EUROPEAN COMMISSION

Brussels, 26.1.2010
C(2010)132 final

In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].		**PUBLIC VERSION** **WORKING LANGUAGE** **This document is made available for information purposes only.**

Subject: **State aid E 5/2005 (ex NN 170b/2003) – Annual financing of the Dutch public service broadcasters – The Netherlands**

Excellency,

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

1. PROCEDURE

(1) The present case was initiated based on a number of complaints.

(2) On 24 May 2002 the Commission received a complaint from CLT-UFA S.A. and its associated subsidiaries RTL/de Holland Media Groep S.A. and Yorin tv BV regarding the financing of Dutch public broadcasters. On 10 October 2002 and 28 November 2002 SBS Broadcasting and VESTRA[1], the association of commercial broadcasters in the Netherlands, each submitted complaints. VESTRA also submitted further information in the course of the investigation. On 3 June 2003 NDP, the Dutch Newspaper Publishers Association, submitted a complaint on behalf of its members. On 19 June 2003 the publishing company *De Telegraaf* lodged a complaint.

[1] *Vereniging voor Satelliet Televisie en Radio Programma Aanbieders*

Zijne Excellentie de Heer drs Maxime Jacques Marcel VERHAGEN
Minister van Buitenlandse Zaken
Postbus 20061
NL - 2500 EB Den Haag
Nederland

(3) More complaints followed at a later stage. On 31 August 2007, MTV Networks B.V and The Box Holland B.V. each filed a complaint. On 6 September 2007, TV Oranje submitted a complaint […]* [2]. On 5 June 2009 NDP submitted a consolidated and updated version of its complaint. On 30 April 2009, VESTRA as well as individual members of VESTRA submitted a consolidated and updated version of their complaint On 22 September 2009, the Dutch Association of Commercial Radio Broadcasters (VCR[3]), who already submitted information before, submitted a complaint.

(4) The present case is related to a procedure under Article 88(2), case C 2/2004. In case C 2/2004 the Commission started in February 2004 investigations into a number of ad hoc financing measures for public service broadcasters. The Commission closed the investigation by means of a final decision of 22 June 2006 ordering the recovery of € 76,327 million (excluding interest)[4]. The measures assessed in case C2/2004 are not subject to the present decision.

(5) The present decision is based on the following administrative procedure.

(6) By letter of 24 March 2004 the Commission asked the Netherlands to provide all information necessary to assess whether the annual contributions from the government of the Netherlands to the Dutch public broadcasting system (hereinafter "the measure") should be considered as existing or as new aid. The Dutch authorities replied to this request by letter of 19 May 2004.

(7) On 3 March 2005, the Commission informed the Netherlands according to Article 17 of regulation (EC) No. 659/1999 of its preliminary conclusion that the annual financing regime of the Netherlands for its public service broadcasting system was incompatible with the EC Treaty.[5]

(8) On 2 June 2005, the Netherlands submitted comments to the Commission's preliminary conclusions of 3 March 2005. Following further correspondence[6] and a meeting at services level on 25 April 2007, the Dutch authorities by letter dated 22 June 2007 provided a summary of measures taken to address the Commission's preliminary concerns as set out in the Article 17 letter and in subsequent correspondence.[7]

(9) On 18 December 2007, the Commission services requested further clarifications. Following several meetings and correspondence at political and services level[8], the Commission by letter dated 16 November 2009 asked the Dutch authorities to finalise

* business confidentiality

[2] […]

[3] *Nederlandse Vereniging voor Commerciële Radio*

[4] C(2006)2084 def.

[5] For a more detailed description of the Commission's findings, see section 4.

[6] Letters from the Dutch authorities dated 01.09.05, 07.09.05, 16.02.06, 04.07.06 and 01.09.06. Letter from DG COMP dated 22.06.06.

[7] For a description of the arguments and additional information submitted by the Netherlands, see section 5.

[8] Meetings took place on 25 January 2008, 23 April 2008, 16 September 2008, 3 February 2009, 25 September 2009, 10 November 2009.

their proposal for appropriate commitments based on the comments of the Commission services so far and – where necessary – to complement them.

(10) On 18 November 2009, the Dutch authorities submitted a preliminary proposal for commitments to amend the current financing regime. On 26 November 2009, the Dutch authorities submitted their final commitments to amend their current financing system. [9]

2. DESCRIPTION OF THE PUBLIC SERVICE BROADCASTING SYSTEM IN THE NETHERLANDS AND THE ANNUAL FINANCING

2.1. General overview of the Dutch Public Broadcasting System

(11) In the 1920s five private associations took the initiative to start broadcasting radio programmes. This laid the basis for the later development of a public broadcasting system. The notion public broadcasting (*publieke omroep*) refers, in this decision, to the government regulated system of broadcasting and not to the ownership of the organisations that are part of the system.

(12) Within the public broadcasting system there are many different organisations, including ten autonomous private associations with members, twelve associations without members[10], an umbrella organisation, the NOS[11], and a separate Foundation, STER, which is responsible for the sale and broadcasting of advertising. The revenues generated by the STER are transferred directly to the State and used to fund the public service broadcasting system. The Dutch Broadcast Production Organisation (NOB) is also part of the public broadcasting system as regards its management task and carries out the recording, transmission preparation and actual transmission of sound, moving pictures and data to all possible distribution channels

(13) The public service broadcasters perform both public service activities, side activities (*nevenactiviteiten*) and association activities (*verenigingsactiviteiten*). All these broadcasters are eligible for State funding for their public service activities. The TV programmes of the public service broadcasters are broadcasted on three general TV channels. The public service broadcasters also operate twelve theme TV channels.

2.2. Historical background on the Dutch Public Broadcasting System

(14) The funding of the public broadcasting system by means of the collection of a licence fee dates back to the early 1940s, with a "radio tax" initially being introduced under German occupation during World War II.

---

[9] For a more detailed description of the commitments proposed by the Netherlands, see section 10.

[10] The associations with members are KRO, AVRO, NCRV, EO, TROS, BNN, VARA, VPRO, Llink and MAX. The organisations without members are: NPS, Teleac, RVU, OHM, RKK, HUMAN, ZvK, Joodse Omroep, NIO, BOS, IKON, NMO.

[11] The *Erkenningswet* (ref. *Wet van 2 juli 2009 tot wijziging van de Mediawet 2008 in verband met onder meer de erkenning en de financiering van de publieke omroep, Stb 2009, 300*) has split the NOS in the NOS (broadcaster) and the NPO (coordination body).

(15) Article 3(3) of the Temporary Telegraph, Telephone and Radio Decree 1944[12] laid the basis for the charging of a periodical radio licence fee (*luisterbijdrage*), payable by all those in possession of transmission receiving equipment. The licence fee was to be collected by the state operator PTT, and the funds collected were to be transferred to the Media Budget, and used to offset the costs of the five radio broadcasters who together formed the public broadcasting system at that time: AVRO, KRO, NCRV, VARA and VPRO[13]. Rules relating to the level of the fee, its payment, exemptions and supervision were subsequently set out in the Radio Licence Fee Decisions (*Radioluisterbeschikkingen*) of 1945, 1950 and 1960.

(16) In order to be entitled to broadcast programmes, the radio broadcasters had to demonstrate that they were orientated towards satisfying the cultural and religious needs of the people with programmes that could be seen as being in the general interest[14].

(17) Following an experimental phase of television broadcasting between 1951 and 1955, the Television Decree 1956[15] authorised television broadcasting by the same five associations who were entitled to broadcast radio programmes, and also by some church organisations. The Television Licence Fee Act of 1956[16] provided for the introduction of a compulsory licence fee payable by all those in possession of a television set. As with the radio licence fee, the state operator PTT was put in charge of collecting the fee, and the funds thus collected were transferred to the Media Budget.

(18) Pursuant to Article 21 of the 1956 Decree, the costs of programming, including the costs associated with the acquisition, maintenance, and exploitation of television and broadcasting equipment, were to be paid out of State resources (*"uit 's Rijks kas betaald"*), to the extent necessary.

(19) From 1965 onwards, advertising revenue formed an additional "input" of funds into the Media Budget. However, individual broadcasting associations were not (and are still not) allowed to sell advertising themselves. Rather, the STER was set up[17] and charged with the task of selling and exploiting advertising on behalf of the public broadcasters. The net income from advertising becomes part of the Media Budget, from which an annual sum continued to be distributed amongst the individual broadcasting organisations[18].

(20) The Broadcasting Act 1967[19] consolidated much of the earlier law, and the general approach remained unchanged. It reaffirmed the role of public broadcasters in meeting the needs of society, and guaranteeing freedom of expression and plurality in public broadcasting. Although the term "public broadcasting" was not used as such, broadcasting associations were obliged to be "orientated towards cultural, religious or spiritual needs so

---

[12] Tijdelijk Telegraaf- Telefoon en Radiobesluit 1944, Stb E 118.
[13] See also the Ministerial decision of 15 January 1947 (No 6528), article 13, which confirmed that the compulsory licence fee would be used to provide funds to compensate the public broadcasters who had been given broadcasting time.
[14] This requirement dates back to the Radio Regulation 1930 (*Radioreglement 1930*, Stb 1930, 159).
[15] *Televisiebesluit 1956*, Stb 1955, 579.
[16] *Wet op het Kijkgeld 1956*, Stb 1955, 489.
[17] By Decree of 11 November 1965, *Besluit houdende instelling van een reclameraad*, Stb 486
[18] See Article 50 Broadcasting Act 1967 which provides that the advertising revenues should be transferred to the State budget.
[19] *Omroepwet 1967*,1 March 1967, Stb 176, entered into force 29 May 1969.

that their transmissions could be understood to be of general interest"[20]. They were required to provide a full range of programmes, and to be non-commercial (in the sense that they should not aim at making profits).

(21) The Act also provided that under certain conditions new broadcasters would be admitted to the public broadcasting system[21], if they could demonstrate that they had at least 50,000 members, co-operated with other associations and had a distinct identity in terms of their programming policy. New associations were subject to the same requirements in terms of providing a broad range of programmes orientated towards the cultural and other needs of the people, so that their programmes could also be understood to be in the general interest.

(22) The same Act also provided for the creation of the NOS, through the amalgamation of two bodies, the NRU and the NTS, which was intended to be a body through which the various associations could operate. NOS itself also provided for broadcasted TV and Radio.

(23) In terms of the annual payments made to the broadcasting organisations by the State the basis and purpose of these remained the same. The old radio and television licence fees (*luistergeld* and *kijkgeld)* were renamed "broadcasting contributions" (*"omroepbijdrage")* but the principle remained the same[22]. The amount of the fee could be determined annually by general regulation and the payment was compulsory.

(24) The Broadcasting Act 1967 was replaced by the Media Act 1987. However, the basic approach to public broadcasting, and its funding, remained fundamentally the same. The funds were now distributed to the broadcasting organisations by the Media Regulator[23], who received them from the Minister. The Minister determined the amount of funding available on the basis of estimated budgets submitted by NOS, which were commented upon by the Media Regulator. The 1987 Media Act also recognised the possibility of side activities (*nevenactiviteiten*)[24].

(25) In 1990, the possibilities for STER advertising on public channels were increased[25].

(26) The Reinforcement of Public Broadcasting Act 1994 (*Wet Versterking Publieke Omroep 1994)* introduced the possibility of granting longer term concessions to (public) broadcasting organisations, providing more certainty regarding their right to broadcasting time and financial contributions. On 7 June 1995 seven broadcasting associations were granted a concession for a five-year period. The Act also amended the organisational structure of the system, insofar as it divided the NOS into NOS RTV (holder of a public broadcasting licence and itself a broadcaster of specific programs), and NPS (a co-

[20] Article 13(2)(4)(e).
[21] Also the current Act maintained the principle of an open broadcasting system.
[22] Under the Law on Broadcasting Contributions 1968 (*Wet op de omroepbijdragen*) the regulations relating to the television and radio fees were integrated. Those in possession of television or radio equipment remained obliged to pay a (differentiated) fee.
[23] *Commissariaat voor de Media*, established by Article 9 of the Media Act 1987. This regulatory body was charged with the task of ensuring compliance with the Media Act.
[24] This possibility was already mentioned in the Explanatory Memorandum of the 1967 Broadcasting Act
[25] *Wet van 13 December 1990, houdende wijzingen van bepalingen van de Mediawet in verband met de verruiming van het reclameregime en andere wijzingen*, Stb 1991, 17.

operation unit/coordination unit for the national public broadcasters with extended responsibilities).

(27) The arrangements for the annual payments remained largely the same. Three categories, A, B and C were introduced, based on membership numbers, with those associations in category A being awarded most of the broadcasting time.

(28) Amendments to the 1987 Media Act by an Act of 5 July 1997[26] further clarified the possibility of "side activities" or (*nevenactiviteiten)* by public broadcasters. It was made clear that such activities had to fulfil certain conditions before they would be permitted, namely that they did not have a negative impact on the "main" task (*"hoofdtaak"*, which was the broadcasting of programmes in the general interest), that they were related to the main task, and that they did not distort competition. Furthermore, the financing of side activities through the public resources given to the broadcasting organisations was not permitted.

(29) The Reorganisation Act 1997[27] made further changes to the organisational structure of the public broadcasting system. One change to the funding system was made by this Act insofar as the State funds were now attributed by the Minister directly to the Board of Directors of the NOS (who then distributed the funds to the individual broadcasting associations), rather than being attributed by the Minister to the Media Regulator, who had then previously distributed the funds to the associations. Furthermore, from 1998 the fees were collected by a special government agency "*Dienst Omroepbijdragen"* instead of the PTT.

(30) In 1998 the term "public broadcasting" was used for the first time in Dutch media legislation, in the Dutch Telecommunications Act 1998[28]. The definition provided in essence that public broadcasting was "broadcast by organisations that have been attributed broadcasting time". However, this should be read in conjunction with the existing principles regarding the basis on which broadcasting time would be allocated (i.e. to organisations which demonstrated their intention to provide varied and high quality programmes in the general interest).

(31) Under Article 106a of the 1987 Media Act a provision for the allocation of additional ad hoc funding was introduced. Also Article 109a was introduced which allowed public broadcasters to keep reserves and NPO to set a maximum amount for these reserves. However such funding falls outside the scope of the present analysis[29].

(32) From 1 January 2000[30] the funding arrangements for public broadcasters were altered and a system funded by income tax proceeds (State Broadcasting Contribution (*Rijksomroepbijdragen)*) was introduced (see also section 7.2.3). This funding continues to form part of the Media Budget from which yearly payments are made to the public broadcasters. In a continuation of the existing approach, Article 110 of the 1987 Media

[26] Stb 1997, 336.
[27] *Reorganisatiewet 1997, Stb 1997, 544*, came into force 1 February 1998.
[28] Stb 1998, 610, came into force 15 December 1998.
[29] See Commission decision C(2006)2084 def.
[30] By law of 22 December 1999, Stb 1999, 573

Act provided that the broadcasters are entitled to compensation from State funds to ensure the provision of high quality programming and continuity of financing. Article 111 provided that the amount of funding provided through State resources under the "new" system would be equal to the amount received in 1998 (under the "old" system), subject to indexation.

