.2. Entrustment and control

- (121) The complainant argues that the establishment of self-commitments by public service broadcasters themselves could not replace a clearly defined and properly entrusted public service. The public service remit must be clearly defined in the relevant legal acts and only the implementation should be left to the public service broadcasters.
- (122) The complainant is furthermore concerned about the lack of a clear entrustment as regards the additional digital channels of ARD and ZDF. Despite the new legislative requirement for these channels to have their focus on information, culture and education, it was still possible for public service broadcasters to use these additional capacities for extensive sports transmissions (for instance during the Olympic Games). In their view, the sports transmissions on these channels exceeded what could be regarded as complementary offer and allowed public service broadcasters to expand their sports programmes and to reduce their willingness to sub-licence rights which cannot be used in the main programme. Referring in particular to the 2006 Olympic Winter Games, the complainant argues that increased offer of sports events allowed ARD and ZDF to gain

considerable market share during that period at the expense of private competitors.

- (123) Finally, the complainant is concerned about the allegedly excessive weight of sports as part of the overall programme of public service broadcasters. For instance, during the Football World cup, ARD and ZDF had shown primarily programmes around football and no longer offered a balanced and varied programme addressing all the different needs and interests of the population.
- (124) Finally, the complainant considered that the existing control mechanisms could not be regarded as efficient. This was true for control by the Broadcasting Councils because of an evident conflict of interest and for the external control by the Länder (“*Rechtsaufsicht*”), since those exercising the control were often also members of the internal control bodies of the public service broadcasters.

#### 6.1.2.3. Proportionality

- (125) The complainant considers that the proportionality of the funding is not ensured in particular because the public service broadcasters did not have separate accounts in line with the requirements of the Transparency Directive. Also, as regards more particularly the financing of public service broadcaster's online activities, the complainant criticised that public service broadcasters did not provide the KEF with sufficiently meaningful data on its online activities so that a clear determination of the relevant costs by the KEF was not possible.
- (126) As regards more specifically the control of public service broadcasters' participations, the complainant is concerned that Courts of Auditors do not have uniform and clear control competences. In particular, Courts of Auditors were not able to examine all participations by public service broadcasters. The KEF on the other hand, would not seem to be able to properly examine the performance of participations and the market conformity of investments in other companies (in particular, the KEF did not assess whether the return on investments from commercial subsidiaries was adequate). Also, and based on a statement by the KEF itself, the current system would not allow the KEF to check whether the financial relations between public service broadcasters and their subsidiaries are at arm's length.
- (127) Contrary to the view taken by Germany, the complainant considers that the control by auditing firms and tax authorities could not be regarded as adequate in particular since the controls for instance of the financial relationships between public service broadcasters and their subsidiaries would not be carried out on an annual basis.
- (128) Finally, the complainant reiterated its view the financing of sports rights acquired by public service broadcasters but which they cannot use themselves, such as payTV rights would not be covered by Article 86 (2) EC Treaty. Where payTV rights were part of an overall rights package, public service broadcasters should be obliged to offer sub-licenses to third parties under pre-established conditions. Any such potential revenues from sub-licensing would have to be deducted from public service needs to reduce the under Article 86 (2) EC Treaty permissible amount of State funding.

- (129) The complainant also consider that the financing of exclusive rights cannot be regarded as justified under Article 86 (2) EC Treaty. The public service mission to offer a balanced and varied programme did not require exclusivity. The complainant also considers that the acquisition of exclusive rights would be contrary to the principles of efficiency and thriftiness, since also a non-exclusive right would satisfy the viewers' needs. Even if non exclusive rights would necessarily imply less audience, this would not significantly affect public service broadcaster since they did not depend to the same extent on financial revenues.
- (130) The complainant reiterates allegations of excessive prices being paid by public service broadcasters for certain sports rights claiming that the prices paid by public service broadcasters could not have been refinanced under normal market conditions and would have implied huge losses for private operators. This indicated that public service broadcaster had spent more than was necessary for the acquisition of these sports rights and thus the fulfilment of the public service tasks.
- (131) The complainant was also concerned with the fact that sports rights were often acquired by SportA, a joint commercial subsidiary of ARD and ZDF, which was not subject to the control of the KEF so that financial transactions were not transparent.

## **6.2. Submission by Kabel-BW**

- (132) Also Kabel-BW submitted additional information in March and October 2006 arguing in particular that the financing regime for public service broadcasters in Germany did not fulfil the *Altmark* criteria and that the funding of public service broadcasters did not respect the requirements laid down in the Broadcasting Communication.
- (133) Kabel BW argues more specifically that the costs as recognised by the KEF could not be regarded as the costs of an efficient operator, since the KEF did not question the programme decisions of public service broadcasters and since the KEF procedure did not allow for any benchmarking with other undertakings (either private broadcasters or public broadcasters in other Member States). Based on comparative data on costs per broadcasted minute<sup>56</sup>, data comparing the general price index with licence fee increases over the years, data comparing licence fee revenues of public service broadcasters with revenues/turnover from advertisement in the commercial sector<sup>57</sup>, the complainant takes the view that the costs of public service broadcasters are not those of an efficient operator. The complainant does not consider that higher programme costs of public service broadcasters compared to private competitors could be justified by specific public service obligations since the highest costs per broadcasted minute were generated by sports and fiction whereas production costs in the area of culture, information and news would be relatively low.

---

<sup>56</sup> The comparison includes both, national private broadcasters as well as other European public service broadcasters and shows that German public service broadcasters have the highest production costs per broadcasted minute.

<sup>57</sup> The data revealed according to the complainant that whereas advertisement revenues decreased, the licence fee revenues steadily increased thus reducing competitive pressure on public service broadcasters and thus increasing the risk of inefficiencies.

- (134) Kabel-BW also considers that the public service broadcasters' public service mission was not defined in a sufficiently precise manner and that public service broadcasters offered services which went beyond their public service remit when offering certain online services or when acquiring certain sports rights. Kabel-BW also considered that there was no adequate control that public service broadcasters respected market principles in the purely commercial activities. This was in particular true for the large number of participations held by public service broadcasters which were not subject to adequate control so that possible cross-subsidies could not be detected and avoided.

### **6.3. Submission by Premiere**

- (135) In June 2005, Premiere submitted additional information, stressing again that the public service broadcasters' behaviour in particular as regards the acquisition of sports rights and alleged refusal to sublicense caused serious concerns of competition.
- (136) Premiere stressed again that ARD and ZDF either individually or in particular through the EBU were able – due to the public financing – to acquire sports rights without being subject to the constraints of private competitors. Contrary to private operators, public service broadcasters were able to offer prices for sports rights which could not be refinanced under market conditions and to acquire such rights at a very early stage where it could not yet be determined whether the transmission of the event would actually be shown (e.g. because a German participation could not be foreseen).
- (137) Premiere also stressed in particular as regards the acquisition of sports rights through the EBU, public service broadcasters were in a position to empty the market, acquiring sports rights package of which a large proportion would not be transmitted.
- (138) Premiere questions the inclusion of sports as part of the public service remit, in particular because private operators would be capable of showing the sports events (also on freeTV). Also, Premiere considers that the use of additional digital channels for the excessive transmission of sports events would be abusive and not covered by the public service remit to provide a balanced and varied programme.
- (139) Also, Premiere considers that exclusivity could not be justified by the public service mission of public service broadcasters since exclusivity would reduce the offer to the detriment of consumers. In this respect, Premiere makes reference to the possibilities of increased offers when sports rights would be shared and where private and public broadcasters would have to compete on other aspects than the transmission of the sports event as such.
- (140) In light of these concerns, Premiere considers that the public service remit would have to be substantiated further by introducing qualitative and quantitative limits, while at the same time excluding the transformation of additional digital channels and that public service broadcasters should be either precluded from acquiring exclusive rights or being subject to adequate sublicensing obligations.

## 7. ASSESSMENT

### 7.1. State aid under Article 87(1) of the Treaty

(141) For a measure to constitute a State aid within the meaning of Article 87(1) the following conditions must be fulfilled:

- It must be granted by a Member State or through State resources in any form whatsoever;
- It must favour certain undertakings or the production of certain goods (selective advantage),
- It must thereby distort or threaten to distort competition and
- It must affect trade between Member States

The Commissions assessed the licence fee financing, the special tax treatment as well as the State guarantee as potential State aid measures under Article 87(1) of the EC Treaty.

#### 7.1.1. Use of State resources

##### 7.1.1.1. Licence fee financing

(142) Referring to the Court's case-law in "*PreussenElektra*", "*Stardust Marine*" and "*Pearle*", Germany denies the existence of State resources given that the licence fee is paid directly by the owners of radio/TV sets to the public service broadcasters and is never under the control of the State.

(143) In accordance with case law and established Commission practice, the Commission considers that the licence fee revenues constitute State resources which are under State control.

(144) The Commission notes first of all that public service broadcasters enjoy a financial guarantee enshrined in the German Constitution as interpreted by the Constitutional Court. This guarantee is also explicitly stipulated in the Interstate Treaty on Broadcasting which gives public service broadcasters a direct claim against the competent Länder to receive adequate financing allowing them to fulfil their public service mission. The licence fee financing mechanism is the form through which the Länder have decided to honour their legal obligations towards the public service broadcasters. It does not under these circumstances matter that the compensation is not paid as a direct contribution from the State budget but that instead of first collecting the licence fees from radio/TV set owners and then re-distributing the revenues to public service broadcasters, the Länder have granted the public service broadcasters the sovereign<sup>58</sup> right to collect these fees directly.

(145) In this last respect, it is also important to stress that the licence fee is a compulsory levy imposed on owners of radio/TV sets<sup>59</sup> and that the collection of

---

<sup>58</sup> The sovereign right is to be understood as the sovereign power normally only exercised by the State towards its citizens in a relationship of subordination by way of – for instance - administrative acts.

<sup>59</sup> See on this aspect also BBC 24-hour news channel Decision, State aid NN 88/98, paragraph 22; BBC digital curriculum Decision, State aid N 37/2003, paragraph 21; France 2 and France 3 licence fee financing Decision, State aid E 8/2005, paragraph 21; RAI licence fee financing Decision, State aid E 9/2005, paragraph 16.



the licence fees follows procedures similar to those of tax collection.<sup>60</sup> For instance, public service broadcasters determine the licence fee debt through an administrative act and are able – in case of non-payment – to enforce their claim by way of an administrative enforcement procedure.

- (146) Also, the licence fee is destined to finance the overall institution of public service broadcasting (“*Gesamtveranstaltung Rundfunk*”) and individual public service broadcasters are entitled to a specific amount of revenues resulting from the licence fee only in accordance with the distribution rules laid down in the relevant legal acts.<sup>61</sup>
- (147) Furthermore, the licence fee level is decided jointly by the Länder Parliaments and fixed in the respective legal acts, following a proposal of the KEF which has the task of determining the financial needs of public service broadcasters taking into account the financing guarantee. It is therefore ultimately the Länder which decide upon the financial resources available to public service broadcasters.<sup>62</sup> It is also for public service broadcasters to engage legal action against the Länder should they consider that the financing awarded to them does not respect the constitutional financing guarantee.
- (148) Finally, the Commission notes that public service broadcasters are organised as public entities (“*Anstalten des öffentlichen Rechts*”) and are obliged to report regularly to the Länder about the financial situation as well as the fulfilment of their public service mission and the use of the licence fee is also subject to budgetary control exercised by the regional Courts of Auditors.
- (149) In accordance with the pertinent case law<sup>63</sup>, and contrary to the views expressed by Germany in this respect, it is relevant that the recipients of the licence fee are a public body which was established to serve the general interest, i.e. the provision of public service broadcasting as laid down in the relevant Interstate Treaty on Broadcasting, adopted by the Länder. In the Commission's view it is equally relevant that the obligation to pay the licence fee as well as the level of that fee are fixed by the Länder allowing the public service broadcasters to fulfil their public service mission and not as a counterpart for services rendered by the public service broadcasters to those obliged to pay.
- (150) Contrary to the arguments brought forward by Germany, the Commission considers that in a situation where the State transfers to an undertaking a sovereign right, such as the right to collect the licence fee, a right which can also be withdrawn by the Länder by amending the relevant legal provisions, the

---

<sup>60</sup> See on this aspect also. TV2 Decision, State aid C 2/2003, paragraph 59.

<sup>61</sup> See on this aspect also BBC 24-hours news channel Decision, paragraph 22 and TV2 Decision, paragraph 59.

<sup>62</sup> See on this aspect also *Kinderkanal/Phoenix* Decision, State aid NN 70/98, and TV2 Decision, paragraph 59.

<sup>63</sup> Cf. judgement of the Court of Justice of 15 July 2004, Case C-345/02, *Pearle*, [2004] ECR I-7139, in particular para. 36-38 in combination with the Opinion of Advocate General Colomer delivered on 11 March 2004 in the above-mentioned case, para. 67 - 78.

resources resulting from the thus collected licence fee are to be regarded as being under public control within the meaning of the relevant case law.<sup>64</sup>

- (151) Also, and contrary to the views expressed by Germany, the Commission considers that the financing of public service broadcasters through licence fees is not comparable to the situation in “*PreussenElektra*”, where the benefit to the undertaking in question resulted from legally imposed minimum quotas and fixed prices. In particular, contrary to the situation underlying the above-mentioned judgement<sup>65</sup>, there is in the current case no private law relationship between the beneficiary and the third party.<sup>66</sup> In fact, the obligation to pay the fee exists irrespective of whether or not TV set owners actually watch public television and cannot therefore be regarded as the counter part for a service rendered to the owners of TV and radio sets .

#### 7.1.1.2. Special tax treatment

- (152) To the extent that the special tax treatment relieves public service broadcasters of a fiscal burden they would normally have to bear, the State foregoes tax revenues. Such foregone tax revenues constitute – as explained in the Commission Notice on the application of the State aid rules to measures relating to direct business taxation - State resources within the meaning of Article 87 (1) EC Treaty.<sup>67</sup> The Notice also clarifies that “*State support may be provided just as much through tax provisions of a legislative, regulatory or administrative nature as through the practices of the tax authorities.*” Consequently, any loss in tax revenues resulting from either the legal provision of § 8 KStG as regards advertisement activities or the administrative practice of tax authorities as regards other commercial activities, would involve State resources.

#### 7.1.1.3. State guarantee

- (153) Pursuant to the Commission Communication on State guarantees, State aid is granted in the form of a guarantee where the legal status of the company excludes insolvency proceedings and thus allows the company in question to benefit from favourable funding terms.<sup>68</sup> The corresponding risk taken over by the State would under normal market conditions be remunerated by a guarantee premium. Foregoing such a guarantee premium constitutes an advantage to the company in

---

<sup>64</sup> Cf. judgement of 16 May 2002, in Case C-482/99, *Stardust Marine*, [2002] ECR I-4397, para. 37 with reference to the judgment of the Court of 16 May 2000, Case C-83/98 P, *France v Ladbroke Racing and Commission*, [2000] ECR I-3271, paragraph 50.

<sup>65</sup> In particular in para. 60 of this judgement, the Court pointed out that the conclusion that the measure did not involve State resources was based on the fact that these measures interfered in the relationship between private parties (cf. judgement of 13 March 2001, Case C-379/98, *PreussenElektra* , [2001] ECR I -2099, para. 54-66).

<sup>66</sup> See on this aspect also TV2 Decision, paragraph 59.

<sup>67</sup> Cf. para. 10 of the above-mentioned Commission Notice (published in the Official Journal C 384 , 10/12/1998, p. 3.): “*A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.*”

<sup>68</sup> Cf. Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees; published in the Official Journal C 071, 11/03/2000, p. 14, point 2.1.3.

question also involving State resources within the meaning of Article 87 (1) of the EC Treaty.

