

NON AUTHENTIC VERSION



EUROPEAN COMMISSION
Competition DG

Brussels, 28.10.2009
C (2009) K(2009)8113

Subject: E 2/2008 (ex CP 163/2004 and CP 227/2005) – Financing of ORF

Dear Sir,

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

1. PROCEEDINGS

- 1) In September 2004, the Commission received a complaint from Verband Österreichischer Zeitungen (VÖZ) [the Austrian Newspaper Association], accusing Österreichischer Rundfunk (ORF) [the Austrian Broadcasting Corporation] of supplying online services which were not part of its public service remit and which should therefore not be financed out of state funds.¹ Further information was supplied in October and November 2004, March and May 2005 and January 2006. On 4 February 2009, VÖZ transmitted a report of the Austrian Court of Auditors to the Commission and reiterated the key points of its complaint. On 29 July 2009, VÖZ submitted an informal draft of the new ORF-law.
- 2) In July 2005, Verband Österreichischer Privatsender (VÖP) [the Association of Austrian Private Broadcasters] submitted a further complaint about the financing of ORF. This complaint relates firstly in general to the existing financing and control mechanisms and secondly to the introduction of a sports programme (addition to the complaint of January 2006). In November 2005, the Commission received another complaint from Premiere AG concerning the introduction of the sports channel.² The complainants sent further information in April 2006. By letter of 4 August

¹ The correspondence was registered under CP 163/2004.

² The correspondence was in both cases registered under CP 227/2005.

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2006, the Commission invited the Republic of Austria to submit observations on the accusations made. The Republic of Austria did so by letters of 12 and 21 February and 11 April 2007. By letter of 31 October 2007, Premiere withdrew the complaint. By letter of 22 September 2008, VÖP submitted further comments.

- 3) By letters of 4 January 2005, 9 August 2005 and 4 August 2006, the Commission invited the Republic of Austria to provide any information relevant for an examination of the complaints. The Republic of Austria did so by letters registered on 7 March 2005, 7 and 18 October 2005 and 12 and 21 February and 11 April 2007. By letter of 2 January 2006, the Republic of Austria also informed the European Commission of the amendment to the ORF Law regarding the introduction of a sports channel. By letters of 30 April and 8 October 2007, the Republic of Austria sent a copy of the Law introducing digital mobile television. By letters dated 12 February and 10 April 2007, the Republic of Austria replied to a request of information from the Commission. By letter dated 31 January 2008, the Commission informed the Republic of Austria about its preliminary view that Austria's public service broadcasting system is not in line with the EC State aid rules (hereafter "Article 17 letter"). By letter dated 2 May 2008, the Republic of Austria replied to the Commission's Article 17 letter. By letter of 22 December 2008 the Republic of Austria replied to the arguments raised in the submissions of VÖP and VÖZ.
- 4) On 9 September 2009 Commissioner Neelie Kroes and Austria's Medienstaatssekretär Mr. Josef Ostermayer reached an agreement in Brussels on a number of modifications to the public financing of ORF. On 17 September 2009 the Austrian parliament held an "*enquête*" on the future of Austria's public service broadcasting system. The Director General of the Commission's Directorate General for Competition participated in this hearing. On 16 and 18 September, meetings between the Commission services and the Austrian federal chancellery took place in Vienna to finalise the agreement which commissioner Kroes and Medienstaatssekretär Ostermayer had reached previously in Brussels.

2. DESCRIPTION OF PUBLIC SERVICE BROADCASTING IN AUSTRIA

A. Historical development

- 5) The basis of ORF in its present form was the Austrian Broadcasting Law (Rundfunkgesetz - RFG) which came into force in 1967³. ORF was already permitted under the legal position at that time to arrange commercial advertising under a dual financing system and to make a broadcasting charge.
- 6) ORF was established in 1974 as an independent separate economic entity. It was financed by advertising and other commercial income and also by the programme fee. The programme remit essentially consisted of comprehensively informing the general public about all important political, economic, cultural and sporting events.

³ BGBl. No 195/1966.

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- 7) In 1999⁴, the RFG laid down the basic conditions for teletext and online services, which have been supplied by ORF since 1995⁵ and financed from the programme fee. The Austrian Broadcast Fees Act (Rundfunkgebührengesetz) which transferred the charging of broadcast fees and the programme fee to the GIS (*now: Gebühren Info Service GmbH*) was also enacted in 1999.⁶
- 8) In 2001, the RFG, now the ORF Law, was amended.⁷ ORF was converted into a foundation with separate legal status. The financing still consisted of income from the programme fee. The intention of the reform was to restrict the admissibility of financing out of the programme fee to activities covered by the public service remit. ORF's public service remit was reworded with the intention of clarifying the remit which had previously only been described in a general form. As a result of the amendment, ORF was no longer merely permitted to provide an online and teletext service but was required to do so.
- 9) Further amendments were made in 2002, 2004, 2005 and 2007. The 2002 amendments related to the provisions of the ORF Law relating to the position of programme-making employees.⁸ The 2004 amendment of the ORF Law⁹ introduced changes in the legal supervision by the Federal Communications Commission. The Austrian Communications Authority (KommAustria) was given the right to institute proceedings before the Federal Communications Commission in the event of a suspected breach by ORF of the advertising, sponsoring and product placement provisions of the ORF Law. Additionally, the requirements for the submission of complaints to the Federal Communications Commission in respect of breach of the statutory provisions were made less stringent. The 2005 amendment¹⁰ laid the way for the establishment of the sports programme, ORF Sport Plus, which started operation on 1 May 2006. The July 2007 amendment of the ORF Law¹¹ largely concerned the introduction of mobile terrestrial television. It was made possible for ORF to prepare a maximum of two television channels specifically for mobile use and to broadcast them via a mobile terrestrial platform. Pursuant to Section 9b of the ORF Law, the running of these channels is not part of ORF's public service remit and cannot therefore be financed by the programme fee. The December 2007 amendment¹² was confined to an amendment of the employment law provisions of the ORF Law (Section 32(8)).

⁴ BGBl. No 1/1999.

⁵ Republic of Austria's comments of 4 March 2005; question 2, p. 5.

⁶ BGBl. No 1/1999.

⁷ BGBl. I No 83/2001.

⁸ Federal Law relating to operational employee provision, BGBl. I No 200/2002.

⁹ Federal Law amending the Private Radio Law, the Private Television Law, the KommAustria Law and the ORF Law and repealing the Television Signal Law, BGBl. I No 97/2004.

¹⁰ Federal Law amending the Federal Law relating to the Austrian Broadcasting Corporation, BGBl. No 159/2005.

¹¹ Federal Law amending the Private Television Law, the ORF Law and the KommAustria Law, BGBl. I 52/2007.

¹² Federal Law amending the Operational Employee Provision Law, the Income Tax Law 1988, the ORF Law, the Journalists Law, the Employment and Social Courts Law, the Families Compensation Law, the Agricultural Work Law 1984 and the Corporation Tax Law 1988, BGBl. I 102/2007.

B. Legal Framework Conditions

2.1.1. Organisation

- 10) ORF is a foundation under public law with separate legal status. According to Section 19(1) of the ORF Law, ORF has the following bodies: the Foundation Council, the Director General, the Audience Council and the Auditing Commission.
- 11) The Foundation Council (Sections 20-21) consists of 35 members, appointed by the Federal Government (9 members), the Federal States (9 members), the Audience Council (6 members) and the Central Staff Council of ORF (5 members). The Foundation Board's activities include in particular regulating the programme fee.
- 12) The Director General (Sections 22-23) is appointed by the Foundation Council and manages the business of ORF. The Director General is responsible inter alia for laying down the programme guidelines and drawing up the plans and guidelines.
- 13) The Audience Council (Sections 28-30) consists of 35 members from the various social groups, such as associations, churches, unions, science, universities, education, art, sports, youth, older people and ethnic groups. Its duties include inter alia the approval of resolutions by the Foundation Council about the level of the programme fee.
- 14) The Auditing Commission (Section 40) consists of auditors appointed by the Foundation Council to audit the annual accounts, the annual report, the group accounts and the group report. The supervision shall also cover economy, profitability and expedience in the management of business and its consistency with the statutory provisions.

2.1.2. Public service remit

2.1.2.1. General Matters

- 15) The Austrian Federal Constitutional Law on securing the independence of broadcasting (Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks)¹³ declares broadcasting to be a "public duty". Pursuant to Section 1 of the ORF Law, the purpose for which ORF was founded was to fulfil the public service remit within the objects of the undertaking. The public service remit includes the provision remit, the programme remit and the special remits.
- 16) Pursuant to Section 2(1) of the ORF Law, the objects of the undertaking comprise the organising of broadcasting, the performance of online services and teletext connected with the broadcasting activity and the running of technical installations necessary for these activities, as well as all transactions and steps which are required for these activities or the marketing of these activities. The "required activities" include for example film and television production, a programme magazine, a news

¹³ Federal Constitutional Law of 10 July 1974 on guaranteeing the independence of broadcasting, BGBl. 396/1974.

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agency and merchandising.¹⁴ The programme fee should only finance those activities which are directly connected with the public service remit.¹⁵ Pursuant to Section 2(3) of the ORF Law, activities within the framework of the objects of the undertaking that go beyond the service provision remit, the programme remit or the special remits are to be separated in organisational and accounting terms from activities within the framework of the service provision remit and may, provided that no funds are drawn from the programme fee, be operated on a profit-making basis.

- 17) The "service provision remit" requires ORF, pursuant to Section 3 of the ORF Law, to run two television channels that can be received throughout Austria¹⁶, online services and teletext and a sports channel (see paragraphs (34) et seq. and (28) et seq. for details).
- 18) Pursuant to Section 4 of the ORF Law, the "programme remit" comprises, inter alia, fully informing the general public about all important political, social, economic, cultural and sporting questions; promoting understanding on all questions about democratic coexistence; promoting the Austrian identity from the point of view of European history and integration; appropriate consideration and promotion of Austrian artistic and creative production; providing entertainment; appropriate consideration for various age and social groups; disseminating and promoting ethnic and youth education and promoting the interests of the population in active sporting activity. ORF is required to supply a differentiated, varied and balanced overall programme (information, culture, entertainment and sport). In competition with commercial broadcasters, consideration must be given to the distinctiveness of ORF's services and the quality criteria must constantly be checked.
- 19) Pursuant to Section 5 of the ORF Law, the "special remits" include appropriate consideration to ethnic group languages in individual programmes and consideration for the needs of people with total or partial hearing loss.
- 20) The specific designing of programmes is specified further in "programme guidelines"¹⁷ and "plans and guidelines" for television, specialist channels and the running of mobile television. These guidelines and plans are laid down by the Director General of ORF.

2.1.2.2. Running a sports channel

- 21) By an amendment to the ORF Law which was passed on 6 December 2005¹⁸, the statutory basis for the establishment of a sports channel, as a third fee-financed television channel of ORF, was created. The new sports channel went on the air on

¹⁴ Republic of Austria's comments of 7 October 2005, question 8, p. 18.

¹⁵ Republic of Austria's comments of 7 October 2005, question 8, p. 20.

¹⁶ Pursuant to Subsection 4, the ORF shall ensure, subject to technical development and the availability of transmission capacities, commercial feasibility etc. that the programmes are distributed terrestrially using digital technology. Programmes are to be broadcast via satellite, subject to technical developments and commercial feasibility, using digital technologies.

¹⁷ <http://publikumsrat.orf.at/pr12006.pdf>.

¹⁸ BGBl No 159/2005.

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- 1 May 2006 under the name ORF Sport Plus. Transmission is on the same frequency as TW1 (TW1 Tourismus Fernsehen GmbH). Since the foundation of Tourismusfernsehen GmbH, ORF has held 50% of its shares. In November 2005, the remaining 50% were taken over by Sitour GmbH with the objective of the subsequent transmission of ORF Sport Plus. TW1 has since then been wholly owned by ORF.
- 22) The programme remit was laid down in Section 9a(1) of the ORF Law, whereby ORF has to provide a specialist television channel providing full information to the general public on all sports questions and helping to promote the interests of the population in active sports activity, and in which, in particular, a diverse supply of types of sports and sport competitions, which do not generally have much space in Austrian media reporting, is to be shown. Pursuant to Section 9a(1) of the ORF Law, ORF may also provide a teletext service and an online service providing information about the content of the Sport Plus sports channel. Conversely, according to information from the Republic of Austria¹⁹, it follows that an online service relating to the specialist channel which goes beyond giving information about the programme contents is inadmissible.
- 23) ORF itself is responsible for detailed programme planning and therefore also for deciding what types of sports are to be shown on ORF Sport Plus. With the aid of a legal report²⁰, ORF has defined what types of sports will normally not be broadcast on the new specialist channel as premium content. These types of sports include, in particular, the summer and winter Olympic Games, the Football World Cup and the Football European Cup, other competitions involving Austrian football teams, alpine and Nordic skiing world championships and Formula 1. As regards other types of sports such as cycling, tennis or ice hockey, the question of the extent to which these are normally allowed a lot of room in Austrian media reporting can only be decided in individual cases.
- 24) As a public service specialist channel, ORF Sport Plus is said to be an integral part of ORF and of its public service remit. ORF Sport Plus constitutes a "window programme" on TW1. TW1 itself is run on a purely commercial basis. The transmission times available for each of the channels were clearly allocated to the broadcasters in advance. ORF paid an "infrastructure payment" to TW1 for the provision of the transmission time²¹. No separate allocation of programme fee took place with regard to the operation of Sport Plus. Accordingly, the costs of Sport Plus are also not shown separately.²² The financing is from the general ORF budget.
- 25) Pursuant to Section 9a(4) of the ORF Law, if another programme according to Section 9 of the ORF Law is transmitted on the same channel, care must be taken to designate them accordingly so that a sufficient distinction can be made between them.²³ Although the advertising times of ORF Sport Plus and TW1 are marketed

¹⁹ Republic of Austria's comments of 12 February 2007, question 13 c, p. 38 et seq.

²⁰ Annex 10 to the Republic of Austria's comments of 12 February 2007.

²¹ Republic of Austria's comments of 12 February 2007, question 11 a, p. 34 et seq.

²² Republic of Austria's comments of 12 February 2007, question 12 a and 12 b, p. 37.

²³ Republic of Austria's comments of 12 February 2007, question 11 b, p. 35.

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by ORF Enterprise, this marketing is done separately.²⁴ Separate price provisions also apply. For example, the same periods of time are sometimes marketed at different prices (the prices for advertising blocks allocated to ORF Sport Plus normally being higher than those of TW1). For example,²⁵ in May/June 2006 the advertising second at 15.00 hours cost €2.00 on ORF Sport Plus and at 15:06 €0.20 on TW1; at 20.00 hours it cost €3.50 on Sport Plus and at 20:04 on TW1 it cost €1.50. In 2007, the advertising second²⁶ at 20.00 hours cost €1.80 on Sport Plus and at 20:04 it cost €1.20 on TW1; on Mondays at 15.00 hours it cost €1.20 on Sport Plus and at 15:06 it cost €0.20 on TW1.

- 26) In spite of the higher prices, ORF Sport Plus's income from conventional advertising is said to be lower than the advertising revenues of TW1. For example, the advertising income of ORF Sport Plus between May and December 2006 came to € 24,101. It had become apparent that the "minority sports" programming environment was less attractive for advertising customers. There was a greater interest, even if only relatively so, in special advertising forms, in particular programme sponsoring, as the supporters of (regional) sporting events were basically trying to implement general sponsoring measures. Accordingly, the income from special forms of advertising came to €126,637 between May and December 2006.²⁷ Compared to that, TW1's advertising proceeds in 2006 (for conventional advertising and special forms of advertising) came to €637,882. This is a substantial increase in advertising income compared to 2005 (advertising income of €570,473 in 2005), but is still below the level for 2004 (advertising income of €677,511 in 2004).²⁸

2.1.2.3. *Supply of online services*

- 27) In 1999²⁹, the framework conditions for teletext and online services were laid down in the RFG. The provision of online services is permissible provided that they come within the objects of the undertaking. The provision of online services in connection with broadcasting and operating the technical installations necessary for that purpose is part of the objects of the undertaking and may therefore permissibly be carried out by ORF. This also includes all business and measures required for the abovementioned activities or for marketing them, as they are also part of the objects of the undertaking.³⁰
- 28) Pursuant to Sections 18 and 13 of the ORF Law, ORF may also arrange commercial advertising (e.g. the sale of ring tones) as part of its online services.³¹

²⁴ Republic of Austria's comments of 12 February 2007, question 11 c, p. 36.

²⁵ Annexes 12 and 13 to the Republic of Austria's comments of 12 February 2007: advertising rates for 2006.

²⁶ Current rates (in this case, 2007) available on <http://enterprise.orf.at/>.

²⁷ Republic of Austria's comments of 11 April 2007, question 11 d and e, p. 23 et seq.

²⁸ The details are based on the Republic of Austria's comments of 11 April 2007, question 11 e, p. 23 et seq.

²⁹ BGBl. No 1/1999.

³⁰ Republic of Austria's comments of 4 March 2005, question 1, p. 2.

³¹ Republic of Austria's comments of 4 March 2005, question 1, p. 4.

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- 29) Pursuant to Section 3(5) of the ORF Law, ORF's compulsory service provision remit also includes online services and teletext which (i) are connected with broadcast programmes as part of the service provision remit and (ii) serve to fulfil the programme remit. According to the explanations given by the Republic of Austria, there is a connection with broadcast programmes in the case of services which "accompany" and "supplement" programmes.³² There is for example a connection in relation to the possibility of sending e-cards and the chat function³³; descriptions and reviews of commercially available games, supplying games with a programme connection (e.g. the one-off Ski Challenge 05); the singles website (terminated in 2004); reports on new IT technologies (Futurezone); the discussion platform; the online sports reporting, updated daily; or the comics series.
- 30) Additionally, "necessary marketing measures" appear also to come within the public service remit,³⁴ even if the Austrian Government's comments on this do not appear to be entirely unambiguous, as it is stated elsewhere that although such marketing measures are not part of the remit, they could be financed from the programme fee.³⁵ In any event, it seems to be established that measures which are offered for the marketing of activities within ORF's public service remit can be financed from the programme fee provided that they are not run with a view to profit.³⁶ ORF had some scope with regard to what the purpose of "necessary marketing" was supposed to be.³⁷ For example, competitions and games for prizes were also part of the marketing measures offered under ORF's public service. On the other hand, separate and independent services were no longer covered.