(33) Amendments in 2000 also broadened the definition of the mandate of public broadcasters. It was emphasised that the main task of the broadcasters remains to offer, on open networks, varied, high quality television and radio programming. However, in addition to the main task, and the additional side activities (*nevenactiviteiten)*, the provision of side tasks (*neventaken*) was now also introduced. These side tasks concerned the distribution of programmes on other distribution platforms and were considered to be part of the public service task of the broadcasters and could therefore be publicly financed (1987 Media Act Article 13c). Association activities (*verenigingsactiviteiten*) were also recognised within the same article, such activities include organising general meetings for members and publishing magazines for members. Such activities cannot be financed using public funding.

(34) The description of "*neventaken"* in Article 13(c)(3) of the 1987 Media Act stated that "the public broadcasting system can also fulfil its task, as mentioned in the first paragraph, by providing means of supply and distribution of programme materials, other than those mentioned in the first paragraph, subsection (a)" (*de publieke omroep kan mede invulling geven aan zijn taak, bedoeld in het eerste lid, door tevens te voorzien in andere dan in de eerste lid, onderdeel a, bedoelde wijzen van aanbod en verspreiding van programmamateriaal)*. Further guidance was given in Articles 57(a)(1) and 55(b)(2).

(35) Public broadcasters had to inform the Media Regulator of their plans, no later than the time at which they start to offer the new service as part of their *neventaken*. The Media Regulator keeps a public register *nevenactiviteiten* and *neventaken* (until the abolishment of *neventaken* by the 2008 Media Act). The Concession Act 2000 renewed the concessions given to public broadcasters.

2.3. The current legal framework

(36) At the time of the Article 17 letter, the 1987 Media Act (including amendments) was applicable to the Dutch public broadcasting system. However, after the Article 17 letter, the Dutch authorities embarked on a broader reform of the Media Act. First reform proposals tabled in 2006 were postponed due to early general elections. In February 2008 a new Media Act was submitted to Parliament which came into force on 30 December 2008 and was most recently amended by another Act (*Erkenningswet*)[31].

(37) The 2008 Media Act should, according to the Dutch authorities, also take into account some of the preliminary concerns expressed by the Commission in the Article 17 letter (see section 4).

[31] *Wet van 2 juli 2009 tot wijziging van de Mediawet 2008 in verband met onder meer de erkenning en de financiering van de publieke omroep (Stb 2009, 300)*

(38) The current legal framework consists of the 2008 Media Act[32] (hereafter: Media Act) and the Media Decree 2008[33] (hereafter Media Decree). According to the Media Act, public service broadcasters may carry out 3 kind of activities: public service activities, association activities and side activities. Only public service activities may receive public funding.

2.3.1. Public service remit

(39) The 2008 Media Act abolished the distinction made in the ´old´ Media Act between main tasks and side tasks (see paragraph (33)), which were both considered as part of the public service remit, and replaced it by a multimedia public service remit. The public service remit is laid down in Article 2.1 (1) of the Media Act:

> *Er is een publieke mediaopdracht die bestaat uit:*
> *a. het op landelijk, regionaal en lokaal niveau verzorgen van publieke mediadiensten door het aanbieden van media-aanbod op het terrein van informatie, cultuur, educatie en verstrooiing, via alle beschikbare aanbodkanalen; en*
> *b. het verzorgen van publieke mediadiensten waarvan het media aanbod bestemd voor landen en gebieden buiten Nederland en voor Nederlanders die buiten de landsgrenzen verblijven*
>
> [**WORKING TRANSLATION**: The public service remit consists of (a) providing on local, regional and national level, public media services by offering media offers in the areas of information, education and entertainment through all available distribution channels and (b) provide public media services of which the media offer is aimed for countries and areas outside the Netherlands and for Dutch people staying outside the Netherlands]

(40) The definition of the public service remit is ring-fenced by the definitions of[34] *media-aanbod* and *mediadiensten* which excludes non-electronic products (eg. prints) and Article 2.1(a) which excludes merchandising and e-commerce[35].

(41) Article 2.1(2) stipulates that public service activities have to meet the democratic, social and cultural needs of the Dutch society by offering media offers which are:

> *a. evenwichtig, pluriform, gevarieerd en kwalitatief hoogstaand is en zich tevens kenmerkt door een grote verscheidenheid naar vorm en inhoud;*
> *b. op evenwichtige wijze een beeld van de samenleving geeft en de pluriformiteit van onder de bevolking levende overtuigingen, opvattingen en interesses op maatschappelijk, cultureel en levensbeschouwelijk gebied weerspiegelt;*
> *c. gericht is op en een relevant bereik heeft onder zowel een breed en algemeen publiek, als bevolkings- en leeftijdgroepen van verschillende omvang en samenstelling met in het bijzonder aandacht voor kleine doelgroepen;*
> *d. onafhankelijk is van commerciële invloeden en, behoudens het bepaalde bij of krachtens de wet, van overheidsinvloeden; e. voldoet aan hoge journalistieke en professionele kwaliteitseisen; en*
> *f. voor iedereen toegankelijk is*

[32] *Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008),* Staatsblad 2008 583
[33] *Besluit van 29 december 2008 houdende vaststelling van een nieuwe Mediabesluit (Mediabesluit 2008).* Stb 2008 584
[34] Media Act Article 1.1
[35] Letter Dutch authorities 26 November 2009 page 12

[**WORKING TRANSLATION**: Offers should: be balanced, multiform, varied and of high quality; provide a balanced representation of society and the variety of beliefs, opinions and interests with regard to society, culture and religion of the population; reach a relevant proportion of both the general public as well as various age and culture groups with a specific focus on minority groups; be independent from commercial and government influences; be of a high professional quality and be accessible for all]

(42) Every five years the public service broadcasters describe, in a strategy plan (*concessiebeleidsplan*), how they intend to fulfil the public service remit in the next five years[36] including which distribution channels they wish to offer. The strategy plan contains a description of how the public service broadcasters will carry out their activities over the next 5 years including qualitative and quantitative objectives; the nature and number of programme channels (including the required spectrum) and other distribution channels[37] it envisages; and the required financial means[38]. Changes to the strategy plan can be made annually as part of the budget procedure.

(43) The Minister has to approve[39] the nature and number of programme channels and other distribution channels[40]. Before taking such decision, the Minister seeks advice concerning the strategy plan as a whole from the Media Regulator and the Council of Culture. The intended ministerial decision is published.

(44) The General Administrative law[41] is applicable to this decision procedure. The General administrative law requires the publication of the decision and obliges the Minister to collect all relevant facts and interests to be balanced[42]. This also provides third parties with an opportunity to provide comments on the intended decision, notably on the negative consequences of such a decision.

(45) Once the facts have been established, the Minister has to balance all interests concerned by this decision[43]. The General Administrative law obliges a careful procedure in preparing a decision and requires the decision to be well motivated[44]. The final Ministerial decision is published as well. Third parties can appeal a decision at the Administrative Court.

(46) A similar procedure applies in the event the public service broadcasters would want to deviate from the decision by the minister (see paragraph (42)).

---

[36] Media Act, Article 2.20

[37] A distribution channel is defined ("*aanbodkanaal*") independently from the way of distribution. It is defined as a bundle of organised and integrated media offers which are offered under a recognisable name through an electronic communication network. The term distribution channel would for instance cover TV channels, (on demand) internet channels, websites and a catch up service.

[38] The Dutch authorities clarified by letter 26 November 2009, page 16 that the substantiation includes an explanation how new activities are placed within the public service remit and relate to already existing public service offers. This would be supported by an analysis of the general setting including elements like target audience, audience needs and existing market offers.

[39] Media Act, Article 2.21.

[40] The Dutch authorities informed the Commission, by letter of 26 November 2009, page 12 *et seq*. that by *Erkenningswet* the possibility for exempting pilot projects from prior approval has been introduced (Article 2.21a Media Act). A Decree to implement this exemption was in preparation.

[41] *Algemene Wet Bestuursrecht*

[42] Awb, Article 3.2

[43] Awb, Article 3.4

[44] Awb, Article 3.46

(47) Article 2.22 of the Media Act stipulates that also on the basis of the strategy plan, a performance agreement (*prestatieovereenkomst*) is concluded between NPO, representing the public service broadcasters and the Minister. This contract specifies in more detail the quantitative and qualitative objectives to be achieved. The public service broadcasters annually report[45] to the Minister on the fulfilment of the commitments laid down in the performance agreement. The Media Regulator verifies and validates these annual reports and reports to/advises the Minister.

2.3.2. Other activities

(48) Apart from activities as part of the public service remit, public service broadcasters can also perform activities which are defined as side activities and association activities. The main requirements are set out in section 2.5.6 of the Media Act.

(49) Side activities (*nevenactiviteiten*) are activities, which are related to or contribute to the execution of the public service remit and have to be carried out on market terms[46]. Examples of such side activities include the sale of programme guides, merchandising and sale of programme-related material (eg. DVDs).

(50) Other activities are association activities[47], which are activities performed by the broadcasting associations for their members. They include for instance an (annual) assembly and a magazine for members.

2.3.3. Supervision and control

(51) The Media Regulator, an independent regulatory body, has been charged with supervisory tasks by the Media Act[48], including the possibility to impose sanctions[49]. The Media Regulator controls the lawfulness of expenditure by public service broadcasters (both concerning revenues from public funding and revenues from other activities) and also supervises the side activities. The Media Regulator also advises on the reports concerning the fulfilment of the performance agreement (see paragraph (47)). Thereby, the Media Regulator supervises the Media Act, including the public service remit.

(52) In addition NPO has to establish every five years an independent Committee[50] which reports i.a. about the way public service broadcasters have carried out the execution of the public service remit and the extent to which the public service broadcasters´ media offers meet the interests of different groups.

[45] Article 2.58 Media Act
[46] Article 2.132 Media Act
[47] Article 2.136 Media Act
[48] Article 7.11 Media Act
[49] Article 7.12 Media Act
[50] Article 2.184 et seq. Media Act

2.3.4. Financing of the Dutch public service broadcasters

(53) The general claim of public service broadcasters concerning public funding is laid down in Articles 2.143 and 2.144 of the Media Act[51]. Only the financing provided on the basis of these articles is part of the current procedure concerning the annual financing of Dutch public service broadcasters. Article 2.144 of the Media Act i.a. stipulates a minimum amount of annual financing from the Media Budget (see also paragraph (32)).

(54) The Minister fixes the budgets annually and makes them, through the Media Regulator, available for the NPO. NPO distributes the budgets to the individual public service broadcasting organisations in line with the principles laid down in the Media Act[52].

(55) Public service broadcasters may also receive public funding for specific purposes from other sources of financing, *so called ad hoc funds*, on the basis of Articles 106a and 170c and 109a of the 1987 Media Act (see paragraph (31)), which have been transposed to the 2008 Media Act as Articles 2.158, 2.159; 2.166, 2.167, 2.169 and 7.7(1); and Articles 2.174-2.177.[53] However, these funds fall outside the scope of this procedure, as these funds are not covered by the scope of this existing aid procedure.

3. INITIATION OF THE STATE AID INVESTIGATION

(56) The Commission received several complaints in the course of 2002 (see paragraph (1)) regarding the financing regime for the Dutch public broadcasting system. In 2004 the Commission asked the Netherlands to provide all information necessary to assess the annual financing regime for Dutch public broadcasters (see paragraph (6)). Having assessed the information, the Commission informed the Netherland on 3 March 2005 about its preliminary position concerning the annual financing regime pursuant to Article 17 of the Procedural Regulation.

4. "ARTICLE 17 LETTER"

(57) Based on the information submitted by the complainants as well as the Netherlands, the Commission carried out a first assessment of the public financing of the Dutch public service broadcasters under the EU State aid rules. Pursuant to Article 17 of the Procedural Regulation, it informed the Netherlands of the preliminary view that the existing annual financing regime was no longer compatible with the EC Treaty [now TFEU] by letter dated 3 March 2005 (hereafter "Article 17 letter") and invited the Netherlands to submit comments.

---

[51] As set out in the 2006 decision concerning the ad hoc financing of Dutch public service broadcasters (para 108) and in the Article 17 letter, this procedure only concerns the funding on the basis of Article 110 and 111 of the 1987 Media Act. These Articles have been replicated in the current Media Act (Articles 2.143 and 2.144) – see letter Dutch authorities of 26 November 2009, page 29. For that reason this procedure only concerns the annual financing on the basis of Media Act, Articles 2.143 and 2.144.

[52] Media Act, Article 2.149 - 2.153

[53] Commission Decision C(2006)2084 def, in particular paragraph 60, 83, 109 and 146 in combination with the *transponeringstabel* attached to the 2008 Media Act

(58) Following its preliminary assessment, the Commission considered that the annual financing[54] constitutes State aid which had to be considered as existing aid. The Commission expressed concerns about the absence of a sufficiently clear and precise definition and entrustment of the public service remit, in particular as regards side tasks (new audiovisual services). The Commission considered that for side tasks no assessment took place whether such activities met the democratic, social and cultural needs of society and how these were distinguished from side activities (i.e. commercial activities).

(59) The Commission also took the preliminary view that certain activities, such as new media activities related to side activities and association activities (eg. webshops, sale of travels, public broadcasters´ own websites, and websites comparable to printed TV guides) and new media (pay) services not having a public service character constitute a manifest error. The Commission also expressed concern about the entrustment of side tasks as these were only assessed ex post by the Media Regulator.

(60) In the Article 17 letter, the Commission expressed preliminary concerns about the implementation of the Transparency Directive as the cost allocation was not clearly laid down in the Financial Handbook. The Commission also expressed its preliminary view that revenues from association activities did not have to be used for financing the public service remit which should therefore be considered stand alone activities. Therefore, the Commission considered that losses from association activities could not be compensated by revenues from the sale of TV guides which was considered a commercial exploitation of the public service remit.

(61) Further, the Commission considered that the legal framework did not contain satisfactory mechanisms which would ensure that the State funding was limited to the net public service costs (no overcompensation). In this context, the Commission also noted that activities outside the public service remit, should be carried out on market terms.

(62) In this respect, the Commission received complaints questioning whether NPO acted as a market investor in relation to its shareholding in Nozema and whether public service broadcasters did not pay above market prices to private companies (eg. prices paid by NPO to Nozema). Finally, the Commission raised preliminary concerns that public service broadcasters may increase the need for public funding by not charging copyrights from cable operators. In view of these concerns, the Commission proposed regular and independent supervision of the market behaviour of public service broadcasters when acting outside the public service remit.

[54] Paragraph 33 of the Article 17 letter stipulates that the financing on the basis of Article 106a of the 1987 Media Act falls outside the scope of the investigation of the annual financing regime.

5. SUBMISSIONS BY THE NETHERLANDS AND COMPLAINANTS SUBSEQUENT TO THE "ARTICLE 17 LETTER"

5.1. Submissions by the Netherlands in view of the Article 17 letter

(63) Following a meeting between the Commission and the Dutch authorities in April 2005, the Netherlands submitted its observations on the Commission's preliminary views by letter registered on 7 June 2005. The Dutch authorities welcomed the fact that the preliminary views considered the Dutch annual funding system for public service broadcasters as existing aid according to Article 1(b)(i) of the Procedural Regulation. They also informed the Commission about a scheduled revision of the Dutch public service broadcasting system (see section 2.3).

(64) The Dutch authorities confirmed they would address the concerns expressed in relation to the unclear definition of the public service remit, notably side tasks, by amending the legal framework. At the same time, while agreeing to some manifest errors (e.g. websites for side activities), the Dutch authorities considered that public service content transmitted by using different platforms may not be considered as a manifest error.