- (154) In light of these considerations, the Commission is of the opinion that the “*Bestands- und Entwicklungsgarantie*” (financial guarantee concerning the maintenance and further development of public service broadcasters) enshrined in the Constitution and the Interstate Treaty on Broadcasting, the explicit exemption from bankruptcy<sup>69</sup> as well as the “*Anstaltslast*” shift the risk of “*Zahlungsunfähigkeit*” from the public service broadcasters to the State. The State does not receive any guarantee premium for this. Consequently, the guarantee involves State resources.

#### 7.1.2. *Financial advantage*

##### 7.1.2.1. Licence fee financing

- (155) The Commission considers that the guaranteed financing by the State through licence fee revenues gives public service broadcasters a financial advantage vis-à-vis their private competitors which have to finance their activities based on commercial revenues only.
- (156) Germany denies the existence of a financial advantage considering that the financing is limited to the net public service costs of public service broadcasters.
- (157) The Commission recalls that the Court has established in the *Altmark*-ruling the conditions under which a compensation for public service obligations would not be regarded as State aid within the meaning of Article 87 (1) EC Treaty:
- (158) “*First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;*
- (159) *Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings;*
- (160) *Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty;*
- (161) *Third, 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 for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.*

---

<sup>69</sup> Cf. for instance § 32 ZDF StV.

- (162) *Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.* “<sup>70</sup>
- (163) The Commission observes that – as will be explained later<sup>71</sup> – the current legal framework does not give a sufficiently clear and precise definition of the public service remit. The Interstate Treaty on Broadcasting allows public service broadcaster to offer certain new media services and additional digital channels without the scope and limit of the activities which are covered by the remit being sufficiently clear.<sup>72</sup>
- (164) Furthermore, the Commission has doubts that the compensation granted to public service broadcasters is based on parameters as required by the Court, given that it is not the KEF which sets the licence fee level but the Länder.
- (165) Also, as explained in more detail below<sup>73</sup>, the current financing regime does not give the necessary guarantees that the compensation granted to public service broadcasters does not exceed the public service costs.
- (166) Finally, the Commission is not convinced that the financing regime ensures – in the absence of a tender procedure - that the compensation amount is limited to the costs of an efficient operator. Even though the KEF examines the public service broadcasters' submission in light of the principles of efficiency and thriftiness (*Prüfung der “Wirtschaftlichkeit und Sparsamkeit”*), this examination is not equivalent to an analysis of the costs of an efficient operator, in particular since the KEF procedure is based on the financial needs of the public service broadcasters. The financing regime does neither foresee the carrying out of such an analysis, nor does it establish the criteria according to which the costs of an efficient operator would be determined and compared to the financial needs as submitted by the public service broadcasters. The Commission is not convinced that the legal framework - as referred to by Germany - requires the KEF to carry out market comparisons (*“Marktvergleiche”*) comparable to an evaluation of the

---

<sup>70</sup> Cf. Judgement of the Court of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, [2003] ECR I-7747), para. 88-94.

<sup>71</sup> Cf. para.(227)and (236).

<sup>72</sup> For instance, the KEF recognised financial needs for the public service broadcasters' online activities, while expressing the reservation that it had not been in a position to check to what extent the relevant activities were covered by the public service remit, i.e. were really programme-related and necessary for the fulfilment of the public service (cf. in particular 13<sup>th</sup> KEF report, para. 201 and 15<sup>th</sup> KEF report, Vol. 2, para. 381).

<sup>73</sup> Cf. in particular para. (268) *et seq.*

costs of an efficient operator.<sup>74</sup> In addition, the Commission observes that the German authorities have not submitted the necessary data which would have allowed the Commission to assess whether the costs as recognised by the KEF can actually be regarded as those of an efficient undertaking.<sup>75</sup> Contrary to what Germany claims, it is for the Member States invoking the *Altmark* exception to submit the necessary proof and not for the Commission to show that the costs as recognised by the KEF are not those of an efficient undertaking.

- (167) Germany had argued that, in light of the *Chronopost* judgement, the Commission could not apply the fourth condition in cases where there was no comparable private operator who could be used as a benchmark.
- (168) Without going into the question of whether the findings in the *Chronopost* judgement are at all relevant for the assessment of the financing of public service broadcasters under the *Altmark* conditions, the Commission does not agree that it is impossible and purely hypothetical to establish the costs of an efficient operator as a benchmark. Germany has also not provided the necessary information which would have pointed to such impossibility. In fact, the various costs items of the public service broadcaster may very well be benchmarked against the costs incurred by other private competitors, while taking into account the specific public service obligations. Furthermore, even if one were to accept the argument that a benchmark with private operators would not be adequate, the Commission observes that, while the KEF looks into the diverging costs of the individual public service broadcasting corporations (which are all subject to the same public service obligations), this comparison does not lead to the establishment of a single benchmark against which the submitted costs of all public service broadcasters would be compared and therefore – if necessary – reduced.<sup>76</sup>
- (169) For all these reasons, the Commission considers that the conditions stipulated in the *Altmark* judgement are not fulfilled as regards the current financing regime.

#### 7.1.2.2. Special tax treatment

- (170) The Commission assessed whether the special tax treatment gives the public service broadcasters an advantage that reduces the costs they would normally have to bear with regard to their commercial activities. This could be the case where – as explained in the Commission Notice on the application of the State aid rules to direct business taxation - the legal provisions (such as § 8 KStG as

---

<sup>74</sup> In fact, the provisions quoted by Germany in this respect (§ 1 and 3 of the RFinStV) only refer in general terms to the assessment by the KEF of efficiency and thriftiness (“*Wirtschaftlichkeit und Sparsamkeit*”).

<sup>75</sup> Actually, the information at the Commission's disposal rather indicates that the amount of compensation awarded to public service broadcasters might exceed the costs of an efficient operator. For instance, Courts of Auditors criticised that costs for external services might well exceed the market prices for such services given that such services are not tendered out. See in this respect also the pending infringement procedure concerning the non-application of procurement rules by the GEZ/public service broadcasters Infringement case No 2006/4680 and Commission decision of 21<sup>st</sup> March 2007 to send reasoned opinion to Germany in this regard.

<sup>76</sup> Cf. for instance the invitation by the KEF to improve the submission and analysis of the relevant data to allow for a qualified comparison between the production costs of the various broadcasting corporations in order to realise additional efficiency gains (15<sup>th</sup> KEF report II, para. 553 *et seq.*).

regards the taxation of advertisement activities) as well as the tax treatment of other commercial activities constitute an exemption from the general tax rules<sup>77</sup> which cannot be justified by the nature or general scheme of the system, because the exception does not derive directly from the basic or guiding principles of the tax system concerned.<sup>78</sup>

- (171) The possible advantage could result from the fact that the tax base is reduced, i.e. instead of using the actual profit, the relevant provisions fixed a hypothetical flat rate profit expressed as a percentage of turnover.<sup>79</sup> As described above (cf. para. (45)(46)), the profits for commercial activities of public service broadcasters have been set either by law or by administrative practice.
- (172) In this respect, the Commission takes note of the explanations provided by Germany that the explicit legal provision in § 8 KStG (concerning the taxation of advertisement activities) determining the tax base for the corporation tax reflects a general principle of law as laid down in § 162 AO and would therefore not constitute an exception from the general tax laws. Indeed, where the determination of the taxable profit is – in particular due to problems concerning the allocation of the relevant costs – difficult, if not impossible, an estimate of the taxable profits appears to be the second-best solution ensuring that commercial activities are properly taxed. The Commission recognised in the Broadcasting Communication that in certain circumstances the cost allocation may not be meaningful.
- (173) However, and in line with its decision making practice, the Commission considers that tax provisions which determine the taxable profit irrespective of the actual profitability of the company concerned could constitute an advantage to the company concerned where the hypothetical profit is fixed without an *ex ante* evaluation and *ex post* control as to whether this hypothetical profit corresponds to the economic realities of the sector concerned.<sup>80</sup>
- (174) In this respect, the German authorities have explained that the tax authorities have determined different hypothetical profits for the different commercial activities of public service broadcasters and that the determination of the tax base has followed prior evaluation of the tax authorities. Furthermore, the tax authorities would adapt the tax base should it not longer correspond to the economic realities.
- (175) Under these circumstances, the Commission considers that as regards the various BgAs defined by the tax authorities, such as advertisement, “*Kostenbeteiligung Dritter*” (contribution to costs by third parties), commercial exploitation of programme material and studios, “*Verpachtung von Anlagevermögen*” (lease of assets) the estimate of profits generated by these activities can be regarded as justified under the existing financing regime, provided that – as confirmed by

---

<sup>77</sup> Cf. Commission notice on the application of State aid rules to measures relating to direct business taxation, para. 16.

<sup>78</sup> Cf. Commission Notice on business taxation, para. 12, with reference to the Judgment of the Court of Justice of 2 July 1974, Case C-173/73, *Italy v Commission* [1974] ECR, p. 709, para. 14.

<sup>79</sup> Cf. Commission Notice on business taxation, para 9.

<sup>80</sup> Cf. for example the Commission decision regarding co-ordination centres in Belgium, published in the Official Journal of the European Union, L 282, 30.10.2003, p. 25.

Germany - the estimated profits are subject to regular evaluation and control so as to adapt them – where necessary - to the economic realities of the sector concerned.

- (176) The Commission would however like to point out that the same is not necessarily true for the future financing regime. The German authorities have announced that public service broadcasters will be explicitly obliged in the future to respect the arm's length principles in their financial relations to commercial subsidiaries. The respect of this principle implies that commercial subsidiaries would charge market prices for any input they receive from public service broadcasters. There would therefore no longer appear to be a reason to question the appropriateness and reliability of the costs as recorded by the commercial subsidiaries for determining the taxable profit under the general tax provisions.

#### 7.1.2.3. State guarantee

- (177) Pursuant to point 2.1.1. of the Commission communication on State guarantees, the guarantee allows an undertaking to benefit from more favourable funding terms than what the undertaking would have received under normal market conditions.
- (178) The Commission considers that the State guarantee linked to the organisational status of the public service broadcasters is liable to provide public service broadcasters a financial advantage, in particular in terms of more favourable funding terms.
- (179) Even if the German authorities claimed that the possibilities of public service broadcasters to finance themselves through debt were limited<sup>81</sup>, the Commission observes that debt financing is not excluded. Consequently, it cannot be excluded that public service broadcasters benefit from more favourable funding terms in this context.
- (180) Furthermore, it cannot be excluded under the existing financing regime (in particular due to the absence of clear rules which would require public service broadcasters to respect market conditions, including the arm's length principle governing the relationship between public service broadcasters and their commercial subsidiaries<sup>82</sup>) that the State guarantee may have spill over effects to the benefit of purely commercial activities/subsidiaries.

#### 7.1.3. Distortion of competition and effect on trade

- (181) According to established case law, "*...aid must be found to be incompatible with the common market if it has or is liable to have an effect on intra-Community trade and to distort competition within such trade. In particular, when aid granted by a Member State strengthens the position of an undertaking compared*

---

<sup>81</sup> Cf. above para. (86).

<sup>82</sup> See on this aspect below, para. (286) *et seq.*)

*with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid....*"<sup>83</sup>

- (182) The Commission generally considers that the State financing of public service broadcasters is liable to distort competition and affect trade between Member States given the often international trade in programmes and programme rights, the cross-border effects of advertisement (in particular in areas close to the border and where both sides of the border the same language is spoken) and because the ownership structure of private competitors may extend over several Member States.<sup>84</sup>
- (183) The aid granted to public service broadcasters (as identified above) is liable to distort competition and trade in several respects, taking into account the various activities carried out by public service broadcasters.
- (184) The aid to public service broadcasters gives them a financial advantage which strengthens their position towards other private operators which offer broadcasting services and which need to finance their activities through commercial revenues. Both public and private operators compete for audience. The audience share being the determining factor for advertisement prices, an increase of the audience share of publicly financed broadcasters to the detriment of private competitors has a direct effect on the advertisement revenues of private operators.
- (185) But also as regards the acquisition of broadcasting rights and provision of content (sale of broadcasting and other rights), the aid granted to public service broadcasters may have an adverse effect on competition given that private operators compete with public service broadcasters for rights (e.g. film or sports rights) which the first need to entirely refinance through commercial revenues while the latter are publicly financed without the need to ensure the refinancing of the rights acquired. Similarly, aid granted to public service broadcasters may allow them to offer more attractive and high quality content compared to content produced by private operators, thus potentially affecting the private operators revenues generated through the sale of such content/broadcasting rights.
- (186) Public service broadcasters are not only active on the national broadcasting market but also on European markets, in particular through co-operations with other foreign broadcasters. Furthermore, public service broadcasters are in competition with private operators with an international ownership structure (for instance RTL) and other foreign operators which offer their programmes destined to the German market. Also, offers of German public service broadcasters are in competition with other German-speaking broadcasters in other Member States.<sup>85</sup>

---

<sup>83</sup> Cf. Judgment of the Court of 15 December 2005, Case C-148/04, *Unicredito Italiano SpA*, [2005] ECR I-11137, para. 55 and 56 with reference to judgement of 17 September 1980, Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11; judgement of 22 November 2001, Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21; and judgement of 29 April 2004, *Italy v Commission*, Case C-372/97, [2004] ECR I-3679, para. 52).

<sup>84</sup> Cf. Broadcasting Communication, para. 18.

<sup>85</sup> For instance, the public service broadcasters ARD and ZDF are after the ORF the most watched TV channels in Austria (ORF *media research*).



- (187) In addition, public service broadcasters are – as regards the acquisition and sale of programme rights – active at a European scale in particular when acting within the EBU.
- (188) Furthermore, public service broadcasters are – mostly through their commercial subsidiaries – active in other markets, such as film production, the provision of transmission facilities, etc. As regards these activities, public service broadcasters are in competition with other operators (e.g. film production companies or transmission operators) who are active in the European market.
- (189) Finally, and more particularly as regards new media activities, public service broadcasters are in competition with private operators offering similar online services. Where public service broadcasters offer online services which are similar or identical to online services offered by private operators, it is obvious that the public funding of such activities may have an impact on private business models either through the competition of pay-services offered by private operators with services offered by public service broadcasters for free or through the competition for users which ultimately determine the advertisement revenues of private operators.
- (190) In light of these considerations, the Commission is of the opinion that the State aid measures in favour of public service broadcasters in Germany are liable to distort competition and trade within the European Union.

#### 7.1.4. Conclusions

- (191) In light of the above considerations, the Commission considers that the financial guarantee (including the unlimited State guarantee due to the organisational status of public service broadcasters as “Anstalten”) as well as the licence fee funding constitute State aid within the meaning of Article 87 (1) EC Treaty.

## 7.2. Nature of the aid

- (192) Pursuant to Article 1 (b) of the EC Procedural Regulation 659/1999<sup>86</sup>, ‘existing aid’ shall mean (*inter alia*):
- (193) “(i)…, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;…
- (194) (v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;”
- (195) In addition, in Article 4(1) of Regulation 794/2004<sup>87</sup>, an alteration of existing aid is defined as “any change, other than modifications of a purely formal or

---

<sup>86</sup> Cf. Council Regulation no 659/1999 laying down detailed rules for the application of Article 93 EC [now Article 88 EC], OJ L 83, 27.03.1999, p. 1.

*administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market.”*

- (196) According to the case law in *Gibraltar*<sup>88</sup>, not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Tribunal, “*it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.*”
- (197) As Advocate-General Trabucchi pointed out in his Opinion in *Van der Hulst*<sup>89</sup>, modifications are substantial if the main elements of the system have been changed, such the nature of the advantage, the purpose pursued with the measure, the legal basis for the fee, the beneficiaries or the source of the financing.
- (198) On the other hand, the Court has clarified in „*Namur-Les Assurances du Crédit SA*“ that “*... the emergence of new aid or the alteration of existing aid cannot be assessed according to the scale of the aid or, in particular, its amount in financial terms at any moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered. Whether aid may be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.*” Where the relevant legal provisions were not changed as regards the nature of the advantage or the activities of the beneficiaries, there was no new aid.<sup>90</sup>
- (199) In light of the above considerations, the Commission examined (1) whether the original financing regime for public service broadcasters was adopted before the entry into force of the EEC Treaty and (2) whether subsequent modifications are either severable from the original measure and, therefore, new aid or (3) whether the non-severable changes affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose or legal basis of the aid, the beneficiaries or the scope of activities of the beneficiaries) so that the latter as a whole is transformed into a new aid as opposed to changes of a purely formal or administrative nature which do not affect the existing aid nature of the original financing regime.

