

REVIEW OF THE COMMUNICATION FROM THE COMMISSION ON THE APPLICATION OF STATE AID RULES TO PUBLIC SERVICE BROADCASTING

1. INTRODUCTION

In 2001, the Commission adopted its Communication on the application of State aid rules to public service broadcasting ("[Broadcasting Communication](#)") to provide guidance about how to assess the financing of public service broadcasters in accordance with Article 86 (2) EC Treaty and the Amsterdam Protocol.

The Commission's assessment is based on the following *guiding principles*: In accordance with the Amsterdam Protocol, Member States enjoy a large margin of discretion in defining, organising and financing public service broadcasting. Consequently, the Commission accepts a broad public service definition, including sports and entertainment as part of a balanced and varied programme remit. The choice of funding also includes in principle the possibility for public service broadcasters to combine State funding with advertisement revenues. While Member States are free to define the public service remit, subject only to checks for "manifest errors"¹, they are nevertheless required to lay down the public service obligations in a clear and precise manner. Moreover, the Commission examines possible disproportionate effects on competition through overcompensation and cross-subsidisation into commercial activities, as well as anti-competitive behaviour.

In general, the Broadcasting Communication has proved to be an appropriate tool for examining the financing regimes in a significant number of Member States. Since the adoption of the Broadcasting Communication in 2001, [the Commission has taken almost 20 decisions](#) in this field. In most cases, the investigations were triggered by complaints.

The Commission services consider that it would increase transparency and legal certainty if the Broadcasting Communication would be up-dated so as to reflect the experience gained from these individual investigations and the additional clarifications provided in the *Commission's decision-making practice* since 2001. There have also been *changes in the legal environment* such as the Commission Decision and Framework on public service compensation payments² and the revised Television without Frontiers-Directive, the Audiovisual Media Services-Directive, (AVMS Directive)³. Moreover, *market developments* due to digitisation and media convergence call for a careful analysis and a possible further development of the existing rules.

¹ The Broadcasting Communication refers to advertisement and e-shops as examples.

² Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312 of 29 November 2005) and Community framework for State aid in the form of public service compensation, (OJ C 297 of 29 November 2005).

³ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending 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, Official Journal, 18 December 2007, N° L 332/27.

Both the current Broadcasting Communication and the recently adopted AVMS Directive refer to the Resolution of the Council and of the Representatives of the Governments of the Member States of 25 January 1999 concerning public service broadcasting⁴, with the AVMS Directive "...reaffirming that the fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market."

The Commission's **overall objective** is to design an appropriate legal framework for the future financing of public service broadcasting in a new media environment. This should take into account the importance of public service broadcasting and the necessity for public support on the one hand and possible adverse effects on competition on the other. The guiding principles should be transparency, proportionality and accountability. The rules should strike a balance between the necessity to have sufficiently clear and precise requirements at EU level and the freedom of Member States to design their system of public service broadcasting according to their legal traditions (in line with the Amsterdam Protocol) and to make their choices as regards the implementation of the requirements as laid down by the Communication.

The **present consultation** gives Member States and stakeholders the opportunity to express their views on the various issues at stake. The Commission will analyse the outcome of the consultation carefully before deciding to what extent changes to the current rules are necessary. If appropriate it will come forward with a proposal for a revised Broadcasting Communication, possibly in the second half of 2008, so that it could be in place by summer 2009.

2. HOW TO CONTRIBUTE TO THE CONSULTATION

Member States and other interested parties are invited to respond to the questionnaire. Replies can be submitted in all official EU languages. Given the possible delays in translating comments submitted in certain languages, translations of the replies in one of the Commission's working languages (English, French or German) would be welcome. In addition, any comments beyond the scope of the questionnaire will be welcome.

The deadline for replies is 10 March 2008. Replies should be sent to the European Commission, DG COMP, State aid registry, 1049 Brussels, "HT.963", preferably via e-mail to Stateaidgreffe@ec.europa.eu.

DG COMP plans to make the replies to this questionnaire accessible on its website (http://ec.europa.eu/comm/competition/state_aid/reform/reform.cfm). Therefore, if respondents do not wish their identity or parts of their responses to be divulged, this should be clearly indicated and a non-confidential version should be submitted at the same time. In the absence of any indication of confidential elements, DG COMP will assume that the response contains none and that it can be published in its entirety.

⁴ OJ C 30, 5.2.1999, p. 1.

QUESTIONNAIRE

NOTE: An overview of the current rules, Commission decision-making practice and preliminary views of its services as regards the scope of the review are provided in the explanatory memorandum (in English only). It contains useful background information in relation to the questions in this "questionnaire". Each chapter of the explanatory memorandum introduces the corresponding part of the questionnaire following the same numbering.