(65) As regards manifest errors, the Dutch authorities also argued that while printed TV guides are considered a commercial activity, electronic TV guides should be considered a side task (i.e. part of the public service remit), because the content is different. A printed TV guide contains apart from programme information also articles and interviews and is considered by public broadcasting association important to bind members. Electronic TV guides provides for less extensive programme information (couple of days instead of a week) and no articles or interviews.

(66) The Dutch authorities also indicated their willingness to address all concerns regarding the proportionality of the financing. In this regard they noted that cost allocation, such as eg. printing costs, distribution costs and costs for articles did take place for printed TV guides. They also noted that association activities could not be considered as so-called stand alone activities[55], because those activities have to be related to the functioning of the broadcasting association. The role of broadcasting associations is directly linked to the Dutch public broadcasting system. In addition, the Dutch authorities clarified that all revenues from both side activities and association activities have to be used to finance the

[55] In the Article 17 letter, association activities were considered as stand alone activities. Under the 2008 Media Act public service broadcasters are not allowed to carry out activities which are not related to the public service task (Article 2.132(3) and 2.136(2)).

public service task[56]. Finally, they announced the sale of the shareholding in Nozema by NPO[57].

(67) On several occasions the Dutch authorities provided the Commission with further information, notably on legislative initiatives[58], also in reply to information requests from the Commission[59]. However, by letter dated 1 September 2006, the Dutch authorities informed the Commission that the legislative process had been cancelled.

(68) The proposals for appropriate measures were summarised by the Dutch authorities in a letter dated 22 June 2007. Following an information request where the Commission expressed some further concerns[60], several meetings and informal e-mail exchanges took place. The Dutch authorities informed about the legislative process and other changes.

(69) For instance, the Dutch authorities informed the Commission that the NPO had allowed individual public service broadcasting organisations to reserve funds for programming. The limits NPO imposed on individual broadcasting organisations varied from 5% for the larger organisations to 20% for smaller organisations. However, the total funds reserved by all organisations could not exceed 10% of the budgeted public funds made available.

(70) Following further informal exchanges, the Dutch authorities submitted preliminary appropriate measures by letter dated 18 November 2009 and their commitments for appropriate measures by letter dated 26 November 2009.

5.2. Submissions by complainants after the Article 17 letter

(71) The concerns and allegations brought forward by the complainants after the Article 17 letter can be summarised as follows.

5.2.1. Definition of the public service remit

(72) Both the Dutch association of newspaper publishers NDP and VESTRA submit that the Media Act of 2008 does not sufficiently clarify the public service remit. In particular the newspaper publishers are concerned about the broad and unspecific public service remit of the Dutch public broadcasting system which would allow broadcasters to use State aid in an uncontrolled manner for online services. This would be problematic, because

[56] According to the Dutch authorities, this is reflected in Article 2.146 of the 2008 Media Act. However, it seems rather to originate from Article 2.135 of the 2008 Media Act. The Dutch authorities clarified further that side activities and association activities are separated. On the basis of Article 136 of the 2008 Media Act and Article 16 of the Media Decree, only membership fees, revenues from association activites and net revenues from the sale of programme guides in so far as necessary to compensate for losses of public service associations can be used for association activities.

[57] In the Article 17 letter, the relationship between NPO and Nozema was explicitly mentioned in relation to the public service broadcasters acting as a market investor in relation to its shareholdings and in relation to the requirement for commercial subsidiaries to pay market prices.

[58] By letter dated 27 March 2007 the Dutch authorities informed the Commission about a change in the rules for approving side tasks.

[59] By letter dated 2 June 2006

[60] Notably the Commission raised concerns that the legislative framework, including the adjustment change in the rules for approving side tasks, did not refer to a prior assessment of the impact of new services on the market. Also it was not clear which criteria would be used. The Commission invited the Dutch authorities to provide further commitments regarding such a prior assessment of the impact of new services on the market and how this would be included in a legislative framework.

newspaper publishers were in a difficult transition phase from mass media based on income from subscription to online providers of information.

(73) NDP and VESTRA as well as some of their individual members claim that the public service remit in Article 2.1 (2) of the new Media Act 2008 is less clear than the remit of the ´old´ Media Act. It would not allow for a meaningful control whether individual activities fall within or outside the remit.[61] NDP and VESTRA refer to an advice of the Dutch Council of State of 19 October 2007 which concluded that the public service remit of the Media Act is not sufficiently clear.

(74) TV Oranje also finds that the number of public TV theme channels was disproportionately high as compared to other Member States and that this would distort cross-border trade contrary to the common interest because it foreclosed foreign broadcasters from access to the Dutch media market.[62] In the views of TV Oranje, one of the public theme channels, Sterren.NL, is fully interchangeable with any commercial channel as it showed only entertainment. This was a manifest error of the remit.[63]

5.2.2. Entrustment

(75) NDP and VESTRA find that the entrustment of the public service broadcasters is not clearly binding. This is because in practice, public service broadcasters would propose their own public service mission in the strategy plan ("*concessiebeleidsplan*") on which basis a performance agreement is signed which – under the terms of the Media Act of 2008 - replaces the previous specific programming requirements for public TV channels in the ´old´ Media Act. Public service broadcasters could now propose how they intend to provide the public service over the coming five years and the responsible minister subsequently approves that proposal by means of a non-binding performance agreement.[64]

5.2.3. Proportionality of the aid

(76) MTV Networks B.V and The Box Holland B.V. and TV Oranje address in their complaint[65] a perceived disproportionate use of State aid for funding TV theme channels of the public broadcasters. They consider that the Dutch government has distorted competition contrary to the common interest of the Union by approving as much as 17 public theme channels including a catch up TV. The distortive effects of launching 17 theme channels were reinforced by an agreement between the public broadcasters and VECAI (now NLKabel, the cable operators association), which allegedly obliged the cable operators to distribute not only the main three public TV channels (Nederland 1, 2, en 3) but also the majority of the new 17 theme channels (at least 9 or 10 of 17). Due to this "bundling", the capacity of the cable operators was "congested" by public TV

[61] CP 24/2009, complaint p. 5. The public mission consisted of "*nothing more than the provision of sound and image to the public via electronic communication networks, with the aim to provide information, entertainment, education and culture, both at home and abroad*".
[62] Complaint in CP 264/2007 of 11.9.2007, p. 5 first paragraph.
[63] E-mail of 20.3.2009 in CP 264/2009.
[64] Article 5 of that agreement would exclude any enforceability in Court and thus rendered the agreement and hence the entrustment were in fact unbinding.
[65] CP 255 (MTV De Box) and CP 264 /2007 (TV Oranje / TV Digitaal).

channels which lead to the foreclosure of commercial TV channels.[66] TV Oranje also set out that there is no commercial incentive for cable operators to pay commercial TV operators for distributing their content if public broadcasters offer their content for free (without charging for copyrights).

(77) As to the control of the net cost principle, the Dutch newspaper publishers find that the public funding of individual broadcasters bears no relation with the net costs of the public service. The annual compensation amount was increased by a fixed amount and public service broadcasting associations were allocated public funding based on the number of their members rather than on the basis of their individual net costs. The Court of Auditors in the Netherlands ("*Algemene Rekenkamer*") would have confirmed it is abstained from verifying (ex post) whether the annual reference budgets of each individual broadcaster in the end reflected their individual net costs for providing the public broadcasting service.[67]

(78) Moreover, the newspaper publishers are concerned that the expansion of public service broadcasters on new platforms such as the internet will undermine the development of a viable on-line business model by the print media unless it is accompanied by an effective market-impact test. According to the NDP, the 2008 Media Act foresees no such "*explicit market impact test. This is in line with the stated policy of the Dutch government to oppose such a test and to ignore the market impact of new services of the public broadcasters*".[68] NDP refers to the minister's understanding of the 2008 Media Act as can be derived from his recent decision of 21 April 2009 approving, amongst others, 12 new radio channels and two new TV channels of the public broadcasters. This decision had not been preceded by a proper market impact test. The decision would also only pay lip service to third party concerns. The minster i.a. had given third parties insufficient possibilities to be heard in a meaningful way.[69]

(79) VESTRA also deplores the lack of an adequate control for the market behaviour of the public broadcasters as regards the acquisition of premium sport rights.[70]

(80) The Nederlandse Vereniging voor Commerciële Radio (VCR) also finds that the public broadcasting system in the Netherlands does not yet dispose of an adequate prior market impact assessment for new audiovisual services.[71] Moreover, VCR doubts that the media ministry verifies whether new audiovisual services represent any added value in terms of satisfying social, democratic and cultural needs of the Dutch society. Some channels approved by the media ministry on 21 April 2009 were "exact duplicates of already existing channels of public or commercial broadcasters".[72]

---

[66] CP 255 and 264/2007, complaint of 31 August 2007, p.- 8 at 13 and FN 11. In concrete terms, the measures allegedly foreclosed market access to the commercial TV channel Family.
[67] CP 24/2009, complaint of 5 June 2009, p. 11, at 4.8.
[68] CP 24/2009, complaint of 5 June 2009, p. 20, at 5.31. and CP 323/2008 p. 26 at 6.28.
[69] CP 24/2009, complaint of 5 June 2009, p. 11, at 5.26 – 5.30. See also at 5.29. The "*omgevingsanalyse*" of the minister's decision was no more than *"a superficial (never more than a few lines, if any) mentioning whether services similar to the ones proposed are already available, without even a trace of a market test or impact analysis as applied in other member states"*.
[70] CP 323/2008, submission of 30 April 2009, p.17, at 5.22.
[71] CP 303/09, complaint of 22.9.2009 at 42 (iii).
[72] CP 303/09, complaint of 22.9.2009 at 53 and Annex 2.

5.3.Submissions by the Netherlands in view of complaints

(81) On 6 November 2007, the Dutch authorities responded to the complaints of MTV and TV Oranje of 18 September 2007 as follows. In reply to the Commission's question whether the new legal regime of side tasks would still take account of effects on the market as part of the proportionality test enshrined in Article 106(2) TFEU, the Dutch authorities explained, by reference to a decision of the Media Regulator dated 26 July 2007[73] that as of 6 October 2006, the media ministry rather than the Media Regulator is competent for testing new audiovisual services of the public broadcasters, including theme TV and radio channels. The new legal regime would foresee an "*omgevingsanalyse*" by the public broadcasters themselves.[74] The public broadcasters considered the viewpoints and expectations of the audience and the need to achieve a "good mix" of target groups and genres.[75] The minister's approval of the new theme channels was motivated by the consideration that the new channels are justified to provide a pluralistic and balanced offer of the public broadcasters.[76] The Dutch authorities underline that the culture ministry's decision of 17 February 2007 approving the public theme channels until 2010 actually remained unchallenged.

(82) As to the complainants' argument that no market impact assessment takes place, the Dutch authorities state that the possible inclusion of such assessment would depend on the outcome of its ongoing discussions with the European Commission.[77] The Dutch authorities find that the choice of a dual broadcasting system necessarily implies distortions of competition. The mere existence of a public broadcasting system has an impact on competition as such.[78]

(83) In reply to the complainant's concern that the launch of the 17 theme channels and the terms agreed between the public broadcasters and the Dutch cable operators had lead to the foreclosure of private operators from the market, the Dutch authorities replied that the public broadcasters was free to agree on the terms of distributing TV and radio content over the cable and that the contracts between the public broadcasters and the cable operators are confidential.[79]

---

[73] See the reply of the Dutch authorities dated 6 November 2007 p. 1, section A and the attached Decision of the Media Regulator 24 July 2007, at page 12. The Decision of the Media Regulator sets out that under the previous Media Law, the Media Regulator was competent to analyse new publicly financed "side-tasks" (i.e.. theme channels, internet offers etc.) as to their impact on competition including the compliance with Article 87 EC [now Article 107 TFEU]. However, as of 6 October 2006, the Media Regulator was no longer competent for this type of competition assessment of side-tasks because Article 57a of the old Media Law had been removed.

[74] See the reply of the Dutch authorities dated 6 November 2007 p. 1, section A "De keuze van de voorgestelde themakanalen is door de publieke omroep gebaseerd op een omgevingsanalyse (binnen- en buitenland) waarin ook de resultaten van onderzoek naar interesses en verwachtingen van het publiek zijn opgenomen."

[75] *Ibid.*, p. 2, 1st paragraph.

[76] *Ibid.*, p. 2, 2nd paragraph.

[77] See the reply of the Dutch authorities dated 6 November 2007 p. 1, section A ("DG Competitie heeft in overleg van 27 september jongstleden met ambtenaren van OCW aangegeven dat een onderdeel daarvan zal zijn een "market impact assessment" die opgenomen zou moeten worden in de goedkeuringsprocedure van nieuwe activiteiten van de publieke omroep. De Nederlandse autoriteiten zullen daarop in de reactie op voornoemde aangekondigde brief van DG Competitie ingaan."

[78] Ibid., p. 3, 2nd paragraph.

[79] *Ibid.*, p. 5.

(84) On 9 September 2009 the Dutch authorities responded to the complaints of VESTRA and NDP of 30 April and 5 June 2009 providing further clarifications on the media minister's decision of 21 April 2009. In particular the Dutch authorities argue that contrary to the contention of VESTRA and NDP, their concerns had been considered in the reasoning of the decision. The draft decision had been modified according to third party comments. Certain third parties had appealed the minister's decision.[80] Regarding the concern of the Dutch newspaper publishers that the activities of public broadcasters had serious repercussions on the development of a new on-line business model of the print press, the Dutch authorities set out that the minister had set up a committee[81] which is to investigate the future of the print media.

6. QUALIFICATION OF THE MEASURES AS STATE AID IN THE MEANING OF ARTICLE 107(1) TFEU

(85) For a State measure to constitute a State aid within the meaning of Article 107(1) TFEU it must be granted by a Member State or through State resources in any form whatsoever. It must favour certain undertakings or the productions of certain goods, thereby distorting or threatening to distort competition and it must affect trade between Member States.

6.1. State resources

(86) The annual payments to the public broadcasters clearly constitute a transfer of State resources in favour of the public broadcasters. This is the case both before and after the change from a system based on the possession of radio and television equipment to a system funded through taxation in 2000. The payments are provided directly from the State Media Budget, to the extent authorised by the Minister. The Netherlands also has not demonstrated that these funds are not state resources.

6.2. Economic advantage

(87) The Commission considers that this transfer of State resources relieve the public service broadcasters from costs they would normally have to bear. It provides them with an economic advantage within the meaning of Article 107(1) TFEU Treaty vis-à-vis their private competitors, e.g. commercial broadcasters, which have to finance their activities based on commercial revenues only.

Applicability Altmark judgement

(88) The Commission recalls that the Court has established in the *Altmark*-judgement[82] the conditions under which a compensation for public service obligations would not be regarded as State aid within the meaning of Article 107 (1) TFEU:

---

[80] CP 323/2008 and CP 24/2009, submission of the Dutch authorities dated 9.9.2009 at p. 3.
[81] *Tijdelijke Commissie Innovatie en Toekomst Pers*
[82] Judgement of 24 July 2003, Case C-280/00, Altmark Trans and Regierungspräsidium Magdeburg, Rec.2003, p.I-7747

"First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;

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;

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 [Now Article 107(1) of the TFEU]*;*

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.

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."

(89) As regards the first criterion, as explained in section 8.2.2 below, the current financing regime does not clearly define the public service obligations.