#### 7.2.1. Licence fee financing

- (200) The Commission observes that financing of public service broadcasters was introduced before the entry into force of the EEC Treaty. The public service broadcasters (regional broadcasters which later formed the association of regional broadcasters, ARD) which existed at that time were subject to a number of different regional laws and Interstate Treaties which were adopted between 1948 and 1955. These laws contained provisions concerning the public service mission

---

<sup>87</sup> Cf. Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140 of 30 April 2004, p. 1).

<sup>88</sup> Cf. Judgement of 30 April 2002, Joined Cases T-195/01 and T-207/01, [2002] ECR II-2309, para. 111.

<sup>89</sup> Cf. Opinion of Mr Advocate- General Trabucchi delivered on 4 December 1974, in Case 51/74, *van der Hulst*, [1975] ECR, p. 79.

<sup>90</sup> Cf. in particular para. 28/29 of the judgement.

as well as its financing through licence fees so that the financing of the ARD can be regarded as existing aid pursuant to Article 1 (b) (i) of the Procedural Regulation.

- (201) On the other hand, the second German-wide TV channel ZDF was established only in 1961, i.e. after the entry into force of the EEC Treaty. However, the Commission observes that the ZDF Interstate Treaty on Broadcasting entered into force before the transitional period as foreseen in the Treaty had come to an end.<sup>91</sup> Before that date, broadcasting services were neither *de iure* nor *de facto* open to competition.<sup>92</sup> As a consequence, subsidies granted to public service broadcasters before the end of the transitional period cannot be regarded as State aid within the meaning of Article 87 (1) EC Treaty. As a consequence, the Commission considers that the financing of the ZDF is to be regarded as existing aid pursuant to Article 1(b) (v) of the Procedural Regulation.
- (202) The relevant legal acts governing the activities of ARD broadcasters and the ZDF have been subsequently amended on various occasions. The Commission considers that these amendments are not severable from and do not affect the substance of the initial financing regime.
- (203) First of all, the reform of the licence fee system following a judgement from the Constitutional Court in 1968/1969 (stating that it was not the Federal State but the Länder which were competent in media and broadcasting matters) did not affect the event triggering the obligation to pay the licence fee (i.e. the possession of equipment capable of receiving broadcasting services), nor did it change the recipient of the licence fee revenues (i.e. the individual public service broadcasters). Also the purpose of the fee remained unchanged (i.e. to finance the public service remit). It merely changed the collection mechanisms - which are an integral and non-severable part of the financing regime – and is therefore regarded as a modification of purely administrative nature.
- (204) Secondly, the adaptation of the existing legal framework following the German re-unification („*Rundfunkstaatsvertrag im vereinten Deutschland 1991*”) and the extension of the existing finance regime to broadcasters established in the former GDR is neither severable from nor a substantive modification of the original funding regime, since these Eastern German broadcasters were integrated into the ARD which as such continued to receive public funding under the existing provisions.
- (205) Thirdly, the „KEF-procedure“ as introduced in 1997 concerned a modification of the methodology and procedure for determining the financial needs of public service broadcasters. The KEF as such existed already before, albeit with only advisory functions whereas the new framework increased its independence. Given that the procedure for determining the financial needs of public service broadcasters is an intrinsic element to the financing regime, the modifications are not severable from the original financing regime. Therefore and in line with previous Commission practice, these modifications can be regarded of an

---

<sup>91</sup> Article 8 of the EEC Treaty stated that the Common Market would be progressively established during a transitional period of 12 years, the expiry of the transitional period constituting the latest date by which all the rules laid down must enter into force.

<sup>92</sup> In this respect, it is recalled that the first private broadcaster took up operations in Germany in 1984.

administrative as well as technical nature, without bringing substantial changes to the financing regime.<sup>93</sup>

- (206) Fourthly, the Commission considers that the increases of the level of the licence fee should not be regarded as new aid. The increase is rather the consequence of an increased financial need of public service broadcasters in fulfilling their public service mission. It is therefore – and in line with previous Commission practice<sup>94</sup> – not severable from the initial funding regime and does not constitute a substantive amendment provided that the public service mission as such has not been substantially changed.
- (207) Fifthly, the Commission also considers that the explicit possibility granted to public service broadcasters to offer programme-related and programme accompanying online activities/new media activities cannot be separated from the initial financing regime and does not affect the substance of the existing financing regime.
- (208) In line with its decision making practice, the Commission considers that the possibility for public service broadcasters to fulfil the existing public service remit via new distribution platforms, such as the Internet, is not in itself a substantial and severable amendment, provided that there is a close association with the original tasks, that the content offered over the new platform corresponds to the existing programme remit and that the legal basis for the financing of the public service activities has not been changed.<sup>95</sup>
- (209) The inclusion of „*programme-accompanying media services with programme-related content*“ – a requirement stipulated in the current Interstate Treaty – is supposed to reflect a close association to the traditional programme tasks of the public service broadcasters. The Commission takes note of the explanation provided by Germany as regards the existing financing regime that the scope of such media services is limited to serving and supporting the main TV programme tasks. Furthermore, the Commission observes that the provisions defining in qualitative terms the public service mission (i.e. to inform, educate, advise and entertain) as well as the provisions governing the financing of the public service broadcaster’s tasks remained unchanged following the revision of the public service remit.<sup>96</sup>
- (210) For similar reasons, the Commission also considers that the possibility introduced in 2001 for ARD and ZDF to distribute existing programmes via digital

---

<sup>93</sup> Cf. also RAI licence fee financing Decision, paragraph 42 and State aid E 14/2005 concerning the compensation payments to the Portuguese public service broadcaster RTP, in particular para. 72.

<sup>94</sup> Cf. RAI licence fee financing Decision, paragraph 43. See also France 2 and France 3 licence fee financing Decision, paragraphs 34 and 35; and RTVE general financing regime Decision, State aid E 8/2005, paragraph 53.

<sup>95</sup> See on this aspect Commission decision „*BBC Digital Curriculum*“, State aid N 37/2003, para. 35/36 and para. 48 with reference to Commission decision „*BBC 24 hours news*“, para. 69/70.

<sup>96</sup> Based on the information at the Commission’s disposal, the KEF had –even before the legislative changes – recognised financial needs in relation to public service broadcasters' online projects under the „*Bestands- und Entwicklungsgarantie*“. For the period 1997 – 2000, the KEF recognised financial needs for online projects based on the previously existing public service definition (cf. 10<sup>th</sup> KEF-report).

technology and to have each three additional digital channels could be regarded as not severable and not affecting the substance of the existing financing regime.

- (211) The use of other means of distribution does not affect the initial public service missions. The same is true also for the additional digital channels. The Commission takes note of the explanation provided by Germany that under the present financing regime the content on these channels relies to a large extent on existing programme material which is re-packaged. As described in more detail above, and despite the required focus on information, culture and education, these channels do not have a thematic focus comparable to special interest channels for children or news (such as "*Kinderkanal*" and "*Phoenix*", the financing of which was approved by the Commission in 1999).
- (212) Finally, the Commission considers that the changes introduced through the 8<sup>th</sup> and 9<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting (both legal acts entered into force after the Commission's "Article 17 letter") are neither severable from nor affecting the original financing regime.
- (213) The changes introduced through the 8<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting concern the public service remit as well as certain restrictions concerning the financing of public service broadcasters.<sup>97</sup> The Commission considers that the required focus of additional digital channels on information, education and culture as well as the limitation of programmes organised by the regional ARD broadcasters constitutes tightening of the scope of the public service mission which is not regarded as a severable and substantial change. Also, the extended control exercised by the KEF as regards the public service broadcasters' self-commitments as well as the limitation of public service broadcasters' possibility to take up loans have introduced an increased discipline on the recognised financial needs of public service broadcasters and is therefore not considered as a severable and substantial amendment to the original financing regime.
- (214) As regards the introduction – through the 9<sup>th</sup> Amendment to the Interstate Treaty on Broadcasting - of the new concept of "*telemedia*" (replacing the current concept of "media services"), the Commission observes that the kind of services covered by this concept could be potentially broader than under the previous concept. However, in line with the reasoning concerning the extension of the scope from traditional TV to online activities, the Commission considers that the remaining limitation to supportive activities ensures a still remaining close link to the traditional programme tasks.

#### 7.2.2. *State guarantee*

- (215) Both the concept of „*Bestands- und Entwicklungsgarantie*“ as enshrined in the German Constitution and the unwritten legal principle of the "*Anstaltslast*" existed before the entry into force of the EEC Treaty. The benefits resulting from these measures are therefore considered as existing aid.

---

<sup>97</sup> See on these aspects also Commission decision concerning the compensation payments to the Portuguese public service broadcaster RTP, para. 77.

### 7.2.3. Conclusions

- (216) The Commission considers that the financial guarantee as well as the licence fee funding in favour of ARD and ZDF in its current form and scope can be regarded as existing aid.

### 7.3. Compatibility assessment of the current financing regime

- (217) The compatibility of the aid measures identified above has to be assessed under Article 86(2) of the Treaty, taking into account the Amsterdam Protocol as well as the Communication on the application of state aid rules to public service broadcasting, laying down principles and methods for assessing compatibility of State funding for the public broadcasting sector (hereafter “Broadcasting Communication”)<sup>98</sup>.
- (218) In accordance with the case-law of the European Court of Justice, the following conditions must be fulfilled in order for an aid to be declared compatible under Article 86 (2) EC Treaty<sup>99</sup>:
- (i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);
  - (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);
  - (iii) the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test).
- (219) In 2001, the Commission adopted the so-called Broadcasting Communication, laying down the conditions under which public funding of public service broadcasters could be declared compatible. According to the Broadcasting Communication, the Commission has to assess whether
- (i) the activities of ARD and ZDF are clearly defined public service obligations;
  - (ii) ARD and ZDF are officially entrusted by the German authorities with the provision of that service and subject to adequate control as to whether they have fulfilled their mission and
  - (iii) the funding is proportionate to the net cost of providing the public service and does not lead to unnecessary distortions of competition.

#### 7.3.1. Definition

- (220) The Commission recognises that, the “*definition of the public service mandate falls within the competence of the Member States...*” whereas “*...the role of the Commission is limited to checking for manifest error. ... The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet - in the wording of the Protocol - the 'democratic, social and cultural needs of each society'*”, such as e-commerce (cf. para. 36 of the Broadcasting Communication).

---

<sup>98</sup> Published in OJ C 320 of 15 December 2001, page 5.

<sup>99</sup> Cf. also “Broadcasting Communication”, para. 29.

- (221) “Given the specific nature of the broadcasting sector, a 'wide' definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity” (cf. para. 33 of the Broadcasting Communication).
- (222) “The public service remit might include certain services that are not "programmes" in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.” (cf. para. 34 of the Broadcasting Communication).<sup>100</sup>
- (223) Despite the freedom of Member States to define the public service remit, the Broadcasting Communication requires that Member State’s definition must be sufficiently precise and clear. The definition “... should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not.” A clear and precise definition is also important “...for non-public service operators, so that they can plan their activities.” and “...that Member States' authorities can effectively monitor compliance...” (cf. para. 37-39 of the Broadcasting Communication).

#### 7.3.1.1. Public service definition for general TV programme activities

- (224) In line with the preliminary view expressed in the article 17 letter, the Commission considers that, as regards the general TV programme activities of public service broadcasters, the current public service definition is sufficiently precise and clear, taking into account that the Commission accepts a "wide" definition comprising a varied and balanced programme, which is based on more qualitative than quantitative criteria.<sup>101</sup> In this respect, the Commission also takes note that the general definition in § 11 RStV is to be further substantiated by the public service broadcasters through legally binding and published guidelines.

#### 7.3.1.2. Public service definition for additional digital channels

- (225) In the Article 17 letter, the Commission took the preliminary view that the public service remit for additional channels was not sufficiently precise, in particular

---

<sup>100</sup> Cf. also para. 12 of the Broadcasting Communication which refers to the Resolution of the Council and of the Representatives of the Governments of the Member States of 25 January 1999 concerning public service broadcasting, which stated that “...public service broadcasting needs to “benefit from technological progress”, bring “the public the benefits of the new audiovisual and information services and the new technologies” and to undertake “the development and diversification of activities in the digital age”.

<sup>101</sup> See also RTP *ad hoc* financing Decision, State aid C 85/2001, published in OJ 2005 L 142/1, paragraph 164.

because there was no programme concept which would further substantiate the scope of programmes to be offered.

- (226) Germany had initially argued that the requirement for these channels to have their focus on, culture, information and education was a sufficiently precise definition of the public service, also taking into account that the public service broadcasters would develop "digital concepts". Germany also explained at the time that it was not intended for these programmes to have their own programme profile. In fact, the additional channels were mostly fed by existing programme material.
- (227) The Commission does not consider that the general requirement for additional digital channels – as stipulated in the Interstate Treaty on Broadcasting - to have a focus on culture, information and education is sufficient to clearly describe the public service obligations that public service broadcasters have in relation to these additional channels. In fact, without a clearer circumscription of what is meant by "culture, information and education" most programme genres offered by public service broadcasters could be covered by these concepts. In such a situation, it remains unclear what is the public service value of these channels in addition to the already existing channels. The creation of additional capacities (channels) without a clear programme concept which reflects the additional public value of this channel bears the risk of simply increasing the share of certain programme genres such as in particular sports to an extent which could no longer be justified by the public service mission to offer a balanced and varied programme. In the absence of clearer legal requirements concerning the required and permissible scope of these additional channels, the announced development by public service broadcasters of digital concepts cannot be regarded as satisfactory.<sup>102</sup>
- (228) The Commission therefore considers that the current possibility granted to public service broadcasters to offer additional channels with a focus on information, culture and education is not sufficiently precise.

#### 7.3.1.3. Public service definition for new media services

- (229) As recognised by the Commission in the Broadcasting Communication, the public service remit may also comprise new services, provided that they serve the same democratic, social and cultural needs of society.
- (230) The Commission considers however that a general authorisation of public service broadcasters to offer such loosely defined new media services and the resulting lack of predictability for third parties bears the risk that other market operators are discouraged to develop and offer such new media services. A clearly defined public service mission is important to strike a balance between the provision of services in the general economic interest and a level playing field between public and private operators, thus ensuring that the financing of new media activities does not run counter to the Community interest.

---

<sup>102</sup> In this respect, the Commission also notes that the digital concepts as submitted by Germany to the Commission lack the necessary degree of precision. For instance, the ZDF digital concept outlines ways of further developing the existing digital channels, outlining in general the possible options ("*skizzierte Entwicklungsoptionen mit Beispielcharakter*") without providing a clear picture of the programme content.