2.1.3. Financing

2.1.3.1. *Financing ORF through programme fee, advertising income and other receipts*

- 31) ORF's activities are primarily financed by the programme fee and advertising income. ORF's other receipts consist inter alia of income from other commercial activities and different public allocations. As can be seen from the table in **Annex 1**, the share of the programme fee in ORF's total income has been 40 - 50% since 1996 (a slightly rising trend overall with an advertising share of 49.9% in 2006), the share

³² A service accompanying a programme must be understood to mean a service which repeats content from the programme and prepares it in a new or different manner; services accompanying programmes retain the programme's focus on content but also extend it to comparable topics not dealt with in the programme. There is normally a direct connection with a specific broadcast, but this is not absolutely necessary: the required connection may also relate to a type of broadcast; see Republic of Austria's comments of 4 March 2005, question 6, p. 6.

³³ In their comments of 4 March 2005, question 6, p. 11, the Austrian authorities explained that the chat function should normally be regarded as accompanying programmes but in any event should also be regarded as supplementing programmes. Where the chat had no direct function of accompanying and supplementing programmes, it did however serve in particular to attract customers and constituted a marketing measure.

³⁴ Republic of Austria's comments of 4 March 2005, question 6, p. 6.

³⁵ Republic of Austria's comments of 4 March 2005, question 6, p. 9.

³⁶ Republic of Austria's comments of 4 March 2005, question 6, p. 9.

³⁷ Republic of Austria's comments of 4 March 2005, question 6, p. 7.

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occupied by conventional advertising has been 30 - 45% (with a clearly falling trend, with only 32.6% in 2006 compared to 42% in 1996) and other receipts (covering the other state allocations and also other commercial receipts) have a share of 10 - 20% (with a clearly rising trend).

- 32) The table in **Annex 1** shows the sources of ORF's financing in detail.
- 33) The *programme fee* is used for the fulfilment of ORF's public service remit. Pursuant to Section 31 of the ORF Law, anybody is entitled to receive ORF radio and television broadcasts in exchange for a continuing programme fee. Pursuant to Section 31(3), the programme fee must be paid independently of the frequency and the quality of the broadcasts or of their reception. The commencement and the end of the obligation to pay the programme fee are determined in accordance with the provisions applicable to broadcast fees. The relevant provisions of the Broadcast Fees Law (Rundfunkgebührengesetz) state in this respect that charge must be paid for operating or being ready to operate a broadcast receiving system. Everyone who receives broadcasts must pay the broadcast fee and also the programme fee. In accordance with Section 31(4) the programme fee is to be collected in the same manner as the broadcast fees. Pursuant to Section 31(5), arrears of programme fees can be collected by the administrative route. Additionally, pursuant to Section 6 of the Broadcast Fees Law³⁸, the general Administrative Proceedings Act (Verwaltungsverfahrensgesetz) is applicable to the collection of the programme fee. Unlike the broadcast fees, which go solely to the Federal budget, the income from the programme fee benefits ORF alone.
- 34) The level of the programme fee is determined by the Foundation Council and it is necessary to ensure, pursuant to Section 31(1), that the statutory broadcasting remits can be fulfilled with the costs being covered, on the basis of economical administration.
- 35) The Foundation Council can increase the programme fee if the costs arising as a result of the services to be provided cannot be covered despite targeted measures to reduce costs and with other forms of income (advertising, commercial income) being exhausted. The reasons for the programme fee adjustment should deal with the services provided, the statutory requirements and framework conditions, the economic framework conditions (e.g. the consumer price index, license cost increases), the technical challenges and the resulting future costs trend. Because of ORF's dual financing structure, the advertising environment and the state of the advertising economy are also particularly important.³⁹
- 36) The last increase of this kind in the programme fee was decided upon by ORF's Foundation Council on 13 December 2007 and came to 9.4%. The increase should come into force on 1 June 2008.⁴⁰ Programme fee increases previously

³⁸ Broadcast Fees Order - version as at 1 January 2004; Broadcast Fees Law (Rundfunkgebührengesetz - RGG) BGBl. I No 159/1999 in the version in BGBl. I No 71/2003.

³⁹ Republic of Austria's comments of 4 March 2005, question 11, p. 39.

⁴⁰ <http://www.orf-gis.at/index.php?kategorie=news&artikel=3953>

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occurred in 2004 (8.2%) and in 1998 (7%).⁴¹ The Austrian authorities stated that the increases were used to adjust the programme fee in line with inflation.⁴²

- 37) Pursuant to Section 13(1) ORF is permitted to market *advertising*. The extent of the advertising broadcasts in ORF programmes is restricted by law and is determined in detail by the Foundation Council.
- 38) In 2006, ORF achieved advertising turnover in broadcasting amounting to €302 million (2005: €300.5 million), of which €220.7 million was in television (2005: €218 million, 2004: €230.8 million). The advertising receipts therefore rose slightly by comparison with 2005 but were still less than the 2004 level. The drop in advertising and sponsoring income recorded in television in 2005 was attributable to the high competitive pressure of the German TV channels or their advertising windows, and additionally to falling ranges, inter alia because of the annual decrease in the number of purely terrestrial TV households and to the regulatory environment. Accordingly, ORF had reduced its advertising prices on television in a manner "appropriate to the market" (by 11.3% in 2005 and by 3.8% in 2006).⁴³ In 2006, 63% of the television advertising expenditure in Austria came to ORF (down 3.2 percentage points compared to the previous year and 9 percentage points compared to 2004).⁴⁴
- 39) The category of *other income* covers all of ORF's other income, such as income from special forms of advertising, license receipts and other public allocations. Accordingly, for example, ORF receives project-related subsidies which are distributed to it on the basis of individual sponsorship guidelines (e.g. for an ORF emphasis on EU enlargement or for a cultural project). In 2005, these payments came to about €350,000. Subsidies of this kind were shown separately in the accounts and allocated to the relevant project.

2.1.3.2. *Establishing the net costs of the public service remit and ORF's financial position*

- 40) ORF establishes the net costs of the public service remit by means of internal guidelines⁴⁵. Firstly, the total costs of the public service remit are established at the level of the parent company, ORF. The net income from commercial activity is deducted. Such net income may arise on the basis of ORF's advertising activity, the sale and exploitation of programmes, merchandising, performing services for third parties, rentals and leasing, license income, offsetting payments to subsidiary companies and distributions of profits from subsidiary undertakings and other holdings. In a further step, other state allocations are deducted from this sum. In a final step, the net costs of ORF at group level are established. For this purpose, the

⁴¹ Republic of Austria's comments of 7 October 2005; question 4, p. 13. Before 1995, programme fee increases took place in 1994 (14.9%), 1989 (10.1%), 1984 (9.7%) and 1982 (12.5%).

⁴² Republic of Austria's comments of 4 March 2005, question 11, p. 39.

⁴³ Audit report pursuant to Section 40 of the ORF Law 2005, Annex X, p. 5.

⁴⁴ Audit report pursuant to Section 40 of the ORF Law 2005, Annex X, p. 5 et seq.

⁴⁵ Republic of Austria's comments of 12 February 2007, question 3 b, p. 14 and instructions for the implementation of separate accounting in the ORF, as at: 2 January 2007 and Republic of Austria's comments of 14 April 2007, appendix 2, pp. 2-3.

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distributions of profits from the subsidiary undertakings are added to the net costs of the public service remit at the level of the parent company (which means that distributions of profits are ultimately disregarded), while the results of the subsidiary companies are deducted (which reduces the net costs at group level). However, only profits are taken into account, not any losses caused by subsidiary companies.

- 41) On the basis of this calculation method, the financial situation of ORF (the parent company) is as follows from the tables in **Annex 2**.
- 42) The Austrian authorities explained that ORF aimed in principle for a balanced result.⁴⁶ Pursuant to Section 39(2) of the ORF Law, any annual surplus resulting from the annual accounts, plus any profit carried forward, less any loss carried forward after allocation of the reserves permissible under the income tax provisions is to be allocated to a separate reserve (a dedicated reserve) or else carried forward. The dedicated reserve may be used only for the fulfilment of the public service remit. The allocation and the dissolution of the dedicated reserve require the consent of the Foundation Council. In practice, ORF has so far not yet made any use of the opportunity to form a dedicated reserve and where annual surpluses have been achieved they have been carried forward.⁴⁷ In this connection, the Austrian authorities also explained that a diversion to the dedicated reserve would be considered only if the annual surplus exceeded the sum to be added onto the equity. However, this had not occurred in the past.
- 43) The reserves which currently exist at ORF are part of its own capital. In the opinion of the Republic of Austria, this is necessary in order to maintain the activities of ORF in a dual financing system (and taking into account the high proportion of advertising income in ORF's total income), as ORF needed possible ways to cushion against any slumps in income in the commercial sector.⁴⁸ ORF's 29% own capital share should be seen as reasonable.

2.1.3.3. Application of the Transparency Directive

- 44) Pursuant to Section 2(3) of the ORF Law, any activities which go beyond the service provision remit, the programme remit or the special remits are to be shown separately in organisational and accounting terms. They can be operated in a profit making manner provided that no funds from the programme fee are used.
- 45) Section 39(4) implements the requirements of the Transparency Directive for ORF. According to this provision, (1) the internal accounts corresponding to the different business divisions are to be kept separately, (2) all costs and income are to be allocated correctly on the basis of legitimate cost accounting principles, applied uniformly and objectively, and (3) the cost accounting principles on which the separate accounts are based are to be decided on unambiguously.

⁴⁶ Republic of Austria's comments of 14 April 2007, question 7b, p. 18.

⁴⁷ Republic of Austria's comments of 14 April 2007, question 7a, p. 17.

⁴⁸ Republic of Austria's comments of 14 April 2007, question 7b, p. 18.

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- 46) The specific implementation of these requirements is laid down in the "Instructions for the implementation of separate accounting in ORF"⁴⁹. The instructions contain detailed requirements about the allocation of costs and income and about relations with subsidiary companies. In cases in which the same resources are used both as part of the public service remit and also commercially, the allocation takes account of whether the termination of the commercial use would involve a reduction in expenditure. The income achieved by ORF is allocated in principle to the commercial sector. This applies also in the case of offset payments by ORF to subsidiary companies and to profit distributions by subsidiary companies and affiliated undertakings. Unless otherwise specified in the instructions, the activities of all ORF subsidiary companies are allocated to the commercial sector. If ORF commissions subsidiary companies to carry out specific tasks, these are to be attributed to ORF's public service sector. In these cases, a subcontract must be entered into between ORF and the relevant subsidiary company, with the tasks that are to be performed being specified precisely enough for an external comparison to be possible. According to the instructions, the payments to be made by ORF to the subsidiary company must either be in accordance with objectively ascertainable market prices or must arise from the arithmetical costs to the subsidiary company of performing the service, plus a reasonable profit surcharge.
- 47) The ORF must draw up the separate accounts annually at the time of the ORF final accounts and submit them to the Director General together with the draft annual accounts.

2.1.4. Reporting obligations and supervision

- 48) With regard to the fulfilment of the public service remit, the following reporting obligations and legal supervision mechanisms exist:
- 49) Pursuant to Section 8 of the ORF Law, the ORF must, every year, send the National Assembly and the Federal Assembly a report on the performance of the remits under Sections 3 to 5 of the ORF Law.⁵⁰
- 50) Administrative protection against alleged breaches of the law by the ORF and its subsidiary companies (Section 35(1) and (2) of the ORF Law) is provided by the possibility of filing complaints with the Federal Communications Commission (Bundeskommunikationssenat - BKS). Pursuant to Section 36 of the ORF Law "individual complaints" (alleging, for example, serious harm to the moral development of young people or a substantial contravention of protection for human dignity), complaints by undertakings (alleging that their legal or commercial interests are affected by the alleged infringement) or else complaints from legal interest groups (e.g. with regard to an alleged infringement of the advertising provisions) may be submitted to the BKS. Pursuant to Sections 37, 38, the BKS

⁴⁹ Republic of Austria's comments of 14 April 2007, annex 2.

⁵⁰ The report also includes how the implementation of section 11 of the ORF Law serves to implement Article 6 of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the television directive); i.e. the transmission of European works.

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may, in the case of a continuing infringement of the Broadcasting Law, annul the decision of the relevant body or impose an administrative fine.

- 51) According to what the Austrian authorities say, the Federal Communications Commission also examines questions of the objects of the undertaking and the public service remit in the context of its legal supervision.⁵¹ It must for example monitor compliance with the requirements of Section 9(a) of the ORF Law with regard to the sports channel⁵².
- 52) From a financial point of view, ORF is subject to the following control mechanisms and authorities:
- 53) Pursuant to Section 40 of the ORF Law, the annual accounts and report and the group accounts and the group report are to be audited by the audit committee. This audit also covers questions of economy, profitability and effective management and compliance with statutory provisions. The Austrian authorities stated that this audit also covered market conformity.⁵³ The May 2006 audit report⁵⁴ sent by the Austrian authorities shows that the audit committee found that there was compliance with the statutory provisions and with the principles of proper accounting; however, the May 2006 report does not appear to contain any audit of market conformity.
- 54) Additionally, the BKS is authorised in the context of the legal supervision of ORF's activities to monitor the setting of the programme fee subsequently with regard to compliance with the provisions of the ORF Law. It is in principle also possible for there to be subsequent checking of the level of the programme fee by the Court of Auditors, which can monitor the economy, profitability and effectiveness of the conduct of ORF.⁵⁵
- 55) Finally, pursuant to Section 31(a) ORF is subject to the supervision of the Court of Auditors. The last "inspection report" by the Court of Auditors took place in 1995 and before that in 1987/88. The Austrian authorities have informed the Commission that the Court of Auditors intended to carry out another audit for 2007.⁵⁶
- 56) The 1995 inspection report gives an overall view of developments between 1989 and 1994. The Court of Auditors makes recommendations (in particular, rationalisation and cost reduction measures) to make it easier for ORF to adjust to the changed competitive situation and to make ORF into a completely competitive undertaking.⁵⁷

⁵¹ Republic of Austria's comments of 12 February 2007 (comments on the complaints); p.10.

⁵² Republic of Austria's comments of 12 February 2007, question 10(b), p.32.

⁵³ The May 2006 audit report sent by the Austrian Authorities does not however appear to contain any such audit.

⁵⁴ Audit report pursuant to section 40 of the ORF Law 2005, sent by the Austrian authorities in February 2007.

⁵⁵ The Commission is not however aware that any such audit has taken place in the past.

⁵⁶ The Commission does not however have any further details about any such audit.

⁵⁷ The Commission is not aware of the extent to which the proposed measures have been carried out by the ORF.

C. Activities of ORF and the market situation

2.1.5. Programme services

- 57) ORF produces two public television channels (ORF 1 and ORF 2), a public specialist channel (ORF SPORT PLUS) and the commercial station TW1. It is involved in 3sat and has cooperated with ARTE since 2002. It has a programme window in the [BR-alpha](#) station which is operated by Bayerischer Rundfunk. ORF 2 Europe, ORF MOBIL and ORF DIGITAL are also broadcast.
- 58) In 2005, ORF 1 and ORF 2 achieved an average market share of 48% among persons over 12 years old. In 2005 ORF television thus once again had one of the highest market shares of the public broadcasters in Europe.⁵⁸ In households which have cable and/or satellite reception, ORF market share was 43%. ORF's main competitors are foreign private stations such as SAT1, RTL and ProSieben, which offer programme windows designed for the Austrian market within their programmes, foreign public television broadcasters such as, in particular, ZDF and ARD and Austrian private broadcasters (in particular, ATV, which broadcasts throughout Austria).

2.1.6. Online Services

- 59) ORF's online services include news, programme information and more detailed information about individual broadcasts and information about ORF.
- 60) ORF offers many other online services⁵⁹, such as chat rooms (<http://chat.orf.at/>), psycho-tests (<http://rataufdraht.orf.at/>), online advisors, for example about calculating the best bank terms; sale of ring tones, sending eCards (<http://oe3.orf.at>); games (<http://games.orf.at>; Ski-Challenge Chat); services for singles (<http://tv.orf.at/single25>); search services (<http://suche.orf.at/>); Computer and IT-services (<http://futurezone.orf.at>); the <http://sport.orf.at/>; website; newsletters, games, chat, voting (<http://insider.orf.at/>); comic collection (<http://comics.orf.at/>) and regional websites with tips about tourism and events.
- 61) In 2005, ORF online service achieved a net range of 64% (2.5 million regular users). orf.at was the market leader.⁶⁰ The 2006 business report confirmed the leading position and the increasing use made of ORF online service. In 2006, an average of 3.1 million unique clients accessed ORF per month, with 24.7 million visits being recorded per month. Compared to 2005, the number of unique clients and visits rose by 16% each. The ÖWA Plus range study which was conducted in the 4th quarter of 2006 also confirmed ORF's position as the market leader.
- 62) The turnover of ORF Online und Teletext GmbH came to €12.5 million in the 2006 financial year (an increase of 23% over the previous year).

⁵⁸ Audit report pursuant to Section 40 of the ORF Law 2005, Annex IV/p.13 et seq.

⁵⁹ Some of the services have been temporarily or permanently discontinued.

⁶⁰ Examination report pursuant to section 40 of the ORF Law of 2005, Annex IV/p.22.