(90) As regards the second criterion, the Dutch government does not calculate the parameters for compensating the public broadcasters on the basis of objective parameters but rather provides public service broadcasters with a budget that is allocated first partly to a coordination body NPO and partly to individual public service broadcasters on the basis of the number of each broadcasting association's members and hence not on the basis of the costs incurred. Secondly, NPO allocates the money to individual public broadcaster in a non transparent way based on a general consideration such as ´promoting the pluriformity of the media offers´.

(91) As regards the third criterion, as explained in section below, the current financing regime does not give sufficient guarantees that the compensation granted to public service broadcasters does not exceed the public service costs.

(92) As regards the fourth condition, the Commission considers that the annual payments to the Dutch public broadcasters do not fulfil the fourth condition. The organisations were not selected by means of a public tender. Rather the funding is determined solely on the basis of the costs public service broadcasters themselves envisage for the envisaged activities in the next year. There is no economic analysis provided for by auditors or any involvement of experts or competitors to determine whether these costs equal the costs which a typical, well run undertaking, would have incurred in carrying out those activities.

(93) Finally, the Dutch government has not demonstrated that the public service broadcasters' compensation is determined on the basis of an analysis of the costs that a typical well-run and adequately equipped undertaking would incur.

(94) For these reasons, the Commission considers that the conditions stipulated in the *Altmark* judgement are not fulfilled as regards the current financing regime. The Dutch authorities have also not demonstrated that *Altmark* applies.

6.3. Distortion of competition and effect on trade

(95) 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 with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid*…."[83]

(96) 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 on both sides of the border the same language is spoken) and because the ownership structure of private competitors may extend over several Member States.

(97) The Dutch public service broadcasters are active on the international market. Through the European Broadcasting Union they exchange television programmes and participate in the Eurovision system[84]. Furthermore the public broadcasting organisations are in direct competition with commercial broadcasters that are active on the international broadcasting market and that have an international ownership structure. According to the jurisprudence of the Court of Justice, "*when state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade the latter must be regarded as affected by that aid*[85]", even if the beneficiary undertaking itself

[83] 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).

[84] See Joint Cases T-185/00, T-216/00, T-299/00 and T-300/00, *M6 and others v. Commission*, [2002] ECR II-3805.

[85] See Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11.

is not involved in exporting[86]. Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on trade within the European Union[87].

(98) The annual funding of the public service broadcasters provides for a financial advantage which strengthens their position towards 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 advertising prices, an increase of the audience share of publicly financed broadcasters to the detriment of private competitors has a direct effect on the advertising revenues of private operators.

(99) Finally, and more particularly as regards new audiovisual activities, the public service broadcasters compete with private operators, including print media 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 the business model of private operators 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 advertising revenues of private operators.

(100) In view of these considerations, the Commission is of the opinion that the State aid measures in favour of the public service broadcasters are liable to distort competition and trade within the European Union.

6.4. Conclusion on the State aid character of the measures

(101) In the light of the above, the Commission considers that the annual financing granted by the Netherlands to the public service broadcasters constitutes State aid within the meaning of Article 107(1) of the TFEU.

7. NATURE OF THE AID

(102) Pursuant to Article 1(b) of Regulation 659/1999[88] "existing aid" means:

"(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;…

[86] Case C-75/97 *Maribel bis/ter ECR* [1999] I-3671.
[87] Case C-310/99 *Italy v. Commission*, [2002] ECR I-2289.
[88] Commission Regulation (EC) No 659/1999 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 108 of the TFEU] (OJ L 83/1) of 27.03.1999, p. 1-9.

(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;"

(103) Moreover, Article 4 (1) of the Regulation (EC) No 794/2004[89] defines an alteration of existing aid as "any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market".

(104) In the *Gibraltar* case[90], it was emphasised that "it is not 'altered existing aid" that must be regarded as new aid, but only the alteration as such that is liable to be classified as new aid. Accordingly 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".

(105) Thus, on the basis of the above mentioned legal principles which are clarified in the Commission's 2009 Broadcasting Communication in paragraph 31, three different questions have to be addressed when deciding whether a measure constitutes new or existing aid:

– Was the legal basis of the aid adopted before the entry into force of the EEC Treaty?

– Have there been any subsequent changes that affected the actual substance of the original measure or are the changes rather of a purely formal and administrative nature; and

– In case of substantial modifications, are they severable from the original measure and can hence be assessed separately or in the alternative is the original measure as a whole transformed into a new aid?

7.1. Legal basis adopted before the entry into force of the EEC Treaty in the Netherlands

(106) The Netherlands is a founding member of the European Economic Union. The practice of providing annual payments to public broadcasters from State resources was well established at that time.

(107) The requirement that the programmes broadcasted are orientated towards the cultural and religious needs of the people, so as to be understood as being in the general interest, can be traced all the way back to the Radio Regulation of 1930.

---

[89] 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 EEC Treaty (OJ L 140/1 of 30.4.2004).

[90] Joined Cases T-195/01 and T-207/01, Court of First Instance, *Government of Gibraltar v. Commission* [2002] ECR II-2309.

(108) As outlined above, the basis for the charging of a periodical licence fee was laid down in Article 3(3) Temporary Telegraph, Telephone and Radio Decree 1944. The Decree provided that the fee would be collected by the State operator PTT, with the funds collected being used to cover the costs related to the production and transmission of programmes. This was consolidated in the Decisions of January 1947, which gave broadcasting time to specified broadcasting associations and provided that a compulsory licence fee system would be used to provide funds for the costs of the broadcasters, who would receive a share of the income.

(109) The same system was maintained in the Television Decree of 1956. In light of technological developments, radio and television broadcasts were now possible. The broadcasting associations received funding from the State Media Budget, financed by means of a licence fee (*luister-* and *kijkgeld*), which was collected by PTT, with the net proceeds being transferred to the State budget.

(110) Pursuant to Article 21 of the 1956 Decree, the costs of programming, including the costs associated with acquisition, maintenance, and exploitation of television and broadcasting equipment, were to be paid out of State resources. The funding is clearly linked to the need to have been allocated broadcasting time, and such allocation brings with it the requirement to provide programmes in the general interest.

(111) The Commission considers that the Television Decree 1956 is the legal basis for the measure, thus then this was before the entry into force of the EEC Treaty in The Netherlands and so the measure should be considered existing aid, provided that the legal framework introduced by the 1956 Decree is "still applicable" today. It is therefore necessary to consider the alterations which have been made to the aid since it was first introduced.

7.2. Assessment of alterations to the legal framework

(112) Since the creation of the Dutch Public Broadcasting System, there have been several alterations to the Media Act which are of a purely formal or administrative nature, such as the introduction of a separate regulatory body in the form of the Media Regulator in 1987, the division of the NOS into NOS RTV and NPS in 1994 and the separation between NOS and NPO in 2009.

(113) As set out below, other alterations are equally not "substantial" according to the criteria set out in paragraph 31 of the 2009 Broadcasting Communication.

7.2.1. Alterations to the amount of aid

(114) Although the amount of funding received by the public broadcasting organisations from State resources has increased over the years, this is not in itself sufficient to substantially alter the existing aid character of the measure. In *Namur-Les Assurances*[91] the Court held 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*

[91] C-44/93 *Namur-Les Assurances*, [1994] I-03829, paragraph 28.

moment in the life of the undertaking if the aid is provided under earlier statutory provisions which remain unaltered".

7.2.2. Alterations to the aim pursued by including new audiovisual services

(115) In 2000, the definition of the public service remit was broadened to include "side tasks". According to Article 13c of the Media Act as modified in 2000, the public broadcasting system "*can also fulfil its task, as mentioned in the first paragraph, by providing means of supply and distribution of programme materials, other than those included within paragraph (1)(a)"*. Side tasks were considered to be part of the public service task of the broadcasters and could be publicly financed. In the 2008 Media Act, the distinction between main tasks and side tasks within the public service remit was deleted to form one uniform public service remit[92].

(116) In the Commission's view, the broadening of a public service mandate for a public service broadcaster by the inclusion of a possibility to provide TV and radio programmes and related services over new types of platforms such as the internet or mobile telephones, does not as such lead to the conclusion that the existing aid scheme has been substantially modified with the meaning of paragraph 31 of the 2009 Broadcasting Communication and the *Gibraltar* jurisprudence.

(117) Already in the *BBC News 24* decision of 18.3.2000[93], the Commission stated that the public service nature of a service cannot solely be judged on the mere basis of the distribution platform used. Once a Member State has defined a certain service as being part of the public service remit, the service remains a public service regardless of the distribution platform, provided the programme concept underlying it and the public funding arrangements do not substantially change, either.

(118) Also, in its Decision concerning Germany's public service broadcasting system of 24 April 2007, the Commission concluded that amendments to the inter-State Treaty on public broadcasting did not qualify as substantial change of the aid scheme because of the changes to the possibility for public service broadcaster to offer new media services, as well as the possibility granted to public service broadcasters to distribute existing TV or radio programmes via digital technology and to offer additional digital channels.[94]

(119) In the case at hand it should be noted that the very wording of Article 13(c)(3) suggested that "side tasks" were considered to be just another way for the public broadcasting organisations to fulfil the original remit, which itself had not been affected by the 2000 amendment. Moreover, Article 13(c)(3) did not impose a clear obligation upon the public broadcasters to offer defined additional public services, but merely introduced the *possibility* of supplying and distributing programme materials on other distribution platforms.[95]

---

[92] According to Article 2.1 of the Media Act.

[93] NN 88/98 *Financing of a 24-hour advertising-free news channel out of licence fee by BBC*, OJ C 78, 18.3.2000, p. 6

[94] Commission Decision in E 3/2005 of 24.4.2007 at 13 and 200-214.

[95] A special notification procedure was foreseen for specific services that the public broadcasters wished to perform under this legal provision. Insofar as the public broadcasting organisations would only be allowed to carry out activities on the basis of

(120) 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 the objective is not changed and that the legal basis for the financing of the public service activities has not been changed.

(121) The Commission is therefore of the opinion that the introduction of Article 13(c)(3) into the Media Act in 2000 does not constitute a substantial change to the aid scheme.

(122) The subsequent merging of "side tasks" with "main tasks" in the Media Act of 2008 and the re-formulation of the two parts of the public service remit as one multimedia public service remit cannot either be regarded as a substantial alteration of the aid scheme. This is because the public service remit in the Media Act of 2008 merely merges two categories of the public service remit already pre-existing before 2008, namely main and side tasks. This is a formal change and does not as such lead to a substantial modification of the public service mission.

(123) These observations on the nature of the aid are in line with the Commission's policy on technology neutrality. They are however notwithstanding the Commission's view that a multimedia public service remit which is formulated in broad terms in Article 2.1 of the Media Act must be further specified in other (legally binding) acts such as a performance contract and/or individuals decisions of the media minister and that such specification should consider the material conditions of the Amsterdam Protocol. (See sections 8.2.2 and 8.4.3).

7.2.3. Alterations to the source of financing / basis on which the levy is made

(124) Through the creation of STER in 1965 advertising was introduced as an additional source of funds. It should be noted that the advertising revenues were added as a funding source before the end of the transitional period provided for in Article 8 of the original EEC Treaty. This was at a time when the broadcasting market was not open to competition by virtue of either national or European Union law. Therefore, this change benefits from existing aid nature of the original scheme pursuant to Article 1(b)(v) of Regulation (EC) No 659/1999.

(125) The increase in possibilities for STER advertising on public channels following the amendments to the Media Act by Act of 13 December 1990 did constitute neither a severable nor a substantial alteration to the ultimate source of the financing. It simply meant that more funding was potentially available to cover the increasing costs of the public broadcasting organisations.

(126) With the Reorganisation Act 1997 State funds were attributed by the Minister directly to the Board of Directors of the NOS rather than through the Media Regulator. This development is also considered to be a substantial alteration of the aid by the complainants. However, the source of the financing remained the same insofar as the

---

this provision that reflected the basic objective of the entire scheme, which is to provide the general public with a balanced package of programmes that meet certain quantitative and qualitative criteria, while the transmission mode merely has a serving function to achieve that objective, one would consider that the aim of the measure did not change. In such a case, the introduction of the legal provision that reflects technological developments would remain within the original remit.

funds are provided by the State from the Media Budget. The only aspect of the system which is altered by this development is the "pathway" via which funds are transferred to the individual broadcasting associations. The ultimate source of the funds and the ultimate beneficiary is unaltered. As such this amendment to the system should not be seen as altering the source of the financing, nor any other relevant aspect of the aid. It should be considered as an alteration simply to the administrative side of the financing system.

(127) From the entry into force of the Media Act 22 December 1999 (as of 1 January 2000), the licence fee, which was charged on the possession of equipment capable of receiving broadcasts, was abolished and in its place the State Broadcasting Contribution was established (*"Rijksomroepbijdragen")*. This was funded out of general income tax proceeds, and continued to flow into the Media Budget for distribution to the public broadcasting system.

(128) The payments foreseen under the original Television Decree 1956 and the payments foreseen under the new funding system introduced from 1 January 2000 are both payments of cash resources from the State Media Budget. Moreover, the overall amount of funding remained broadly the same. Hence, there was neither a severable nor a substantial alteration in the source of the financing capable of altering the classification of the aid as existing.

(129) The Commission considers that the charge is still based on the possession of equipment capable of receiving broadcasts, but that in the digital age the Government has chosen to simply assume that every member of the population who pays income tax also possesses a television or other broadcast equipment. Moreover, it seems that the overriding reason for the change was one of improving the efficiency of the system, and reducing the costs involved in the collection of the fees and the supervision of the system.

(130) The changes introduced by the Media Act of 2008 to the financing mechanism cannot be regarded as substantial or severable alterations either. The legal provisions governing the annual payments from the State Media Budget have not been substantially changed, but rather retained in the 2008 Media Act. Already from 2000 minimum available funds existed as a way to ensure independent financing. The increase in the 2008 Media Act[96] is neither a severable nor a substantial alteration to the ultimate source of the financing, but rather ensures a certain minimum available amount.

7.2.4. Alterations to the persons and bodies affected

(131) The Broadcasting Act 1967 introduced the possibility that new broadcasters would be permitted to the system under certain conditions. In general terms, the Broadcasting Act 1967 retained the same fundamental approach to the financing of the public broadcasting system. However, it included provisions that permit the introduction of new broadcasting

[96] The minimum amount increased in the 2008 Media Act by € 47,179, million starting from € 577.093 million. This increase amounts to 8,2% and is well below the 20% benchmark mentioned in Regulation 794/2004, article 4.

associations which were also eligible to receive public funding, provided they could demonstrate that they fulfilled certain conditions[97].

(132) In principle it might be possible to argue that the financing of a newly established broadcasting corporation constitutes new aid. However, in the current case the financing of public broadcasting concerned the public service broadcasting system as such (in other words, public service broadcasting as an institution), with the legislation providing for the available funds to be shared amongst the organisations which had been given broadcasting time, in accordance with the existing law. Therefore the inclusion of new broadcasters in order to expand the range of programming and the range of "socio-political pillars" of society represented within the system should not be seen as a severable or as a substantial alteration resulting in the aid becoming new aid.

(133) In support of considering the system "as a whole" it should also be noted that it is possible for individual associations to *leave* the public system, as well as join it. One example of this is the case of Veronica, an association that was originally part of the public broadcasting system but which later chose to become a commercial operator. Thus the Commission concludes that no severable and substantial alterations were made to the bodies or persons affected by the measure either de iure or de facto.