- (231) The Commission does not dispute that public service broadcasters can participate in new technological developments and distribute TV content over different platforms. On the other hand, the Commission does not consider that the possibility to use new platforms automatically establishes the public service character of all services offered over these platforms, since new platforms also offer the possibility to develop a wide range of services which are different in nature from the traditional tasks of TV programmes and where the relevance for public opinion shaping and the broadcasters' specific contribution to the democratic, social and cultural needs is not always evident.
- (232) The Commission does not share Germany's views that all online activities offered by public service broadcasters (including services such as online games, chat rooms, calculators, links to third parties offers/services, online dating services, etc.) automatically and in all circumstances constitute services of general economic interest. As explained in the Article 17 letter, and depending on the circumstances, such services may lack the specific features as compared to other services which are in a similar or identical form already offered by the market.
- (233) The Commission maintains the concerns already expressed in the Article 17 letter with respect to certain online activities, also in light of the explanations provided by Germany. For instance, the Commission does not question in general that chat rooms may fulfil the public service broadcasters' specific function of contributing to the opinion shaping process. However, this function may become negligible while interfering with similar offers on the market where such chat rooms are offered without a clear and specific link to the TV programmes. Also, other online services such as online calculators (for instance calculators to find the cheapest health or car insurance) or online dating services or online games may be regarded as complementing traditional offers of public service broadcasters but would not in all circumstances reflect the specific function of public service broadcasters or the specific editorial arrangement of public service broadcasters while interfering with similar or identical offers on the market.<sup>103</sup>
- (234) The Commission is not convinced that the required link of the new media service to the programme ("*programme-related*" and "*programme accompanying*" "*media services*", or under the new Interstate Treaty on Broadcasting: "*telemidia*") is suitable for determining whether new media activities, which go beyond the mere distribution of the same or similar content over different platforms (see above), satisfy the same democratic, social and cultural needs of society as traditional TV.
- (235) In this respect, the Commission observes that there are no generally applicable criteria determining the nature of the link to the programmes and which would allow for a clear determination of which individual online activities would still fall within the category. The explanation provided by Germany in this context and which refers to the existence of a link to programmes where the media offer refer to programme offers, where new offers are based on sources and material used for TV programmes and where they serve to support, deepen and accompany the TV offers in terms of themes and content covered by TV programmes is not laid down in a binding way which would guarantee a meaningful control. In this

---

<sup>103</sup> The Commission had already expressed similar doubts as regards games or chat rooms which did not differ from similar commercial products and which were actually considered as purely commercial activities by the Danish authorities themselves; cf. TV2 Decision, paragraphs 90 to 92.

respect, the Commission observes in particular that the KEF reiterated previous statements that it had not been possible to judge whether the online offers of ARD and ZDF were actually programme-related and programme-accompanying.<sup>104</sup>

- (236) Therefore, the Commission considers that a provision which allows public service broadcaster to offer programme-related and programme accompanying new media is not in itself sufficiently precise and does not show that the services covered by this definition can be regarded as service of general economic interest within the meaning of Article 86 (2) EC Treaty.

7.3.1.4. "*Manifest errors*" in the definition and a clear distinction between public service and commercial activities

- (237) Apart from the question of whether the existing definition of the public service remit is sufficiently precise (see discussion above), the Commission's task under the Broadcasting Communication is also to check whether the definition contains "*manifest errors*".
- (238) The Commission considers that the current definition also includes the possibility for public service broadcasters to engage in what the Commission considers purely commercial activities. This bears the risk that such purely commercial activities may also benefit from licence fee funding given that the KEF recognises the financial needs of public service broadcasters for activities covered by the public service remit. Also, given that the public broadcasting corporations carry out to some extent purely commercial activities, such activities could unduly benefit from advantages resulting from the unlimited State guarantee, which is linked to the organisational status of public service broadcasters.
- (239) Such purely commercial activities, the inclusion of which in the public service remit would constitute in the Commission's view a "manifest error" comprise in particular e-commerce (sale of goods and services over the Internet), advertisement, sponsoring and merchandising over the internet or other new media. It would also normally include pay-services such as payTV or pay-per-view services. Also, activities which are regarded as commercial on one platform should in principle also regarded as commercial when made available over another platform.
- (240) On the other hand, the Commission does not consider that the determination of a "manifest error" can be based on the mere use of new delivery platforms, where the content is distributed over new platforms under conditions which are identical or similar to those for traditional television broadcasting. Consequently, the Commission does not consider the inclusion of "mobile services" into the public service mission as constituting a "manifest error". However, where public service broadcasters commercially exploit their content by making it available to telecom operators against remuneration, this would constitute a normal commercial activity.

---

<sup>104</sup> Cf. statements in the 13<sup>th</sup> and 14<sup>th</sup> KEF reports, also referring to the need for further criteria to determine whether the online services offered by public service broadcasters are really necessary for the fulfilment of the public service mission (para. 227, 229 and 253 of the 14<sup>th</sup> KEF report and para. 201 of the 13<sup>th</sup> KEF report) as well as statements in the 15<sup>th</sup> KEF report, Vol. 2, para. 381).

- (241) Community law does not prohibit public service broadcasters to engage in such commercial activities, but the relevant legal framework needs to ensure that these activities do not benefit from public funding. Under the current legal framework this is not ensured.
- (242) Finally, as regards the complainants' allegations about the excessive weight of sports on public television, the Commission points out that the current legal framework, including the existing control mechanisms should ensure that sports remain part of a balanced and varied programme. The Commission does not therefore find any manifest error in this respect.<sup>105</sup>

### 7.3.2. *Entrustment and control*

- (243) Pursuant to para. 40 of the Broadcasting Communication, “...*the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference).*” Furthermore, the Broadcasting Communication requires that, “*whenever the scope of the public service remit is extended to cover new services the definition and entrustment act should be modified accordingly, within the limits of Article 86(2).*” (cf. para. 35 of the Broadcasting Communication)
- (244) Furthermore, para. 41 requires “...*that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitor its application.*” In this respect, para. 42 of the Broadcasting Communication clarifies that it “...*is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking.*” Finally, para. 43 states that “*[i]n the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.*”

#### 7.3.2.1. *Entrustment*

- (245) In the Article 17 letter, the Commission expressed the preliminary view that the general authorisation granted to public service broadcasters to offer new media and additional digital channels could not be regarded as an appropriate act of entrustment.
- (246) Germany refutes this view considering that the authorisation contained in § 11 and § 19 of the Interstate Treaty on Broadcasting should be regarded as sufficient.
- (247) The Commission does not share this view. Contrary to the obligation of public service broadcaster to offer generalists TV programmes via their full coverage TV channels (“*Pflichtaufgabe*” in relation to “*Fernsehvollprogramm*”), the offer of new media and additional channels is not an obligation but a possibility given to public service broadcasters. In line with Commission practice, a mere authorisation granted to a public service broadcaster to perform activities which are described in a very broad way cannot be regarded as sufficient for the act of

---

<sup>105</sup> The questions concerning the financing of sports rights are addressed in more detail below, para. (289)

entrustment. This general possibility would need to be further substantiated and the public service broadcaster be specifically entrusted with the provision of the thus specified services.<sup>106</sup>

- (248) The Commission does not consider that the current definition of programme-related and programme accompanying new media services is sufficiently precise (see above, para. (236)). Also, the Commission observes that there is no additional official act by which the public service broadcasters have been entrusted with further specified new media services. In particular, the further description of the envisaged online offer in the public service broadcasters' self-commitments (as issued for the first time in October 2004), cannot be regarded as a formal act of entrustment since they are drawn up by the public service broadcasters themselves.
- (249) The same is true for the possibility of public service broadcasters to offer three additional digital channels (each). The requirement in the Interstate Treaty on Broadcasting for these channels to have their focus on information, education and culture is not sufficiently precise (see above, para. (228)). Furthermore, there is no additional act of entrustment in which the Länder would have laid down the specific obligations as regards these additional offers (for instance based on a sufficiently precise programme concept). As stated above, the establishment of self-commitments referring to digital offers cannot be regarded as sufficient in this respect. The same is true for the elaboration of the so-called "digital concepts" of public service broadcasters since – here again – it is the public service broadcaster itself and not the Länder which establish and endorse the concept.
- (250) Germany had argued that the German Constitution, and in particular the principle of programme autonomy and independence from the State - would not allow for an act of entrustment in addition to the general legal provisions in § 11 and 19 of the Interstate Treaty on Broadcasting.
- (251) The Commission considers however that, in light of the requirements under EC law, independence from the State cannot justify an extension of the public service broadcasters remit without a clear entrustment by the Länder as to which new services in addition to the traditional TV are to be offered by public service broadcasters and financed through the licence fee. The Commission does not accept that under the current financing regime it is entirely left to the public service broadcasters, including their internal control bodies, to decide upon the scope of their activities. The question of entrustment has to be distinguished from the question of editorial independence, which is entirely left to the public service broadcasters. It is indeed for them, within the limits of the public service mission, to decide – based on editorial criteria ("*publizistische Kriterien*") about the content of individual programmes and new media offers.
- (252) Consequently, the Commission considers that there is no adequate act of entrustment as regards new media activities as well as additional digital channels.

---

<sup>106</sup> See for instance the decision concerning the RTP *ad hoc* financing, paragraph 171; On the other hand, the Commission was satisfied when, based on a general authorisation clause, there was a subsequent formal legal act by which the exact scope of such additional services was laid down (BBC 24-hours news channel Decision, paragraphs 65 to 70).

### 7.3.2.2. Control

- (253) In the Article 17 letter, the Commission had expressed doubts as to whether the existing control mechanisms would ensure an adequate control, given in particular that for new media activities as well as offers over additional digital channels a clear public service definition as well as a sufficiently clear act of entrustment was missing. Under these circumstances it was doubtful whether the control bodies could effectively check compliance with the public service mission, including an adequate control of whether public service broadcasters remained within the scope of this mission.
- (254) Germany had argued that there were numerous internal and external control bodies and mechanisms which would ensure adequate control.
- (255) The Commission recognises the special status and importance of the Broadcasting Council (“*Rundfunkrat*” as regards the ARD broadcasters and “*Fernsehrat*” as regards the ZDF) within the German regime for public service broadcasting. On the other hand, the Commission has doubts that these internal control bodies alone can ensure effective supervision of the fulfilment of the public service.
- (256) The fact that the Broadcasting Council is responsible for the establishment of the programme guidelines and advise the Director (“*Intendant*”) as regards the programming activities of the public service broadcaster in question, while at the same time being responsible for checking compliance with these same rules/guidelines<sup>107</sup> may lead to an inherent conflict of interests of the operations of the public service broadcaster on the one hand and the “regulatory” and control functions.
- (257) The Commission takes note that, in addition to these internal control bodies, public service broadcasters are subject to external control: the Länder Parliaments exercise such control based on reports submitted by public service broadcasters and the Länder exercise control of public service broadcasters' action as part of their legal supervision (“*Rechtsaufsicht*”). The control also comprised the fulfilment of the self-commitments established for the first time in October 2004.
- (258) However, the Commission maintains its initial view that, in the absence of a public service mission which is defined in a sufficiently clear and precise manner, the Commission is not convinced that these control mechanisms are entirely satisfactory.

### 7.3.3. Proportionality

- (259) Pursuant to para. 47 of the Broadcasting Communication, “*the Commission has to verify, under Article 86(2), that the derogation from the normal application of the competition rules for the performance of the service of general economic interest does not affect competition in the common market in a disproportionate manner. The test is of a "negative" nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the interests of the Community.*”

---

<sup>107</sup> Cf. for instance § 20 ZDF StV.

- (260) Furthermore, para 49 of the Broadcasting Communication clarifies that the proportionality assessment “...requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities. ...Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Protocol.” The requirements concerning the separation of accounts in line with the Transparency Directive are laid down in para. 50 – 56.
- (261) In accordance with para. 57 of the Broadcasting Communication, “... the Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However...it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid.”
- (262) Finally, para. 58 of the Broadcasting Communication points out that “...there might be market distortions which are not necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors. Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster....”
- (263) Against this background, the proportionality assessment to be carried out by the Commission comprises the following aspects: (1) separate accounting, (2) control of the limitation of State funding to the net public service costs and (3) examination of possible market distortions which are not inherent to the fulfilment of the public service remit.
- (264) As consistently held by the Commission, when examining existing aid, the examination of the Commission is focussed on the existence of adequate safeguards in the relevant legal acts which would ensure the respect of the above requirements.<sup>108</sup>

#### 7.3.3.1. Separate accounts

- (265) Pursuant to Article 2(1)(d) of the Transparency Directive<sup>109</sup> “*undertaking required to maintain separate accounts means any undertaking that enjoys a special or exclusive right granted by a Member State pursuant to Article 86(1) of the Treaty or is entrusted with the operation of a service of general economic interest pursuant to Article 86(2) of the Treaty, that receives public service*

---

<sup>108</sup> Cf. licence fee financing of France 2 and France 3, para. 56.

<sup>109</sup> Cf. Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, published in the Official Journal L 312 , 29/11/2005, pages 47/48.

*compensation in any form whatsoever in relation to such service and that carries on other activities;”.*

- (266) The Commission considers that public service broadcasters in Germany are entrusted with the operation of a service of general economic interest pursuant to Article 86(2), receive compensation payments in relation to this service and carry on other activities. In fact, the Commission considers that activities such as sale of advertisement or other activities concerning the exploitation of the public service cannot be considered as service of general economic interest and are therefore “other activities” within the meaning of the Transparency Directive.
- (267) The Commission observes that the existing legal framework does not include an explicit requirement for public service broadcasters to keep separate accounts distinguishing between public service and other, purely commercial activities. Furthermore, the information submitted by Germany shows that in practice public service broadcasters did not keep separate accounts based on the requirements laid down in the Transparency Directive.

#### 7.3.3.2. Limitation of compensation to net public service costs

- (268) As stated above, the Commission needs to examine whether the legal framework provides for the necessary safeguards which ensure that the financial compensation granted to public service broadcasters does not exceed the net public service costs linked to the fulfilment of the public service mission. The determination of the net public service costs requires a clear establishment of the public service costs based on separate accounts (see also above) as well as the determination of the commercial revenues to be taken into account. The limitation of the compensation to the net public service costs needs to be subject to adequate *ex post* control.

##### (a) Determination of public service costs

- (269) In this respect, the Commission notes first of all that the financing guarantee given to public service broadcasters covers all activities which public service broadcasters are allowed to carry out under national law. The scope of activities is not explicitly limited to services of general economic interest but covers also purely commercial activities.
- (270) The Commission observes that there is currently no provision which would explicitly exclude the taking into account of losses of commercial activities/subsidiaries. In the Commission’s view, losses incurred by commercial subsidiaries and which are taken over by the mother company, i.e. the public service broadcaster in question, are costs related to commercial activities which cannot be regarded as part of the public service costs.

##### (b) Deduction of commercial revenues

- (271) The Commission observes that commercial revenues are in principle taken into account by the KEF when determining the financial needs of public service broadcasters. In its Article 17 letter, the Commission had expressed however the concern that it was not clear whether the KEF would take into account all profits generated by commercial subsidiaries.

- (272) Germany had argued that such a full transfer of profits from the commercial subsidiaries to the mother company would not correspond to market practice.
- (273) In line with the requirements set out in the Broadcasting Communication (as well as established Commission practice), the Commission considers that all such profits would need to be taken into account and channelled back to the public service broadcasters where such revenues are generated through the commercial exploitation of the public service and where no proper cost allocation between the public service and the commercial activity could be carried out (see above on the lack of a clear separation of accounts, para. (267)).<sup>110</sup>
- (274) The Commission takes note of the statement by Germany that the KEF will in the future base its determination of the financial needs of public service broadcasters not only on those profits which are actually distributed to the public service broadcasters but would also include those profits retained within the commercial subsidiary (“*Berücksichtigung der Gewinnthesaurierung*”).
- (275) As regards the appropriateness of the profits/dividends<sup>111</sup> channelled back to the public service broadcaster, the Commission was initially concerned that there were no proper investment management and control mechanisms in place and that it was not clear to what extent the KEF would take into account adequate returns when determining the net public service costs.
- (276) In this respect, the Commission takes note that the KEF will, where necessary adapt the financial needs of public service broadcasters if it considers that the profitability prospects as submitted by public service broadcasters are too low.
- (277) However, the Commission observes that there are no clear and uniform requirements for public service broadcasters' investments in commercial undertakings subject to adequate control (see on this aspect also below, para. (283) *et seq.*).
- (278) Furthermore, the Commission considers that the current legal framework does not allow the KEF to make a thorough assessment to what extent the numerous participations of public service broadcasters generate adequate yields and that public service broadcasters have an adequate investment management and control system in place which would ensure that investments in commercial undertakings bring optimal yields. The absence of such a system bears the risk that public service broadcasters do not act in a market conform manner on the respective markets resulting in unnecessary distortions of competition and that commercial revenues are not maximised, resulting in less commercial revenues being deducted and thus resulting in an increase in the financial needs of public service broadcasters.