2.1.7. Sports Channel

- 63) Programmes are broadcast on Sport Plus on the basis of the transmission schedule decided on by the Director General. Accordingly, Sport Plus shows live transmissions from 20.15 to 22.45 every day with repeats of these programmes every day from 2.00 to 4.30. On Saturdays and Sundays, ORF SPORT PLUS also broadcasts its programme from 14.00 to 18.00. On special occasions, sports content can also be broadcast during this period on weekdays. The focus of the reporting was on sports such as tennis, volleyball, handball, riding, swimming and sports for the disabled.
- 64) The sporting rights are being acquired in their entirety by ORF. It is apparent from the information⁶¹ supplied by the Republic of Austria that ORF has acquired sporting rights to a significant degree. In the "minority sports" sector, ORF has sporting rights in respect of the following events, inter alia: American football, biathlon world cup, dolomite man (annual relay contest in Lienz), 2008 ice hockey World Cup, football (street soccer cup, schools league final), golf (European weekly, Austrian Ladies Open 2006, Austrian Open, Ladies European Tour), handball (Champions League), hockey (World Cup, Vienna), track and field athletics, motor sport (3 Night of the Jumps 2006, German touring car masters (DTM) 2006, 2007, Erzbergrodeo 2006, Paris-Dakar 2007, Rally World Cup 2007), Paralympics (Winter 2006), cycling (Tour de France 2006, Europe criterion, Mayrhofen, Graz old city circuit race, Austrian cycle tour, town hall circuit race 2006), riding, tobogganing world cup, swimming (European Cup, World Cup), sailing (ISAF World Sailing Games 2006), skiing (AON Speed games 2007), dancing ("Masters of the Professionals 2006"), tennis (Fed Cup, ATP Magazine 2006 - 2007, Davis Cup, World Cup), table tennis (Super League Final, World Cup), triathlon (Ironman - Klagenfurt, Kitzbühel 2006, World Cup Kitzbühel 2007), volleyball (Beach Masters 2006, Beach VB – Klagenfurt, Champions Ladies League, Indesit European CHL Post SV, CHL AON Hot volleys, CHL Hypo Tirol).
- 65) ORF has additionally acquired rights for premium sporting rights which are mainly broadcast on the ORF 1 and ORF 2 channels.⁶² The premium content includes⁶³ football (Federal League 2006/2007, Champions League Team 2006-2009, European Cup 2008, Austrian Football Association – Federal State Games 2004/05 – 2008/09, City Hall Gymnastics 2007, UEFA Cup, World Cup 2006), motor sport (Formula 1), Olympic Games (Turin Winter Games 2006, Beijing Summer Games 2008, Vancouver Winter Games 2010, London Summer Games 2012), skiing (FIS Alpine/North World Cup 2007, FIS Alpine/North World Cup 2009, Alpine/North World Cup Switzerland 06/07, Foreign World Cup, Domestic World Cup, Finland World Cup), tennis (Hypo Group Internationals, Masters Graz, Roland Garros Paris, Telering Trophy, WTA "Ladies General" Graz).

⁶¹ Annex 9 on the Republic of Austria's comments of 12 February 2007.

⁶² According to the committee report, however, the possibility of "premium content" also being broadcast on Sport Plus in special exceptional circumstances (for example, if two important contests were held at the same time) could furthermore not be excluded.

⁶³ Annex 9 to the Republic of Austria's comments of 12 February 2007.

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- 66) According to the information on the ORF website⁶⁴, a total of about 2,600 hours of live sports transmissions as well as full summaries of various sporting events are provided on Sport Plus every year. Sports broadcasting in 2006 was increased by one half compared to the previous year's level as a result of the introduction of Sport Plus on 1 May 2006.⁶⁵

2.1.8. Further activities by ORF and its subsidiary companies

- 67) Pursuant to Section 2(2) of the ORF Law, ORF is entitled to establish branches and to form subsidiary companies and take holdings in other undertakings provided that they have the same objects as ORF or that the objects of the undertaking so require. ORF is also permitted to take holdings in undertakings with different objects for investment purposes.
- 68) Section 39(4) of the ORF Law to implement the Transparency Directive is also⁶⁶ binding on ORF's subsidiary companies. Pursuant to Section 2(4) of the ORF Law, the contractual collaboration by ORF with other undertakings must be on non-discriminatory terms. This provision also applies to the subsidiary companies.
- 69) The Austrian authorities have submitted that the subsidiary companies which are active on the market could not be costs-neutral from the start, meaning that start-up losses could also be financed from the programme fee.⁶⁷ The question whether profits achieved by the subsidiary companies should be distributed or retained depended on the relevant company law provisions and a retention of profits could therefore not in principle be excluded.⁶⁸ In practice, however, according to the information given by the Republic of Austria, the commercial income was not fully taken into account when determining the costs of the public service remit, as the results from the subsidiary companies also have an effect in the course of group consolidation.
- 70) ORF has a range of subsidiary companies, which perform purely commercial services but are also partly involved in performing activities which are attributable to the public service remit.⁶⁹ These include, for example:
- GIS Gebühren Info Service GmbH, which was founded in 1998 and is responsible for collecting the programme fee for ORF. This statutory task was a service of general commercial interest.
 - ORF Online & Teletext GmbH (ORF O&T) has the task of producing and marketing ORF's online and teletext service. The duties therefore include

⁶⁴ http://digital.orf.at/show_content2.php?s2id=440, see also year-end schedule 2006, Annex 15 to the Republic of Austria's comments of 12 February 2007.

⁶⁵ Republic of Austria's comments of 12 February 2007, question 10 f, p. 34.

⁶⁶ And all other statutory requirements in respect of the ORF - Republic of Austria's comments of 12 February 2007, question 4 a, p. 15.

⁶⁷ Republic of Austria's comments of 12 February 2007, question 4 f, p. 18.

⁶⁸ Republic of Austria's comments of 11 April 2007, question 4 d, p. 12.

⁶⁹ Further information about ORF's subsidiary companies can be found in the report by the Audit Committee for 2005 (appendix 2 to the comments of 12 February 2007, p.12 et seq. of annex X).

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activities in the context of the public service remit and also duties of a commercial nature.

- The main task of Österreichische Rundfunksender GmbH & Co KG (“ORS”) is the transmission of broadcasting and similar signals via a terrestrial transmission network or by satellite. Where ORS's services relate to the dissemination of the programmes and services covered by the provision remit, the ORS is performing a service of general commercial interest. Services that go beyond this, particularly services to third parties (in this respect, see also under paragraph (78)), are performed outside the public service remit. Overall, it is said that the ORS acts exclusively on a commercial basis. Services to ORF and to third parties must likewise be performed on non-discriminatory and market-consistent terms.⁷⁰
- ORF Budapest Rádío- es Televízió Kft was formed to purchase a property in Budapest where the Hungarian correspondent office is run. This is used for reporting on international topics and therefore constitutes a task attributable to the public service remit.⁷¹

71) The commercial activities performed by the subsidiary companies⁷² include, for example, the transmission of broadcasting and similar signals via the terrestrial transmission network for third parties (ORS⁷³); the rental of transmission infrastructure (ORS); the transmission of broadcasting and similar signals via satellites for third parties (ORS); the rental of satellite capacities to third parties (ORS); advertising and marketing (including promotion for ORF) (ORF Enterprise GmbH&Co KG, "ORF-E KG"); communication of advertising for ORF (ORF-E KG); music publishing (ORF-E KG); providing information to the public in exchange for payment (GIS); marketing of orf.at and teletext (ORF O&T); online content syndication (ORF O&T); audio and video service (sending copies at prime costs) (RSG); the ORF shop (RSG); running and involvement in the TW1 specialist channel (TW1 and TW1-BF).

72) A number of commercial activities are performed by ORF itself.⁷⁴ These include advertising and marketing (Central, Ö3, Federal State Studios); financial investment; marketing programmes; content syndication (mobile); rentals and leasing (e.g. canteen); technical services/assistance to third parties; services for ORF shop; advertising and off-air promotion (Top Spot-advertising prize promotion, TV programme presentation) and services to subsidiary companies.

⁷⁰ Republic of Austria's comments of 11 April 2007, question 4 b p.9 (f).

⁷¹ Republic of Austria's comments of 11 April 2007, question 4 b p.10.

⁷² Republic of Austria's comments of 11 April 1007, question 4 b p.11.

⁷³ ORS: Österreichische Rundfunk-Sender GmbH & Co. KG.

⁷⁴ Republic of Austria's comments of 11 April 2007, question 4 b, p.10 et seq.

3. INITIATION OF STATE AID INVESTIGATION

- 73) On 25 July 2005, the Austrian association of private television broadcasters (VÖP) introduced a formal complaint which takes issue with a number of aspects relating to the public service broadcasting system in Austria.
- 74) The complaint was generally directed against the state financing of ORF.⁷⁵ The complainant also more specifically addressed the lack of a precise definition of the public service remit for ORF, the lack of an external supervision of the fulfilment of the remit and the absence of adequate financial requirements as well as the absence of proper separate bookkeeping, and the concern that commercial activities (in particular, ORF's TV channel TW1) may be cross-subsidised. As a result of channel sharing between TW1 and SPORT PLUS, the public financing of the sports programme indirectly also benefited the commercial programme TW1 which was loss making. The acquisition of exclusive rights for broadcasting sport events by ORF made it impossible to develop commercially feasible offers. The ORF-law should determine how many hours ORF may show sport events on TV. Austria should moreover determine how many sport rights ORF may acquire annually. The launch of mobile terrestrial television DVB-H by ORF was incompatible with Article 86 (2) EC. It would equally be inadmissible that ORF charged viewers for receiving its programmes via satellite (smart cards).
- 75) VÖP also argued that the inclusion of online services and of SPORT PLUS in the public service remit of ORF would convert the existing aid into a new aid. Due to the absence of a notification, these services had to be terminated immediately.
- 76) In its complaint of 8 November 2005, the German private TV operator Première addressed specifically ORF's SPORT PLUS channel. According to Première, ORF planned to broadcast premium content such as the Champions League on ORF SPORT PLUS. However, following an unspecified agreement between Première and ORF, Première withdrew its complaint in October 2007.
- 77) In its complaint of September 2004, VÖZ raised the accusation that ORF, using state funds, supplies online services such as games, dating services, computer and IT programs, GSM ring tones, sports platform and SMS services. The complainant considers that the public service remit has not been defined specifically enough with regard to online services and that there is no effective control over the extent of the services offered.⁷⁶
- 78) VÖZ moreover argued that the commercialisation of ORF's on-line services led to a more pronounced distortion of competition to the detriment of newspaper publishers than for instance in Germany. Contrary to ARD and ZDF, ORF was allowed to advertise on its website. Like VÖP, VÖZ argues that ORF's on-line

⁷⁵ The complaint also covered alleged exploitation of a dominant market position in the advertising market.

⁷⁶ The complainant had additionally stated that the ORF was abusing its dominant market position in the advertising market. No further details were however given in respect of these accusations in the course of the provisional examination proceedings, and so they form no part of the present proceedings.

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services are severable from the existing TV and radio offer of ORF and that it went beyond a purely "supporting function" with regard to TV and radio offers of ORF. Austria should therefore have notified a new aid before ordering ORF to provide on-line services.

- 79) VÖZ called upon the Commission to review the public service remit for TV and for radio.⁷⁷ § 4 ORF-Gesetz would merely contain a number of abstract aims without clarifying, however, which media (TV, radio, online etc) ORF should use to achieve these aims. Austria had therefore committed a manifest error in defining the public service remit.

4. THE ARTICLE 17 LETTER

- 80) In the Article 17 letter of 31 January 2008, the Commission services took the preliminary view that the programme fee qualifies as State resources within the meaning of Article 87 EC. The Commission services also took the preliminary view that the requirements set out in the "Altmark" judgment had not been met.
- 81) The Commission services then took the preliminary view that ORF's use of programme fees for financing TV and radio broadcasting as well as online activities did not qualify as "new aid". Conversely, it raised certain preliminary doubts as to the legal nature of the aid granted for operating the special interest channel ORF SPORT PLUS.
- 82) The Commission services then raised preliminary concerns that the aid granted to ORF was incompatible with Article 86(2) EC as interpreted by the Amsterdam Protocol. These concerns pertained to the following matters:
- 83) First, as to the definition of the public service remit: the Commission services took the preliminary view that the remit for online services and for special interest channels was too unspecific. The Commission services took the preliminary view that it was necessary for the public service obligations to be defined more specifically with regard to online services taking into account the existing offer on the market. It should be clear which of the population's needs are supposed to be covered by the broadcasting institutions with their online services and the extent to which these online services, described in greater detail, serve the democratic, social and cultural needs of society in the same way as conventional programmes.
- 84) Second, as to the supervision of the remit: The Commission raised preliminary doubts whether the existing control mechanisms are capable of appropriately monitoring whether the public service remit has been fulfilled, both regarding information given to the National Assembly and the Federal Assembly (under Section 8 of the ORF Law and with regard to the fulfilment of the remit under Section 3-5 of the ORF Law) and with regard to the legal supervision performed by the BKS;

⁷⁷ Letter of VÖZ dated 4 August 2008.

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- 85) Third, as to the proportionality control: The Commission recognised that Section 39(4) of the ORF Law implements the requirements of the transparency directive for ORF. The Commission services therefore took the preliminary view that the requirements for separate accounting have in principle been met. However, the Commission services was not assured that the legal requirements are also properly fulfilled in practice. In particular, it raised doubts regarding the separation of costs between TW1 and Sport Plus/ORF. On the basis of the information supplied by Austria, the possibility could not be excluded that advertising blocks and advertising income from the advertising placed around the sports channel is allocated to TW1 to an excessive degree. The Directorate-General for Competition wondered whether ORF was unnecessarily increasing its costs by granting benefits to TW1.
- 86) For the Commission services it was also doubtful whether sufficient monitoring takes place as to whether public funds available to ORF do not exceed what is necessary for the fulfilment of the remit. It did not appear that the BKS or the Court of Auditors checked for any possible overcompensation; nor did there appear to be any regular check.⁷⁸ With regard to the Auditing Commission's powers of supervision, the Directorate-General for Competition doubted whether there was sufficient independent supervision. Nor does the check appear to cover the question of possible overcompensation. It was also unclear what the consequences would be of any possible finding that there had been overcompensation
- 87) The Commission services also raised preliminary doubts with regard to the market behaviour of ORF as concerns the purchasing and holding of exclusive live sporting rights. While acquiring such rights was permitted as part of a balanced programme and covered by the public service remit, there was no clarity on the scope of premium sport shown on the special interest channel ORF SPORT PLUS and on the possibility of third parties to acquire sublicenses for unused sport rights. The Commission services raised preliminary concerns as to whether ORF was in a position regularly to outbid its competitors and therefore to "buy up" the market without this being necessary for the fulfilment of the public service remit.
- 88) On the basis of the information given by the Austrian government and the ORF guidelines, the Commission services took the preliminary view that transactions between ORF and its subsidiary undertakings appear to be subject to the arm's length principle. However, the Directorate-General for Competition noted that there was no clear legally binding requirement and also no appropriate subsequent control thereof.

5. THE AUSTRIAN GOVERNMENT'S COMMENTS PRIOR AND SUBSEQUENT TO THE ARTICLE 17 LETTER

- 89) The Republic of Austria considers that the use of the programme fee is not State aid within the meaning of Article 87(1) of the EC Treaty. The programme fee had to be paid by private individuals and could therefore not be described as state resources. There was therefore no direct or indirect charge on the state budget. Setting, raising

⁷⁸ It will be recalled that the last report from the Court of Auditors was in 1995.

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and using funds from the programme fee was outside State control. Unlike broadcast fees, which are paid directly into the Federal budget and collected by the GIS under the supervision of the Federal Minister of Finance, no such supervisory rights existed with regard to collecting the programme fee.⁷⁹

- 90) Quite apart from whether the programme fee can be described as state funds, the financing of ORF did not constitute state aid, as the "Altmark" criteria were met. The public service remit was clearly determined. The criteria by which the settlement is calculated were laid down objectively and transparently in Section 31 of the Austrian Broadcasting Corporation Law (Bundesgesetz über den Österreichischen Rundfunk - ORF-G). The programme fee did not exceed the amount necessary to carry out the remit. On the contrary, ORF was structurally underfunded⁸⁰. ORF's costs were covered only insofar as they were in accordance with efficient business management.⁸¹
- 91) *In eventum*, the alleged aid was compatible with Article 86(2) of the EC Treaty, as the definition, supervision and financing of ORF were in accordance with the requirements listed in the Broadcasting Communication. The structure of ORF's public service remit was sufficiently specific. Additionally, in accordance with the Amsterdam Protocol, the balanced and wide-ranging programme to be offered by ORF had to be seen as a service in the general commercial interest. As regards the broadcasting of ORF SPORT PLUS, the Republic of Austria claims that this service took account of specific social requirements of the Austrian population and thus also had to be considered as a service of general economic interest. The same applied to the ORF online service, which was part of the overall programme. In this respect, the ORF Law contained a relevant and sufficiently precise definition of remit and entrustment.
- 92) Finally, it was guaranteed that only those activities which related to the service provision remit, the programme remit and the special remits of ORF, and transactions and steps required for these activities or the marketing of these activities can be financed from the programme fee. It was additionally laid down by statute that the activities which went beyond the public service remit had to be separated in organisational and accounting terms and that no programme fees could be collected to finance them if they were performed with the intention of making a profit. Additionally, ORF was statutorily obliged to maintain accounts in accordance with the principles of the Transparency Directive. As the net costs of the public service remit far exceeded the income from the programme fee, there was no overcompensation. Additionally, the Austrian authorities state that the level of the programme fee had to be determined "on the basis of economical administration" and the determining of the programme fee was subject to supervision by the Federal Communications Commission (Bundeskommunikationssenat).
- 93) In reply to the Commission's Article 17 letter, the Austrian government provided the following clarifications. ORF had meanwhile withdrawn a number of its online offers

⁷⁹ Republic of Austria comments of 2 May 2008, p. 4.

⁸⁰ Republic of Austria's comments of 3 March 2005, p. 41.

⁸¹ Republic of Austria's comments of 3 March 2005, p. 24 et seq.

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from the market (e.g.: on-line dating services, comics, e cards, SMS services). ORF Mobil, a mobile TV channel of ORF, was merely a pilot project that had meanwhile been ended.