(134) The Media Act of 2008 introduced a number of procedural modifications regarding admission of new broadcasters without, however, substantially altering the system as a whole.

7.2.5. Conclusion

(135) Thus, the Commission concludes that, although it is accepted that the annual payments from State resources to the public broadcasting organisations in The Netherlands have been modified since the accession of The Netherlands to the EEC Treaty in 1958, these modifications are neither severable, nor substantial.

(136) Indeed, the basic aspects of the aid, in terms of the amount of the advantage, the aim pursued, the source of financing or basis on which the levy is made, the persons and bodies affected have not substantially been altered since the Television Decree of 1956.

(137) The public financing of the Netherlands for its public service broadcasting system can therefore be considered as "existing" aid in accordance with Article 1(b)(i) and (v) of the Procedural Regulation.

[97] A similar system is in place under the current 2008 Media Act.

8. COMPATIBILITY ASSESSMENT OF THE CURRENT FINANCING REGIME

8.1. General remarks

(138) The compatibility of the aid measure identified above has to be assessed under Article 106 (2) of the TFEU, taking into account the Amsterdam Protocol as well as the 2009 Communication on the application of State aid rules to public service broadcasting ("the Broadcasting Communication"), which sets out the principles and methods for assessing the compatibility of State funding in the public broadcasting sector.

(139) The Amsterdam Protocol states that *"[t]he provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the public interest, while the realisation of the remit of that public service shall be taken into account*."

(140) In accordance with the Protocol and the Court jurisprudence interpreting Article 86(2) of the EC Treaty [currently Article 106(2) TFEU] as well as the Protocol, the Commission verifies whether[98]:

- the service in question is a service of general economic interest and clearly defined as such by the Member State (definition);
- the undertaking in question is explicitly entrusted by the Member State with the provision of that service (entrustment);
- 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 Union (proportionality test).

(141) It is for the Commission to assess, on the basis of evidence provided by the Member States, whether the criteria are satisfied. As regards the definition of the public service remit, the role of the Commission is to check for manifest errors. The Commission further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations[99]. In carrying out the proportionality test, the Commission considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding.

[98] 2009 Broadcasting Communication, paragraph 37
[99] 2009 Broadcasting Communication, paragraphs 39 and 40

8.2. Definition of the public service remit

8.2.1. General remarks

(142) Member States are solely competent and at the same time obliged to establish a clear official definition of the public service mandate (also "the public service remit"). Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 106(2) is applicable.[100]

(143) The definition of the remit must be as precise as possible to 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. Otherwise, there can be no effective control whether public funds are indeed used to finance the public service or rather commercial activities.[101]

(144) At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of public service broadcasters, a qualitative definition - entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer - is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 106 (2).[102] These qualitative criteria are the very justification for the existence of broadcasting SGEIs in the audiovisual sector.[103]

(145) The public service remit may also include services which are not "programmes" in the conventional meaning such as those provided via TV or radio. These other audiovisual services are, for instance, online services. Public service broadcasters may therefore use State aid to provide audiovisual services over all kinds of new distribution platforms, provided that these services are addressing the same democratic, social and cultural needs of the society in question and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.[104]

(146) As regards the definition of the public service remit, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product. 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 Amsterdam Protocol - the "democratic, social and cultural needs of each society".[105]

---

[100] Paragraph 43 of the 2009 Broadcasting Communication.
[101] Paragraph 45 of the 2009 Broadcasting Communication.
[102] Paragraph 47 of the 2009 Broadcasting Communication.
[103] See Court of First Instance in T-442/03, SIC v. Commission, paragraph 211.
[104] Paragraph 81 of the 2009 Broadcasting Communication.
[105] Paragraph 81 of the 2009 Broadcasting Communication. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising, for example.

8.2.2. Definition of the public service remit

(147) In the Article 17 letter, the Commission expressed doubts mainly as to the definition of side tasks but also as regards the distinction between side tasks and side activities. The distinction between main tasks and side tasks in the ´old´ Media Act has been abandoned in 2008 (see section 2.3.1). Accordingly it has to be seen to what extent the Media Act contains a clear definition of the public service remit and distinguishes it from side activities.

(148) The public service remit of the Dutch public service broadcasting system is defined by Article 2.1 of the Media Act together with the ministerial decisions approving the number and nature of programme and other channels, and the performance agreement (*prestatieovereenkomst*) which are based on the strategy plan (*concessiebeleidsplan*). First, Article 2.1 stipulates a wide concept of public service broadcasting by using the concept of "public media services". Such publicly financed services consist of a mix of media offers, in the field of information, culture, education and entertainment, which have to meet the democratic, social and cultural needs of society by being varied, editorially independent, accessible, of a professional quality and meeting different audiences[106].

(149) Such a broad definition of the public service remit as in Article 2.1 of the current Media Act, however, does not provide for a sufficiently clear benchmark to distinguish which media services can specifically be considered to be part of the public service remit of the public service broadcasters and which not.

(150) The Dutch Council of State already stated in its advice to the Dutch government[107]:

De Raad begrijpt, mede tegen die achtergrond, de keuze voor een techniek-onafhankelijke formulering van de publieke mediaopdracht. Dat stelt evenwel hoge eisen aan de formulering van de criteria (content), daar alleen hetgeen tot de publieke mediaopdracht gerekend kan worden, in aanmerking komt voor publieke financiering zonder dat sprake is van staatsteun. (..) De Raad is van oordeel dat deze formulering onvoldoende onderscheidend vermogen heeft voor de afbakening van de publieke mediaopdracht ten opzichte van de activiteiten van de commerciële omroep. Weliswaar geeft artikel 2.1, tweede lid, criteria voor de wijze waarop de publieke mediaopdracht wordt uitgevoerd (voldaan moet worden aan democratische, sociale and culturele behoeften van de Nederlandse samenleving), maar de definitie van de publieke mediaopdracht bevat verder geen aanknopingspunten aan de hand waarvan kan worden vastgesteld dat bepaalde activiteiten niet tot het domein van de publieke omroep, maar tot dat van de commerciële omroep behoren. Dat zou ertoe kunnen leiden dat de commerciële omroep op alle terreinen kan worden geconfronteerd met concurrentie van de kant van den publieke omroep. (..) De formulering van de publieke mediaopdracht biedt door zijn ontoereikend onderscheidend vermogen naar het oordeel van de Raad dan ook onvoldoende

[106] Offers should: be balanced, multiform, varied and of high quality; provide a balanced representation of society and the variety of beliefs, opinions and interests with regard to society, culture and religion of the population; reach a relevant proportion of both the general public as well as various age and culture groups with a specific focus on minority groups; be independent from commercial and government influences; be of a high professional quality and be accessible for all.

[107] See the Advice of the Dutch Council of State as regards the public service remit in Article 2.1 of te Media Act 2008 as quoted in Tweede Kamer der Staten-Generaal, vergaderjaar 2007-2008, 31.356, Nr. 4, at p. 7.

waarborgen tegen concurrentievervalsing tussen de publieke en de commerciële omroep en tegen overtreding van de Europese staatssteunregels."

(151) The Commission, however, also finds that Member States may define a public service remit in more than one legally binding act provided all acts are sufficiently transparent.[108] In the present case, the broad concept of "public service media" in the Media Act is in fact further specified in Ministerial decisions which may approve the use of programme and other channels by public service broadcasters on the basis of the strategy plan in which the public service broadcasters explain how they intend to carry out the public service remit in the next five years. This puts also requirements to the specificity of the strategy plan. Having assessed the strategy plan the Commission considers that the strategy plan[109] lacks the specificity to determine what services would be envisaged and may be approved by a Ministerial decision. Such decision should clearly set out what services are approved as part of the public service remit.

(152) On the basis of the strategy plan the Minister and the public broadcasters enter into a performance agreement which contains qualitative and quantitative objectives. It is intended to replace the ´programme requirements[110] and extend these to new audiovisual services. However, as such agreement has no sanctions (and is concluded only after the Ministerial decision including a prior evaluation, see below) the Commission considers it does not provide sufficient clarification either.

(153) As set out above in the Commission's view, the public service remit is not sufficiently precise. However, as set out in its preceding case practice, the Commission in principle considers that the public service remit can be further specified in the framework of a prior evaluation (Amsterdam test, ex ante assessment) In the Netherlands such prior assessment process (see hereafter in section 8.4.3) is carried out by the government, which the Dutch authorities refer to as one step in defining the public service remit[111]. Such a process could ensure a clear defined public service remit 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 in particular new media activities does not run counter to the interest of the Union.[112]

(154) In view of the discretion of the Netherlands to define the remit, the Commission is prepared to accept either an exhaustive list of entrusted new audiovisual services which

---

[108] In this connection, see in particular what was stated by the Commission in aid case E 3/2005 (financing of public broadcasters in Germany), paragraph 224: "*in this respect, the Commission also notes that the general definition of public broadcasters under Article 11 of the Interstate Broadcasting Treaty [Rundfunkstaatsvertrag] must be specified in greater detail by legally binding guidelines which are to be published."* and For instance, the public service remit in France is defined by means of a "*contrat d'objectifs et de moyens*" between France Télévision and the government. This contract complements a "*cahier des charges des chaînes publiques*". See Commission Decision of 20.4.2005 in E 10/2005 at paragraph 47 and 48

[109] For instance, the interim strategy plan for 2008 – 2010 page 45 sets out that the public service broadcasters will develop a "bouquet" of new theme (internet) channels without, however, specifying concretely under which circumstances such new channels satisfy the social, democratic and cultural needs of the Dutch society

[110] These programme requirements set out binding requirement related to the categories of content to be broadcasted.

[111] See section 3.2.1.3. of the commitments ("De ex ante goedkeuringsprocedure door de minister … De publieke media opdracht").

[112] Commission Decision in E 3/2005 of 24.4.2007 at 230. See also 2009 Broadcasting Communication at paragraph 80 ("This has raised new questions concerning the application of the State aid rules to audiovisual services which go beyond broadcasting activities in the traditional sense").

clearly[113] satisfy the requirements of the Amsterdam Protocol and/or broader qualitative criteria which are then verified on a case by case basis in a procedure at the national level that assesses the requirements of the Amsterdam Protocol before a new significant audiovisual service is put on the market.[114]

(155) It is for each Member State to establish a system for determining the public value character of new audiovisual activities in full transparency.[115] Whether the procedure foreseen in the Netherlands to assess the requirements of the Amsterdam Protocol before a new significant audiovisual service is put on the market satisfies this requirement will be assessed in section 8.4.3.

8.2.3. Conclusion on the definition of public service remit

(156) Following the preliminary concerns raised by the Commission in the Article 17 letter, the Media Act has abolished the distinction between main and side tasks. As explained above, the Commission considers that the current definition of the public service remit in Article 2.1 Media Act 2008 does not *on a stand alone basis* sufficiently specify which services can be deemed to be part of the public service and which are outside the scope.

(157) While other legally binding acts such as the performance agreement and individual ministerial decisions approving services as part of the public service remit, both based on the strategy plan, may help to clarify this broad public service remit in Article 2.1 Media Act, these acts are not precise, also in view of the open formulation in the strategy plan, and the performance agreement lacks sanctions when not fulfilling the requirements of the public service remit and not always allows for Court proceedings[116].

(158) The definition is also unclear as regards which potential new publicly funded audiovisual services satisfy the social, democratic and cultural needs of the Dutch society.[117] The prior assessment procedure leading to the entrustment of audiovisual services by means of individual ministerial decisions could in principle help to ensure a clearly defined public service remit. However, as will be further explained in section 8.4.3, the prior assessment procedure does not satisfy all conditions set out the 2009 Broadcasting Communication[118].

(159) Therefore, the Commission considers that the current provisions to define the public service remit are, in particular for new types of audiovisual services, not sufficiently precise and do not guarantee that the services covered by this definition can be regarded as service of general economic interest within the meaning of Article 106 (2) TFEU.

---

[113] So far, the Dutch broadcasting system contains only negative lists of clearly commercial activities such as the illustrative list of commercial activities on the website of the Media Regulator or the exclusion of commercial activities such as merchandising (eg. sale of ´Sesamstraat´ puppets), e-commerce (eg. sale of travels) and non-electronic products (eg. prints) in the Media Act.

[114] Paragraphs 84 to 91 of the 2009 Broadcasting Communication; see also Commission decision of 28.10.2009 in case E 2/2008 at 177 and Commission Decision in E 3/2005 of 24.4.2007 at 251.

[115] Commission Decision in E 3/2005 of 24.4.2007 at 312, 313 and 362 and paragraph 88 of the 2009 Broadcasting Communication.

[116] Article 5 of the performance agreement

[117] Paragraph 48 and 88 of the 2009 Broadcasting Communication.

[118] In particular paragraph 88 of the 2009 Broadcasting Communication

8.3. Entrustment and supervision

(160) Pursuant to paragraphs 50 and 53 of the 2009 Broadcasting Communication, the public service remit is to be entrusted by way of an official act (for example, by legislation, contract or terms of reference). Additionally, Member States are required to provide appropriate mechanisms to supervise the extent to which the broadcasting institutions are in fact performing the public service as agreed. The decision as to how compliance with public service obligations is to be supervised is in principle a matter for the Member States. However, effective supervision can normally only be guaranteed by a body which is effectively independent of the entrusted undertaking[119].

8.3.1. Entrustment

(161) As set out in section 2.3.1, the scope of the public service remit in the Media Act, is further clarified by way of a formal ministerial decision approving the nature and number of distribution channels[120], based on a strategy plan, which are part of the public service remit. The strategy plan (*concessiebeleidsplan*) contains a description of how the public service broadcasters envisage to implement their tasks as part of the public service remit over a period of five years. In a second stage, on the basis of the strategy plan, a performance agreement (*prestatieovereenkomst*) is concluded between NPO and the media Minister which is also important in light of the supervision of the public service remit. So, there is a two stage entrustment process.

(162) The Commission considers that the procedure as described above[121] can in principle be considered to be an entrustment (in several steps) within the meaning of the 2009 Broadcasting Communication. The ministerial decisions and performance agreement have to be legally binding to qualify as complementary entrustment acts to article 2.21 of the Media Act, which presupposes the possibility of adequate remedies. However, the performance agreement does not contain sanctions if objectives are not achieved. In order to be able to ensure the respect of the public service obligations, the Commission considers that only including effective sanctions can be a valid entrustment.

8.3.2. Supervision

(163) The Commission notes that the public service broadcasters yearly report to the Media Regulator and to the Minister on how the public service remit is carried out and whether the objectives are achieved[122]. Both the Minister and the Media Regulator can be considered effectively independent from the management of the public service broadcaster. In addition, these bodies should have the powers, the necessary capacity and

---

[119] See paragraph 54 of the 2009 Broadcasting Communication.

[120] The Dutch authorities define a distribution channel ("*aanbodkanaal*") independently from the way of distribution. It is defined as a bundle of organised and integrated media offers which are offered under a recognisable name through an electronic communication network. The term distribution channel would for instance cover TV channels, (on demand) internet channels, websites and a catch up service.

[121] On the basis of Articles 2.1, 2.20, 2.21, 2.22of the 2008 Media Act

[122] Article 2.58 of the 2008 Media Act

resources to carry out supervision regularly and if necessary propose remedies to ensure respect of the public service obligations.