---

<sup>110</sup> In the Commission decision concerning the *ad hoc* financing of RAI (published in OJ 2004 L 119/1), the Commission had deducted all revenues generated by all commercial subsidiaries. This was justified given that it had not been possible to verify the correctness of the transfer prices between RAI and its subsidiaries; cf. in particular paragraphs 126 and 127.

<sup>111</sup> Where the public service broadcasters have invested in a commercial undertaking and where it is ensured that this undertaking does not benefit from any form of benefit resulting from the financial guarantee and/or the licence fee funding, it is acceptable that the financial transfers from the commercial undertaking to the public service broadcasters do not comprise all the profits but dividends.



(c) *Ex post* control of possible overcompensation

- (279) Finally, the Commission considers that the current legal framework does not provide for an adequate *ex post* control of possible overcompensation. As explained in the Article 17 letter, the Commission is concerned about the fact that the KEF would not seem to examine to what extent the licence fee revenues received by public service broadcasters corresponded to the actual costs incurred by the public service broadcasters in fulfilling their public service tasks.
- (280) Germany does not share this concern and considers that the existing control mechanisms, including the control exercised by the KEF, but also other control bodies ensured that the licence fee funding would be limited to the public service costs of public service broadcasters.
- (281) In line with its previous decision making practice, the Commission considers that the legal framework should contain clear provisions limiting the available annual public funding to the net public service costs incurred in any given financial year as well as adequate control mechanisms which make sure that the public service broadcasters do not enjoy more financial means than necessary to cover the net public service costs.<sup>112</sup> The control mechanisms need to make sure that excess money does not, in principle, remain at the free disposal of the public service broadcaster. Where the funding is determined and the compensation granted on an annual basis, excess money would need to be recovered or deducted from next year's payment. The Commission has, however, accepted that a margin of 10% could remain at the public service broadcaster's disposal in particular to allow the public service broadcaster to react to fluctuations in revenues and costs. On the other hand, where the financing regime is based on contributions which are determined for a longer period, any excess money detected at the end of a given year would not automatically need to be withdrawn from the public service broadcaster immediately but could under certain conditions be carried over to the next year. In any case, at the end of a certain period of time, any remaining excess would need to be definitively withdrawn from the company in question.<sup>113</sup>
- (282) The Commission observes that, in the current legislation, there is no provision which would explicitly limit the public funding to the net public service costs and which would provide for the necessary control mechanisms. For instance, there are no provisions which would regulate the use of a possible surplus at the end of any given financial year. Furthermore, the Commission observes that the KEF does not carry out an *ex post* control for individual years based on actual figures which would reveal whether the public service broadcasters had in any given year received more licence fee revenues than necessary for the fulfilment of their tasks in that particular year. Other control mechanisms referred to by Germany, such as the examination of annual accounts by auditing firms cannot be regarded as sufficient safeguards against possible overcompensation, given that auditing firms have no power to make sure that any surplus does not remain at the public service broadcaster's free disposal. Under the current system, it is only the KEF – and only at the end of the licence fee period – which is in a position to deduct excess

---

<sup>112</sup> Cf. France 2 and France 3 licence fee financing Decision, paragraphs 67 and 68.

<sup>113</sup> Cf. Commission decision on the *ad hoc* financing of Dutch public service broadcasters C 2/2004 (ex NN 170/2003).

money from the declared financial needs. Even though the KEF is deducting any surplus recorded at the end of the 4-year-licence fee period, the determination of such a surplus is not based on the actual financial results of the public service broadcasters in the relevant years.

#### 7.3.3.3. Respect of commercial principles

- (283) In the Article 17 letter, the Commission expressed concerns regarding the existing legal framework, given the lack of general principles and requirements as regards the respect of market principles and more particularly the absence of appropriate investment management and control mechanisms and *ex post* control mechanisms. The Commission had also expressed doubts about existing control mechanisms, given that the Courts of Auditors did not have uniform and exhaustive control competences, in particular as regards the control of participations.
- (284) Germany had argued that the respect of these principles was already adequately controlled by the relevant control bodies (including in particular tax authorities as well as external accountants).
- (285) In general terms, the Commission considers that where public service broadcasters commercially exploit the public service and carry out commercial activities in competition with other operators, this should be done on purely market terms. Any such non market conform behaviour would lead to distortions of competition which are not inherent to the fulfilment of the public service. Also, non market conform behaviour of public service broadcasters as regards their commercial activities could reduce commercial revenues which should be used to finance public service costs and could therefore lead to State financing in excess of what is necessary for the fulfilment of the public service remit. For these reasons, the Commission has in its decision-making practice required Member States to ensure that public service broadcasters are required to respect market principles.<sup>114</sup>
- (286) The Commission does not consider that the existing legal framework or the existing control mechanisms can be regarded as sufficient in order to ensure that the financial needs of public service broadcasters are not increased by non-market conform behaviour.
- (287) First of all, the Commission observes that there is no clear and explicit obligation on public service broadcasters to respect such market principles in the relevant Interstate Treaty on Broadcasting. In addition, other legal provisions referred to by the German authorities (in particular § 53HGrG and §193AO) cannot, in the Commission's view, be regarded as sufficient since the provisions do not make explicit reference to these principles and the control exercised by the relevant control bodies is not regular and does ultimately not make sure that infringements of these principles will be taken into account when determining the justified

---

<sup>114</sup> Cf. BBC licence fee Decision, State aid N 631/2001, paragraph 51. See also more recent decisions: RAI licence fee financing Decision, paragraphs 60 and 61; RTVE general financing regime Decision, paragraph 71 and. France 2 and France 3 licence fee financing decision, paragraph 69; cf. also Commission decision concerning the compensation payments to the Portuguese public service broadcaster RTP, in particular para. 98 and 101.

amount of compensation for public service broadcasters. The fact referred to by the German authorities that tax authorities would make the necessary corrections (e.g. in case they considered that the financial transactions between public service broadcasters and their commercial subsidiaries were not at arm's length), cannot be regarded as sufficient since these corrections would only concern the tax burden but would have no incident on the State financing.

- (288) Furthermore, the Commission notes in particular that the KEF itself stated that it was not in a position to check compliance with the arm's length principles.<sup>115</sup> Also, Courts of Auditors as well as the KEF have repeatedly requested adequate control competences over public service broadcasters' participations and recorded in several reports that the necessary examinations could not be carried out.<sup>116</sup> Also, the explanation given by Germany that Courts of Auditors would decide themselves about the scope and regularity of their examinations shows that there is no guarantee that the compliance with the commercial principles referred to above is examined regularly and that infringements of these principles will not artificially increase public service broadcasters' financial needs.

#### 7.3.3.4. Acquisition and use of sports rights

- (289) In the Article 17 letter, the Commission had, based on the complainants' allegations, expressed doubts regarding the justification for State financing of exclusive, payTV and other new media rights and had also questioned the alleged practice of the public service broadcasters' refusal to grant sub-licenses for unused rights. Complainants had also alleged that public service broadcasters disposed of excessive financial means which would enable them to pay excessive prices and thus outbid private competitors. They also considered that the weight of sport was excessive and would no longer be covered by the public service mission of offering a balanced and varied programme.
- (290) Germany refuted the arguments brought forward by the complainants and the Commission's doubts whether the acquisition of exclusive rights, pay TV and new media rights was necessary for the proper fulfilment of the public service mission. Furthermore, there were no normally unused rights and in any case, where exceptionally rights remained unused, the public service broadcasters had offered these rights to third parties. Germany also refuted allegations about excessive prices and an excessive weight of sports in public service broadcasters' programmes.
- (291) The Commission considers that sports can be part of the public service mission of providing a balanced and varied programme. Consequently, the financing of sports rights can be justified as part of the public service compensation.

---

<sup>115</sup> Cf. 15<sup>th</sup> KEF report Vol. 1, para.294 where the KEF stated that "*...die Kommission weder rechtlich noch tatsächlich die Einhaltung des von der Generaldirektion Wettbewerb für kommerzielle Tätigkeiten der Rundfunkanstalten postulierten "arms length principle" garantieren kann.*"

<sup>116</sup> Cf. 14<sup>th</sup> KEF report, para. 696 as well as statements by Courts of Auditors regarding the lack of exhaustive control of public service broadcasters' commercial participations (For instance in the 2005 report on the *Bayrischer Rundfunk* (BR), the Court of Auditor recorded that still only 10 out of 18 participations could be controlled, excluding in particular SportA; or the statement by another Court of Auditor which considered that *Südwestdeutscher Rundfunk* (SWR) did not report on the establishment and changes in its commercial participations).

- (292) Given the overall share of sports as part of the public service broadcasters' programme activities (i.e. not exceeding on average 10% of broadcast time), the Commission does not consider in the present case that the proportion of sports is manifestly excessive in the sense that it can no longer be regarded as part of a varied and balanced programme. Also, the mere share of sports compared to the overall programme cannot as such be regarded as a competition concern, considering that this share not only includes major and mass attractive sports events but also other sports which attract less audience and are therefore of less or no interest for private competitors.<sup>117</sup> The Commission also takes note of the explanations given by Germany that the KEF procedure as well as the obligation for a balanced and varied programming would limit the risk of disproportionate shifts of costs to the benefit of sports transmissions and at the expense of other programmes.
- (293) The Commission therefore considers that the general obligation imposed on public service broadcasters to offer an overall balanced and varied programme, and the determination of the financial needs by the KEF as well as the existing *ex post* control mechanisms checking whether public service broadcasters fulfilled these obligations should be sufficient to exclude an excessive weight of sports in the public service broadcasters' programmes.
- (294) Furthermore, the Commission considers that exclusivity is an accepted practice not only to maximise revenues, but also to be distinctive from other operators. Even though guaranteed State financing makes the choice of exclusivity by public service broadcasters less dependent on financial considerations, they would still seek exclusivity to attract large audiences and to promote their overall programme. Consequently, the Commission does not consider that State funding of exclusive sports rights is *per se* contrary to Article 86 (2) EC Treaty.
- (295) Nevertheless, it is the Commission's task to evaluate whether the public funding of sports rights does not lead to market distortions which are not necessary for the fulfilment of the public service. The proportionality test requires balancing the needs of public service broadcasters as regards the fulfilment of their public service tasks against the adverse effects on competition.
- (296) In this respect, the Commission notes that, based on the information submitted by the German authorities, public service broadcasters have acquired a significant portion of sports rights which are regarded as being of particular appeal to the German audience<sup>118</sup>, without however preventing private operators from acquiring sports rights of similar appeal.
- (297) In general terms, the Commission therefore observes that – when looking at a period of several years - public service broadcasters held exclusively the rights for

---

<sup>117</sup> For instance, as regards the ARD, Germany had explained that only 30% of the sports transmissions concerned major sports events.

<sup>118</sup> These sports events include: German football league (*Erste und zweite Bundesliga*), Champions League, *DFB-Pokal*, Formula One, Football EURO (*Fußball-EM*), National teams (*Fußball-Länderspiele*, insb. *Qualifikationsspiele für EM und WM*), Football World Cup (*Fußball-WM*), Olympic Games, Tour de France, UEFA Cup, Ski Jumping (*Vierschanzen-Tournee*). Some among these events fall under the category of listed events which Germany defined as events of major importance pursuant to Article 3(a)(1) of the Television without Frontiers-Directive and as laid down in Article 4(2) of the Interstate Treaty on Broadcasting.

live transmissions for about half of the sports events which were qualified by Germany as being the most attractive sports events for the German market. It is also noted that for some of the major sports events, the rights were shared with private (freeTV and payTV) operators. On the other hand, private freeTV operators held the rights for about one third of the events, while also holding rights for other sport events exclusively. Finally, as regards payTV, it is noted that Premiere held the rights for less than half of the major sports events, while also holding the rights for other events.<sup>119</sup>

- (298) Under these circumstances, the Commission does not consider that the current financing regime allows public broadcasters to structurally outbid private competitors by offering consistently and regularly prices which are significantly higher than what private operators would be able to pay and thus “empty” the market.
- (299) On the other hand, the Commission considers that unused rights are not necessary for the fulfilment of the public service task. In addition, the holding back of (in particular exclusive) rights leads to market distortions that are not necessary for the fulfilment of the public service remit. As a consequence, State financing used for exclusive rights which the public service broadcaster cannot or does not intend to use would not, in principle, be justified under Article 86 (2) EC Treaty.
- (300) The Commission recognises that there may be objective constraints or justifications for not using all rights potentially available. However, there needs to be a balance between the justified interests of public service broadcasters in being able to exploit the exclusivity of an acquired right as well as the need for some flexibility in the planning of events, on the one hand and market distortions that are not necessary for the fulfilment of the public service due to rights being acquired on an exclusive basis without being used and without being offered to other operators for exploitation, on the other.
- (301) The Commission observes that there is currently no system in place which would ensure such a balance given that there are no clear parameters for the acquisition, use and possible sub-licensing of sports rights to third parties. In particular there is no sufficient clarity of what is a (justified) non-use of rights. The question of “unused” rights comes up for instance in a situation where the public service broadcasters has acquired the transmission rights for a sport event, including the rights for live transmissions but may only show summaries, or where the potentially available broadcast minutes of an event exceeds by far the time which public service broadcasters may actually show. There are also other situations where the question of “unused” rights require further clarification such as where, due to the legal prohibition to offer pay services, public service broadcasters are not in a position to exploit payTV rights or, where due to the lack of clear entrustment as regards new media services, it is not clear whether the transmission of sports events over new platforms is covered by the public service remit. Given the fact that sports rights were actually shared between public service broadcasters/freeTV operators and payTV operators, and further given the

---

<sup>119</sup> In particular given the fact that the rights for some sports events were shared between operators, this overview can only serve as a rough estimate of the share of sports rights between private and public operators.

in general limited impact of PayTV on freeTV<sup>120</sup>, the Commission is not convinced about the general argument brought forward by Germany against the sublicensing of payTV rights, considering payTV as being consumed by the exploitation of freeTV rights.

- (302) The Commission observes that according to the German authorities, payTV rights (as well as new media rights) included in the rights package have on several occasions been offered by public service broadcasters to third parties or where subject to existing sub-licensing obligations.<sup>121</sup>
- (303) Nevertheless, the current system does not ensure that such sublicenses are offered in a systematic and predictable way.
- (304) Germany had argued that the general principles of efficiency and thriftiness would already ensure that public service broadcasters would sub-license rights whenever this was possible. The Commission understands that part of the assessment of efficiency potential is to evaluate whether it is possible to generate new forms of revenues or to improve existing sources of revenues. However, despite this general statement, the Commission observes that the various KEF reports do not address the particular issue of sub-licensing of sports rights in their separate assessment of the potential for improved efficiency.
- (305) In summary, the Commission considers that the current framework bears the risk that public service broadcasters might use public funds to acquire sports rights which are not necessary for the fulfilment of their public service tasks. In cases where public service broadcasters are not allowed to use such rights (either because of an explicit prohibition of pay-services<sup>122</sup> or because the activity is not part of the public service mission), any such rights which are acquired (for instance as part of a rights package) would risk remaining unused by public service broadcasters and thus would lead to market distortions that are not necessary for the fulfilment of the public service.
- (306) The current financing regime does not – in the absence of a clear scope of sublicensing requirements - make sure that the State financing is limited to what is necessary for the fulfilment of the public service mission while limiting adverse effects on competition to the necessary minimum.