- 94) Turning to the complaints, Austria takes the view that the public service remit in § 4 ORF-G was sufficiently precise to meet the requirements of the Commission's 2001 Broadcasting Communication. While the categories in the ORF-law were indeed abstract in nature, they were still sufficiently clear and were moreover further specified in ORF's programme guidelines (Programmrichtlinien) and broadcasting schemes (Sendeschemen). Austria also rejects VÖZ's argument that the remit must distinguish between a mission for TV, a mission for radio and a mission for online services. Referring to the 2001 Broadcasting Communication, Austria argues that it was legitimate to define qualitative standards for all platforms alike. Based on the CFI judgment in TV2 , Austria also underlines the broad discretion of Member States for defining the public service remit. Austria rejects *ab initio* the viewpoint of the complainants that ORF should be limited to activities which no commercial broadcaster was willing to offer on the market. ORF's right to determine its TV programming within the framework of the public service remit flows from the principle of editorial independence as enshrined in Article 10 ECHR.⁸²
- 95) As to the complainants' argument that ORF SPORT PLUS qualifies as "new aid", Austria replies that the launch of this channel on 1.5.2006 neither affected the financial needs of ORF nor did it change the core elements of ORF's public service remit at the time. Austria referred to § 210 of the Commission's decision in case E 3/2005 to strengthen its position that the expansion of the public service remit into the areas of online activities and special interest channels do not constitute new aid. The increase of licence fees which ORF had decided in 2007 and which entered into force as of 1 June 2008 was necessary due to inflation between 1.1.2004 and 31.12.2008 and did not relate to the introduction of ORF SPORT PLUS. Moreover, the public service remit under § 4 ORF-G obliged ORF to provide a balanced offer including both premium and minority sports. The launch of ORF SPORT PLUS would serve this aim by allowing ORF to broadcast more minority sports on television than before. § 9a ORF-G did not alter the remit of § 4 ORF-G, it simply rendered that remit more specific. ORF SPORT PLUS would reproduce content largely shown on ORF1 or ORF2. On ORF1 and ORF2, sport events are often broadcast as small fragments during the news. The launch of ORF SPORT PLUS allowed ORF to broadcast such events in full length and live. As ORF SPORT PLUS remained limited to minority sports, ORF SPORT PLUS had a miniscule market share of only 0.2%.
- 96) The public financing of SPORT PLUS was therefore existing aid. Moreover, it was compatible with the EC State aid rules, because the operation of SPORT PLUS and TW1 on one channel did not lead to a cross-subsidisation of public and commercial activities. The commercial programme TW1 was structurally separated from the ORF mother company which operated the ORF SPORT PLUS programme. Despite maintaining its initial view that the remit for the ORF SPORT PLUS programme

⁸² See in this respect also Joined cases T-309/04, T-317/04, T-329/04 and T-336/04, TV2 v Commission, paragraph 118.

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was already clearly defined in § 9a ORF-G, Austria offered commitments to further specify that remit (see below).

- 97) As to the market behaviour of ORF regarding premium sport rights, Austria informed the Commission that the Austrian competition authority had meanwhile adopted a decision prohibiting exclusive contracts between ORF and the organizers of ski world cups. Due to this decision, competitors of ORF were now in a position to acquire exclusive sport rights for ski world cups. ORF could no longer "buy up the market" for such premium sport rights. Finally, ORF's advertising fees were market conform.

6. ASSESSMENT AS AID

A. Nature of aid pursuant to Article 87(1) of the EC Treaty

- 98) Pursuant to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.
- 99) These measures must be described as state aid within the meaning of Article 87(1) if the following conditions are met:
- the use of state resources;
 - favouring certain undertakings or the production of certain goods;
 - distorting competition and affecting trade between Member States.

6.1.1. Use of state resources

- 100) The Republic of Austria considers that the programme fee pursuant to Section 31 of the ORF Law is not state resources within the meaning of Article 87(1) of the EC Treaty⁸³.
- 101) In the Commission's view, to the contrary, income from the programme fee qualifies as State aid for the following reasons.
- 102) In accordance with established decision-making practice of the Commission and the relevant case law, the Commission takes into consideration in particular the extent to which the income is allocated in accordance with statutory provisions⁸⁴ and the income from the programme fee accrues to a public institution which protects the

⁸³ See the Austrian government's comments in section 5.

⁸⁴ See Case Law 173/73, *Italien gegen Kommission*, Court of Justice Reports, 1974, 709, para 16, and Commission decision on "BBC 24-hour news channel" (NN 88/98 - UK).

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interests of the public good and the extent to which the collection, calculation and use of the programme fee is subject to state control.⁸⁵

- 103) In the present case, the Commission notes that ORF is a foundation under public law which performs the functions transferred by the ORF Law in the public interest. The income from the programme fee constitutes compensation for the fulfilment of the public service remit enshrined by law, to which ORF has a statutory entitlement.
- 104) The level of the programme fee is determined by the ORF Foundation Council. As most of the members of the Foundation Council are appointed by state bodies, it must be assumed that the level of the programme fee is determined under state control in the broader sense. This also appears to be recognised by the Austrian government in a different context.⁸⁶
- 105) The Republic of Austria takes the view⁸⁷ that such a decision by the Foundation Council to raise the programme fee merely constitutes an internal legal act by the ORF foundation and is to that extent irrelevant as a possible influence on the part of state bodies on the determining of the programme fee.
- 106) However, the programme fees are levied by the GIS as a sovereign administrative function, applying the general administrative procedural law. The charge is based on a statutory provision, namely Section 2(1) RGG in conjunction with Section 31(4) of the ORF Law, and not on a private agreement between ORF and the broadcasting participants. Legal enforcement takes place pursuant to Section 31(5) of the ORF Law by way of public instruments. The fee is collected by GIS which acts as "Abgabenbehörde erster Instanz", a "tax authority of first instance" under the supervision of the Austrian finance minister.⁸⁸ Citizens can appeal decisions of GIS to the tax authorities of second instance, the Finanzamt für Gebühren und Verkehrssteuern of Vienna⁸⁹.
- 107) Against this background, the Commission takes the view that the programme fee is akin to a public tax. The fact that the Federal Minister of Finance has no rights of supervision in the levying of the programme fee does not change the sovereign nature of the collection of the programme fee itself.

⁸⁵ See Case Law C-83/98 P, *Ladbroke Racing*, judgment of 6 May 2000, and also the "*Pearle*" judgment (judgment of 15 July 2004 in Case Law C-345/02), including the statements of Advocate General Ruiz-Jarabo Colomer of 11 March 2004, para 67. Also see Commission decision on "BBC licence fee" (N 631/2001 - UK).

⁸⁶ In the proceedings before the European Court of Human Rights, the Republic of Austria argued, within the context of the admissibility of the proceedings, that the ORF is under state control, since 18 of the 35 Member States of the Foundation Board were named by the Federal Government of each country. Therefore the state sites would directly or indirectly occupy a dominant position in the ORF. Likewise, the public remit and the collection of programme fees, as well as the governmental supervision, for example, on the part of the Court of Auditors are signs of the ORF's state character. (Judgment of the European Court of Human Rights of 7 December 2006; *Austrian Broadcasting versus Austria*; Appl. N. 35841/02. (www.echr.cor.int).

⁸⁷ Letter of 12 February 2007, question 2a, p. 11 et seq.

⁸⁸ § 5 (6) RGG.

⁸⁹ § 6 (1) RGG in conjunction with Decree BGBl. II Nr. 166/2004.

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- 108) Nor does the reference to the “*Preussen Elektra*” judgment⁹⁰ lead to any different result. Unlike the set of facts on which the judgment is based, there is no private-law exchange relationship between the persons obliged to pay the fees and the GIS or ORF⁹¹. The obligation to pay the programme fee, which is enshrined in Section 31 of the ORF Law, exists solely on the basis of operating or being ready to operate (in possession of) a broadcast receiving system and is independent of receiving the ORF broadcasts. For this reason, the programme fee cannot be seen as a private-law service in return for the services of ORF.
- 109) The Commission also notes that the European Court of Justice in its judgment of 13 December 2007 in the *Bayerischer Rundfunk* case also came to the conclusion that the financing of public broadcasting institutions by means of broadcast fees must be regarded as “financing by the state” within the meaning of the allocation directives. In this respect, the Court of Justice took into account in particular the fact that the fee was provided for and imposed by law and was not the result of a legal transaction between the broadcasters and the consumers. Additionally, it was levied and collected as a sovereign act. The payment was also made without any specific service in exchange.⁹²
- 110) The Court of First Instance came to a similar conclusion in a judgment of 22 October 2008⁹³ qualifying the TV licence fee in Denmark as “state resource” due to the similarities with a tax.
- 111) For these reasons, the Commission takes the view that the Austrian programme fee is a State resource.

6.1.2. *Granting a benefit*

- 112) The income from the programme fee gives ORF a benefit compared to its private competitors which depend solely on commercial income, particularly from advertising.
- 113) Referring to the *Altmark* criteria, the Republic of Austria denies that any benefit has been granted.⁹⁴
- 114) In the “*Altmark*” judgment⁹⁵, the Court of Justice stated that state measures are not covered by Article 92(1) of the EC Treaty [now Article 87(1) of the EC Treaty] if

⁹⁰ Case Law C-379/98, *PreussenElektra*, judgment of 13 March 2001, Court of Justice Reports 2001 I-2099, paras. 54-66.

⁹¹ The claim to payment of the programme fee cannot be implemented through civil law but rather through administrative law. In particular, para. 60 of the “*PreussenElektra*” judgment made it clear to the Court of Law that, in the case of denying the state funds, it depends decisively on whether the measure intervenes solely in the relationship between private entities.

⁹² See paragraph 48 of the judgment in Case C337/06. Although in this case the Court of Justice had to decide how to interpret a directive relating to the awarding of public contracts, this argument also appears applicable to Article 87(1) of the EC Treaty.

⁹³ Joined cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2 v Commission*, paragraph 159.

⁹⁴ See the Austrian government's arguments in section 5.

⁹⁵ Case C-280/00, judgment of 24.7.2003, *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] ECR I-7747, in particular paragraphs 89-94.

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they are to be regarded as compensation for Services to perform public service obligations, and it set out the following cumulative requirements:

- “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.”
- “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.”
- “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.”

115) The Austrian government has failed to provide proof that the requirements listed in the Altmark judgment are met.

116) In particular regarding the 2nd Altmark criterion, ORF will maintain the possibility to auto-determine the licence fees it deems necessary to cover public service costs over a five year cycle. This mechanism leaves ORF considerable discretion, both with regard to the estimation of the evolution of its own cost and of its future (in particular: advertising) revenues. While these estimations will be verified by the media regulator, Austria has only committed to a purely formalistic control. The media regulator will only control whether the licence fees are set "in accordance with the law". However, Austria has not proposed any commitments which would allow the media regulator to supplement ORF's assessment with its own regarding the development of cost, revenues and inflation over the next five year cycle, should it find that the estimations are rather unlikely. These facts fundamentally distinguish the present case with the facts at hand in the judgment rendered by the Court of First Instance on 22 October 2008⁹⁶ regarding the TV licence fee in Denmark.

⁹⁶ Joined cases T-309/04, T-317/04, T-329/04 and T-336/04, TV2 v Commission, paragraph 228. The procedure for setting licence fees in Denmark involve the Danish parliament, competitors of the public service broadcaster TV2, a firm of auditors etc. None of these elements is present in the current case.

- 117) The Commission also considers that the 4th Altmark criterion is not fulfilled in the present case. It is undisputed that ORF was not chosen on the basis of a public procurement. Moreover, the Austrian authorities have supplied no specific information that would have made it possible to check the extent to which the costs on which ORF is based are in fact in accordance with the costs of an efficient undertaking. The reference by the Austrian government to the fact that there is no comparable undertaking does not discharge the Austrian authorities of their duty to give an explanation. Moreover, in a special report on ORF of the Austrian Court of Auditors of April 2009 set out a number of serious shortcomings as to the efficiency of ORF's operations. In this report, the Court in particular determined that ORF had foregone the possibility to cut cost and to become more efficient despite clear suggestions of an external consultant.⁹⁷ The Commission therefore considers that ORF incurs more costs than necessary for a typical broadcaster who is well run and provided with adequate means so as to be able to meet the public service mandate to discharge those obligations.
- 118) Under these circumstances, the Commission takes the view that the requirements set out in the "Altmark" judgment have not been met and therefore that the allocation of the programme fee to ORF represents a benefit that is relevant for aid purposes.

6.1.3. Distortion of competition and effect on trade

- 119) In the light of the relevant case law, there is a distortion of competition and an effect on trade within the Community if the aid granted by a Member State strengthens the position of the undertaking receiving the aid compared to other competitors.⁹⁸ Pursuant to paragraph 18 of the Broadcasting Communication⁹⁹, this applies in particular with regard to the frequently international purchase and sale of programme rights, advertising with cross-border effect, especially in areas near to the border in which the same language is spoken on both sides of the border, and the ownership structure of commercial broadcasters which may extend to more than one Member State.
- 120) As a result of financing by means of the programme fee, ORF's position is strengthened compared to that of its private competitors. The services of ORF can be received beyond the borders of Austria. In Austria itself, ORF is in competition with TV broadcasters with a foreign or international company structure (e.g. SAT1, RTL and ProSieben) and foreign public TV broadcasters (in particular, ARD and

⁹⁷ In this report "Bund 2009/2" , the Austrian Court of Auditors pointed amongst others to the "absence of a comprehensive strategy", the "overlap of organisational structures", the absence of common strategic marketing concept for ORF's 17 sub-organisations, duplications within the organisation, an unnecessary increase of staff by more than 13% due to a lack of proper planning; the failure of ORF to follow-up on suggestions of external consultants to reduce its costs and become more efficient (ORF failed to implement even half of the potential for savings it determined and even this potential in turn was considerably below the potential for savings identified by the external auditor) etc. . See <http://www.rechnungshof.gv.at/berichte/ansicht/detail/oesterreichischer-rundfunk.html>

⁹⁸ Judgment of 17 September 1980 in Rs. 730/79, *Philip Morris*.

⁹⁹ Communication of the Commission regarding the application of the provisions via state aids to public service broadcasting, published in the Official Journal of the European Community of 15 November 2001, C 320/5.

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ZDF). Additionally, ORF also operates throughout Europe with regard to the purchase and sale of programme rights, particularly via the EBU.

- 121) The Commission therefore concludes that the financing of ORF through programme fees is capable of distorting competition and affecting trade between Member States.

B. Qualification as existing aid

- 122) Pursuant to Article 1(b) of the procedural regulation, the term "existing aid" covers, inter alia, all aid which existed before the Treaty came into force in the relevant Member State. On the other hand, alterations to existing aid can constitute "new aid" pursuant to Article 1(c) of the procedural regulation.

- 123) Pursuant to Article 4(1) of the regulation implementing the procedural regulation¹⁰⁰, an "alteration to existing aid", for the purposes of the abovementioned provision, shall mean 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.

- 124) In this respect, the Commission takes into account, inter alia, the nature of the benefit, the objective pursued by the measure and the benefited institutions or undertakings.¹⁰¹

- 125) In the light of the relevant case law, what matters for the purposes of describing aid as new aid is the extent to which the legal provisions about the nature of the benefit or the activities of the undertaking receiving aid have been changed.¹⁰² Additionally, the original provision is converted into a new aid provision as a result of the change only if the change affects the essence of the provision and therefore cannot be clearly separated from the original provision.¹⁰³

- 126) Against this background, the Commission will examine the extent to which the legal basis existed before the EC Treaty came into force and the extent to which subsequent amendments can be separated from the original provision or affect the essence of the original provision.

- 127) The financing of ORF was introduced in its present form before the accession of Austria in 1995. The financing by means of programme fees, the intended purpose and the beneficiaries of the financing largely continue unchanged (see paragraphs (5) to (9)).

¹⁰⁰ Commission Regulation (EC) No 794/2004 of 21 April 2004 for implementing the Council Regulation (EC) No 659/1999 regarding particular provisions for the application of Article 93 of the EC Treaty, OJ L 140/1, 30 April 2004.

¹⁰¹ See also the opinion of Mr Advocate General Trabucchi in Case 51/74 van der Hulst/Produktschap voor Siergewassen [1975] ECR 79.

¹⁰² Judgment in Case C 44/93, "Namur-Les Assurances du Cr dit SA" [1994] ECR I-3829, paragraph 28.

¹⁰³ Judgment of the Court of Justice of 30 April 2002, Gibraltar v Commission, paragraph 111.

- 128) The Commission takes the view that the possibility of online activities which was only explicitly provided for in 1999 in the ORF Law and thus the financing of these activities can be regarded as existing aid.
- 129) The Commission, in accordance with its decision-making practice¹⁰⁴, concludes that the performance of the public service remit by means of new technological transmission methods (such as the internet or mobile platforms) does not per se constitute a substantial alteration if the content offered using the new medium is in accordance with the existing programme remit and if the legal basis for the financing has not substantially changed.

6.1.4. The introduction of online services

- 130) The provision of online services (and teletext) connected with the programmes, which according to the ORF Law serve to achieve the programme remit and are connected with the broadcasting programme, has a close connection in any event, according to the wording, with ORF's traditional programme remit and appears restricted to supporting functions. In line with its case practice, the Commission therefore takes the view that the online services of ORF do not modify the existing public service remit to a fundamental extent within the meaning of the *Gibraltar Jurisprudence*.¹⁰⁵
- 131) Other changes introduced in 1999, 2001, 2002, 2004 and 2007 are of an administrative nature, in other words primarily of an organisational nature. These include, for example, the alteration of ORF's organisational structure, including internal but also external control mechanisms and the provisions with regard to the levying of the programme fee by the GIS (for the details of the changes, see paragraph (7)).

6.1.5. The launch of special interest channels for sport, information and culture

- 132) In respect of the authorisation to run the ORF SPORT PLUS channel, based on the extensive clarifications provided by Austria in reply to the Article 17 letter, the Commission takes the view that the financing of this special interest channel constitutes existing aid. This is because the remit set out in Section 9(a) of the ORF Law follows the orientations already contained in the general television programming remit (in particular Section 4 of the ORF Law). Moreover, the launch of the theme channel did not lead to an increase of the programme fee.¹⁰⁶ The launch of ORF SPORT PLUS is therefore no substantial alteration of ORF's public service remit and hence no "new aid". The compatibility of this TV channel with the EC State aid rules is further explored hereafter, in section 6.1.6.

¹⁰⁴ See Commission decision of 1 October 2003 in "*BBC Digital Curriculum*", state aid No 37/2003, paragraph 48 with reference to the Commission decision on "*BBC 24 hour news*", paragraph 69/70.

¹⁰⁵ See Commission decision of 24.4.2007 in E 3/2005, financing of public broadcasting in Germany, paragraph 204.

¹⁰⁶ The increase of the licence fees which ORF decided in 2007 and which entered into force as of 1 June 2008 aimed at adjusting the level of the fees to inflation and did not relate to the introduction of ORF SPORT PLUS.

133) As to the launch of a new culture and/or information channel, Austria informed the Commission¹⁰⁷ that such (a) channel(s) would follow the existing remit as set out in Section 4 of the ORF-law. The new channel(s) would deepen already existing programme categories on ORF1 and ORF2 as to information (news, political information, regional news etc.) and culture (theatre plays, music, architecture, philosophy, literature, cinema etc.). In view of this clarification, the Commission considers that this (these) channel(s) will become part of the existing aid scheme, provided that Austria observes the conditions for the compatibility of these channels with the EC State aid rules as set out hereafter in section 7 on appropriate measures.