(164) The uncertainties surrounding the scope of the current public service remit, as set out above in section 8.2, also affect the supervision of the public service remit. As already set out in the Commission's Article 17 letter and as also underlined by the Dutch Council of State in its advice to the Dutch government on the new Media Act 2008[123], it may be difficult to verify ex post whether or not by offering a concrete new service the public broadcasting system actually provides a public service within the meaning of the public service remit.

8.3.3. Conclusion Entrustment and Supervision

(165) The Commission considers that the public service remit can be properly entrusted by means of several legally binding acts including the Media Act, the performance agreement and individual ministerial decisions. The Commission therefore has no objections to the entrustment process in the Dutch system as such.

(166) However, the performance agreement lacks sanctions in case of an infringement of the public service remit as defined in the performance agreement and individual ministerial decisions.

(167) In addition, for there to be an effective supervision of the remit, the remit must be clearly defined which the Commission still considers to be insufficient as explained above.

(168) In summary, in the present situation the Dutch public broadcasting system does not foresee a clear definition of the public service remit, which prevents adequate entrustment and effective supervision and foresees no sanctions if public broadcasters do not operate in line with the public service tasks.

8.4. Proportionality

(169) In carrying out the proportionality test, the Commission considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Commission assesses, in particular on the basis of the evidence that Member States are bound to provide, whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities.[124]

(170) Firstly, in order to satisfy the proportionality test, public service broadcasters must maintain a clear and appropriate separation between public service activities and non-

[123] See also the advice of the Dutch Council of State, as quoted in section 8.2.2 about the public service remit in Article 2.1 of the Media Act 2008 as quoted in Tweede Kamer der Staten-Generaal, vergaderjaar 2007-2008, 31.356, Nr. 4, at p. 7

[124] See paragraph 40 of the 2009 Broadcasting Communication.

public service activities including a clear separation of accounts.[125] The amount of public compensation must 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.[126]

(171) Secondly, Member States must provide for appropriate mechanisms to control that in practice there is no over-compensation of the public service remit. They shall ensure regular and effective control of the use of public funding.[127]

(172) Thirdly, Member States should ensure that public service broadcasters respect the principle of proportionality also with regard to their behaviour on the market.[128] Member States shall ensure that public service broadcasters respect the arms' length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.[129]

(173) Fourthly, Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account their potential effects on trading conditions and competition.[130]

8.4.1. Net Cost Principle and Transparency

(174) The Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation 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 of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.

(175) However, public service broadcasters may retain yearly overcompensation above the net costs of the public service to the extent that this is necessary for securing the financing of their public service obligations. In general, the Commission considers that an amount of up to 10% of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay.

(176) By way of exception, public broadcasters may be allowed to keep an amount in excess of 10% of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a nonrecurring, major

[125] *Ibid.*, paragraph 60.
[126] *Ibid.*, paragraph 71.
[127] *Ibid*, paragraph 77.
[128] *Ibid.*, paragraph 92.
[129] *Ibid.*, paragraph 93.
[130] *Ibid.*, paragraph 84.

expense necessary for the fulfilment of the public service mission. The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication

(177) First, as public service broadcasters in the Netherlands carry out activities both as part of the public service and outside the scope of the public service remit (the side activities and association activities), they are required to maintain a separation of accounts.

(178) The Transparency Directive 2006/111/EC[131] requires Member States to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a Service of General Economic Interest. In the Netherlands the Transparency Directive is implemented in Competition law. The obligation for public service broadcasters to apply a separation of accounts is laid down in a Ministerial decision on the basis of the Media Act[132].

(179) By ministerial decision of 12 August 2009 the rules for financial reporting for national public broadcasters, world broadcaster and STER (Financial Handbook) have been adopted. The financial handbook obliges public service broadcasters to maintain separate accounts for association activities and side activities[133] (i.e. non public service activities) and now also contains cost allocation rules[134]. The Commission therefore takes the view that the requirements for separate accounting have been met.

(180) Secondly, the net benefits of commercial activities related to the public service activities must be taken into account for the purpose of calculating the net public service costs. (see paragraph 67 of the Broadcasting Communication).

(181) Based on the information received from the Dutch authorities, the Commission considers that the net revenues from the exploitation of the public service remit are used for the financing of the public service remit. Indeed, all the net revenues of side activities and association activities have to be used for the fulfilment of the public service mission. Consequently, the net costs of the public service activities are determined by taking into account the revenues from all activities of the public service broadcasters.[135] The calculation of the public service costs hence meets the obligation set out in paragraph 67 of the Broadcasting Communication. Subsequently the public compensation should not exceed the net costs of the public service remit.

(182) The Dutch authorities claimed that in the Media Act measures were implemented to prevent overcompensation in section 2.6.6.2. Having assessed the mechanism foreseen in the new Media act the Commission concludes that the current mechanism does not sufficiently prevent that public service broadcasters may be compensated more than their public service costs, because not all public funding received by NPO is adequately taken into account.

---

[131] OJ L 318/17, 17.11.2006
[132] Article 2.172(3) of the 2008 Media Act (p 32 letter)
[133] The latter one being split between result from programme guides, capital and other side activities
[134] See also Court of Auditors reaction to updated Handbook
[135] Ad hoc decision, 22 June 2006, C(2006)2084 def, paragraph 135

(183) The Commission notes that the NPO can allow the individual public service broadcasting organisations to reserve funds for programming and allowed differentiated ceilings from 5 to 20% (see section 5) and that the total of the reserved funds is limited to 10% of the budgeted public funds made available[136].

(184) In the event any individual broadcasting organisation would reserve more than the limit set by NPO, the excess reserves had to be repaid to NPO which would reserve the funds for programming itself[137]. If the total reserves for programming, held by individual broadcasting organisations and NPO together, exceed 10% of the budgeted public funds made available, the Media Regulator recovers the excess funds for the benefit of the Media reserve[138].

(185) The Commission considers that it can accept the different limits set for individual broadcasters in view of the close link between individual public service broadcasters and NPO, and because the distortive effect is the same whether the net cost principle is applied on an aggregate or individual level due to NPO´s central role. This also takes account of the specificities of the Dutch broadcasting system with one central body NPO in charge of financing individual broadcasting organisations[139]

(186) However, the Commission considers that the mechanism does not take full account of all compensation the public service broadcasters receive above their public service costs. While individual public service broadcasters can only keep retained overcompensation in programming reserves[140] which is taken into account in calculating overcompensation, the public funding NPO receives for its activities, and which overcompensation is reflected in the foundation reserves, is not part of the mechanism taken up in the Media Act. Therefore, the Commission concludes that the Dutch broadcasting system does at present not prevent that public service broadcasters receive more public compensation than needed to carry out their public service tasks in line with paragraph 73 and 74 of the Broadcasting Communication[141].

8.4.2. Financial control mechanisms

(187) The Commission considers that not only mechanisms should be in place to ensure that there is no overcompensation. There should also be regular and effective control on the

[136] In the Broadcasting Communication the 10% is mentioned as a percentage on the basis of the annual budgeted expenses. In normal circumstance the annual public funding will be lower than the annual expenses as part of the annual expenses is financed by the revenues from public broadcaster's commercial activities.

[137] These funds have been qualified as ad hoc funds (see decision C(2006)2084def. Although not part of this procedure they should be taken into account in determining overcompensation.

[138] The General Media Reserve (*Algemene Media Reserve*) is a reserve for public broadcasting which is managed by the Media Regulator and controlled by the minister.

[139] NPO distributes the public funding among the different broadcasting organisations on the basis of the rules set out in the Media Act. Although for part of the funding NPO acts as a interlocutor, for the other part it decides on the distribution of financing itself.

[140] An exception is made for new public service associations which can build up reserves up to € 750.000 (Media Act 2.174a and Media Decree 16a for financing of association activities).

[141] In this respect, the Commission notes that although this decision only applies to the annual financing of public service broadcasters (Article 110 and 111 of the ´old´ Media Act) and not the ad hoc financing, all public funding has to be taken into account to calculate whether public service broadcasters have been overcompensated.

use of public funding[142]. Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis (Broadcasting Communication, paragraph 79).

(188) The Commission observes that the Dutch authorities have foreseen an annual control of the public funds by the Media Regulator[143], having the possibility of sanctions, and encompasses not only the expenditure of public funding but also of other commercial revenues. Therefore, the Commission considers that effective financial control mechanisms are in place.

8.4.3. New audiovisual services and prior assessment

(189) The Commission considers that in order to ensure that new audiovisual media services of the Dutch public broadcasters do not distort competition contrary to the common interest, the government should foresee a procedural framework which assesses such planned new activities as to their compliance with the Amsterdam Protocol prior to their introduction on the market.[144]

(190) The general administrative rules on procedure in the Netherlands foresee a procedure which can in theory serve as basis for developing such prior assessment of the Amsterdam Protocol. As for any administrative act, the media minister must take account of third party comments and properly balance "all interests concerned" by its envisaged decision and provide reasons for its decision.

(191) However, in order to be effective in terms of the Broadcasting Communication, it should be an open transparent process, including an active and adequate period for consultation. There is no clear obligation on the public body in charge of the assessment to also verify the *second* element of the Amsterdam Protocol as set out in paragraph 88 of the 2009 Broadcasting Communication.

(192) The *Erkenningswet*, introduced the possibility for public service broadcasters to introduce "prototypes" without a prior assessment in the Media Act.[145] The definition of "prototypes" which are exempt from the prior assessment is currently too broad as it also comprises fully fledged services which should normally be tested as to the value added for satisfying social, democratic and cultural needs of society and the market impact.[146]

(193) Finally, it is at present not foreseen in an effective binding way that the nature and scope of distribution channels are sufficiently clearly defined before a ministerial draft decision

---

[142] Broadcasting Communication, paragraph 77
[143] 2008 Media Act, section 2.6.6.1
[144] Paragraph 86 of the 2009 Broadcasting Communication.
[145] Article 2.21a
[146] The concept of "prototype" currently includes services which are not limited in scope of audience and they can be "tested" for 1.5 years. Such "prototypes" are in fact fully fledged services that should be subject to the test as set out in § 88 and 90 of the 2009 Broadcasting Communication.

(*concept besluit*) so as to allow third parties to submit *substantiated* comments on the possible market impact.[147]

(194) An effective prior assessment is important, the more in view of a public service remit which is as broadly formulated in article 2.1 of the Media Act. In the absence of an effective prior assessment public funds can then be used to finance virtually any type of services remotely related to moving images and sound. The Commission therefore shares the concern of the complaints, in particular of the Dutch newspaper association whose members must develop a viable online business model or else exit the media market. An uncontrolled expansion of the public service broadcasters´ offers to all kinds of media activities in disrespect of the Amsterdam Protocol would seriously harm media pluralism in the Netherlands and elsewhere. This would be in conflict with the common interest of Europe to maintain a pluralistic media landscape in the fast developing media environment.[148]

(195) The use of State aid for funding new audiovisual services which are as broadly defined as "public media services" must therefore carefully be examined as to their compliance with the substantive elements of the Amsterdam Protocol to ensure amongst others that the distortion of competition and of cross-border trade is not contrary to the common interest of the Union.

(196) This is currently not yet the case in the Netherlands. Hence, there are no adequate safeguards that the State aid to the public broadcasters is proportionate to the public service remit.

8.4.4. Respect of market principles

(197) In line with the Broadcasting Communication, the Commission considers that it is in the first place up to national authorities to ensure that public service broadcasters respect market conditions[149] (see section 4).

(198) The Commission considers that the preliminary concerns expressed in the Article 17 letter regarding the market conformity of the relationship between NPO and its subsidiary Nozema has ceased as NPO has sold its shareholding in Nozema. More generally the Commission observes that the rules applicable to side activities apply to shareholdings for public service broadcasters[150] and therefore obliges public service broadcasters to act in line with market conditions in their relation with subsidiaries.

---

[147] These doubts are without prejudice to the validity of the media minister's decision of 21.4.2009 approving 12 radio channels and 2 theme channels. It is not for the Commission but for the national judge to assess whether the *concept besluit* preceding this decision was sufficiently specified to allow third parties to adequately substantiate their comments on the potential market impact.

[148] Moreover, the broad concept enshrined in Article 2.1 of the media Act is problematic because of the fact that public service broadcasters in the Netherlands also engage in so-called "association activities" which could be cross-subsidised from public funds if the definition of the public service mandate is not sufficiently clear and precise.

[149] 2009 Broadcasting Communication, paragraph 96

[150] 2008 Media Act, Article 2.134

(199) As regards cable operators, the Dutch authorities informed the Commission of a request from Dutch Parliament, to allow public service broadcasters to abstain from charging copyrights for the channels where there was an obligation for cable operators to transmit such channels ("must carry")[151]. They also clarified that for all (other) channels, normal market principles would apply, i.e.: the price for copyrights would be negotiated freely between the cable operators and the public broadcasters.

(200) As regards the channels covered by the must carry obligations, the Commission considers in line with its findings in the decision concerning the ad hoc financing of Dutch public service broadcasters[152] that *commercial agreements between the broadcasters and the cable operators can take various forms, particularly in view of the fact that the transaction involves an exchange of transmission services for availability of content, which is valuable to both parties.* In this decision it was concluded that there were no clear indications that NPO acted contrary to market behaviour.

(201) The Commission considers that a *must carry* obligation may indeed influence the negotiating process. It creates a bargaining power on the side of the public service broadcasters as cable operators are under a statutory obligation to distribute a certain "must carry" channel. It is therefore understandable that the Dutch parliament seeks to somehow regulate the fees which public service broadcasters could charge for copyrights related to must carry channels. By complying with this "price" regulation, a public service broadcaster cannot be deemed to infringe market principles. However, for other channels, without a must carry status the Commission considers it appropriate that public broadcasters have to exploit their copyrights under normal market conditions[153] in order not to unnecessarily increase the need for public funding and to distort competition beyond the necessary. The Commission therefore considers that for these channels normal market negotiations should take place[154].

(202) More generally, the Commission takes account of several provisions which require public service broadcasters to respect market conditions, such as the requirement to carry out side activities on market terms, for side activities to at least cover their costs, the prohibition on cross-subsidisation[155], and the prohibition for public service broadcasters to be instrumental to third parties in making profits[156]. Further clarification is provided by the guidelines of the Media Regulator.

8.4.5. Conclusion Proportionality

(203) The Commission considers, that the current system for State funding of the Dutch public broadcasting system does not sufficiently ensure the proportionality of the aid in view of

[151] 2008 Media Act, section 6.3.1.2
[152] C(2006)2084def
[153] This includes, also in view of the concerns it received as regards bundling, respecting other competition rules such as notably Article 101 and 102 of the TFEU.
[154] The Dutch authorities informed the Commission that the public service broadcasters (NPO) and cable operators (NLKabel) are negotiating a new agreement. National supervision of market behaviour is foreseen by way of the Dutch competition authority (NMa) and the Media Regulator (CvdM).
[155] See also report of the Dutch Court of Auditors
[156] 2008 Media Act, Article 2.132, 2.135, 2.141

the absence of an adequate ex post control concerning overcompensation and the lack of an effective mechanism to examine the compliance of new audiovisual services with the elements of the Amsterdam Protocol to ensure amongst others that the distortion of competition and of cross-border trade is not contrary to the common interest of the Union.

8.5. Conclusions on the assessment of the current financing regime

(204) Therefore, the Commission concludes overall that - despite the amendments of the legal framework after the Article 17 letter - the existing annual financing regime in favour of the public broadcasters in the Netherlands is currently not compatible with the TFEU.