1. GENERAL

- 1.1. A number of significant legal developments have taken place in the public broadcasting area since 2001, namely the adoption of the Audiovisual Media Services Directive, the adoption of the Decision and Framework on compensation payments as well as Commission decision-making practice. Do you think that the Broadcasting Communication should be up-dated in light of these developments? Alternatively, do you consider that these developments do not justify the adoption of a new text?
- 1.2. How would you describe the current competitive situation of the various players in the audiovisual media sector? Where available, please provide the relevant data on for instance leading players, market shares, market share evolution in the broadcasting/advertising/other relevant markets.
- 1.3. In your view, what are the likely developments and where do you see the major challenges for the sector in the future? Do you consider that the current rules will remain valid in the light of the developments or do you believe that adaptations will be necessary?

2. COMPATIBILITY ASSESSMENT UNDER ARTICLE 86 (2) EC TREATY, IN COMBINATION WITH THE BROADCASTING COMMUNICATION

2.1. Coherence with the Commission Decision and Framework on public service compensation⁵

- 2.1.1. Do you consider that (at least some of) the requirements laid down in the Decision and Framework on public service compensation⁶ should be included in the revised Broadcasting Communication or not? Please explain why.
- 2.1.2. In the affirmative, please specify which requirements should be included and explain what adaptations, if any, would be appropriate for the broadcasting sector (see also the questions below, in particular those on overcompensation; point 2.6).

2.2. Definition of the public service remit

- 2.2.1. You are invited to provide information on the definition of the public service remit in your country, in particular as regards new media activities.
- 2.2.2. Do you consider that the distinction between public service and other activities should be further clarified? In the affirmative, which measures could provide such clarification (e.g. establishment by the Member State of an illustrative list of commercial activities not covered by the public service remit)?
- 2.2.3. In the current Broadcasting Communication, activities other than TV programmes in the traditional sense can be part of the public service remit provided that they serve the same democratic, social and cultural needs of society. Does this provision sufficiently clarify the permissible scope of such public service activities? Why? In the negative, do you consider that further clarifications should be provided in a revised Broadcasting Communication?
- 2.2.4. Do you consider that the general approach in the recent decision-making practice of the Commission (i.e. determination of the public service remit based on an *ex ante* evaluation for new media activities) could be incorporated into a revised Broadcasting Communication?
- 2.2.5. Should a revised Broadcasting Communication further clarify the scope of an *ex ante* evaluation of the public service remit by Member States?

⁵ Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312 of 29 November 2005) and Community framework for State aid in the form of public service compensation, (OJ C 297 of 29 November 2005).

⁶ For an overview of the various elements, please consult the explanatory memorandum on point 2.1.

- 2.2.6. Which services or categories of services should in your view be subject to an *ex ante* evaluation?
- 2.2.7. Should a revised Broadcasting Communication contain the basic principles as regards the procedural and substantive aspects of such an evaluation (such as for instance the involvement of third parties or the possible evaluation criteria, including for instance the contribution to clearly identified objectives, citizen needs, available offers on the market, additional costs, impact on competition)?
- 2.2.8. In view of the fact that the determination of the public service character of such activities may be determined in various ways, to what extent should a revised Broadcasting Communication set out possible different options?

2.3. Entrustment and Supervision

- 2.3.1. You are invited to explain in which way entrustment is granted in your country. Is the procedure leading to the entrustment subject to public consultation? To what extent is the broadcaster's remit laid down in legally binding acts of entrustment? To what extent is the implementation and determination of the exact scope of activities left to public service broadcasters? Are any such "implementing measures" publicly available?
- 2.3.2. Please explain the mechanisms to supervise public service broadcasters in your country. What is your experience of the existing supervision mechanisms? Do you consider that there are sufficient possibilities for third parties to take action against alleged infringements/non-fulfilment of public service (and other) obligations in your country?
- 2.3.3. Do you consider that the Broadcasting Communication should contain further clarifications about the circumstances in which an additional act of entrustment (i.e. in addition to the general provisions laid down by law) is necessary or are the current rules sufficient?
- 2.3.4. Do you consider that the Broadcasting Communication should contain further clarifications in order to ensure increased effectiveness of supervision of public service broadcasters? What are in your view the advantages or possible drawbacks of control authorities independent from the entrusted undertaking (as referred to in the Broadcasting Communication) as opposed to other control mechanisms? Do you consider that effective supervision needs to include sanctioning mechanisms, and if so, which ones?
- 2.3.5. Should there be specific complaints procedures at national level where private operators could raise issues related to the scope of the public service broadcasters' activities? If so, what form should they take?

2.4. Dual Funding of public service broadcasters

- 2.4.1. What is – in your view - the expected impact of (partly) State-funded pay-services on competition?