6.1.6. The increase of the licence fee

134) The Commission also considers that increases of the level of the licence fee should not be regarded as new aid. The increase is rather the consequence of an increased financial need of public service broadcasters in fulfilling their public service mission. It is therefore – and in line with previous Commission practice - not severable from the initial funding regime and does not constitute a substantive amendment provided that the public service mission as such has not been substantially changed.¹⁰⁸

C. Assessment of compatibility pursuant to Article 86(2) EC as interpreted by the Amsterdam Protocol

135) The Commission assesses the financing of public broadcasting pursuant to Article 86(2) of the EC Treaty, the Amsterdam Protocol on public broadcasting and the 2009 Communication on the application of State aid rules to public service broadcasting ("the 2009 Broadcasting Communication").

136) 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."

137) In accordance with the case law of the Court of Justice on Article 86(2) of the EC Treaty, the Commission laid down the following requirements in the "Broadcasting Communication":

- the Member State must give a sufficiently precise definition of the public service remit ("definition of the public service remit");
- the relevant broadcasting institution must be entrusted with this remit by means of a formal document and the performance of the public service remit must be subject to sufficient control ("entrustment" and "supervision");

¹⁰⁷ See also appropriate measures of Austria, First Part, section V.

¹⁰⁸ See Commission decision of 24.4.2007 in E 3/2005, financing of public service broadcasting in Germany, paragraph 206 with further references.

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- the compensation payment must be restricted to the net costs of the public service remit and there must be effective external control of the net cost principle ("net cost principle" and "financial control")
- new significant audiovisual services must be assessed in advance of being put on the market; this assessment must be based on an open consultation to assess at the national level whether a new audiovisual service creates predominantly negative effects on the market and whether such predominantly negative effects can be justified with added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer ("proportionality" and "Amsterdam test").

6.1.7. Definition of the public service remit

- 138) Member States are solely competent and at the same time obliged to establish an official definition of the public service mandate (the public service remit).¹⁰⁹ Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable. 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.¹¹⁰ Otherwise, there can be no effective control whether public funds are indeed used to finance the public service or rather commercial activities.
- 139) 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 86(2).¹¹¹ These qualitative criteria are the very justification for the existence of broadcasting SGEIs in the audiovisual sector.¹¹²
- 140) The public service remit may also include services which are not "programmes" in the conventional meaning such 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.¹¹³
- 141) 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

¹⁰⁹ Paragraph 43 of the 2009 Broadcasting Communication.

¹¹⁰ Paragraph 45 of the 2009 Broadcasting Communication.

¹¹¹ Paragraph 47 of the 2009 Broadcasting Communication.

¹¹² See Court of First Instance in T-442/03, SIC v. Commission, paragraph 211.

¹¹³ Paragraph 81 of the 2009 Broadcasting Communication.

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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".¹¹⁴

6.1.7.1. *Definition of the remit with regard to the TV programme activities of ORF*

- 142) With regard to the general television programme activities covered by the legal remit (see Sections 3-5 of the ORF Law), the Commission maintains its view set out in the Article 17 letter that while the remit is broad, it can be further specified by means of programme guidelines and transmission plans.¹¹⁵ However, as ORF's programme guidelines and transmission plans are no legally binding acts,¹¹⁶ there are currently no adequate safeguards to ensure that ORF in practice considers the qualitative standards in the public service remit.¹¹⁷

6.1.7.2. *Definition of the remit with regard to ORF's online services*

- 143) The Commission maintains the view that the current requirement under Section 3(5) of the ORF Law for online services "to be connected with" existing television and radio programmes and which serve the performance of the general public service remit is insufficient to establish to which extent such online services serve the democratic, social and cultural needs of society. In particular, it is not apparent when online services should be regarded as separate and independent therefore, in the view of the Austrian authorities, outside the remit.¹¹⁸

¹¹⁴ 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.

¹¹⁵ 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.*"

¹¹⁶ Austria's comparison of ORF's programme guidelines with France Television's "*cahiers de charge*" (submission dated 2 May 2008 in reply to the Article 17 letter at § 20) in COM Decision C(2003)4497 fin of 11.12.2003 is misplaced. In that case, France agreed with the public service broadcaster France Télévision on a set of legally binding services in exchange for the payment of a licence fee. ORF's internal guidelines on coordinating and creating TV programmes do not display such character of a binding agreement between two parties.

¹¹⁷ In a parliamentary "*enquête*" held by the Austrian Nationalrat on 17 September 2009 on the future of the public service system in Austria, a number of parliamentarians indeed brought concrete examples why, in their mind, the actual offer of ORF in one of the mainstream TV channels does not in practice live up to the qualitative criteria set out in § 4 ORF-law.

¹¹⁸ For example, chat rooms which are closely connected with the ORF television channel can certainly be attributed to the public service remit. Where, however, chat rooms are provided on all topics of social relevance or where they are merely used for making contacts, without there being any clearly apparent reference to the programme, while on the other hand similar services are supplied by other market participants, it is debatable whether this can be described as a service of general commercial interest.

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- 144) The current remit is so unclear that ORF could in practice offer on-line services whose value for satisfying social, democratic and cultural needs of the Austrian society are highly doubtful.¹¹⁹ The current remit would even allow ORF to offer an "electronic press" on the internet provided it is remotely related to ORF's TV and radio programme.
- 145) The Commission therefore takes the view that the current public service remit for ORF's online activities must be defined more clearly.

6.1.7.3. Definition of the remit with regard to ORF Sport Plus

- 146) The public service mission for ORF SPORT PLUS, as set out in Section 9(a), is currently too unspecific to identify which of the Austrian society's needs are being served here, in what manner or to what extent, or why these needs cannot be satisfied as part of the existing programme remit.
- 147) The Commission also notes that ORF has in the past to a considerable extent acquired exclusive live sporting rights. Although the purchase of exclusive sport rights can be justified to offer premium sport as part of a balanced overall programme, the launch of ORF SPORT PLUS in addition to the sport offer on the general television programmes ORF1 and ORF2 raises the concern that this increase of broadcasting capacity could allow ORF to effectively "empty" Austria's market for premium rights.
- 148) According to paragraph 92 of the 2009 Broadcasting Communication, Member States should however ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters. Neither are such rules currently in place, nor is the remit of ORF SPORT PLUS currently sufficiently clear as to the satisfaction of social, democratic and cultural needs of the Austrian society.
- 149) The Commission therefore takes the view that the current public service remit for ORF SPORT PLUS should be defined more clearly.

6.1.8. Entrustment and supervision

- 150) 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

¹¹⁹ Such offers, which ORF meanwhile withdrew from the market, include: ringing tones for mobile telephones, e-cards, dating and partner exchanges, real estate and job postings, gambling, betting, e-banking, on-line auctions.

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normally only be guaranteed by a body which is effectively independent of the entrusted undertaking¹²⁰.

- 151) Sections 1-5 of the ORF Law can in principle be seen as an entrustment within the meaning of the 2009 Broadcasting Communication. The Commission however considers, as set out in sections 6.1.7.2 and 6.1.7.3 that a special entrustment, in the sense of a more specific drafting of the public service obligation, is required in particular with respect to ORF's online services and the ORF SPORT PLUS channel.
- 152) As to the supervision of the remit, the existing control mechanisms do not appear adequate for appropriately monitoring whether the public service remit has been fulfilled.
- 153) This applies firstly with regard to ORF's information given to the National Assembly and the Federal Assembly by the "position report" (Lagebericht) under Section 8 of the ORF Law with regard to the fulfilment of the remits under Section 3-5 of the ORF Law and secondly with regard to the legal supervision performed by the BKS.
- 154) Austria in particular could not dispel the Commission's concerns regarding the standards which ORF must comply with in writing the annual "situation report" (Lagebericht) to parliament. It is moreover unclear how ORF's failure to fulfil the remit could be derived from such report. It also remained unclear what the potential consequences are for ORF if such shortcomings could be identified on the basis of the situation report.
- 155) Even if the legal supervision exercised by the BKS currently covers compatibility with the ORF Law and therefore also –amongst other matters– questions relating to the remit, the definition as to the extent of the online services entrusted to ORF as well as the sports channel do not appear to be sufficiently verifiable, because of the very broad wording and the correspondingly broad interpretation. BKS also does not appear to dispose of sufficient staff and resources to adequately supervise the public service remit.
- 156) The Commission therefore considers that the supervision of ORF's public service remit must be improved.

6.1.9. Proportionality test

- 157) 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-

¹²⁰ See paragraph 54 of the 2009 Broadcasting Communication.

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subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities.¹²¹

- 158) Firstly, in order to satisfy the proportionality test, public service broadcasters must maintain a clear and appropriate separation between public service activities and non-public service activities including a clear separation of accounts.¹²² 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.¹²³
- 159) 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.¹²⁴
- 160) Thirdly, Member States should ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sublicensing of unused sport rights by public service broadcaster.¹²⁵ 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.¹²⁶ An example of such an anti-competitive practice is price undercutting as regards advertising.
- 161) 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 its potential effects on trading conditions and competition.¹²⁷

6.1.9.1. Separate accounts

- 162) Section 39(4) of the ORF Law implements the requirements of the transparency directive for ORF. Additionally, ORF has laid down cost calculation principles in internal guidelines which contain further explanations as to the specific application of the costs calculation. The Commission therefore takes the view that the requirements for separate accounting have been met. In view of Austria's clarifications regarding the structural separation of costs and revenues between TW1 and Sport Plus/ORF¹²⁸, the Commission also considers that a risk of a cross-

¹²¹ See paragraph 40 of the 2009 Broadcasting Communication.

¹²² *Ibid.*, paragraph 60.

¹²³ *Ibid.*, paragraph 71.

¹²⁴ *Ibid.*, paragraph 77.

¹²⁵ *Ibid.*, paragraph 92.

¹²⁶ *Ibid.*, paragraph 93.

¹²⁷ *Ibid.*, paragraph 84.

¹²⁸ See Austria's reply to the Article 17 letter dated 2 May 2008, paragraph 45 setting out the structural separation of cost and revenues between Sport Plus (public service) and TW1 (commercial activity).

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subsidisation between the commercial activities of TW1 and the public service activities through Sport Plus will be adequately addressed.

6.1.9.2. Insufficient implementation of the net cost principle

- 163) The Commission also confirms its preliminary view that Austria's method of calculating the net costs of ORF's public service is in accordance with the Broadcasting Communication. However, the Commission takes the view that these merely internal requirements as to the calculation of net cost must be set out in a legally binding way, for instance in the ORF-law. Moreover, Austria must clarify how it separates cost of ORF's daughter companies which engage both in public service and commercial activities.
- 164) The Commission moreover considers that the current system does not exclude the possibility of losses arising from commercial activities being inadmissibly cross-subsidised by the programme fee. Although ORF's internal rules contain a requirement that losses by subsidiary companies are not to be taken into account, this is in contrast with Austria's clarification that ORF has in the past covered initial losses of commercial subsidiary companies with income from the programme fee. In the Commission's view, the cost of a public service broadcaster's *stand alone* commercial activities (e.g.: ORF starts a new casino business) must not be subsidised with income which the broadcaster derives from its public service (here: ORF's programme fees and, in essence, its income from advertising). To the contrary, a public service broadcaster may net the annual expenses related to the commercial exploitation of its public service (e.g.: the marketing cost related to advertising or the sale of audio- and audiovisual records) with the overall annual income resulting from the performance of the public service (including State aid) provided that any loss (in particular start-up losses) of commercial exploitations related to the public service remain limited to what is acceptable for a hypothetical private investor (market economy investor principle). This must be adequately monitored by an external body such as independent auditors.
- 165) The state financing of ORF is also currently not restricted to the amount necessary for the fulfilment of the statutory remit. As set out in paragraphs 73 and 74 of the 2009 Broadcasting Communication, public service broadcasters may retain yearly overcompensation above the net costs of the public service (as "public service reserves") 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. This is currently not yet the case in Austria's public service broadcasting system. By way of exception, ORF 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 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.

166) The Commission therefore finds that the ORF-law or other binding statutory rules should foresee the modalities of recovering overcompensation and they should strictly limit ORF's possibility to retain overcompensation as set out in the preceding paragraphs.

6.1.9.3. Possibility to build up equity capital

167) The Austrian government does not dispute that ORF has in the past accumulated annual surpluses and converted them into equity capital. In the Commission's view an uncontrolled accumulation of equity which results from the retention of overcompensation is problematic because it prevents any recovery of overcompensation and is therefore in contrast with the net cost principle. An annual surplus above the thresholds in §§ 73 and 74 of the 2009 Broadcasting Communication must be recovered rather than piled up as equity capital.

168) However, the ORF group has incurred losses of EUR 79.8 Mio in 2008 and it is estimated that it will lose another EUR 53.7 Mio by the end of this year (see Annex 2). These losses, which Austria attributes to the financial and economic crisis starting in Summer 2008, reduced ORF's equity capital ratio from 30.1% in 2006 to 23.5% in 2007 and [BUSINESS SECRET] in 2009 (estimate).

169) To avoid the need for a capital injection (ad hoc aid) by the Austrian government, the Austrian authorities envisage setting the programme fees in the next financial cycle including a certain amount which is needed to gradually increase ORF's equity capital up to a viable level. According to Austria, ORF should moreover be able to convert a potential overcompensation in the next financial period into equity if and to the extent that this is needed to safeguard the performance of the public broadcasting service in the mid term.

170) Based on Austria's information the Commission cannot exclude that ORF may be approaching a situation where its equity must be increased to safeguard the performance of the public service in the medium term.

171) One reason why ORF may need equity capital to perform the public broadcasting service is that, as "*Stiftung sui generis*". As such, ORF does not benefit from a constitutional guarantee for its existence. Due to the absence of such a "*Bestandsgarantie*", ORF can in principle go bankrupt. The Austrian government is not obliged to intervene and rescue ORF. Hence, ORF must stand on its own feet. It is also subject to the general statutory obligation to restructure if the equity capital ratio is as low as 8%.¹²⁹ Above this threshold which presumes a risk of insolvency, the public service could also be at stake if banks are about to refuse granting loans to the public service broadcaster due to the likelihood of insolvency in the mid term.

¹²⁹ In Austria paragraph 8 of the Bundesgesetz über die Reorganisation von Unternehmen ([BGBl. I Nr. 114/1997](#)), for instance, presumes the need to restructure a capital company once the equity capital ratio drops below 8 % and if the duration to honour debts exceeds 15 years.

172) In view of the Court of First Instance's jurisprudence,¹³⁰ the Commission considers that in a situation such as in the present case, Article 86(2) EC as interpreted by the Amsterdam Protocol does not prevent the recapitalisation of a public service broadcasters as far as this is necessary to safeguard the performance of the public broadcasting service in the near and medium term future. However, as a matter of principle, any equity increase must indeed remain limited to what is strictly necessary to safeguard the performance of the public broadcasting service, taking into account all reserves the public service broadcaster disposes of including the reserves mentioned in paragraphs 73 and 74 of the 2009 Broadcasting Communication.

6.1.9.4. Absence of adequate financial control

173) The Commission takes the view that neither the BKS nor the Court of Auditors regularly verifies whether ORF is overcompensated.¹³¹ The Auditing Commission is an internal ORF body and the Court of Auditors does not control the finances of ORF on a regular (annual) basis, either. It is also currently unclear what the consequences would be of any possible finding that there had been overcompensation. The ORF-law currently contains no rules on the recovery of overcompensation.

6.1.9.5. Market distortions going beyond what is necessary for the fulfilment of the public service remit

174) The Commission is concerned by the absence of rules on the market behaviour of ORF due to the absence of clear rules for ORF's obligation to sublicense unused sport rights. This creates a risk that ORF acquires sports rights which are not necessary for the fulfilment of the public service tasks and which lead to market distortions that are not necessary for the fulfilment of the public service.¹³² It must also be ensured that ORF respects the arms' length principle in its relations with commercial daughter companies, undertakes commercial investments in line with the market economy investor principle and does not engage in anti-competitive practices with regard to their competitors, based on their public funding.¹³³

175) The Commission is also concerned that under the current legal framework there are no adequate rules on the purchasing and holding of exclusive live sporting rights by ORF. There is currently no clarity on the scope of premium sport shown on the special interest channel ORF SPORT PLUS and on the possibility of third parties to acquire sublicenses for unused sport rights. ORF is therefore in a position to

¹³⁰ As indicated by the Court of First Instance in its *TV2* judgment, Article 86 (2) EC as interpreted by the Amsterdam Protocol does not in principle oppose the possibility of public service broadcasters to build up equity capital as far as this is necessary to guarantee the provision of the public service. The proportionality of equity capital depend on the facts and the legal framework of each individual case. See joined cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2 v Commission*, paragraphs 220, 223.

¹³¹ It will be recalled that the last report from the Court of Auditors was in 1995.

¹³² See also in that respect Commission decision of 24.4.2007 in E 3/2005, financing of public broadcasting in Germany,., paragraph 305.

¹³³ *Ibid.*, paragraph 93.

regularly outbid its competitors and therefore to "buy up" the market without this being necessary for the fulfilment of the public service remit. This concern is strengthened by a recent decision of the Austrian competition authority.¹³⁴

6.1.10. Conclusions

- 176) The Commission concludes from the above that the current rules for the financing of public service broadcasting system in Austria lack a sufficiently precise and clear definition of the public service remit, a clear entrustment and effective supervision of the remit, the exclusion of clearly commercial activities from the public service remit in particular in the area of online services. Finally, the current rules do not adequately ensure that the public financing of ORF is limited to what is necessary for the performance of the public service and that commercial activities are performed according to the market economy investor principle and the arms length principle. There are no adequate mechanisms to ensure that the public financing of online services and of other new significant audiovisual activities does not create disproportionate distortions of competition and cross border trade. The acquisition of exclusive premium sport rights should be based on sound rules in particular with respect to the sublicensing of unused sport rights. The programming of ORF SPORT PLUS must be clearly defined and there must be effective mechanisms to ensure that the qualitative criteria in the public service remit are in practice respected by ORF for all its services, including its television programming.