9. APPROPRIATE MEASURES

(205) In view of the above and having discussed the Commission's concerns with the Dutch authorities, and having regard to the changes introduced to the Media Act since the Commission's Article 17 letter, the Commission would consider the following measures appropriate to ensure compliance with the State aid rules of the TFEU.

(206) The **definition of the remit** for new audiovisual services must be further clarified in an appropriate way, either by amending the Media Act and/or other legislation and/or by indentifying on a case by case basis those services which satisfy the public service remit. This in particular is required for services with a pay element which are not per se excluded as part of the public service remit (see paragraph (214)). Such case by case assessment could also take place in the framework of the prior assessment of the market impact (see below) according to the *Algemene wet bestuursrecht* whereby - based on the public broadcasters' strategy plan – planned new audiovisual services are either confirmed or rejected as being part of the public service remit.

(207) In this hypothesis, however, the strategy plan becomes an important element in the clarification of the public service remit and needs to be sufficiently detailed. In this respect, the description of planned new audiovisual services in the strategy plan must be considerably enhanced and specified to such extent that third parties can understand each service which may be concluded upon to be part of the public service remit following a prior assessment. Moreover, the performance agreement (see also below) which ensures that public service broadcasters offer a mix of categories of programmes, should include sanctions in order to effectively enforce the public service obligations.

(208) Moreover, new audiovisual services which do not satisfy the cultural, social and democratic needs of the Dutch society should in the future be clearly excluded from the remit in a transparent way. This concerns in particular the online promotion and distribution of travel agency services by public broadcasting associations or online merchandising. Moreover, a clearer distinction must be drawn in the definition of the public service remit between the pure announcement of TV / radio programmes, which may legitimately be part of the public service remit, and any form of commercial

exploitation of the intellectual property rights in weekly TV guides which manifestly qualifies as commercial activity.[157]

(209) Turning to the **entrustment** of the public broadcasting service, should the Netherlands chose to specify the public service remit for new audiovisual services by means of the prior evaluation procedure, the final act which enshrines the outcome of such an evaluation must be legally binding upon the public broadcasters. In addition, for qualifying the performance agreement as part of the entrustment, the Dutch authorities must ensure that infringements of the performance agreement are subject to adequate remedies should the public broadcasters offer services which do not comply with the public service remit as defined, i.a. in the performance agreement.

(210) As far as the requirement is concerned, that the funding of public broadcasters does not affect competition and affect trading conditions to an extent which is contrary to the common interest (**proportionality**), the Dutch authorities shall take the subsequent measures.

(211) First, it must be ensured that the total public funding of the public broadcasters exceeding the net public service costs, is subject to the minimum requirements for financial discipline set out in paragraphs 73, 74 and 79 of the Broadcasting Communication, irrespective of its accounting treatment. Currently, as set out above, not all public service funding is subject to such control. Overcompensation within the meaning of paragraphs 73 and 74 of the Broadcasting Communication must be determined in a transparent way and subject to an independent effective control at the national level.

(212) Second, new audiovisual services such as in particular online activities must be subject to the prior assessment set out in section 6.7, notably paragraphs 84 - 89 of the Broadcasting Communication. The existing prior assessment in the *Algemene Wet Bestuursrecht* must be improved as to the transparency of the consultation process. The start of the consultation must be adequately made public in a pro-active way and third parties must have sufficient time to respond to the consultation.

(213) The exemption of prototype projects must be defined in line with paragraph 90 of the Broadcasting Communication. Such exception should be limited to testing innovative services on a limited scale in terms of time and audience. Such exception may not be used to introduce a fully-fledged significant new service as such service must be subject to a prior assessment process as described in paragraph (212).

(214) Third, while pay services do not necessarily qualify as manifest error, the Dutch authorities must assess whether they undermine the distinctive character of the public service (manifest error) and whether they *do not affect trading conditions and competition in the Community* [Union] *to an extent which would be contrary to the common interest* (proportionality). New pay services should therefore be subject to a prior assessment as set out in paragraph 83 of the Broadcasting Communication.

[157] See paragraph 49 Broadcasting Communication ("Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit ").

10. COMMITMENTS SUBMITTED BY THE NETHERLANDS

(215) Following discussions as how to address the preliminary concerns addressed in the Article 17 letter and as specified in further meetings, also in relation to the 2008 Media Act, the Dutch authorities submitted by letter of 26 November 2009, an extensive summary of their commitments given in the context of the present investigation. These commitments are to some extent already implemented by the 2008 Media Act. The commitments are summarised below, including where appropriate references to the 2008 Media Act.

10.1. The public service remit

(216) In the 2008 Media Act, the Dutch authorities have introduced a new definition of the public service remit[158] which abolishes the distinction between main tasks (TV, radio) and side tasks (internet, mobile services etc.). The Dutch authorities explain that first the scope of the public service remit is limited by the definition of the public service remit which is based on the concept of "media service" and "media offer". These concepts as set out in Article 1.1 of the Media Act 2008, limit the public service remit to electronic products (eg. no physical print).

(217) The public service remit is further limited as it has to be a mix of information, education, culture which excludes merchandising (eg. sale of ´Sesamstraat´ puppets) and e-commerce (eg. sale of travels). Pay services are not excluded as part of the public service remit.

(218) The Media Regulator publishes a register of commercial activities which are not part of the public service remit (so called side activities). The Dutch authorities confirmed that the online promotion and distribution of travel agency services by some public broadcasting associations, online merchandising (webshops) and the commercial exploitation of TV guides are considered commercial activities and cannot benefit from public funding.

(219) Second, on the basis of the public service remit stipulated in the 2008 Media Act[159], every five years the public service broadcasters are to indicate in their strategy plan (*concessiebeleidsplan*) which programme and other distribution (´offer´) channels they would like to offer on the market. These distribution channels consist of existing services and – partially – also of new audiovisual services such as internet offers or mobile offers, but also new theme TV and radio channels. In a specific part of the strategy plan, the public broadcasters must then explain why the proposed new offers would fit into the total existing offer of the public broadcasting system.[160] This is supported by an *´omgevingsanalyse´* which includes a part concerning the existing market offers.

[158] Article 2.1 of the 2008 Media Act
[159] Article 2.20 of the 2008 Media Act
[160] Section 3.2.1.2. "De onderbouwing van de publieke omroep bevat ook een omschrijving van de positie van zijn nieuwe activiteiten binnen de publieke mediaopdracht, de relatie met het andere aanbod van de publieke omroep en een inhoudelijke benadering vanuit thema's en doelgroepen. Dit wordt ondersteund door een omgevingsanalyse met onderdelen als "beogde publieksgroepen".

(220) The minister then has to approve, before such services can be carried out, the nature and number of programme channels and other ´offer´ channels envisaged in the strategy plan every five years[161]. A prior assessment procedure is foreseen before such new services can be launched. The ministerial approval takes place in three steps and is procedurally based on the *Algemene wet bestuursrecht*. The Dutch authorities clarified that in the first step of such prior assessment the assessment concentrates on whether a new audiovisual service meets the democratic, social and cultural needs of society. For the second step and third step, where i.a. the effect of a new service on the market is being assessed, it is referred to paragraph (235).

(221) In a first step, the public value of the planned new audiovisual services is tested. This means that each individual new service is assessed separately by the minister in light of the integral public service broadcasting offer in the Netherlands[162] whether it satisfies the democratic, social and cultural values of society.[163] The minister seeks an advice from the Media Regulator and the Council of Culture as about the strategy plan and whether new services envisaged in the strategy plan can serve to satisfy the tasks set out in the Media Act. Based on this advice and its own assessment, the minister may decide to discard a request for new audiovisual services (partially or entirely) if he/she considers that a proposal does not (entirely) meet the public service requirements. The minister then draws up a draft decision which summarises the planned new services. The Dutch authorities committed that such draft decision will describe new services so detailed, clear and precise regarding both the nature and number of envisaged new services that this will enable third parties to make substantiated comments.[164] The draft decision is then published on the website of the ministry as well as in its newsletter *Cultuur en Media*. Again, for the second and third step it is referred to paragraph (235) *et seq*.

(222) Changes to the services approved can be made annually as part of the budget cycle in which case a similar procedure is followed. Both the services in the strategy plan, or the exceptional requests from the public broadcasters to approve new services outside the five year cycle, and the decision of the minister will be published. According to the Dutch authorities as both the strategy plan and the decisions will be published, the public service remit is clarified for third parties.

(223) The Dutch authorities commit to ensure in a binding way that the strategy plan will be sufficiently detailed for third parties to be able to understand how the public service broadcasters envisage to carry out the public service tasks.

(224) On the basis of the strategy plan, a performance agreement (*prestatieovereenkomst*)[165] is concluded between NPO, representing the public service broadcasters and the Minister.

---

[161] Article 2.21 of the 2008 Media Act

[162] Section 3.2.1.3 of the commitments ("De beoordeling van nieuwe diensten "in zijn totaliteit" houdt in dat iedere voorgenomen dienst wel afzonderlijk wordt beoordeeld, maar in het licht van het totale aanbod van de publieke omroep".)

[163] The criteria are laid down in Article 2.1 (2) of the 2008 Media Act

[164] Section 3.2.1.3 of the commitments ("De Nederlandse autoriteiten zeggen toe dat het ontwerpbesluit een zodanig gedetailleerde, duidelijke en specifieke uiteenzetting van zowel de aard als de omvang van de voorgenomen nieuwe audiovisuele diensten bevat, zodat derde partijen ook daadwerkelijk in staat worden gesteld om hun zienswijzen aannemelijk te onderbouwen".

[165] Article 2.22 of the 2008 Media Act

This contract specifies in more detail, including qualitative and quantitative objectives, the activities to be carried out and the objectives to be achieved and serves to ensure the variety of offers by public service broadcasters. The Dutch authorities commit to include in future performance agreements measures against non-fulfilment including a sanction clause.

(225) As regards pay services, the Dutch authorities commit that such services will have to pass a prior assessment as set out in the subsequent section 10.3.

10.2. Entrustment and supervision

(226) As explained in paragraph (209), for a proper **entrustment** of the public broadcasting service, the final act which enshrines the outcome of such an evaluation must be legally binding upon the public broadcasters. In this respect, the Dutch authorities commit to include in future performance agreements measures against non-fulfilment including a sanction clause (see also paragraph (224)). The entrustment process starts with the strategy plan of the public service broadcasters, followed by a ministerial decision approving (new) services to the public service broadcasters and concluded by a performance agreement which specifically lays down the requirements to be met by public service broadcasters.

(227) Turning to the **ex post supervision of the public service remit**, the public service broadcasters must annually report to the Minister and to the Media Regulator[166] on the fulfilment of the public service remit and the achievements of the objectives laid down in the performance agreement. The Media Regulator verifies and validates these annual reports and reports to/advises the Minister. In addition the Dutch authorities refer to the five yearly evaluation of how the public service remit is carried out[167]

10.3. Proportionality

10.3.1. net cost principle and transparency

(228) The Dutch authorities clarified that by way of a Ministerial decision[168] the financial handbook has been amended in 2005, 2008 and most recently in August 2009 to increase transparency and to include rules for cost allocation.

(229) Further, the Dutch authorities clarified that the 2008 Media Act[169] in principle requires all revenues, i.e. public funding, net revenues of commercial activities, membership fees and revenues from association activities, to be used for funding the public service remit. However, by way of exception, membership fees may be used to finance association

[166] Article 2.58 of the 2008 Media Act
[167] Media Act, Article 2.184
[168] Article 2.172 of the 2008 Media Act
[169] According to the Dutch authorities, this is reflected in Article 2.146 of the 2008 Media Act. However, it seems rather to originate from Article 2.135 of the 2008 Media Act.

activities and a net loss on association activities may be compensated by profits on the sale of TV guides (a side activity).

(230) The Dutch authorities clarified that the 2008 Media Act[170] stipulates that NPO can allow individual public service broadcasters to maintain public funding as a programming reserve. The amount of reserves may differ between public service broadcasters[171], but the total amount of reserves may not exceed 10% of the total budget made available by the Minister. When the reserves of an individual public service broadcaster exceed the limit set by NPO, the excess funds have to be repaid to NPO[172].

(231) When the total programme reserves of individual public service broadcasters including the funds repaid to NPO exceed 10% of the total overall budget made available by the media Minister, the Media Regulator will recover the excess funds and add such funds to the Media reserve. The Dutch authorities commit that the public funding NPO receives for its coordination tasks, and for which the overcompensation accumulates in the foundation reserves, will henceforth be included in the 10% overall limitation. The foundation reserve of NPO will be subject to the 10% cap as laid down in paragraph 73 of the Broadcasting Communication and/or earmarked according to paragraph 74 of the Broadcasting Communication (see paragraph (232)).

(232) The Dutch authorities committed to limit the total reserved funds above the net public service costs (retained overcompensation) to 10% of the annual budgeted public service expenditure. Specifically, the Dutch authorities committed to amend Article 2.174 of the Media Act to include the foundation reserve of NPO in the calculation and application of the 10% overall limitation.

(233) In addition, the Dutch authorities committed to inform the Commission in such cases where it applies, by way of exception, the possibility foreseen in paragraph 74 of the Broadcasting Communication to reserve more than 10% of the annual budgeted expenditure. The Dutch authorities committed in such cases to in advance specifically determine (earmark) in a binding way the reserved funds for a non-recurrent major expense which is necessary for the fulfilment of the public service tasks and limit it in time.[173]

10.3.2. New audiovisual services and prior assessment

(234) As set out in paragraph (219) above, the Dutch authorities foresee that new audiovisual services will be entrusted by means of a three step prior approval procedure which culminates in a decision of the media minister approving (or rejecting/amending) the new services envisaged by the public broadcasters in its strategy plan (and as set out in individual approval requests in the framework of the annual budget cycle).

---

[170] Articles 2.174 - 2.177 of the 2008 Media Act

[171] According to the Dutch authorities, thresholds are set of 20% for small public service broadcasters and 5% for large public service broadcasters.

[172] This transfer falls out side the scope of this procedure (see paragraph (55))

[173] The Commission is aware that the Netherlands intends to use this exception […]

(235) As explained in paragraph (221), the public value of the planned new audiovisual services is tested in a first step. The second step, starts with the publication of the draft decision of which the Dutch authorities committed that such a draft decision will describe new services so detailed, clear and precise regarding both the nature and number of envisaged new services that this will enable third parties to make substantiated comments.[174]

(236) This draft decision is then submitted to an open public consultation[175]. The Dutch authorities committed to use, based on Article 3 (16) of the *Algemene wet bestuursrecht,* the *´uniforme openbare voorbereidingsprocedure´* (uniform public preparation procedure) for taking a decision approving new audiovisual services, necessarily including a hearing.[176] In addition, the Dutch authorities committed to actively communicate to interested parties the start of such procedure. In any event, the ministry will publish the start of the consultation period by means of a notice on its website and in its newsletter *Cultuur en Media*.

(237) As part of the *uniforme openbare voorbereidingsprocedure* third parties can submit comments on the draft decision within 6 weeks after the publication of the draft decision. In the framework of this consultation procedure, the ministry will hold a general public hearing and/or bilateral meetings with stakeholders.[177] Third parties can then comment whether and how in their views planned new audiovisual services may entail negative effects on the market. Apart from the consultation of third parties, the minister may also in other ways obtain further information, for instance by way of external advice[178].