#### *7.3.4. Conclusions on the assessment of the current financing regime*

- (307) In light of the above considerations, the Commission considers that the current financing regime does not provide for a sufficiently clear and precise public service definition and lacks the required act of entrustment as regards new media services (online as well as additional digital channels). Furthermore, the scope of

---

<sup>120</sup> There is a certain interplay between these two markets. In particular, attractive offer on freeTV reduces the incentive of viewers to opt for a payTV subscription. In this sense, freeTV represents a certain constraint for payTV. On the contrary, due to low penetration rates, payTV cannot exercise a comparable constraint on freeTV.

<sup>121</sup> This was the case for rights for the DFB-Pokal, Uefa Cup finals, Olympic Games, Tour de France, whereas in other cases (such as games by national football teams and the Uefa Cup), apparently no such rights were offered to third parties.

<sup>122</sup> Cf. § 13 RStV.

the public service remit comprises purely commercial activities with the consequence that it is not excluded that such activities benefit from State financing. Furthermore, the existing framework conditions do not guarantee that the compensation granted to public service broadcasters is limited to what is necessary for the fulfilment of the public service, that commercial activities are carried out in conformity with market principles and that in particular as regards the financing of sports rights, the adverse effects on competition are not disproportionate.

#### **7.4. Appropriate measures**

- (308) Based on the concerns regarding the existing financing regime as identified above and following discussions with the German authorities, the Commission considers that the following measures would be appropriate to ensure compatibility.

##### *7.4.1. Clear definition of the public service remit as regards new media activities*

- (309) Germany needs to make sure that the scope of the public service broadcasters' obligations in relation to additional channels is further clarified, both by setting the general legal requirements and by the development of sufficiently concrete programme concepts.
- (310) Germany needs to make sure that the determination of whether new media activities satisfy the same democratic, social and cultural needs of society is based on a set of criteria suitable to assess the public service character of the service in question also in light of other already available offers on the market. The legal framework needs to provide for a sufficiently precise public service remit, allowing other business operators to plan their activities and control bodies to effectively monitor compliance.
- (311) Finally, the legal framework needs to make sure that purely commercial activities are not part of the public service remit giving public service broadcasters a claim for financial compensation (this does not exclude the possibility for public service broadcasters to carry out such activities, provided that this is done on market terms).

##### *7.4.2. Entrustment and control*

- (312) Based on the possibility to offer new media services and additional digital channels, Germany needs to make sure that public service broadcasters are formally entrusted with sufficiently precise public service tasks. While there is nothing which prevents public service broadcasters to develop and make proposals for new media offers, it needs to be ensured that it is ultimately for the Länder to certify that these proposals fall within the public service mission.
- (313) New media activities not already offered by public service broadcasters need to be preceded by an act of entrustment. This also implies that the scope of new media services which are subject to such a prior entrustment needs to be further determined.

### 7.4.3. Proportionality

#### 7.4.3.1. Separation of accounts

- (314) Germany needs to adopt the necessary legal provisions which ensure the respect of the requirements laid down by the Transparency Directive as regards the separation of accounts distinguishing between services of general economic interest and other activities.

#### 7.4.3.2. Exclusion of overcompensation and cross-subsidisation of commercial activities

- (315) Germany needs to adopt legal provisions which limit the financing of public service broadcasters to the net public service costs. This implies on the one hand that only costs related to the public service are taken into account (excluding costs/losses incurred by commercial activities). On the other hand, it needs to be ensured that all commercial revenues generated by the exploitation of the public service are deducted. This also implies that it needs to be ensured that the deductible commercial revenues are those that would be generated under market conditions (see also assessment concerning the respect of market principles below).
- (316) The measures to be adopted also need to make sure that the State guarantee does not have spill-over effects to the benefit of purely commercial activities.
- (317) Furthermore, the Commission considers that the financing regime would need to provide for an *ex post* control that the licence fee revenues collected by public service broadcasters do not exceed the public service costs as referred to above (based on actual figures). Furthermore, there must be clear rules and control mechanisms as regards any possible surplus at the end of any given year as well as at the end of the licence fee period. This means in particular that the accumulated possible surplus at the end of a licence fee period needs to be fully deducted from the compensation granted for the next licence fee period. This also means that possible surpluses recorded during the licence fee period which may remain at the public service broadcasters' free disposal may not normally exceed what is necessary as a buffer against unforeseen fluctuations in costs or revenues (i.e. 10% of the annual compensation). A higher annual reserve may be justified, for instance where the surplus is intended to be used for predetermined projects, the costs of which have been certified by an independent body and which are to be carried out at a later stage during the licence fee period, provided that there are satisfactory control mechanisms ensuring that these reserves cannot be used for other purposes.

#### 7.4.3.3. Respect of market principles for purely commercial activities

- (318) Germany needs to adopt the necessary legal provisions obliging public service broadcasters to respect market principles. More particularly, the Commission considers that respect of market principles does not only comprise the market conform behaviour vis-à-vis third parties (for instance the requirement not to undercut prices as regards the sale of advertisement), but also an arm's length relationship between public service broadcasters and their commercial



subsidiaries also including the respect of the MEIP as regards the public service broadcasters' investment decisions as regards their participations.

- (319) The respect of these principles needs to be subject to a regular external control.
- (320) These measures need to ensure that the financial needs of public service broadcasters are not artificially increased due to non-market conform behaviour (see also above on overcompensation).

#### 7.4.3.4. Safeguards against financing of sports rights which remain unused

- (321) Germany needs to make sure that the financing of sports rights acquired by public service broadcasters is limited to what is necessary for the fulfilment of the properly entrusted public service mission. This implies in particular that the financial needs of public service broadcasters are not artificially increased by not offering third parties sub-licences for unused rights. This requires in particular that the public service broadcasters' behaviour as regards the acquisition, use and possible sub-licensing to third parties is made transparent and predictable for third parties. In this respect, it is important to clarify when a right is regarded as not used as well as the circumstances and conditions, under which public service broadcasters would offer such rights to other operators.

### 7.5. Commitments submitted by Germany in December 2006

- (322) Following discussions between the Commission and the German authorities on the necessary safeguards, the Commissioner Kroes and the Minister Presidents Beck and Stoiber reached an agreement on certain principles<sup>123</sup> which led, in December 2006, to an agreement with Germany on the necessary commitments as regards the future financing regime for public service broadcasters in Germany.
- (323) In this context, the German Government has stressed that its agreement to amend the current financing regime for public service broadcasters cannot be understood as having accepted the Commission's qualification of the licence fee funding as State aid.
- (324) In its submission dated 28<sup>th</sup> December 2006<sup>124</sup>, the German Government proposes to implement a number of measures, notwithstanding the German Government's view that the financing of public service broadcasters does not constitute State aid within the meaning of Article 87 (1) EC Treaty. Germany commits itself to implement the measures as further outlined in the submission within a period of 24 months starting from the date the Commission adopts a decision. Within this deadline, the Interstate Treaty implementing the envisaged measures shall have entered into force.
- (325) Germany points out that the implementation of these measures will be guided by the principles of respect of the editorial responsibility of public service broadcaster as regards their programme decisions ("*redaktionelle*

---

<sup>123</sup> Cf. Joint press declaration of European Commissioner Neelie Kroes and Minister-Presidents Kurt Beck and Edmund Stoiber, MEMO/06/273 of 7 July 2006.

<sup>124</sup> Registered by the Commission under A/30032.

*Verantwortung...in Bezug auf...Programmentscheidungen*") and that the requirements for a clear definition and entrustment shall not intrude upon the public service broadcasters' programme autonomy and their decisions regarding the editorial content. Germany also refers to the principle of technological neutrality according to which all offers which are covered by the public service remit may be distributed over all distribution platforms (including Internet TV, mobile phones or other portable devices).

- (326) The commitments formally submitted by the German Government in the letter dated 28<sup>th</sup> December 2006 are the following:
- (327) Germany explained the envisaged measures to further substantiate the public service remit and to ensure entrustment at the level of Länder legislation, evaluation and concretisation by public service broadcasters and formalisation through the Länder: (1) Legislative provisions would further substantiate the remit for "*telemedia*" and additional digital offers referring to binding criteria (see para. (335) *et seq.* and (337) *et seq.*, respectively) and also lay down the criteria which would trigger the evaluation procedure; (2) the public service broadcasters further specify the criteria which trigger the evaluation procedure and carry out the procedure (as described in para. (328)); (3) this procedure ends with the examination and declaration by the Länder as part of their legal supervision ("*Rechtsaufsicht*").
- (328) Germany announced the establishment of an evaluation procedure and criteria for all new or modified digital offers of public service broadcasters. This procedure would also apply for "mobile services". The Länder will substantiate the entrustment procedure for all new offers of public service broadcasters. Public service broadcasters shall be obliged for all new or modified digital offers to apply a three-step test. The three steps will be laid down by law and require public service broadcasters to evaluate that each offer (1) that it is covered by the public service remit and therefore serve the democratic, social and cultural needs of society and (2) contribute in a qualitative way to "*editorial competition*" ("*publizistischer Wettbewerb*") and that (3) the public service broadcasters specify the financial impact of such offers. The Interstate Treaty will also contain a further explanation of the concept "*editorial competition*" (in the explanatory memorandum to the future Interstate Treaty), taking into account the following elements: the scope and quality of already existing freely available ("*frei zugänglich*") offers and the relevant impact of the planned offer on the market; the relevance of the envisaged offer for opinion shaping ("*meinungsbildende Funktion*")- which can also contain elements of entertainment - in light of overall already existing offers on the market.
- (329) Germany specified that not every modification of an online offer or digital offer is subject to this procedure. The relevant provision in the Interstate Treaty will obliged public service broadcasters to develop and lay down in statutes and guidelines transparent and verifiable criteria according to which the "novel character" of a particular service can be determined which would trigger the above mentioned procedure. When developing these statutes and guidelines, public service broadcasters shall take into account criteria such as the importance of the project for editorial competition, the financial impact of the project; the envisaged duration of the project and to what extent comparable services are already offered by public service broadcasters (from the point of view of the user: which services are from his point of view substitutable).

- (330) The Interstate Treaty will require public service broadcasters to provide sufficiently concrete explanations of their offers, following an evaluation of the offer, in order to allow the relevant supervision but also third parties to evaluate their offer.
- (331) Furthermore, third parties will also have the opportunity to give their views. The Interstate Treaty will require internal control bodies of public service broadcasters to hear third parties on the expected market impact before taking a decision on the proposed offer.
- (332) The self-commitments established by public service broadcasters for the respective offer are to be approved by the internal control bodies and will then be published in the Official Journals of the Länder. The Länder will examine and declare in the context of their legal supervision ("*Rechtsaufsicht*") that the self-commitments are in accordance with the legal requirements and therefore part of the public service mission.
- (333) For "*telemedia*" which are already offered by public service broadcasters, Germany announced that the Länder will confirm formally that these activities are covered by the public service remit as further substantiated in the future Interstate Treaty on Broadcasting. This formal declaration can take the form of a Declaration to the Interstate Treaty. For that purpose, the public service broadcasters will develop and present to the Länder an overall concept for new media services ("*Gesamtkonzept zu neuen Medien*").
- (334) Germany also clarified that with the entry into force of the future Interstate Treaty, the newly introduced legal requirements and restrictions for "*telemedia*" and additional digital offers applied immediately to all existing offers, meaning that offers which are not covered by the public service mission could not be offered by public service broadcasters. The Länder would exercise the control of compliance with these new requirements in the context of the legality control ("*Rechtsaufsicht*"), either triggered by third party complaints (where a complaint with the internal control bodies has not been successful) or *ex officio*.
- (335) As regards the additional digital channels, Germany announced that the future Interstate Treaty would introduce – by way of illustration ("*beispielhaft*") - programme categories to further specify the existing requirement for these channels to have their focus on information, education and culture. For instance, as regards the focus on "information", the Interstate Treaty could refer to programme categories such as news, political information, regional information, but also sports. "Education" could comprise categories such as science and technology, children and youth, education, history, religion, nature etc. The focus on "culture" could be further specified through the reference to programme categories such as theatre, music, architecture, philosophy, literature, cinema, etc.
- (336) Public service broadcasters will be legally obliged to develop a programme concept specifying these different programme categories. This programme concept will be approved by the internal control bodies and be published in the official Journals of the Länder. The Länder will in the context of the legal supervision of public service broadcaster's activities ("*Rechtsaufsicht*") examine and declare that the programme concepts as laid down in self-commitments are in accordance with the public service remit.

- (337) As regards the further specification of the public service remit for "*telemedia*", Germany announced that "*telemedia*" offers shall be subject to the entrustment procedure (as described above in para. (328)).
- (338) As regards "*telemedia*", the public service remit will be limited to edited offers ("*journalistisch-redaktionelle Angebote*"); this also comprises "*journalistisch-redaktionell veranlasste Angebote*" such as chats; the concept of "*journalistisch-redaktionelle Angebote*" is based on jurisprudence on this same concept used in other laws and will be further substantiated (in an explanatory memorandum).
- (339) Germany has also announced the establishment of an illustrative list of "*telemedia*" services which would normally (not) be covered by the public service remit ("*Positive/Negativ-Liste mit illustrativem Charakter*"). This list will also contain activities which shall not be part of the public service remit such as e-commerce.
- (340) The Interstate Treaty will contain criteria which online offers need to serve. These criteria relate to functions which shall be performed in particular through the public offer in order to fulfil the original public service mission in a changing media environment ("*unter Bedingungen des Medienwandels*"). Such functions comprise for instance the endeavour to allow all citizens to participate in information society, adequate access of minorities to offers; to promote the use and usefulness of digital offers for citizens, to offer a trustworthy guide, to promote media know how ("*Medienkompetenz*") and to accompany TV programmes in light of changes/developments in the use of media.
- (341) Germany considers that local reporting ("*flächendeckende lokale Berichterstattung*") shall not be covered by the public service remit. Public service broadcasters will continue to be prohibited from offering sponsoring and advertisement. The public service broadcasters will also be legally obliged to lay down rules (as part of self-commitments) ensuring that links will not directly lead to direct commercial offers ("*keine unmittelbaren Verweisungen zu direkten Kaufaufforderungen*"). Also, public service broadcasters are obliged, as regards their programme accompanying offers, to indicate in their media concepts the respective programme as well as the temporal context ("*zeitlicher Bezug*").
- (342) Germany announced that the relevant legal provisions (Interstate Treaty or laws governing the public service broadcasters) would regulate public service broadcasters' commercial activities. Examples for commercial activities, to be included in the legal provisions, are advertisement and sponsoring, commercial exploitation of the public service ("*Verwertungsaktivitäten*"), merchandising, production and renting/lease of transmission facilities ("*Vermietung von Senderstandorten*"). The legal requirements include that commercial activities can only be offered under market conditions and shall be accounted for separately from public service activities. The respect of market conditions includes explicitly the principle of market conformity and the arm's length principle. The explanation will clarify that market conformity will also include the assessment and financial control that the respective decisions are in line with those of a private investor. Public service broadcasters shall specify these requirements in self-commitments.
- (343) The German Government gave the commitment that commercial activities of public service broadcasters were carried out by subsidiaries which -as distinct legal entities from the public service broadcasters - would have separate accounts

for their activities, whereas the broadcasting corporations ("*Anstalten*") would be entrusted exclusively with the public service mission.