7. APPROPRIATE MEASURES

- 177) In view of the above and having discussed the Commission's concerns with the Austrian authorities, the Commission would consider the following measures appropriate to ensure compliance with the EC State aid rules:
- Ø The **public service remit** of ORF's special interest channel SPORT PLUS (including clarity on the scope of premium sport shown on this channel) and of the planned information/culture channel(s) must be defined more clearly with regard to social, democratic and cultural needs of the Austrian society.
 - Ø The current **public service remit** for ORF's online activities and other new audiovisual services must be defined more clearly. In view of Austria's discretion to define the remit, the Commission is prepared to accept either an exhaustive list of entrusted online services which obviously 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 (paragraphs 84 to 91 of the Commission's 2009 Broadcasting Communication).

¹³⁴ ORF's practice of accumulating exclusive sport rights was already once condemned by the Austrian competition authority. See the decision of the Austrian Bundeswettbewerbsbehörde in case BWB/K-105 (http://www.bwb.gv.at/BWB/Aktuell/Archiv2008/orf_osv_22022008.htm)

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- Ø It is furthermore necessary for Austria to install a more effective **supervision of the remit** which ensures that the actual activities including ORF's programming for TV and radio satisfy the qualitative standards of the public service remit as in particular defined in sections 3 to 5 of the ORF-law. It is in Austria's discretion to choose a mechanism of supervision which respects ORF's editorial independence, as enshrined in Article 10 ECHR. It is however necessary that such a body has the powers and the necessary capacity and adequate resources to carry out the supervision regularly and is effectively independent from ORF as set out in paragraph 54 of the 2009 Broadcasting Communication. This supervisory body must be able to impose adequate remedies if the remit is infringed.

- Ø Austria must implement the **net cost principle** as set out in §§ 70 to 76 the Commission's 2009 Broadcasting Communication. ORF's internal rules as to the calculation of net cost must be set out in a legally binding way, for instance in the ORF-law. Moreover, Austria must clarify how it separates cost of ORF's daughter companies which engage both in public service and commercial activities. Austria must ensure that the cost of ORF's stand alone commercial activities (e.g.: on-line activities which are manifestly not part of the public service remit) cannot be subsidised with income from programme fees. Start-up losses of ORF's daughter companies which commercially exploit the public service remit must respect the market economy investor principle. Any overcompensation which exceeds the thresholds set out in paragraphs 73 and 74 of the 2009 Broadcasting Communication must be recovered, unless – exceptionally – ORF needs such funds to increase its equity to safeguard the performance of the public service in the mid term and after being undercompensated due to financial losses. The conditions for increasing ORF's equity capital must be strictly related to the performance of the public service and Austria must put in place adequate procedural safeguards to prevent any possibility of abuse. The necessary level of equity must be established on the basis of objective and verifiable criteria and the need for an equity increase must be verified by a public authority which is fully independent from ORF.

- Ø As to **financial control**, the current framework must be improved including the creation of an external independent body which regularly supervises the finances of ORF with regard to the possibility of overcompensation and the use of aid for purposes other than the public service. The ORF-law or other binding statutory rules should explicitly foresee the possibility of and modalities for recovering overcompensation.

- Ø The ORF-law or other binding rules must foresee rules on the **market behaviour** of ORF regarding the acquisition of exclusive premium rights including an obligation to sublicense unused sport rights. It must be ensured that ORF respects the arms' length principle in its relations with commercial daughter companies, undertakes commercial investments in line with the market economy investor principle and does not engage in anti-competitive practices

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with regard to their competitors, based on their public funding,¹³⁵ in particular as regards the pricing of advertising or other non-public service activities such as commercial pay-services below what can reasonably be considered to be market-conform (§ 94 of the Commission's 2009 Broadcasting Communication).

- Ø **Proportionality control:** the Commission considers it necessary, in view of ORF's competition with print media and other private undertakings on the internet, that the added value in terms of serving the social, democratic and cultural needs of society and the potential competition effects of ORF's on-line services and other new audiovisual services on the market (Amsterdam Protocol) are considered *before* new audiovisual services are put on the market (§§ 84 to 91 of the Commission's 2009 Broadcasting Communication). The new media regulator in Austria will have to assess the planned culture and information channel(s) in such a prior evaluation, too.

8. AUSTRIA'S PROPOSAL FOR APPROPRIATE MEASURES

- 178) The below is a summary of Austria's appropriate measures. For the precise wording, reference is made to Austria's appropriate measures as submitted to the Commission via the Permanent Representation of the Republic of Austria on 24 September 2009. The below structure essentially follows the appropriate measures as submitted by Austria.

1st PART OF AUSTRIA'S APPROPRIATE MEASURES

I. The Future Mandate for On-line services

- 179) Austria proposes to clarify in a binding way that ORF must contribute with all of its on-line services to the implementation of programming mandate regulated in § 4 ORF-G.
- 180) Austria proposes a two-fold way of defining and entrusting the public service remit of ORF's online activities. For services which in Austria's views are not new or not significant within the meaning of paragraphs 85 of the 2009 Broadcasting Communication, Austria specifies and entrusts these services by means of an exhaustive list. ORF will be charged with these services subject to its financial capacity (see below, point A 1 to 4). For other on-line services Austria proposes applying the prior evaluation procedure set out in §§ 84 to 91 of the 2009 Broadcasting Communication (see below, Part I, Section I.B).

¹³⁵ 2009 Broadcasting Communication, paragraph 93.

I. A. Online services without prior evaluation

I. A.1. Programme Information and information on the company

- 181) Information about ORF's current radio, television and other public service programme including information about ORF itself.

I. A.2. News

- 182) Daily news overviews in text and image including supplementary audio and audio-visual elements as well as podcasts (download no longer than 7 days after first publication). This offer must not exceed daily news overviews which is similar in design and content to newspapers or magazines distributed on the internet (in such cases, a prior evaluation is needed).

I.A.3 Online Offers supporting concrete TV and radio broadcasts

- 183) ORF can support TV and radio broadcasts with on-line offers, as follows:.
- a. Information about the broadcast itself and the actors involved as well information on related broadcasts including a summary of the broadcast in writing.
 - b. Information explaining and deepening a subject matter covered by a TV or radio broadcast.
 - c. Audio-visual offers in the sense of a and b including short segments of other broadcasts of the same broadcasting series.
- 184) Such offers must not amount to a separate and independent service which is dissociated from a concrete TV or radio broadcast. The radio or television broadcast, which is supported by the on-line service services, must be identified by name and by broadcasting date. Supporting on-line offers may only be available for download for a specific time period after they had been broadcast on TV or radio (30 days as of the day a TV series ends; otherwise 30 days as of the broadcast of the programme). The timely unlimited provision of information regarding the broadcast itself as well as related broadcasts is explicitly foreseen. Supporting on-line offers may generally not be similar in design and content to newspapers or magazines distributed on the internet (in such cases, a prior evaluation is needed).

I.A.4. On-demand downloads of audio and audiovisual content

- 185) Within technical and legal possibilities and economic affordability, ORF must offer the online down-load (without the possibility of storage except for podcasts) of its own TV or radio programmes including those produced in co-operation with third parties , as follows:
- a. Television and radio broadcasts on demand up to 7 days
 - b. Programmes of premium sport events up to 24 hours

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- c. Archives with time-historical and culture-historical contents based on a specific concept (*Angebotskonzept*) also without time limits;
- d. Advance notices of television and radio programmes within an appropriate timeframe before they are broadcast.

186) Any offer exceeding these services will be subject to a prior evaluation. Austria also clarified that ORF may in principle exploit the above services commercially. The opportunity of ORF to continue exploiting existing online services (i.e.: those pre-dating 31 January 2008) commercially, remains unaffected as long as the offer is not modified in such way that it becomes a "new" service within the meaning of the 1st Part, Section VI of Austria's commitments and hence is subject to a compulsory pre-evaluation.

B. Other on-line services subject to prior evaluation

187) Subject to technical and economic feasibility, ORF must offer the public further on-line services as long as they serve the implementation of the general public service remit according to § 4 ORF-law or the special mandate according to § 5 ORF-law. Among these offers are:

- a. On-demand download of non linear audio- and audiovisual content as far as such services exceed the scope of A.4 .
- b. other (non-linear) textual and/or image-based or audio or audio-visual offers which remain within the boundaries of ORF's statutory purpose and which serve the implementation of the public service remit of ORF according to § 4, Section 1, ORF-G (e.g. the existing programmes Futurzone and Soundpark, in the future for example offerings enabling the access to sport programmes not broadcast by ORF - for example within Olympic Games).
- c. linear audio and audio-visual offerings, which are not broadcast terrestrially, via satellite or cable (e.g. linear transmission of parliamentary debates via ipTV).

188) These offers (as well as any other on-line offer not specifically mentioned in the exhaustive list of the First Part, Section I.A of Austria's commitments) will be subject to a prior evaluation based on a description in specific concepts.

C. Black List of commercial online services

189) Austria proposes to clarify that a number of on-line activities which in its views clearly do not satisfy the social, democratic and cultural needs of the Austrian population, are not part of the public service remit and may therefore not be financed with programme fees. These services include ringing tones, e-cards, dating and partner exchanges, real estate and job postings, classified directories, search engines (except own offering), SMS services (except related to its own offer or information services), gambling, betting, e-banking, erotic offerings, access providing, on-line auctions except non-commercial auctions for non-profit purposes, distribution of IT programmes, unless required for the perception of its own

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offerings, electronic exchange platforms for photos, music, videos, computer programmes etc., billing for third parties (except for daughter companies of ORF).

D. Specific concepts (Angebotskonzepte)

190) For all offers which are not subject to a pre-evaluation, these are:

- offers under the First Part, Section I.A of Austria's commitments ;
- existing offers preceding 31 January 2008 even if they fall under the First Part, Section I.A of Austria's commitments ;
- services that have once passed a prior evaluation and then count as "existing" ;

Austria will oblige ORF to specify the scope of the service for the sake of legal certainty in a concept (*Angebotskonzept*). Such concepts must be sufficiently specific to facilitate that the regulatory authority can effectively monitor the compliance with the concepts (supervision of the remit). The concepts must be notified to the regulatory authority which assesses any violation of the public service remit. Upon receipt of a concept, the regulatory authority must also examine whether the service qualifies as significant new offer that is subject to a prior evaluation. If yes, such evaluation is started.

191) ORF will be obliged to publish all concepts on its web page in an easily accessible way.

II. New audiovisual services on other platforms

192) Austria reserves the right, to impose on ORF a public service mandate comparable with the 1st Part section I for new communication platforms (e.g. digital radio). Such new offers must be subjected to a pre-evaluation.

III. Platform neutrality for linear communication

193) ORF may – subject to a legal entrustment - transmit all television and radio programmes, which are offered as part of its public-service mandate, simultaneously (or with a delay in time within a time frame of 24 hours after broadcasting; "linear-time delayed" television/radio) and unaltered via all other technically feasible communication platforms. This must, however, be notified to the regulatory authority.

IV. Sport

A. ORF SPORT PLUS

194) Austria offers to clarify that the programme of ORF SPORT PLUS covers sport and sport competitions –including the broadcasting of sport events- which do not have a

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broad space in the Austrian media coverage (minority sports). The public service remit for this sport channel will define the following qualitative criteria: ORF must amongst others:

- a. comprehensively inform the population about sport-related questions;
- b. encourage interest of the population in active sport;
- c. encourage appreciation of the audience for less known sports and their practice rules;
- d. report about sports and sports competitions, which are of interest from the popular sports perspective as well.
- e. consider regional sport events;
- f. report about health-related sports aspects;
- g. broadcast sport competitions if such transmission is a precondition for Austrian athletes or Austrian sports teams to participate in international events and such transmission cannot be expected by other broadcasters.

195) ORF SPORT PLUS should predominantly broadcast sports and sport competitions which are practised or hosted in Austria or in which Austrian athletes or teams participate. Sports competitions, which already dispose of a broad coverage in the Austrian media (premium sports) may not be broadcast on ORF SPORT PLUS. Austria has provided a list of sport events which would in any event qualify as premium sport. ORF SPORT PLUS may only be offered under the condition that ORF further specifies this remit in a programme concept which must be submitted to the regulatory authority. ORF must publish the concept also on-line.

B. Sport rights

196) ORF will be obliged to offer sports rights, which it purchased and does not intend to use itself, for sub-licensing at an adequate price. ORF must provide information about such available rights and their price to interested parties at any time. This information must be made available on-line on a web page to all interested parties, as soon as ORF knows about the possibility to sub-licence.

V. Information- and Culture Channel

197) Austria does not exclude to entrust ORF with launching further special interest channels beyond the sports channel. This entrustment would follow the model of ORF SPORT PLUS. This means in particular that ORF must set out in a specific concept how it intends to implement the public service remit. Any new special interest channel must be tested in a prior evaluation. Austria clarified that ORF's duty to provide a balanced and varied offer in line with section 4 of the ORF-law will not be affected by the new special interest channels.

VI. Prior evaluation (Amsterdam test)

198) Any new offer must be subject to a pre-evaluation. Offers are considered as new,

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- § if they were newly created (=provided for the first time) and they differ substantially from offerings already rendered by ORF at the time of the evaluation.
- § if existing offerings are changed and the changed offering is most likely significantly different from the already existing offering.

199) A significant differentiation exists in particular:

- § for new offers, which differ significantly from existing offerings in their content, their form of technical usability or their access (e.g. an Austrian history portal; a topic-specific on-line magazine; a topic-specific regional portal; an on-line archive of ORF produced films, unless they are subject to 1st Part I.A.1 to I.A.4 of Austria's commitments; audio-visual on-line media, which are not only retrievable, but also downloadable; offerings on new transmission platforms, unless they are subject to platform neutrality or to the mandate under the terms of the 1st Part I.A.1 to I.A.4 of Austria's commitments; change from comprehensive to divisional programme); or
- § for new offers, which address a significantly different target group than existing comparable offering (e.g. creation of a new on-line platform for teenagers, when an existing on-line platform is mainly directed to seniors);
- § a significant differentiation is indicated where a new/modified service costs more than 2% of the total public service budget.

200) Mere technical changes to existing offers (e.g.: a change of the broadcasting format from 4:3 to 16:9) shall not trigger a prior evaluation. The on-line services described in the First Part, Section I.A of Austria's commitments are also not deemed to be significant new services and hence not subject to the prior assessment.

201) The decisive benchmark for assessing whether a new service satisfies the above criteria is the concept ("Angebotskonzept") underlying that new offer. If no such concept exists, then programme plans and broadcast schemes are of relevance. ORF will be obliged to prepare a concept (Angebotskonzept) for each new service with a precise description of the planned offer, a justification, why it seems suitable for implementing the public service remit in § 4 of ORF-G as well as special mandates regulated by law; an explanation regarding the target audience; an explanation regarding the financing of the offer; an explanation regarding anticipated impact of the offering on the competitive situation in the respective market as well as on the offering diversity for viewers, listeners and users.

202) ORF must publish the specific concept on the internet and invite third parties to comment within an adequate period of time, but at least six weeks. The publication in the internet must by all means be explicitly reported to the Austrian Federal Economic Chamber and the Austrian Chamber of Employment. All persons concerned can submit comments.

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- 203) ORF must forward its specific concept and all comments received to the regulatory authority. The regulatory authority must forward the documents to the Austrian competition authority as well as to a statutory established advisory council consisting of independent experts. The Advisory Council must assess whether a planned offer is advisable in the sense of the public service mandate of ORF.
- 204) The regulatory authority must then evaluate firstly whether the new offer serves the social, democratic and cultural needs of the Austrian society and secondly considering its potential impact on cross-border trade and the competitive market conditions . In detail, the regulatory authority must evaluate, whether the new offer seems suitable to satisfy social, democratic and cultural needs of the Austrian society and implements § 4 Section 1 or 5, ORF-G; and whether it has no potential negative impact on the competitive situation and media diversity which is disproportionate to the added value of the new offer, and whether it creates a positive impact on the competitive situation particularly due to an especially innovative design in comparison to other media offerings.
- 205) The mere fact, that other (commercial) broadcasters or media providers actually or potentially offer a similar service as planned by ORF, does not as such prevent the approval by the regulatory authority. Rather, the authority must assess whether the the added value (resulting from the fulfilment of social, democratic and cultural needs of society taking into account the overall existing public service offering) justifies an overall negative impact on competition.
- 206) The Austrian competition authority will advise the media regulator on the anticipated impact of the new offering on the competitive situation of other media providers operating in Austria.
- 207) After successful completion of a pre-valuation, ORF must publish the approved concept underlying its new service as well as the approval by the media regulator on its web page. Notwithstanding the above, ORF can launch pilot projects to test new innovative services for a maximum duration of 6 months without a prior evaluation. If technically possible and meaningful, such a trial should be limited to a limited number of users. ORF must announce any pilot project to the regulatory authority.
- 208) Should ORF launch a new offer without a prior assessment, the regulatory authority must recover the amount of money used to finance that service.

VII. Supervision of the public service remit

- 209) Austria commits to ensure that the supervision of the public service remit will in the future be the task for an independent public authority which is a public authority external to and independent from ORF. That authority will be equipped with adequate resources and staff and empowered to impose sanctions on ORF in case of infractions.
- 210) ORF will henceforth published its annual report about the fulfilment of the public service mandate in the internet and forward it to the regulatory authority as well as to the federal chancellor and the parliament. The regulatory authority must

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randomly control in regular intervals if ORF complies with the public service mandate. A verification of the content of individual programmes is however not envisaged (editorial independence).

- 211) Regarding the existing TV and radio programmes, ORF must strengthen already existing internal quality control procedures. A quality assurance procedure is to be introduced which is also subject to the control of the regulatory authority. The supervisory body must verify prior to approval of the long-term programming plans for radio and television and transmission schemes whether ORF respected the criteria of the quality assurance system .

VIII. Transitory Provisions

- 212) For all online offerings that existed until 31 January 2008 (the Section 17 letter) or that have been newly created or changed between this date and the date the new legal framework enters into force, the following transitory provisions shall apply. Essentially, services launched before the new ORF-law enters into force must be described in concepts which are to be notified to the regulator within 6 months after the new ORF-law is in force. A pre-evaluation of new audiovisual services is in principle only needed to the extent that they were offered after the Article 17 letter on 31 January 2008 and to the extent that they fall under Part I Section I.B of Austria's appropriate measures.
- 213) ORF intends to launch an on-demand offer for its TV and radio programmes in a newly created "ORF TVTHEK" after the adoption of the present Decision. Austria will limit this new offer to services defined under point I.A.4. This means that the programmes on ORF TVTHEK will be limited to the retrieval of TV and radio broadcasts and include live streaming (platform neutrality). Austria clarified that no commercial exploitation of this offer is foreseen unless approved in a prior evaluation pursuant to Part I Section VI of Austria's appropriate measures.