(238) In a third step the minister will balance the value of a new audiovisual service for society with the negative effects of such a new service. The Dutch authorities committed to balance the substantiated (negative) effects on the market with the planned new services' value for society in line with paragraph 88 of the Broadcasting Communication.[179] Paragraph 88 of the Broadcasting Communication reads:

> *"In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer."*

---

[174] Section 3.2.1.3. of the commitments.
[175] Awb, Article 3.2
[176] Algemene Wet Bestuursrecht, Article 3:4
[177] "Het bestuursorgaan kan er ook voor kiezen, één of meer aparte gespreken met belanghebbenden te voeren".
[178] In such cases where the external advice relates to comments made by third parties, the third party will have the possibility to comment on the advice.
[179] "De minister zal, in overeenstemming met paragraaf 88 van de 2009 Omroepmededeling, de (schadelijke) markeffecten van een nieuwe audiovisuele dienst, in het bijzonder op basis van de door belanghebbenden aangedragen zienswijzen, beoordelen en afwegen tegen de waarde van de betrokken diensten voor de samenleving.

(239) The final decision of the minister, which may reject, amend or approve a new service, on a prior assessment must be adequately reasoned in all respects (public value and market impact) in line with Article 3 (46) of the *Algemene wet bestuursrecht*[180] and can be appealed to an administrative Court. The decision will be published.

(240) In line with paragraph 90 of the Broadcasting Communication innovative services can be exempt from the prior assessment of the market impact as "prototype projects". The Dutch authorities commit to ensure that pilot projects will be tested on a scale as limited as possible and only for a limited time period. This implies that the target audience will be limited[181] and that a pilot project may not take longer than one year. Also, the Dutch authorities have foreseen that the budget available for such projects will be capped at 2% of the annual public service compensation for the public service broadcasters.

10.3.3. Market principle

(241) The Dutch authorities confirmed that several clauses in the 2008 Media Act ensure that public service broadcasters have to act in line with market conditions when operating outside the scope of the public service remit. First, public service broadcasters may not use public funding for commercial activities[182] and such commercial activities must be carried out market terms[183]. In order to control the prohibition of cross subsidisation, public service broadcasters have to apply a separation of accounts.

(242) Also the prohibition to contribute to the profit of third parties has been maintained[184], which prohibits public service broadcasters to pay more than normal market prices for services from third parties. The Media Regulator supervises fulfilment of these provisions and specifically issued a guideline for side activities which have to be approved before public service broadcasters can carry out such activities. According to the Dutch authorities, the rules for lawful use of funds have been improved in the 2008 Media Act following advice from the Dutch Court of Auditors.

(243) As regards the shareholding of NPO in Nozema, the Dutch authorities informed the Commission that NPO (and the world broadcaster) have ceased its shareholding in Nozema[185].

11. APPRAISAL OF THE COMMITMENTS GIVEN BY THE NETHERLANDS

(244) The Commission assessed the commitments given by The Netherlands in light of its preliminary concerns expressed in the Article 17 letter and in subsequent requests for information and meetings, as well as the amendments made in the 2008 Media Act.

---

[180] Section 3.2.1.3 of the commitments, chapter "De tweede fase: het besluit".
[181] Unless technologically not possible or only against disproportionate high costs.
[182] Article 2.135 Media Act
[183] Article 2.132 - 2.134 of the 2008 Media Act
[184] Article 2.141 of the 2008 Media Act
[185] Letter Dutch authorities, dated 22 June 2007 and page 36 Letter dated 26 November 2009

11.1. The public service remit

(245) The Dutch authorities have not proposed to clarify the definition of the public service remit in Article 2.1 of the Media Act. It must therefore be seen whether measures other than the definition in the Media Act can sufficiently specify the public service mission of the Dutch public broadcasting system for the Commission to exercise its review under Article 106(2) TFEU.

(246) The Dutch authorities committed to clarify the definition of the public service remit in particular for new audiovisual services in the framework of the minister's prior assessment procedure on the basis of the *Algemene wet bestuursrecht.*[186] The starting point of such a process is the description of an envisaged new audiovisual service in the public broadcasters´ strategy plan. As a first step in the assessment procedure, following advice from two independent bodies, the minister assesses for each individual service separately whether it satisfies the democratic, social and cultural values of society. Subsequently, the minister will publish a draft decision setting out which services he intends to approve, before taking account of possible effects on the market, in other words which services meet the public value of Dutch society.

(247) The Dutch authorities have committed to improve and clarify in a binding way the strategy plan so that third parties are in the future able to understand from the strategy plan which specific services the public broadcasters envisage to offer as part of the public service remit in the coming five years.[187] In addition the Dutch authorities committed to clarify in any draft decision which audiovisual services the Dutch authorities envisage to approve as part of the public service remit in such a detailed, clear and precise way that third parties can make substantiated comments to the nature and number of envisaged new services. In other words, third parties should be able to understand which specific services are being considered to meet the democratic, social and cultural needs of society.

(248) Finally, the Dutch authorities committed to introduce sanctions in the performance agreement, which is published and specifies the objectives to be achieved as part of the public service remit and ensures a variety of offers by public service broadcasters (see also paragraph (253)).

(249) The Commission can agree to such an approach for clarifying the definition of the public service remit by means of a prior case by case assessment of the public service character of new audiovisual services. The commitment to enhance the specifications in the strategy plan and the draft decisions will further enhance the transparency of the remit by allowing third parties to anticipate which types of new services may be approved by the minister after the prior evaluation procedure. The introduction of sanctions in the performance agreement will further ensure that the public service remit is carried out in line with the public service tasks and to ensure a variety of services.

(250) Specifically as regards pay services the Dutch authorities have committed that such services will be subject to a prior assessment procedure before its approval. The

[186] See section 3.2.1.3 of the commitments.
[187] See section 3.2.1.1 of the commitments.

Commission can agree to such a prior assessment procedure being used for pay services to determine the public service character in terms of serving the social, democratic and cultural needs of citizens[188].

(251) The Dutch authorities also confirmed and thereby committed to exclude all kinds of commercial activities from the public service remit including the online promotion and distribution of travel agency services by some public broadcasting associations, online merchandising (webshops) and the commercial exploitation of TV guides.[189]

(252) In this respect, the Commission also notes the Dutch authorities' clarification that the Media Regulator (*Commissariaat voor de Media)* verifies ex ante[190] side activities of the public broadcasters according to Article 2.132 (1) of the Media Act and keeps a public register of such activities. The Commission considers such an illustrative list helpful to understand better which specific activities fall outside the scope of the public service remit. However, at the same time the Commission notes that the Media Regulator does not assess whether concrete activities fall under the public service remit and the fact that certain activities are approved as side activities (i.e. commercial activities) does not mean *a contrario* that all other activities of public broadcasting associations necessarily form part of the public service.

11.2. Entrustment and supervision

(253) As to the entrustment, the Dutch authorities commit to include a clause in future performance agreements which will foresee adequate measures in case of non respect of the agreement by the public broadcasters which also includes the possibility to impose sanctions.[191]

(254) Such a measure is adequate to render the performance agreement sufficiently legally binding to acknowledge it as a proper entrustment act. The Commission can therefore recognise that the public service broadcasters are entrusted with a public service remit based on a valid entrustment act which consists of the Media Act, the individual ministerial decisions qualifying specific audiovisual services as part of the remit which have been committed to be easily accessible and transparent for third parties and the performance agreement.

[188] The Commission also observes that in the second phase of the prior assessment procedure the effect on the market will be assessed.

[189] See section 3.1.1 of the commitments.

[190] Article 2.132 first indent reads "*De publieke media-instellingen mogen alleen na voorafgaande toestemming van het Commissariaat nevenactiviteiten verrichten* "

[191] See section 3.2.1.1. of the commitments.

11.3. Proportionality

11.3.1. Net cost principle and transparency

(255) As regards the concerns expressed in the Article 17 letter regarding a lack of sufficient safeguards to limit public funding to what is necessary for carrying out the public service tasks, also in view of the 2008 Media Act (see paragraph (186)), the Commission first takes note of the commitment of the Dutch authorities to limit the total of reserved public funds above the net public service costs to 10% of the annual budgeted expenses.

(256) Specifically, the Commission takes note of the commitment of the Dutch authorities to amend Article 2.174 of the Media Act to include the foundation reserve of NPO in the calculation and application of the 10% limitation.

(257) Second, the Commission takes note of the commitment to inform the Commission when the Dutch authorities make use of the exception foreseen in paragraph 74 of the Broadcasting Communication and commit to apply the requirements set out in this paragraph. At the same, time the Commission takes note of the intention expressed by the Dutch authorities to use the exception […][192]

(258) Third, the Commission takes note of the further explanations of the Dutch authorities that any retained overcompensation may only be used for public service activities in the following year[193], except for the funds reserved on the basis of paragraph 74 of the Broadcasting Communication which can only be used for earmarked aims in the same year as the costs occur.

(259) Fourth, the Commission takes note of the further explanations that any surplus above the 10% cap will be recovered annually and that the financial control will be carried out by the Media Regulator, an independent entity, on the basis of actual figures[194].

(260) In light of these considerations, the Commission considers that the commitments given by the Netherlands (cf. section 10) are appropriate to ensure that the compensation granted to the public service broadcasters will not exceed what is necessary for the fulfilment of its public service tasks, i.e.: the net costs of the public service and, hence, are compatible with Article 106 (2) of the TFEU.

11.3.2. New audiovisual services and prior assessment procedure

(261) The Commission considers that the commitments provided to increase transparency in the first step of the procedure by taking as a starting point that each individual audiovisual service should be detailed enough described to enable third parties to provide substantiated comments (see paragraph (247), provides for a transparent framework to

[192] This is currently part of the foundation reserve and is envisaged to be rededicated as a reserve within the meaning of paragraph 74 of the 2009 Broadcasting Communication […] (Letter Dutch authorities 26 November 2009, page 25 and 38).
[193] Letter Dutch authorities 26 November 2009, page 27, Media Act Article 2.176.
[194] Letter Dutch authorities 26 November 2009, page 27

assess the effect on the market of envisaged new audiovisual services in line with the Amsterdam Protocol.

(262) The commitment to pro-actively approach interested stakeholders and more generally publish the draft decision provides a basis for an open consultation process. This is further enhanced by the commitment to provide for at least 6 weeks for third parties to comment on the draft decision and a compulsory hearing of third parties.[195]

(263) The Commission has ascertained itself of the commitment from the Dutch authorities that they will assess in particular on the basis of the open consultation the (negative) effects on the market of a new audiovisual service and balance possible negative effects on the market with the value of new audiovisual services for the society. Moreover, the Dutch authorities have committed to carry out such assessment and balancing according to paragraph 88 of the Broadcasting Communication.

(264) The Commission considers in this respect that the assessment of paragraph 88 of the Broadcasting Communication in the framework of the procedure foreseen in the *Algemene wet bestuursrecht* will contribute to ensuring compliance with the State aid rules of the TFEU and more precisely with respect to the second substantive requirement of the Amsterdam Protocol which is that the funding of public service broadcasters "*does not affect trading conditions in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*".[196]

(265) The Commission can agree to the use of the *Algemene wet bestuursrecht* as procedural framework for the substantive assessment of the elements set out in paragraph 88 of the Broadcasting Communication, because it is for Member States to choose the institutional setup and the procedural framework for a prior assessment which best fits its public service broadcasting system and which is sufficiently effective.[197]

(266) The Commission has in particular no indications to doubt the independence of the minister from the Dutch public service broadcasting system.[198] Nor are there reasons to consider that the body responsible for the assessment will not dispose of sufficient resources and sufficient capacity to asses the value and market impact of a new service[199].

---

[195] See paragraph 88 of the 2009 Broadcasting Communication.

[196] The assessment of paragraph 88 of the Broadcasting Communication at the national level will be an important safeguard to prevent that an inconsiderate expansion of the activities as part of the public service remit by public broadcasters create disproportionate harm to media pluralism by for instance driving the print media out of the on-line market and hence undermine their chances to survive in the new media environment. This is without prejudice to the competences of the Commission to verify that Member States respect the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative (Paragraph 91 Broadcasting Communication).

[197] See paragraph 86 and 89 of the 2009 Broadcasting Communication

[198] See paragraph 89 of the 2009 Broadcasting Communication on effective independence.

[199] In this context, the Commission takes note of the clarification by the Dutch authorities that the ministry may seek expert advice should this become necessary in the course of a prior assessment. See 3.2.1.3. of Dutch proposal for appropriate measures dated 18.11.2009 on "*belangenafweging*". *"Indien de minister zelf niet de nodige kennis in huis heeft kan hij bijvoorbeeld een adviseur inschakelen. De belanghebbende dient dan weer in de gelegenheid te worden gesteld op dat advies te reageren".*

(267) Therefore, in light of the above, the Commission considers that the commitments given by the Netherlands, regarding the prior assessment procedure are adequate to ensure that the new audiovisual services envisaged by public broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of society, while duly taking into account its potential effects on trading conditions and competition.

11.3.3. Market principles

(268) The Dutch authorities clarified that the Media Act sets out in a legally binding way that commercial activities of the public broadcasters must comply with market principles. This covers the behaviour of public broadcasters both in relation to their subsidiaries as well as when carrying out activities outside the public service remit. Moreover, only those commercial activities are allowed which are related to the public broadcasting service[200].

(269) Considering that Nozema has been divested and the Media Regulator is also explicitly supervising market behaviour by public service broadcasters, the Commission considers that this preliminary concern in the Article 17 letter has been met without it being necessary to pronounce further appropriate measures in this regard.

12. CONCLUSIONS

(270) In accordance with Article 17 of the Procedural Regulation[201], the Commission informed the Netherlands about its preliminary views that the applicable broadcasting legislation was no longer compatible with the Internal Market.

(271) Having assessed the information and arguments subsequently submitted by the Netherlands, the Commission concludes in accordance with Article 18 of the Procedural Regulation, that the existing aid scheme is no longer compatible with the Internal Market. In order to ensure compatibility of the Dutch annual public financing regime for the future, the Commission discussed with the Dutch authorities a number of changes to the existing legal framework and thereupon recommended appropriate measures.

(272) With the submission of the commitments to the Commission on 26 November 2009, the Netherlands accepted to implement these appropriate measures. The Commission agrees with these commitments. With the present decision, the Commission takes note of these commitments provided by the Netherlands, records acceptance in accordance with Article 19 of the Procedural Regulation and closes the procedure.

(273) The Commission reminds the Netherlands to notify the Commission of the application of paragraph 74 of the Broadcasting Communication. The Commission invites the Netherlands to provide it with a copy of the legislative changes which must enter into force no later than 12 months after the date of the present decision. Commitments

[200] Article 2.132 - 2.134 of the 2008 Media Act

[201] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty , OJ L 083 , 27/03/1999 p. 1 – 9.

concerning the performance agreement and strategy plan have to be implemented with the upcoming strategy plan and performance agreement in 2010. Finally, commitments related to the prior assessment procedure have to be implemented at the first prior assessment procedure following the date of this decision.

(274) The present letter is without prejudice to the possibility for the Commission to continuously assess existing aid schemes under Article 108 (1) of the TFEU, and to propose appropriate measures required by the progressive development or the functioning of the internal 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 full text of the letter in the authentic language on the Internet site:
http://ec.europa.eu/community_law/state_aids/state_aids_texts_nl.htm

Your request should be sent by registered letter or fax to:

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

Yours faithfully,

For the Commission

Neelie KROES

Member of the Commission

OVERVIEW