- (344) The KEF would ensure that deficits caused by a declared infringement of the principles of market conform behaviour ("*bei festgestellten Verstößen*") would not be financed through licence fees. The competences of the KEF would also explicitly include the assessment to what extent yields from investments are adequate, in addition to the general principle of efficiency and thriftiness, which according to Germany already included such an assessment.
- (345) As regards more particularly participations in commercial undertakings, Germany announced that there would be uniform legal requirements (either in the Interstate Treaty or other relevant legal acts), similar to § 36 SWR-Interstate Treaty, laying down the conditions under which public service broadcaster may establish or maintain participations in commercial undertakings. Furthermore, there will be rules for an investment management as well as rules ensuring that activities carried out by these commercial undertakings shall be market conform. Public service broadcasters will be asked to further substantiate this general requirement in statutes or guidelines. The investment controlling ("*Beteiligungsmanagement*") shall be carried out by the Administrative Council ("*Verwaltungsrat*"). Also, the relevant legal acts will clarify that the financial transactions between the public service broadcasters and their commercial subsidiaries shall respect market investor principles as well as the arm's length principle.
- (346) Germany also announced a series of measures as regards the control of the above requirements. First of all, the control competences of Courts of Auditors will be strengthened as regards public service broadcasters commercial participations. There will be a uniform control competence similar to § 30 ZDF-Interstate Treaty for all subsidiaries. For commercial companies in which public service broadcasters have minority holdings the control will take the form of a "*Betätigungsprüfung*".
- (347) All ARD broadcasters and ZDF will be obliged to introduce an efficient controlling for all its participations and to submit to the competent Court of Auditor as well as the respective Länder Governments an annual report on the participations. These annual reports shall cover the following aspects: a description of all direct and indirect participations and their economic impact for the public service broadcaster concerned; a separate section on the compliance of commercial activities with the various legal requirements (including organisational separation/separate accounts, arms-length-principle, etc.); an overview of the control of participations.
- (348) As regards public service broadcasters' majority holdings, there will be additional control competences for Courts of Auditors; Courts of Auditors may address particular requests to public service broadcasters as regards in particular the proof that the legal requirements for commercial activities have been respected. Courts of Auditors may ask accountants ("*Wirtschaftsprüfer*") to examine these questions. The accounts certify the annual reports and report also to the Courts of Auditors on these specific issues. The respective Courts of Auditors evaluate the accountants' findings and may also carry out themselves further examinations as regards selected commercial undertakings. Any findings by the Courts of Auditors of an infringement against the requirements for market conformity shall be submitted to the Länder which shall take the necessary measures. Furthermore,

the reports by the Courts of Auditors shall be submitted to the KEF (public service broadcasters may add their views).

- (349) For the rest, the examination of the commercial undertakings in which public service broadcasters have participations are carried out by independent accountants.
- (350) As regards the proportionality of the State funding, Germany gives assurance that, on the one hand, only the costs of the public service will be taken into account and that, on the other hand, all revenues of public service broadcasters are deducted. Furthermore, revenues which have not been generated contrary to the principle of market conform behaviour ("*Grundsatz wirtschaftlichen Handelns*") shall be deducted from the recognised financial needs.
- (351) Germany gave the commitment to introduce a safeguard should public service broadcasters have generated – in any given financial year - a surplus which exceeds 10 % of the licence fee revenues. Any such surplus shall be put into a reserve destined for foreseeable under-compensation in the following years (within the same licence fee period) which are the result of the four year planning cycle; such reserves shall generate interest ("*verzinsten Rücklage zur Abdeckung systembedingter Unterdeckung für den angemeldeten Bedarf*"). The KEF verifies that the public service broadcasters make use of money from the reserves for the purposes which were determined beforehand.
- (352) The accumulated surpluses based on the relevant annual reports of public service broadcasters shall be taken into account by the KEF when determining the financial needs of public service broadcasters for the next licence fee period. Any such surplus at the end of a licence fee period would be deducted from the financial needs of public service broadcasters for the next licence fee period. On the other hand, the KEF would not accept transferring deficits from one licence fee period to the other.
- (353) Germany has also given the commitment to stipulate in the Interstate Treaty that the licence fee revenues shall not exceed the net public service costs, deducting other direct or indirect revenues generated through the exploitation of the public service.
- (354) The German authorities have finally announced that the financial control carried out by the KEF will be based on actual figures (where such figures are not available at the time that the control is carried out, this will be done later so that there will be a continuous control of all financial years).
- (355) As regards sports rights, Germany announced that public service broadcasters will make their policy transparent in the following respects:
- The transmission of sports events in the main programmes of ARD and ZDF ("*Sportberichterstattung in den Hauptprogrammen von ARD und ZDF*") does not normally exceed approximately 10% of annual total broadcast time ("*10 % des jährlichen Gesamtprogramms*");
  - ARD and ZDF shall not leave sports rights unused, since they will either use them themselves or offer them for sub-licensing to third parties. For rights

acquired through the EBU, sublicenses shall be offered according to the EBU sublicensing regime under the control of a trustee;

- ARD and ZDF shall not operate a dedicated sports channels without explicit entrustment (laid down in the Interstate Treaty);
- The transmission of sports events over digital channels of ARD and ZDF shall take place as a supplement to the main programmes without however changing the legally required focus of these channels ("*Ergänzung zu den Hauptprogrammen, ohne Umwidmung dieser Programme*"). The transmission over the digital channels does not restrict the possibility for third parties to acquire sub-licenses;
- Unused rights shall be offered to third parties for sub-licenses with public service broadcasters laying down in a transparent way under which conditions sports rights are regarded as "unused";
- Public service broadcasters' behaviour must be transparent for potentially interested third parties, including in particular the "when" and the scope of such rights (including a publication of the offer over the Internet).

(356) As regards the question of the unlimited State guarantee, Germany announced that there will be no contractual guarantees in favour of commercial subsidiaries; also profit transfer agreements ("*Gewinnabführungsverträge*" / "*Gewinnentnahmen*") with subsidiaries which could trigger a legally imposed guarantee by the mother company towards the daughter company to cover potential losses will be excluded.

(357) As regards the taxation of commercial activities, Germany confirmed that the level of the assumed/hypothetical profit which is used as the tax base for corporate taxes will be subject to regular control in order to exclude market distortions.

## **7.6. Appraisal of the commitments given by Germany**

(358) The Commission assessed the commitments given by Germany in light of the concerns as well as the proposals for amendments to the financing regime as identified above (cf. in particular para. (307) as well as para.(308) *et seq.*).

### *7.6.1. Clear definition of the public service remit as regards new media activities*

(359) The Commission takes note of the commitments given by Germany in relation to the further substantiation of the public service remit concerning new media activities (i.e. additional digital channels and "*telemedia*") and the distinction between public service and other purely commercial activities.

(360) Firstly, as regards the public service definition for additional digital channels, the Commission considers that the reference in the future Interstate Treaty to programme categories serves further specifying the potential scope of these channels in addition to the existing requirement for these channels – as introduced by the Länder in Interstate Treaty on Broadcasting - to have their focus on information, education and culture. Furthermore, the Commission considers that the public service broadcasters' obligation to develop a programme concept

specifying the different programme categories laid down in the future Interstate Treaty can be regarded as adequate to ensure that the scope as well as the purpose of these channels in addition to other offers of public service broadcasters will be sufficiently clear, thus allowing private operators to plan their activities and the relevant control bodies to monitor the respect of the public service obligations in this respect (on the control aspect, see also below).

- (361) More specifically, the Commission considers that the statement by Germany that the transmission of sports events over digital channels of ARD and ZDF shall take place only as a supplement to the main programmes without however changing the legally required focus of these channels ("*Ergänzung zu den Hauptprogrammen, ohne Umwidmung dieser Programme*") should be sufficient to ensure that the required focus on – *inter alia* – information (which also comprises according to the German authorities sports) does not allow public service broadcasters, without explicit entrustment, to operate a dedicated sports channel and limits the potential use of these digital channels for the transmission of sports events - so as to ensure that the programmes offered over these channels respect the focus on information, education and culture as required by the Interstate Treaty on Broadcasting as further specified through programme concepts.
- (362) Secondly, as regards the public service definition for "*telemedia*", the Commission considers that the announced additional criteria and conditions according to which the scope of the public service remit will be delimited serve to further clarify the public service mission. It is for each Member State to establish a system for determining the public value character of new media activities in full transparency. The following considerations are related to the system as designed by Germany. In this respect, the Commission considers in particular that the enumeration of the specific functions and the role that public service broadcasters' "*telemedia*" offers shall perform as well as the requirement for "*telemedia*" to contribute in a qualitative way to what is called "*publizistischer Wettbewerb*" ("*editorial competition*") can be regarded as appropriate criteria and conditions to determine whether such activities serve the same democratic, social and cultural needs of society. The Commission considers that the commitment given by Germany that the further clarification of the concept of "*editorial competition*" takes into account the scope and quality of already existing (free-of-charge) offers, the relevance of the envisaged offer for opinion shaping ("*meinungsbildende Funktion*") in light of already existing offers on the market as well as the relevant impact of the planned offer on the market can be regarded as adequate to address concerns about the potential distortive effects of new media services which are identical or similar to services already offered on the market. The Commission also considers that the limitation of the public service mission to editorially arranged offers ("*journalistisch-redaktionelle Angebote*"), a concept which would be further substantiated in the relevant legal acts, appears adequate to limit the scope of "*telemedia*" to those services which reflect the editorial added value of public service broadcasters (i.e. selection and focus of topics based on journalistic criteria).
- (363) The Commission is satisfied that the implementation as well as the future application of these criteria allow to carry out the required evaluation as to their particular public service features of the different new media offers of public service broadcasters for which the Commission expressed doubts concerning their



automatic qualification as service of general economic interest (such as games, chats, etc.).

- (364) The Commission also considers that the announced establishment of an illustrative list of "*telemedia*" of services which would normally be/not covered by the public service remit constitutes one way of further clarifying the general concepts laid down in the future Interstate Treaty on Broadcasting and facilitates the application and interpretation of these concepts. It increases transparency and predictability for other operators on the market and also allows the relevant control bodies to effectively monitor compliance (see on the control aspect also below, para. (368) *et seq.*).
- (365) In particular as regards new media activities, the Commission takes note of those services (mentioned in the commitments given by Germany) which are explicitly not part of the public service such as e-commerce, sponsoring and advertisement (on the Internet), "*flächendeckende Berichterstattung*", no direct links to commercial offers ("*unmittelbare Verweisungen zu direkten Kaufaufforderungen*") as well as other activities mentioned in previous submissions by Germany such as paid for games or other downloads. In this respect, the Commission also notes that whereas "*mobile services*" may be part of the public service subject to the above-mentioned criteria, licence agreements with mobile operators are regarded as a purely commercial activity.
- (366) Finally, the Commission considers that the commitment to clarify that public service broadcasters will be entrusted with the provision of the public service, whereas purely commercial activities would be carried out by commercial subsidiaries provides for the necessary distinction between public service and purely commercial activities. Examples for such commercial activities as provided by Germany are advertisement/sponsoring, the exploitation of the public service, merchandising, film production as well as the provision of transmission facilities ("*Vermietung von Sendestandorten*"). In this respect, the Commission takes also note of the explanation provided by Germany that this list was not exhaustive and could comprise also other activities where public service broadcasters enter into economic competition with private operators ("*ökonomischer Konkurrenz*"). Together with commitments regarding the proportionality of the funding (see below), the Commission considers that the risk of licence fee funds being used for commercial activities can be expected to be excluded under the future financing regime.
- (367) In light of the above considerations, the Commission considers that the commitments concerning the future definition of the public service remit as regards new media services as well as the announced exclusion of purely commercial activities are adequate to provide a sufficiently precise and clear public service definition, excluding activities which would be regarded as "*manifest errors*".

#### 7.6.1. *Entrustment and Control*

- (368) The Commission considers that the commitments given by Germany as regards the evaluation and entrustment procedure combined with the legal supervision exercised by the Länder for "*telemedia*" as well as additional digital offers (including also "*mobile services*") satisfy the requirement for a formal entrustment and adequate control of these services.

- (369) For "*telemedia*" which are already offered by public service broadcasters, Germany announced that the Länder will confirm that the activities which are part of a new media concept to be submitted by public service broadcasters are covered by the public service remit as laid down in the future Interstate Treaty on Broadcasting. The Commission is satisfied that this confirmation, which can take the form of a Declaration to the Interstate Treaty, ensures a proper entrustment of public service broadcasters, based on the criteria which will define and delimit the future public service mission.
- (370) Furthermore, as regards new "*telemedia*" offers, the entrustment is preceded by a more thorough evaluation process, including in particular the possibility of third parties to submit their views on the expected impact on the market. Furthermore, the Länder will examine and declare in the context of their legality control ("*Rechtsaufsicht*") that the self-commitments are in accordance with the legal requirements and therefore part of the public service mission. Given that the entrustment procedure comes to an end with this declaration, the Commission is satisfied that public service broadcasters will only be allowed to launch new "*telemedia*" after they have been properly entrusted by the Länder.
- (371) The Commission considers that it is acceptable to apply the more thorough evaluation procedure to new services which would due to their scope (also in terms of additional financial needs) be likely to have an impact on the market in areas not already covered by public service broadcasters' existing offers. The announced criteria to determine such new services (including the financial impact and duration of the offer as well as the comparison with already existing offers), including the further development by public service broadcasters in statutes and guidelines, are in the Commission's view appropriate to identify those services which are not currently offered by public service broadcasters as part of the existing public service remit (i.e. "*programme-related and programme accompanying telemedia*"). In addition, the commitment that public service broadcasters shall develop more detailed criteria to determine when a service is to be regarded as "new" allows for verification by the Länder as to the necessity of a more thorough entrustment procedure.
- (372) As regards additional digital offers, the Commission is satisfied that the legal obligation imposed on public service broadcasters to develop a programme concept specifying the different programme categories laid down in the future Interstate Treaty, as approved by the internal control bodies, which is subject to the control by the Länder ensures that the public service obligations of public service broadcasters as regards these additional digital channels are laid down in a proper act of entrustment.
- (373) Germany also clarified that with the entry into force of the future Interstate Treaty, the newly introduced requirements for "*telemedia*" and additional digital offers applied immediately to all existing offers, meaning that offers which do not (no longer) fulfil these requirements could not be offered by public service broadcasters as part of their public service remit. The Länder would exercise the control of compliance with these new requirements in the context of the legality control ("*Rechtsaufsicht*"), either triggered by third party complaints or *ex officio*.
- (374) As a consequence, the Commission also considers that the external control mechanisms in place can be regarded as satisfactory because the clearer public service definition and resulting proper entrustment allows the respective bodies to

carry out a meaningful control, including a control to what extent public service broadcaster stayed within the limits of their mission. In this respect, the Commission notes in particular that the *ex post* control will also include the control to what extent public service broadcasters have respected their self-commitments as well as the concepts developed for “*telemidia*” and additional digital channels.

#### 7.6.2. *Proportionality*

##### 7.6.2.1. Separate accounts

- (375) Germany has given the commitment to structurally separate commercial activities from the public service activities. Whereas the broadcasting corporations will be entrusted with the public service mission, all commercial activities would be carried out by commercial subsidiaries (cf. para. (342) and (343)). In addition, Germany has also given the commitment to stipulate in the future Interstate Treaty that commercial activities will be subject to a number of commercial principles, including the separation of accounts as well as the arm's length principle and the MEIP governing the financial relationship between public service broadcasters and commercial subsidiaries.
- (376) The Commission considers that the requirement of separate accounts can be met through a structural separation between public service and commercial activities<sup>125</sup> combined with the arm's length requirement governing the financial relationship between public service broadcasters and commercial subsidiaries. The commitments given by Germany in this respect comply with the requirements for cost separation resulting from the Transparency Directive and ensure a clear distinction between public service and commercial activities as required by the Broadcasting Communication. In particular, the structural separation ensures that the accounts for the public service activities are separate from the accounts of the commercial activities and that all revenues and – in particular through the arm's length principle - all costs are allocated to the respective activities on the basis of clearly established, consistently applied and objectively justifiable principles within the meaning of Article 4 (1) of the Transparency Directive.

##### 7.6.2.2. Limitation of compensation to net public service costs

- (377) In the Commission's view, the measures announced by Germany are appropriate to ensure that the licence fee funding granted to public service broadcasters will be limited to the net public service costs. This is ensured through the commitment given by Germany to stipulate in the Interstate Treaty that the licence fee revenues shall not exceed the costs which are generated exclusively by public service activities, while deducting other direct or indirect revenues generated through the exploitation of the public service (limitation of licence fee funding to net public service costs). Germany emphasised in this context that, in determining the financial needs of public service broadcasters, the KEF takes all revenues of public service broadcasters into account.