2nd PART OF AUSTRIA'S APPROPRIATE MEASURES - FINANCES

I. Definition of the program remuneration

- 214) Austria will introduce a legally binding definition of the "cost" of the public service. The remuneration is to be calculated on the basis of net costs including expected price increases (inflation) within the time period of the following 5 years (financing period) based on the expected number of contributors (viewers and listeners) who pay a programme fee. The adequacy of the programme fee must generally be verified every 5 years. ORF may continue to set the programme fee itself as before, but it will from now on be subject to an ex post control by the new media regulator.
- 215) Austria announces its intention to compensate ORF for the loss of income which stems from the fact that socially disadvantaged groups of viewers and listeners are exempted from the duty to pay a programme fee by law. Austria considers this new compensation to qualify as "existing aid" in the sense of Article 1, let. b of Provision (EC) No. 659/1999, because it does not affect the core of the existing aid regulation - similar to a possible increase of the programme fee.

II. Equity Increase

- 216) Austria proposes the following substantive and procedural safeguards for a capital increase of ORF. If the equity of ORF declines due to losses, so that a continuous fulfilment of the public service mandate in the sense of Article 86/2 EC and the Amsterdam Protocol cannot be ensured in the medium term (within the next five years), then ORF may increase its equity capital as follows:

Form of equity increase

- a. Increase of equity from a possible annual surplus rather than recovery.
- b. Increase of equity by an increase of the programme fee above net costs taking into account the need for a capital increase.

Substantive requirements for an equity increase:

Any such equity increase requires that:

- a. the continuous fulfilment of the public service mandate according to the ORF-law is medium-term (5 years) is not ensured without equity increase;
- b. the contributed equity is exclusively used for fulfilment of the public service mandate and not for commercial activities;
- c. the equity of ORF has decreased in the current and/or in the previous financing period (5 years) due to an under-compensation of the public service mandate and the capital increase will not exceed such an under compensation; Austria commits to notify the Commission any equity increase exceeding this cap as ad hoc aid.

Formal requirements:

- 217) The equity increase must always be approved by the regulatory authority. The regulator must assess the need for an equity increase with regard to the potential risk of ORF either to become insolvent or to become over-indebted within the next 5 years in the absence of an equity increase; the notions of "insolvency" and "over-indebtedness" are to be understood as defined in §§ 66 and 67 of the Austrian Bankruptcy Act. The need for a capital increase must be formally confirmed by accountants which are sufficiently qualified and factually independent from ORF within the meaning of § 271 Business Enterprise Code (UGB). The accountants must be appointed and paid for by the regulatory authority.

III. Prohibition of over-compensation

- 218) Austria commits to comply with the net cost principle as set out in paragraph 74 of the 2009 Broadcasting Communication. As far as reserves are available at the end of a financing period (5 years), they will be recovered (see below in section VII) with the exception of special reserves within the meaning of paragraph 74 of the 2009 Broadcasting Communication. .

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- 219) ORF will foresee a special public service reserve within the meaning of paragraph 74 of the 2009 Broadcasting Communication for the hypothesis that it is overcompensated above 10% and if it needs to retain such funds to finance a one-off large investment such as a concrete and substantial restructuring of the company; a large investment which is necessary for the performance of the public service mandate (e.g.: a new broadcasting centre for ORF) and cost related to technological innovation which do not result in an increase of ORF's offer (e.g.. the digitalisation of archives). ORF may build such a public service reserve only for investments at a minimum amount of EUR 10 Mio per project. If ORF is repeatedly overcompensated more than 10% of the yearly public service costs , then the regulatory authority must verify in the sense of paragraph 79 of the 2009 Broadcasting Communication, whether the programme fee was set too high to correspond to the actual financial needs of ORF.

IV. Transparency calculation

- 220) Austria will oblige ORF to clarify how it allocates cost for subsidiaries, which do not exclusively perform either public service or commercial activities. These regulations must be submitted to the regulatory authority and must be approved by the authority, if they comply with the statutory requirements. It will be defined by law that commercial activities must basically be outsourced into their own subsidiaries (structural separation).

V. Competitive behaviour

- 221) ORF's behaviour towards its commercial subsidiaries as well as towards third parties must be non-discriminatory and in accordance with market conditions and must satisfy the arm's length principle.
- 222) ORF will be prohibited to sell advertising below the market value and it may not purchase premium sports rights above the market price using its privileged financial position and generally has to comply with the principle of proportionality also with regard to the acquisition of premium rights in the sense of paragraph 92 of the Broadcasting Communication, (i.e. no "emptying" of the market for premium sport rights).
- 223) ORF may cover start-up expenses for launching commercial activities which are associated with the public service mandate with commercial income from activities related to the public service mandate, but these investments must obey the principle of market economy investor. A surplus from such commercial activities must be used to finance the public service mandate.

VI. Financial control

- 224) An independent public authority will control that ORF respects the above mentioned principles. The authority will verify on random the yearly financial statements of ORF for compliance with the rules on cost separation and the provisions on the build-up and dissolution of reserves and on equity capital. Furthermore, the

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authority must on a case by case basis ex officio or upon complaints verify whether ORF complies with the guidelines for commercial activities including the market conformity of ORF's relationship with commercial subsidiaries. The authority must for this purpose appoint an independent board of auditors (*Prüfungskommission*) which reports to the regulatory authority. The members of this independent board must be effectively independent from ORF under the terms of § 271 UGB¹³⁶.

VII. Sanctions

- 225) If the media regulator finds, in the course of its control activities evidence, indications that ORF engaged in anticompetitive behaviour in the sense of Article 82 EC, then the authority must notify the Austrian competition authority on these circumstances. The authority must prosecute other anticompetitive behaviour itself. Proceeding according to Article 82 EC shall take precedent over the proceedings of the authority regarding other distortions of competition resulting from a disproportionate use of State aid.
- 226) Any improper use of public funds must be sanctioned by recovery of these funds and other sanctions (e.g.: administrative penalty). Overcompensations must be recovered by means of a transfer on a blocked bank account.

VIII. Recovery

- 227) Austria proposes to commit to clarify by law that the recovery of State aid in the present context will work, as follows. ORF will transfer the funds concerned on a blocked bank account. ORF will neither have access to the funds on this account nor benefit from its interests. At the beginning of the subsequent financial cycle, any funds in the blocked account will be deduced from the net costs of the public service and thereby reduce the compensation amount (the programme fees). Should ORF use programme fees to finance activities outside the public service remit, recovery takes a stricter form. ORF would be obliged to recalculate the programme fees, taking into account the sum to be recovered, already at the beginning of the next year (that is before the financial cycle ends). Due to the administrative effort involved in an immediate recalculation of the programme fee, this special recovery procedure with a punitive character will only apply if the funds that are to be recovered exceed 5% of ORF's total net cost of the public service.

9. ASSESSMENT OF AUSTRIA'S COMMITMENTS

- 228) The Commission has assessed Austria's commitments with respect to the concerns set out in section 7. The Commission can accept these commitments for the following reasons.

¹³⁶The UGB is the Austrian law defining the concept of a conflict of interest for the purpose of audits.

9.1.1. Definition of the public service remit

- 229) The Commission accepts Austria's commitments regarding the clarifications of the public service remit for special interest channels and on-line services.
- 230) Regarding ORF's special interest channel ORF SPORT PLUS, which operates since 1 May 2006, the public service mandate will be defined with respect to clear qualitative criteria. The Commission hereby also takes into account that ORF will be obliged to draw up programme concepts which further clarify the public service remit of ORF SPORT PLUS to facilitate the tasks of the regulatory authority which is to exercise the supervision of the public service remit. The new public service remit of ORF SPORT PLUS will create a clear added value in terms of satisfying social, democratic and cultural needs of the Austrian society.
- 231) Regarding Austria's plans to entrust ORF with one or two additional theme channels for culture and/or information, the Commission takes note of Austria's intention to define this remit with regard to § 4 ORF-law. The qualitative criteria set out in this remit do not display a manifest error. It will however be important that the scope of the two theme channels be spelled out more explicitly in programme concepts thereby determining the scope and the purpose of this (these) channel(s). It is also important that the regulatory authority carefully verifies the compliance of these concepts with the public service remit in the framework of a prior evaluation procedure (Part I (VI) of Austria's commitments).
- 232) Austria's definition of ORF's public service remit for online services will be considerably clarified based on (i) an exhaustive list of online services which will be clearly described and entrusted in the ORF-law; (ii) the exclusion of certain on-line services from the public service remit where they are manifestly commercial by nature (black list); (iii) the obligation of ORF to describe new online offers in specific concepts ("*Angebotskonzepte*") (iv) and the assessment of such a concept with regard to the social democratic and cultural needs of the Austrian society in the framework of a prior evaluation procedure according to paragraphs 84 to 91 of the 2009 Broadcasting Communication. In view of these clarifications, the Commission considers that the appropriate measures are adequate to render ORF' public service mandate for online services sufficiently precise.

9.1.2. Entrustment and supervision

- 233) The Commission considers that Austria adequately entrusts ORF in view of its commitments to clarify the public service remit. The Commission moreover accepts Austria's commitments regarding the supervision of the remit. Three elements of Austria's commitments are of particular importance in that respect.
- 234) First, Austria's commitment to set up a new media regulatory authority: It is important that this authority will be adequately staffed and responsible for supervising on a regular basis albeit on a case by case basis ("*stichprobenartig*") that ORF's services are compatible with the public service remit (except commercial stand alone activities). The Commission takes note that this control will not imply a verification of individual TV, radio or online broadcasts (Sendungen) in order to safeguard ORF's editorial independence. The Commission invites Austria to keep

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the Commission services adequately informed on the progress made in setting up this authority. The authority must be fully operational no later than 12 months after the new ORF-law has entered into force.

- 235) Second, as regards ORF's existing TV and radio programmes (Sender), the Commission considers it important that Austria will steps up ORF's internal procedures for securing an adequate quality of its offer in line with the qualitative standards of the public service remit. These qualitative requirements are the very justification for the existence of broadcasting SGEIs in the national audiovisual sector and there is no reason for a widely defined broadcasting SGEI if public service broadcasters sacrifice compliance with those qualitative requirements by broadcasting programming specifically designed to generate optimal audiences for advertisers.¹³⁷ It must be ascertained that the internal quality procedure of ORF is effective and indeed observed in practice. Austria's commitment to empower the media regulator for verifying ORF's compliance with the quality procedure is adequate in this end.
- 236) Third, Austria's commitment to ensure an adequate control whether ORF infringes the specific concepts ("*Angebotskonzepte*") for on-line offers and special interest channels.

9.1.3. Proportionality control

Financial control

- 237) Starting with the financial control, which is a crucial part of the proportionality assessment, the Commission accepts Austria's commitment to strengthen the existing mechanisms by charging the new media regulator with verifying on a random basis the yearly financial statements of ORF as to their compliance with the rules on cost separation and the provisions to build-up reserves and equity capital. The regulatory authority will in particular have to verify the market conformity of ORF's commercial activities including the observation of the arms length principle in relationships between ORF and its commercial subsidiaries. The Commission welcomes that the media regulator will for this purpose appoint independent auditors and that such auditors must be effectively independent from ORF.
- 238) The Commission also accepts Austria's commitments to improve the transparency of ORF's public financing by clarifying the separation of cost with regard to ORF's subsidiaries that engage both in commercial and public service activities and by introducing structural separation of commercial activities –where reasonable– as a general principle.
- 239) The Commission also accepts Austria's commitments with respect to sanctions for an anticompetitive behaviour of ORF and for an improper use of public funds. Such appropriate sanctions will include a recovery procedure which consists in the transfer of the funds concerned to a blocked bank account. The Commission considers that this is an effective way of recovering funds provided that money on

¹³⁷ See Court of First Instance in T-442/03, *SIC v. Commission*, paragraph 211.

the bank account no longer counts as asset on ORF's balance sheet and that interests accruing from the capital on the bank account are not considered as income in ORF's profit and loss statement.

Compensation for loss of programme fees

- 240) The Commission also takes note of Austria's intention to compensate – entirely or partially – ORF for the loss of income which stems from the fact that socially disadvantaged groups of viewers and listeners are exempted from the duty to pay a programme fee by law.
- 241) Based on paragraphs 29 to 31 of the 2009 Broadcasting Communication, the Commission shares Austria's consideration that this compensation will not affect the existing aid scheme in a fundamental way. Not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Court of First Instance, “*it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme*”.¹³⁸
- 242) The compensation payment will not constitute such a substantial transformation of the original scheme. First, the compensation payment is intrinsically linked to the programme fee, which is the existing form of ORF's public financing. Logically, without the compulsory programme fee, there could be no "compensation" for the exemption of socially disadvantaged people from the duty to pay the programme fee. Second, the compensation will hardly affect the pattern of ORF's public financing. While the compensation will most likely be paid directly from the budget of the Republic of Austria, while citizens directly contribute the programme fee to ORF, the payment will not exceed 10% of ORF's income from programme fees. Third, the planned compensation payment is not motivated by a change of ORF's public service remit.¹³⁹ Fourth, from an economic perspective, the effect of the compensation payment is akin to an abolition of the exemption which would increase the number of contributors. Such measure would certainly not qualify as "new aid", as it merely increased the total income from the existing programme fee. From an economic perspective, the compensation payment therefore achieves the same. For all these reasons, the Commission considers that the planned compensation payment is no alteration which affects the substance of the existing aid scheme. It qualifies as "existing aid" in the sense of Article 1, let. b of Provision (EC) No. 659/1999.
- 243) The compatibility of the compensation with Article 86(2) EC will depend on whether or not it leads to an overcompensation of the public service mandate. Austria will therefore have to ensure that ORF considers the compensation payment in setting the programme fee at the beginning of the next financial period.

¹³⁸ Joined cases T-195/01 and T-207/01, [2002] *Gibraltar* ECR II-2309.

¹³⁹ The clarifications to the remit which Austria has now committed to are purely motivated by the Commission's investigation rather than by the introduction of the compensation payment. The rationale of the payment is ultimately a social one. Without the compensation payment, the Republic of Austria would have to scrap the exemption of socially disadvantaged people from the programme fee in order to prevent an undercompensation of ORF's public service.

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Reserves

- 244) Austria's proposal to allow ORF retain overcompensation in a 10% buffer and a special reserve for large one-off investments are in line with paragraphs 73 and 74 of the 2009 Broadcasting Communication. It is important that Austria excludes the possibility that ORF's special public service reserve can be used to finance running expenses. The funds will be correctly earmarked in advance of and in a binding way for the purpose of a nonrecurring major expense related to the public service. The new media regulator will have to verify that an overcompensation for providing the public service above 10% of the annual net cost is recovered¹⁴⁰ unless such funds are used to build up a special public service reserve within the meaning of paragraph 74 of the Broadcasting Communication or unless –exceptionally– the funds are used to increase ORF's equity capital to prevent the risk of bankruptcy (see below, paragraphs 245 to 259).

Equity Increase

- 245) Under Article 86 (2) EC, as interpreted by the Amsterdam Protocol, Member States may in principle provide as much public financing to public service broadcasters as needed to safeguard the performance of the public service. This not only concerns the running cost of performing the SGEI but also equity capital. The Commission has enacted this principle in a number of decisions with regard to ad hoc aid of Member States.
- 246) In the *Télévision Française* decision of 10 December 2003¹⁴¹, France had injected capital into its two public service broadcasters in order to consolidate the structure of its balance sheets.¹⁴² The Commission deemed the capital injections proportionate to the extent that the depreciation of capital injected, taken together with the total income from the public broadcaster's licence fees, did not exceed the net cost of the public service in the period under investigation. In this decision the Commission also clarified that for the calculation of the compensation for public service costs, items on the balance sheet (grants to increase the equity capital) must be considered besides items in the annual profit and loss accounts (depreciations, included in the total costs of the year).¹⁴³
- 247) In the *RTP Portugal* decision of 4 July 2006¹⁴⁴, the Commission again considered capital injections to increase equity as proportionate as long as this did not lead to an overcompensation of the total cost of the public service during the period under investigation.

¹⁴⁰ See above 1st Part Section VIII of Austria's commitments.,

¹⁴¹ COM Decision 10.12.2003, France 2 and France 3, OJ L 361/21 of 8.12.2004.

¹⁴² COM Decision 10.12.2003, France 2 and France 3, OJ L 361/21 of 8.12.2004, 41.

¹⁴³ COM Decision 10.12.2003, France 2 and France 3, OJ L 361/21 of 8.12.2004, 85.

¹⁴⁴ COM Decision 4.7.2006, C(2006) 2952 final.

- 248) In the framework of the existing aid procedure, the Austrian government informed the Commission services that for reasons related to editorial independence of ORF, Austria's preferred solution for recapitalising ORF after the financial and economic crisis was to give ORF flexibility for converting a possible future annual surplus into equity and/or to set the programme fee in 2012 by taking into account the undercompensation of 2008 and 2009.
- 249) In the Commission's view, the solution envisaged by Austria must be reconciled with the net cost principle which flows from Article 86(2) EC and which is now set out in more detail in paragraphs 73 and 74 of the 2009 Broadcasting Communication. Public service broadcasters must in principle reimburse yearly overcompensation above the net costs of the public service. They may retain – unexpected – overcompensation during a financial period provided that these funds do not exceed 10% of the annual budgeted expenses of the public service mission. Such "buffer" may be deemed necessary to withstand cost and revenue fluctuations in the future. As a rule, overcompensation above this limit must be recovered without undue delay. By way of exception, public service 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 expense necessary for the fulfilment of the public service mission.
- 250) Clearly, if ORF were allowed to retain overcompensation in order to accumulate equity capital in an uncontrolled manner, this would be in breach of the net cost principle as set out in paragraphs 73 and 74 of the 2009 Broadcasting Communication. However, this is not the case here.
- 251) The solution which Austria proposes for recapitalising ORF¹⁴⁵ after the financial and economic crisis in 2008 and 2009 starts from the premise that any capital increase of ORF by means of converting an annual surplus into equity will only be legitimate if and to the extent that this measure is required to divert a risk of ORF's bankruptcy in the medium term.¹⁴⁶ The second restraint is the requirement of an under compensation in the ongoing or in the preceding financial period.
- 252) The Commission considers that public service broadcasters must respect the net cost principle as interpreted by the Commission in § 73 and 74 of the Broadcasting

¹⁴⁵ To the difference of the *Télévision Française* and *RTP Portugal* cases, Austria will not increase ORF's capital through a grant, but rather by allowing ORF to an annual surplus which Austria would otherwise have to recover as overcompensation. The funds would thereby stem from the existing financing mechanism (income from the programme fee or other comparable public sources) and the assessment of the measure must therefore occur in the framework of the resent decision rather than in a new aid procedure.