- 2.4.2. Should pay-services always be considered as purely commercial activities or are there instances in which they could be regarded as part of the public service remit? For instance, do you consider that pay-services as part of the public service remit should in this respect be limited to services which are not offered on the market? Or do you think that pay-services could be regarded as part of the public service remit under certain conditions? In the affirmative, please specify which. For instance, should the conditions include elements such as specific public service objectives, specific citizen needs, existence of other similar offers on the market, inadequacy of existing public service obligations or inadequacy of existing funding to meet particular citizen needs?

2.5. Transparency requirements

- 2.5.1. To what extent are commercial activities carried out by the public service broadcaster itself in your country? Is there a structural or functional separation between public service and commercial activities?
- 2.5.2. Do you consider that there is a need for a structural or functional separation of commercial activities, and if so why? What would the positive or negative effects of either a structural or a functional separation?
- 2.5.3. Do you consider that the rules for cost allocation as set out in the current Broadcasting Communication could be improved in light of experience in your country? If so, please give possible examples of good practice. Or do you consider that the current rules are sufficient?
- 2.5.4. Against the background of your answers to the previous questions (2.5.1, 2.5.2, 2.5.3), do you consider that a revised Broadcasting Communication should contain further clarifications of transparency requirements?

2.6. Proportionality test – Exclusion of overcompensation

- 2.6.1. Do you consider that the Broadcasting Communication should include a requirement for Member States to clearly lay down the parameters for determining the compensation amount?
- 2.6.2. Do you consider that the requirements currently laid down in the Broadcasting Communication allow sufficient financial stability for public service broadcasters? Or do you think that the current rules excessively limit pluri-annual financial planning of public service broadcasting?
- 2.6.3. Under what circumstances could it be justified for public service broadcasters to keep a surplus at the end of a financial year? Do you consider that the related provisions in the service of general economic interest Decision and Framework (cf. the overview in the explanatory memorandum and in particular the 10% cap on annual surplus) could be incorporated into the new Broadcasting Communication?

- 2.6.4. What should be the safeguards/limits in order to avoid possible undue distortions of competition (e.g. should the 10% margin remain at the public service broadcaster's free disposal within the limits of its public service tasks or should it be earmarked for particular purposes so that reserves may only be used for predetermined purposes/projects? Should there be a re-evaluation by the Member State of the public service broadcaster's financial needs in case of consistent surpluses)?
- 2.6.5. Do you consider that the current rules laid down in the Broadcasting Communication could possibly act as a disincentive for public service broadcasters to achieve efficiency gains? If so, how could this situation be remedied? What are the mechanisms in place in your country which could be referred to as a good example?
- 2.6.6. In what circumstances and under which conditions would you consider that public service broadcasters could be allowed to keep a profit margin?

2.7. Proportionality test – exclusion of market distortions not necessary for the fulfilment of the public service mission

- 2.7.1. What are the available mechanisms in your country under which private operators could challenge alleged anti-competitive behaviour of public service broadcasters? Please indicate whether you consider that these mechanisms ensure a sufficient and effective control. Are lower revenues due to demonstrated anti-competitive behaviour (e.g. price undercutting) taken into account when determining whether or not the public service broadcasters have been overcompensated?
- 2.7.2. As regards the possible anti-competitive behaviour of public service broadcasters (and in particular as regards allegations of price undercutting), do you consider that the Broadcasting Communication should include requirements for public service broadcasters to respect market conditions as regards their commercial activities in line with Commission decision-making practice, including appropriate control mechanisms?
- 2.7.3. Do you consider that the methodology for detecting price undercutting should be clarified, possibly also including other tests which could be used as an alternative to the methodology currently referred to in the Broadcasting Communication? Please make reference to tests applied in your country to the pricing behaviour of public service broadcasters and which could be used as an example of good practice.
- 2.7.4. Do you consider that the Broadcasting Communication should contain clarifications as regards the public funding of premium sports rights? In the affirmative, what further requirements should in your view be included in the Broadcasting Communication and how would they specifically address potential competition concerns resulting from State funding? Alternatively, do you think that potentially adverse effects on competition due to the acquisition of such rights by public service broadcasters would be sufficiently addressed under the antitrust rules?

2.8. Other issues

- 2.8.1. Do you consider that the reference to the difficulties of smaller Member States is necessary?
- 2.8.2. What would you consider to be typical difficulties of smaller Member States and how should these be taken into account?

3. FINAL REMARKS

- 3.1. You are invited to explain what would be in your view the impact of the possible amendments to the current rules on for instance the development of innovative services and in more general terms employment and growth in the media sector, consumer choice, the quality and availability of audiovisual media and other media services, media pluralism and cultural diversity.
- 3.2. To what extent do you expect that the possible additional clarifications outlined above could create new administrative burdens and compliance costs?
- 3.3. Do you consider that the possible additional clarifications as outlined above would create a better regulatory framework?
- 3.4. Please explain whether or not you consider that the positive impacts of possible additional clarifications along the lines outlined in this questionnaire outweigh the negative impacts.