---

<sup>125</sup> Cf. BBC licence fee Decision, paragraph 42.

- (378) In this respect, the Commission also considers that the commitments given by Germany allow for a clear determination of the public service costs, excluding costs incurred by commercial activities.
- (379) The commitment by Germany to ensure that the broadcasting corporations are entrusted only with the public service tasks whereas commercial activities would be carried out by commercial subsidiaries implies that the KEF would, when determining the financial needs of the public service broadcasters, base itself only on costs incurred in relation to the fulfilment of the public service. As a consequence, commercial activities would no longer benefit from licence fee revenues and would also not benefit from preferential funding terms resulting from the unlimited State guarantee.
- (380) The Commission observes that under the future financing regime the guarantee will be limited to the broadcasting corporations which will no longer carry out commercial activities themselves but through commercial subsidiaries which, due to their organisation as commercial undertakings, do not benefit from the State guarantee. Also, the new funding regime excludes that commercial subsidiaries could benefit indirectly from the favourable funding conditions obtained by the public service broadcaster, since subsidiaries would need to pay market prices for any facilities which the public service broadcasters make available to the daughter company. Also as regards the debt raising of commercial subsidiaries themselves, the Commission considers that the commitments given by Germany would exclude that subsidiaries benefit from the State guarantee enjoyed by the mother company. Once market principles will be enshrined in the relevant legal acts, it should be sufficiently clear that public service broadcasters will not take over liabilities from their subsidiaries unless this is strictly in line with the behaviour of any private investor. In addition, the Commission takes note of the commitment given by Germany that, in the future, there would no longer be profit transfer agreements (“*Gewinnabführungsverträge*”) between commercial subsidiaries and the public service broadcasters, which would trigger the broadcaster's liability for any losses incurred by the daughter company.
- (381) Furthermore, the commitment given by Germany to make public service broadcaster subject to the MEIP as regards their participations in commercial companies is appropriate to ensure that commercial subsidiaries/activities would not benefit from State aid in the form of licence fee revenues, provided that the accompanying investment control and –management mechanisms are properly implemented.
- (382) On the other hand, the specific legal provision as well as the further explanations given by Germany ensure that the KEF will deduct all commercial revenues generated through commercial activities from the public service costs in order to determine the net public service costs for which licence fee funding can be awarded.
- (383) Finally, the Commission considers that the control mechanisms announced by Germany ensure that there is a proper control of possible overcompensation as well as safeguards to make sure that any possible surplus at the end of any given financial year can only be spent for predetermined purposes under the control of the KEF.

- (384) In this respect, the Commission takes in particular note of the announcement by Germany to stipulate in the relevant legal acts that, should public service broadcasters have generated at the end of any financial year a surplus which exceeds 10 % of the licence fee revenues, any such excess amount shall be put into a reserve destined for foreseeable under-compensation in the following years (within the same licence fee period) which are the result of the four year planning cycle; such reserves shall generate interest (*verzinsten Rücklage zur Abdeckung systembedingter Unterdeckung für den angemeldeten Bedarf*). The Commission is satisfied that the KEF verifies that the public service broadcasters make use of money from the reserves only for the purposes which were determined beforehand.
- (385) The Commission recognises that a system which is based on the determination of the financial needs of the public service broadcaster over a period of 4 years by an independent body and which determines the level of the licence fee accordingly may imply situations of overcompensation when looking at the accounts of a given year. Where the revenues stemming from the licence fee exceed the public service costs at the end of a given financial year such excess would not have to be withdrawn from the public service broadcaster provided that the excess represents the amount of money which was pre-determined for other purposes, the costs of which are planned to be incurred at a later stage during the relevant period. Depending on the circumstances of the case, such inherent overcompensation may exceed 10% of the annual funding. Given that the general margin of 10% margin was conceded in other cases as a buffer allowing public service broadcasters to react to unforeseen fluctuations in costs and revenues, this ceiling is not necessarily applicable to cases in which – like in Germany - the surplus in a given year may be the result of already foreseen events/projects the financial needs of which have been determined by an independent control body (here the KEF).
- (386) Furthermore, the Commission takes note of the commitment that, should there be a surplus at the end of a licence fee period, such a surplus would be deducted from the financial needs of public service broadcasters for the next licence fee period. On the other hand, the KEF shall not recognise any transfer of deficits from one licence fee period to the next one.
- (387) The Commission is also satisfied that the German authorities have announced that the financial control carried out by the KEF will be based on actual figures (where such figures are not available at the time that the control is carried out, this will be done later so that there will be a continuous control of all financial years).
- (388) In light of the considerations above, the Commission considers that the commitments given by Germany (cf. para. (377) – para. (387)) are appropriate to ensure that the compensation granted to public service broadcasters will not exceed what is necessary for the fulfilment of its public service tasks.

#### 7.6.2.3. Respect of market principles

- (389) The Commission considers that the commitment given by Germany (cf. in particular para. (342) *et seq.*) that public service broadcasters' commercial activities would be subject to the principle of market conform behaviour as defined in the relevant legal acts as well as further specified in public service broadcasters' self-commitments ensure that there are clear legal obligation

governing the public service broadcasters' commercial activities. The respect of market conditions includes market conformity, the arm's length principle and compliance with the „private investor test“. In particular as regards the public service broadcasters' numerous holdings in commercial undertakings, the Commission is satisfied that there will be uniform conditions under which public service broadcaster may establish or maintain participations in commercial undertakings. Furthermore, there will be rules for an effective investment management as well as rules ensuring that activities carried out by these commercial undertakings shall be market conform.

- (390) The Commission is further satisfied that the respect of the above commercial principles will be subject to the control of both the KEF and Courts of Auditors (cf. in particular para. (346) *et seq.*).
- (391) The KEF will examine whether the return on investments in the public service broadcasters' commercial undertakings is adequate. In general, the KEF procedure will ensure that revenues which have not been generated contrary to the principle of market conform behaviour ("*Grundsatz wirtschaftlichen Handelns*") shall be deducted from the recognised financial needs, while additional costs due to non market conform behaviour would not be taken into account by the KEF when determining the financing needs of public service broadcasters. For that purpose, the KEF can also rely on the finding of the Courts of Auditors which will be asked to submit their findings on market conformity to the KEF.
- (392) Courts of Auditors will have increased control competences as regards public service broadcasters' commercial participations and will also check that public service broadcasters comply with the legal requirements concerning organisational separation/separate accounts, arms-length-principle, etc..
- (393) In light of the above considerations, the Commission considers that the commitments given by the German authorities are appropriate to ensure that the necessary safeguards against non market-conform behaviour of public service broadcasters as regards the purely commercial activities are in place. The announced measures would also ensure that the financial needs of public service broadcasters are not unnecessarily increased through any such non-market conform behaviour since the KEF will recognise the net public service costs after having deducted commercial revenues generated in full compliance with the above principles.

#### 7.6.2.4. Acquisition and use of sports rights

- (394) The Commission takes note of the commitments given by Germany to ensure that public service broadcasters will make their policy transparent (cf. para. (355) *et seq.*).
- (395) The Commission is satisfied that there will be a clear prohibition for public service broadcasters to leave sports rights unused and a clear obligation imposed on public service broadcasters to offer any such unused rights to third parties. In particular the fact that there will be a clarification of what is to be regarded as an "unused" right should allow for an assessment of a possible justification for total or partial non-uses in a transparent and objective manner. The further clarification

concerning the scope and timing of sublicensing procedures<sup>126</sup> should ensure the necessary predictability for private operators as regards the scope of sub-licensed sports rights and allow them to adequately plan their activities accordingly. In this respect, the Commission also takes note of the statement by Germany that the public service broadcasters' possibility to use digital channels for sports transmissions would not restrict the possibility for third parties to acquire sub-licenses.

- (396) The Commission considers that these commitments are in principle adequate to ensure that the public financing of sports rights is limited to what is necessary for the fulfilment of the public service remit, while not leading to disproportionate effects on competition.<sup>127</sup>

## 8. CONCLUSIONS

- (397) Having informed Germany about its preliminary view that the present financing regime is no longer compatible with the common market pursuant to Article 17 of the Procedural Regulation, and having assessed the information and arguments subsequently submitted by Germany, the Commission concludes, pursuant to Article 18 of the Procedural Regulation that the existing aid scheme is no longer compatible with the common market (cf. para. (307)). With a view to ensuring the compatibility of the financing regime in the future, the Commission discussed with Germany the necessary amendments to the current financing regime and recommended accordingly appropriate measures (cf. para. (308) *et seq.*).
- (398) With the submission by Germany of commitments to change the funding regime for public service broadcasters, Germany has accepted to implement the agreed appropriate measures. With the present decision, the Commission takes note of the commitments given by Germany (cf. para. (322) *et seq.*), records this acceptance pursuant to Article 19 of the Procedural Regulation and closes the procedure.
- (399) The Commission reminds the German authorities to submit the proposal for legal provisions implementing the commitments given in due time and, in any case, submit the final legal framework which is to enter into force two years from the date of the present letter to the Commission.
- (400) The present letter is without prejudice to the possibility for the Commission to continuously assess existing aid schemes under Article 88(1) of the EC Treaty, and to propose appropriate measures required by the progressive development or the functioning of the common market.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the

---

<sup>126</sup> It is noted that for rights acquired through the EBU sublicenses shall be offered under the EBU sublicensing regime under the control of a trustee.

<sup>127</sup> The acceptance of the commitments given by Germany in this respect is limited to the State aid investigation.

full text of the letter in the authentic language on the Internet site:  
[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/). Your request should  
be sent by registered letter or fax to:

European Commission  
Directorate-General for Competition  
State Aid Greffe  
Rue de Spa 3  
BE-1049 Brussels  
Fax No: +32 2 296.12.42

Yours faithfully,  
For the Commission

*Neelie KROES*  
Member of the Commission



## Table of content

<b>1. PROCEDURE</b> .....	1
<b>2. DESCRIPTION</b> .....	2
<b>2.1. Description of the financing regime for public service     broadcasters in Germany</b> .....	2
2.1.1. <i>General remarks and historical overview</i> .....	2
2.1.2. <i>Definition of public service tasks</i> .....	4
2.1.3. <i>Control</i> .....	6
2.1.4. <i>Financing of public service broadcasters</i> .....	7
2.1.4.1. <i>Licence fee financing</i> .....	7
(a) <i>Legal provisions</i> .....	7
(b) <i>Financial situation of public service broadcasters</i> .....	9
2.1.4.2. <i>Special tax treatment of commercial activities of             public service broadcasters</i> .....	10
2.1.4.3. <i>Financial guarantee and “Anstaltslast”</i> .....	11
<b>2.2. Description of broadcasting market in Germany</b> .....	12
<b>2.3. Description of public service broadcaster’s commercial activities</b> .....	17
<b>3. INITIATION OF STATE AID INVESTIGATION</b> .....	18
<b>4. "ARTICLE 17 LETTER"</b> .....	19
<b>5. SUBMISSIONS BY GERMANY FOLLOWING THE ARTICLE 17 LETTER</b> .....	20
<b>5.1. State aid qualification</b> .....	21
5.1.1. <i>Licence fee funding does not constitute State aid within the         meaning of Article 87 (1) EC Treaty</i> .....	21
5.1.2. <i>Special tax treatment of commercial activities does not         provide public service broadcasters with a financial         advantage</i> .....	21
5.1.3. <i>State guarantee does not provide public service broadcasters         with a sizable benefit</i> .....	22
<b>5.2. Compatibility under Article 86 (2) EC Treaty</b> .....	22
5.2.1. <i>Definition of public service mission</i> .....	22
5.2.2. <i>Entrustment and control</i> .....	23
5.2.3. <i>Proportionality</i> .....	24
<b>6. SUBMISSIONS BY THE COMPLAINANTS FOLLOWING THE ARTICLE 17 LETTER</b> .....	27
<b>6.1. Submission by the VPRT</b> .....	27
6.1.1. <i>State aid qualification</i> .....	27

6.1.2.	<i>Compatibility assessment</i> .....	28
6.1.2.1.	Definition of public service mission.....	28
6.1.2.2.	Entrustment and control .....	28
6.1.2.3.	Proportionality .....	29
<b>6.2.</b>	<b>Submission by Kabel-BW</b> .....	30
<b>6.3.</b>	<b>Submission by Premiere</b> .....	31
<b>7.</b>	<b>ASSESSMENT</b> .....	32
<b>7.1.</b>	<b>State aid under Article 87(1) of the Treaty</b> .....	32
7.1.1.	<i>Use of State resources</i> .....	32
7.1.1.1.	Licence fee financing .....	32
7.1.1.2.	Special tax treatment .....	34
7.1.1.3.	State guarantee.....	34
7.1.2.	<i>Financial advantage</i> .....	35
7.1.2.1.	Licence fee financing .....	35
7.1.2.2.	Special tax treatment .....	37
7.1.2.3.	State guarantee.....	39
7.1.3.	<i>Distortion of competition and effect on trade</i> .....	39
7.1.4.	<i>Conclusions</i> .....	41
<b>7.2.</b>	<b>Nature of the aid</b> .....	41
7.2.1.	<i>Licence fee financing</i> .....	42
7.2.2.	<i>State guarantee</i> .....	45
7.2.3.	<i>Conclusions</i> .....	46
<b>7.3.</b>	<b>Compatibility assessment of the current financing regime</b> .....	46
7.3.1.	<i>Definition</i> .....	46
7.3.1.1.	Public service definition for general TV programme activities.....	47
7.3.1.2.	Public service definition for additional digital channels .....	47
7.3.1.3.	Public service definition for new media services .....	48
7.3.1.4.	" <i>Manifest errors</i> " in the definition and a clear distinction between public service and commercial activities.....	50
7.3.2.	<i>Entrustment and control</i> .....	51
7.3.2.1.	Entrustment .....	51
7.3.2.2.	Control.....	53
7.3.3.	<i>Proportionality</i> .....	53
7.3.3.1.	Separate accounts .....	54

7.3.3.2.	Limitation of compensation to net public service costs .....	55
(a)	Determination of public service costs .....	55
(b)	Deduction of commercial revenues .....	55
(c)	<i>Ex post</i> control of possible overcompensation .....	57
7.3.3.3.	Respect of commercial principles .....	58
7.3.3.4.	Acquisition and use of sports rights .....	59
7.3.4.	<i>Conclusions on the assessment of the current financing regime</i> .....	62
<b>7.4.</b>	<b>Appropriate measures</b> .....	<b>63</b>
7.4.1.	<i>Clear definition of the public service remit as regards new media activities</i> .....	63
7.4.2.	<i>Entrustment and control</i> .....	63
7.4.3.	<i>Proportionality</i> .....	64
7.4.3.1.	Separation of accounts .....	64
7.4.3.2.	Exclusion of overcompensation and cross-subsidisation of commercial activities .....	64
7.4.3.3.	Respect of market principles for purely commercial activities .....	64
7.4.3.4.	Safeguards against financing of sports rights which remain unused .....	65
<b>7.5.</b>	<b>Commitments submitted by Germany in December 2006</b> .....	<b>65</b>
<b>7.6.</b>	<b>Appraisal of the commitments given by Germany</b> .....	<b>71</b>
7.6.1.	<i>Clear definition of the public service remit as regards new media activities</i> .....	71
7.6.1.	<i>Entrustment and Control</i> .....	73
7.6.2.	<i>Proportionality</i> .....	75
7.6.2.1.	Separate accounts .....	75
7.6.2.2.	Limitation of compensation to net public service costs .....	75
7.6.2.3.	Respect of market principles .....	77
7.6.2.4.	Acquisition and use of sports rights .....	78
<b>8.</b>	<b>CONCLUSIONS</b> .....	<b>79</b>