¹⁴⁶ Austria has clarified with reference to generally applicable accounting provisions that this notion of "medium term" is to be understood as a five year time horizon.

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Communication. The possibility to retain a 10% buffer for overcompensation and a special reserve for non recurring major investments is usually enough flexibility to withstand future cost and revenue fluctuations. So, in principle any aid which is retained above these thresholds is incompatible with Article 86(2) EC.

- 253) However, the financial discipline set out in §§ 73 and 74 of the 2009 Broadcasting Communication does not address the question of how much State aid is permissible if the performance of the public broadcasting service is threatened due to a drop of the broadcaster's equity capital. The assessment of how many assets are needed to perform the public service can differ from the question of how much income is needed annually to cover the running cost if, for instance, assets are depreciated due to external factors such as a financial and/or economic crisis¹⁴⁷.
- 254) In Austria, contrary to other Member States, there is no constitutional guarantee for the existence of a public service broadcasting system. ORF can therefore go bankrupt. There is moreover a statutory legal presumption that undertakings, including a trust "*sui generis*" such as ORF, are presumed to approach insolvency once their equity capital ratio drops beyond a certain threshold.¹⁴⁸ To safeguard the performance of the public broadcasting service in Austria, there is thus a need to divert on a permanent basis the risk that ORF's equity capital ratio approaches a critical threshold.
- 255) In the present case, the public service compensation for ORF had just been set before the start of the financial and economic crisis in 2008 until 2012 and therefore the overall decrease of advertising income in the broadcasting market had not yet been considered. The financial and economic crisis has moreover affected ORF's balance sheet by a devaluation of ORF's assets. Considering that ORF has no possibility to increase the programme fee until 2012 despite the equity decrease, the Commission agrees with Austria that ORF must have the possibility to increase its equity on its own should it achieve a turn around in the next financial period.
- 256) The Commission therefore agrees with Austria's proposal to recapitalise ORF in the framework of the existing aid scheme by means of converting annual overcompensation into equity irrespectively of the 10% cap in § 74 of the Broadcasting Communication if and to the extent that the equity increase is indeed necessary for the performance of the public broadcasting service within the meaning of Article 86(2) EC and the Amsterdam Protocol. Austria clarified when an equity increase will become necessary to safeguard the performance of the public service by reference to the definition of insolvency under paragraphs 66 and 67 of the Austrian Bankruptcy Act. Based on these two provisions, Austria considers that the performance of the public broadcasting service is endangered if ORF faces either insolvency (paragraph 67 Bankruptcy Act) or over-indebtedness (paragraph 68

¹⁴⁷ The extraordinary depreciation of an asset will usually also affect the profit and loss statement of a capital company as it results in lower income (interests etc.) at a later stage. The extraordinary depreciation will, however, immediately affect the equity capital ratio of a capital company and for that sole reason may pose a risk of bankruptcy due to over indebtedness.

¹⁴⁸ Art XI, § 22 BGBl. I Nr. 114/1997.

Bankruptcy Code). The Commission considers that this is a clear and objective benchmark for defining when the performance of the public service is threatened. It is proportionate within the meaning of Article 86(2) EC that ORF maintains a level of equity capital to prevent both risks in the medium term (5 years).

- 257) In view of the possibility that ORF's equity capital was inflated prior to the financial and economic crisis, Austria's new regulatory authority will have to verify carefully whether ORF's equity decreased to an extent that ORF's very existence is at stake in the medium term. This assessment will have to take into account that ORF will be restructured and trimmed down and that its fixed cost will therefore most likely be lower than in the past. The media regulator will also have to verify Austria's commitment that such an increase of ORF's equity capital will not exceed an under compensation of ORF's public service in the current and in the preceding financial period. Only a decrease of equity resulting from the performance of the public service can be relevant here, because Article 86(2) EC as interpreted by the Amsterdam Protocol does not cover commercial activities unrelated to the performance of the public broadcasting service.
- 258) The Commission considers it finally important that the media regulator charges qualified and fully independent auditors with assessing whether and to which extent ORF's equity capital must indeed be increased to prevent a risk of bankruptcy. It is only subject to the media regulator's control that ORF may convert an annual surplus into equity or set future programme fees above annual cost to include a contribution which aims at addressing a preceding decrease of equity capital.¹⁴⁹

ORF SPORT PLUS

- 259) In view of Austria's commitment to clarify and modify the public service remit of ORF SPORT PLUS, the Commission also takes the view that the public funding of this channel does not affect cross-border trading conditions and competition within the Community to an extent which would be contrary to the common interest, taking into account the realisation of the remit of that public service.

On-line offers and prior evaluation

- 260) The Commission accepts Austria's commitments with respect to the introduction of a prior evaluation procedure for any significant new audiovisual service (Amsterdam test) which Austria describes in the First Part, Section I, § VI of its appropriate measures. This test satisfies the requirements of §§ 84 to 91 of the 2009 Broadcasting Communication.
- 261) In line with Article 85 of the 2009 Broadcasting Communication, the Commission considers that it is acceptable for Member States to apply the prior evaluation procedure set out in paragraph 84 of the 2009 Broadcasting Communication to new audiovisual services which are – in view of their scope - likely to have an impact on

¹⁴⁹ This share of a recapitalisation contribution as part of the licence fee should be transparent in the accounts of ORF and towards citizens.

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the market and therefore qualify as "significant". Other services may be entrusted by means of a clear and legally binding list.¹⁵⁰ It is up to each Member State, subject to the Commission's review of a manifest error, to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as "significant new service". The "new" nature of an activity may depend among others on its content as well as on the modalities of consumption. The "significance" of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services must be subject to the same assessment as significant new services.

- 262) The Commission considers Austria's concrete solution for the definition of "new" and "significant" services clear and adequate.¹⁵¹ Moreover, the list in the First Part Section I.A of Austria's appropriate measures proposal is clear and concise and the on-line services mentioned in this exhaustive list are not manifestly commercial by nature.¹⁵² They are in essence services which support ORF's existing TV and radio offer.¹⁵³ It is important to note in this respect that Austria expressly excluded on-line offers which are separate and independent from TV and radio broadcasts as well as newspaper-like on-line services from this exhaustive list. Should ORF wish to launch such services as well as other services not mentioned in Part I Section I.A of Austria's Appropriate Measures, such services would have to pass a prior evaluation in line with section VI of Austria's commitments.
- 263) Whether the launch of new theme channels for information and culture could distort competition and trade contrary to the common interest will have to be tested in the framework of the prior evaluation procedure.
- 264) The on-line services which are described in sections I and II of the protocol attached to Austria's appropriate measures on services¹⁵⁴ and which were put on the market before the Commission's Article 17 letter on 31 January 2008 will not have to be

¹⁵⁰ For instance, Germany entrusted ARD and ZDF with a number of "telemidia" services described in an exhaustive list in § 11d (2) of Germany's inter-State Treaty for broadcasting. http://www.alm.de/fileadmin/Download/Gesetze/RStV_aktuell.pdf

¹⁵¹ See above Part I, Section VI of Austria's appropriate measures.

¹⁵² It should also be mentioned that this entrustment will be subject to a public consultation in the framework of Austria's revision of the ORF-law as is the case in any legislative process.

¹⁵³ Television and radio broadcasts on demand up to 7 days; Programmes of premium sport events up to 24 hours ; archives with time-historical and culture-historical contents based on a specific concept (*Angebotskonzept*) also without time limits; Advance notices of television and radio programmes within an appropriate timeframe before they are broadcast on TV or radio.

¹⁵⁴ Religion.ORF.at ; Futurezone.ORF.at ; FM4.ORF.at einschließlich FM4.ORF.at/Soundpark) RataufDraht.ORF.at ; Fussabdruck.ORF.at ; Insider.ORF.at. Kundendienst.ORF.at ; TV.ORF.at ; News.ORF.at ; Sport.ORF.at ; Science.ORF.at ; Help.ORF.at ; Oesterreich.ORF.at OE1.ORF.at ; OE3.ORF.at ; TV.ORF.at/ondemand: Radio.ORF.at: Radio live und on demand ; Radio.orf.at/podcast as described in section II of Austria's "Protokoll" on existing on-line services, as attached to the appropriate measures and as submitted to the Commission on 24 September 2009.

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submitted to a retrospective prior evaluation unless services described in section II are significantly changed and hence qualify as a "new" offer. The new media regulator will have to verify whether services mentioned in section I and II of the protocol were indeed already on the market before 31 January 2008. If this was not the case, the service concerned must be subject to a retrospective prior evaluation.

- 265) On-line services which ORF put on the market subsequent to the Commission's Article 17 letter are in principle subject to a prior evaluation¹⁵⁵ unless they are on-line services mentioned in Section I, A 1 to 4 of Austria's appropriate measures which do not need to be tested *ex ante*¹⁵⁶. The Commission can in that sense also agree that ORF will launch its planned "ORF TVTHEK" before the new ORF-law enters into force provided that this streaming and down-load offer is kept within the confines of Section I, A 1 to 4 of Austria's appropriate measures and that it is not commercially exploited until the new media regulator has assessed the potential competitive impact of such a commercial exploitation in the framework of a prior evaluation.
- 266) The Commission also accepts Austria's commitments to improve the supervision of ORF's market behaviour, including an obligation on ORF to sublicense unused sport rights, it being understood that this obligation will be further clarified in a legally binding way, in particular when sport rights are deemed to be fully or partially "unused"¹⁵⁷ and to observe the principle of proportionality when purchasing exclusive premium sport rights, in line with paragraph 95 of the Broadcasting Communication. The Commission considers that these measures, taken together with the new remit for ORF SPORT PLUS, dispel its concerns regarding the proportionality of ORF's market behaviour.

10. CONCLUSIONS

- 267) Having informed the Austrian authorities according to Article 17 of the procedural regulation¹⁵⁸ on its preliminary views that Austria's public broadcasting system is not

¹⁵⁵ This applies in particular for the services mentioned in Section IV section II of Austria's "Protokoll" on existing on-line services, as attached to the appropriate measures and as submitted to the Commission on 24 September 2009. These services are: Eurovisionsspiele08.orf.at Medienfrauen.orf.at .

¹⁵⁶ The new media regulator will have to verify whether this applies to the services referred to in section III Austria's "Protokoll" on existing on-line services, as attached to the appropriate measures and as submitted to the Commission on 24 September 2009. These are: Klima.orf.at ; Bewusstgesund.orf.at ; Klimaschutzpreis.orf.at ; Programm.ORF.at ;Zukunft.ORF.at ;Okidoki.orf.at ;Avisokalender.ORF.at.

¹⁵⁷ This could be done, for instance, by reference *mutatis mutandis* to the EBU rules on general events (http://www.ebu.ch/CMSImages/en/leg_rules_sublicensing_150305_tcm6-44855.pdf).

¹⁵⁸ 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.

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in line with the EC State aid rules, and having assessed Austria's response to its preliminary views, the Commission concludes according to Article 18 of the procedural regulation that the existing aid scheme is no longer compatible with the Common Market (see section 6). In order to ensure compatibility of ORF's public financing for the future, the Commission discussed with the Austrian authorities a number of changes to the existing legal framework for the public financing of ORF and thereupon recommended appropriate measures (see section 7).

- 268) By submitting the agreed appropriate measures to the Commission on 24 September 2009 (section 8), the Austrian authorities consented to the implementation of the appropriate measures. The Commission agrees with these appropriate measures (see section 9). In accordance with Article 19 of the procedural regulation, the Commission records the commitment by means of the present decision and thereby renders the implementation of the appropriate measures binding.
- 269) The Commission invites the Austrian authorities to provide it with a copy of the new ORF-law which must enter into force no later than 12 months after the date of the present decision. The new media regulator must be operational no later than 12 months after the entry into force of the new ORF-law.
- 270) This letter is notwithstanding the Commission's continuing supervision of existing aid schemes and the competence of the Commission to propose appropriate measures, should such measures appear necessary in view of the further progress and the functioning of the Common Market. This letter is also without prejudice to the application of the internal market rules and the fundamental freedoms in the field of broadcasting.

Should this letter contain confidential information, which is not to be disclosed towards third parties, you must inform the Commission accordingly and provide reasons within 15 working days upon receipt of the present letter. If the Commission does not receive such a reasoned request, it will be presumed that you consent to the publication of the present letter in all binding linguistic versions on the Commission's internet-website http://ec.europa.eu/competition/state_aid/register/ . Such a reasoned request must be sent either by recommended letter or via telefax to the following address:

European Commission
DG Competition
State Aid Registry
Rue de Spa 3
BE-1049 Brussels

Fax.: No: +32 2 296.12.42

Yours sincerely,

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For the Commission

Neelie Kroes
Member of the Commission

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10. CONCLUSIONS 60

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Annex 1

Income Sources ORF

in € Mio	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	FC 2009
Programme Fee	329,7	324,2	350,8	367,8	369,7	374,6	388,7	402,3	444,5	450,8	462,8	472,7	503,9	[BUSINES S SECRET]
Revenues from "classic advertising"	299,1	316,8	318,8	345,8	365,2	348,4	324,8	312,4	312,1	300,8	302	300,2	263,3	[BUSINES S SECRET]
Other Income	81,4	84,1	99,5	110	118,7	109,5	112,9	122,6	119,9	131,1	132,2	145,3	117,6	[BUSINES S SECRET]
Total sales income	710,2	725,1	769,1	823,6	853,6	832,5	826,4	837,3	876,5	882,7	897	918,2	884,8	[BUSINES S SECRET]
Total Other Income	54,2	72,6	62,6	87,8	93,1	62,8	57,9	73,8	89,4	182,6	67,8	74,9	114,1	[BUSINES S SECRET]
Total Income	764,4	797,7	831,7	911,4	946,7	895,3	884,3	911,1	965,9	1065,3	964,8	993,1	998,9	[BUSINES S SECRET]
in %	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	FC 2009
Programme Fee	43,1%	40,6%	42,2%	40,4%	39,1%	41,8%	44,0%	44,2%	46,0%	42,3%	48,0%	47,6%	50,4%	[BUSINES S SECRET]
Revenues form "classic advertising"	39,1%	39,7%	38,3%	37,9%	38,6%	38,9%	36,7%	34,3%	32,3%	28,2%	31,3%	30,2%	26,4%	[BUSINES S SECRET]
Other Income	10,6%	10,5%	12,0%	12,1%	12,5%	12,2%	12,8%	13,5%	12,4%	12,3%	13,7%	14,6%	11,8%	[BUSINES S SECRET]
Total Other Income	7,1%	9,1%	7,5%	9,6%	9,8%	7,0%	6,6%	8,1%	9,3%	17,1%	7,0%	7,5%	11,4%	[BUSINES

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Annex 2

ORF								
in Mio. Euro	2002	2003	2004	2005	2006	2007	2008	FC 2009
Sales Income	826,3	837,3	876,5	882,8	897,1	918,2	884,8	[BUSINESS SECRET]
Annual Surplus/Deficit	-42,6	5,0	1,2	51,6	-4,5	-12,2	-104,5	[BUSINESS SECRET]
as % of sales	-5,1%	0,6%	0,1%	5,8%	-0,5%	-1,3%	-11,8%	[BUSINESS SECRET]
Equity Capital	237,2	246,1	251,5	303,1	298,6	286,4	181,9	[BUSINESS SECRET]
Balance Sheet Total	801,1	820,3	818,2	902,8	891,2	863,9	778,6	[BUSINESS SECRET]
Equity Ratio	29,6%	30,0%	30,7%	33,6%	33,5%	33,1%	23,4%	[BUSINESS SECRET]
in Mio. EUR	2002	2003	2004	2005	2006	2007	2008	FC 2009
Sales Income	826,3	837,3	876,5	882,8	897,1	918,2	884,8	[BUSINESS SECRET]
Programme Fee	388,7	402,3	444,5	450,8	462,8	472,7	503,9	[BUSINESS SECRET]
Annual Surplus/Deficit	-42,6	5,0	1,2	51,6	-4,5	-12,2	-104,5	[BUSINESS SECRET]

NON AUTHENTIC VERSION

as % of sales	-5,1%	0,6%	0,1%	5,8%	-0,5%	-1,3%	-11,8%	[BUSINESS SECRET]
as % of programme fee	-10,9%	1,2%	0,3%	11,4%	-1,0%	-2,6%	-20,7%	[BUSINESS SECRET]

NON AUTHENTIC VERSION

ORF Group								
in Mio. Euro	2002	2003	2004	2005	2006	2007	2008	FC 2009
Sales Income	844,4	857,8	897,0	898,2	927,1	949,9	924,6	[BUSINESS SECRET]
Annual Surplus/Deficit	-39,9	2,1	1,1	5,7	9,0	3,6	-79,8	[BUSINESS SECRET]
as % of sales	-4,7%	0,2%	0,1%	0,6%	1,0%	0,4%	-8,6%	[BUSINESS SECRET]
Equity Capital	260,1	262,1	263,3	283,1	292,1	294,1	212,3	[BUSINESS SECRET]
Balance Sheet Total	860,8	908,1	898,5	976,8	989,4	978,3	903,9	[BUSINESS SECRET]
Equity Ratio	30,2%	28,9%	29,3%	29,0%	29,5%	30,1%	23,5%	[BUSINESS SECRET]
in Mio. EUR	2002	2003	2004	2005	2006	2007	2008	FC 2009
Sales Income	844,4	857,8	897,0	898,2	927,1	949,9	924,6	[BUSINESS SECRET]
Programme Fee	388,7	402,3	444,5	450,8	462,8	472,7	503,9	[BUSINESS SECRET]
Annual Surplus/Deficit	-39,9	2,1	1,1	5,7	9,0	3,6	-79,8	[BUSINESS

NON AUTHENTIC VERSION

								SECRET]
as % of sales	-4,7%	0,2%	0,1%	0,6%	1,0%	0,4%	-8,6%	[BUSINESS SECRET]
as % of programme fee	-10,3%	0,5%	0,3%	1,3%	1,9%	0,8%	-15,8%	[BUSINESS SECRET]