



## **PART I: RESPONSE TO THE COMMISSION QUESTIONNAIRE**

### **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?**

The State Aid Communication of 2001 has played a very helpful role in allowing the European Commission to scrutinise state aid to public broadcasters. It is noticeable that only after the adoption of the 2001 Communication was it possible for the Commission to deal with the backlog of cases which, due to heavy political pressure, had remained unsolved throughout the 1990s. Our starting point is therefore that the Communication should be updated mainly to reflect changes both in the media landscape and in EU case law on state aid and public broadcasting. The changed media environment poses a challenge to all stakeholders (including regulators and competitors, as well as pubcasters) of redefining the scale and purpose of public intervention in broadcasting and media markets. There is a risk that structural problems in broadcasting regulation may persist into the online world.

There is also the need to review the Communication in the light of the Altmark judgment of the European Court, and the Commission Decision of 28 November 2005<sup>1</sup>, which is particularly important because it provides a more in-depth analysis of the extent of the exception under Art.86 (2) of the Treaty, under which the more recent complaints have been handled, and the ongoing revision of the legal framework for State Aid, as stated in the State Aid Reform.

**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.**

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<sup>1</sup> Decision 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

For market shares and other data on television markets, we would refer DG COMP to the data published by the European Audiovisual Observatory and the Television 2007 Yearbook from IP Sales.

It would be helpful if, in the context of the revision of the Communication, the Commission could update their data on the amount of state aid in the broadcasting and media sectors. When compiling data for the ACT/EPC/AER White Paper on the Financing and Regulation of Publicly-Funded Broadcasters, our estimate was that state aid exceeded €15bn in 2001 for the EU-15. Clearly the figure today, in an EU of 27 and with many publicly-funded broadcasters having benefited from above-inflation increases in state aid in recent years, will be significantly higher. However, the decision of DG Competition, post-Altmark, to remove aid granted to “services of general economic interest” from the State Aid Scorecard means that there is no transparent, independently verifiable data on this point. Nor is such information readily available elsewhere.

Given the scale of state aid in the broadcasting sector, which we estimate as the third-largest recipient of state aid, it is surprising that it is left to competitors to make estimates as to the exact amount of public money involved. We assume that, in the interests of transparency, the EU will request accurate and complete data on this point from publicly-financed operators.

Obviously, the market situations are very diverse across Europe. In terms of financing, public broadcasters are generally better-resourced than their immediate competitors. This – coupled with vague remits – has underpinned the extraordinary dominance which the public sector has achieved for example in sports rights in many Member States, causing major market distortions because of public broadcasters presenting bids that private broadcasters can not match. The financing issue is particularly stark in the many markets where there are non-transparent sources of finance, or where dual financing is practiced.

We will now examine some national markets, including especially those where the dual financing system is still distorting competition in the audiovisual market:

In **Flanders**, the public broadcaster’s resources are themselves significant (€279 M in 2007 rising to €293 M in 2010). These are now indexed, with an increase of 1.5% p.a. But there is also the unquantifiable competitive advantage of certainty in revenues – broadcasters who are dependent on subscription and (particularly) advertising markets are usually only able to predict their revenues within a three to six month horizon. Having a guaranteed income over a three to four year period is a huge tactical advantage in terms of planning, particularly when bidding for sports rights. The public broadcaster also benefits from a range of additional sources of revenue, including a specific grant of €4 M for “innovation in the media” and for fiction programming – each of which could legitimately be expected to fall under the main public service remit. Additional aid is granted under the new Beheersovereenkomst for pension financing and even for renovation of the public broadcaster’s building – the latter, unusually, is seen as part of the public service remit. The sale of assets, even though these were acquired with public money, is treated as a cash windfall for the Flemish public broadcaster.

**France** - France has, at least for the time being, a dual financing model, based on both licence fee (“redevance”) and on advertising. Dual financing is a significant problem (not least because the proportion of advertising in the pubcaster’s overall income is substantial: around 30%, (supporting data available on request, sourced from the Annual Reports of France Télévision). Indeed, the coexistence of dual financing for pubcasters has an undoubted impact on the advertising market, notably on the prices of advertisements, in a context where pubcasters are allowed to – and do - advertise heavily during prime-time.

There are also a range of issues which we recognise are outside the scope of this Communication, but which contribute to the strong market position of publicly-financed operators. For example, according to a 1986 law, the public channels have a “droit de préemption” i.e. a pre-emptive right for access to frequencies. This is the case for access to DTT, where public channels get i) automatic and ii) priority access. This is equally true for currently allocated HDTV frequencies. Also, the respective “cahier des charges” of private and pubcasters raise issues. In particular, the public broadcasters’ channels are allowed to cross-promote programmes aired by the other channels of the same group (e.g. France 2 making announcements (sometimes isolated) for programmes aired (same day or other days) on France 3), while doing the same is strictly prohibited for private channels in their “cahier des charges”.

By contrast in **Finland**, while competition between public and commercial broadcasters takes place in all other relevant markets (like viewing shares, programme acquisitions, sports rights acquisitions, personnel), this is not the case in broadcasting of television and radio advertising. Broadcasting of advertising is not allowed on Yleisradio's television and radio channels by the Act on Yleisradio Oy (§ 12).

Until recently, analogue commercial television channels were compelled to pay a concession fee for financing Yleisradio. The fee was paid to the State Television and Radio Fund which passed it to Yleisradio. The concession fee paid by commercial broadcasters was, however, removed gradually after 2002 due to the fact that it was not anymore sustainable in the new digital competition environment. The concession fee ended August 31st 2007 when analogue terrestrial broadcasts were switched off in Finland.

The concession fee was a reason for many conflicts between commercial broadcasters and Yleisradio during its existence. After removal of the fee relations between companies have improved significantly, although there are some other privileges remaining for the benefit of Yleisradio Oy. This has created possibilities for improved programme services to the public.

In **Italy** the public broadcaster (RAI – Radio Televisione Italiana) benefits from the dual funding system, based on both public funding through the licence fee (“canone”), a tax related to the possession of a TV device, and advertising. The public broadcaster’s revenues are themselves significant (€2.624M in 2006). Part of it is financed through the

licence fee (€1.491M) and almost all the rest from advertising<sup>2</sup>. The public broadcaster, RAI remains the main actor in the audiovisual market in terms of total share of revenues. Public broadcaster's revenues continued to grow compared to 2005 (€2.570M) and 2004 (€2.545M). Indeed, the continued existence of dual financing for pubcasters has an undoubted impact on the Italian advertising market. Dual financing constitutes a significant problem not least because the pubcaster's share of the advertising market remains substantial: around 29%. After recording a significant increase in the course of 2004 (equal to 10.5%), revenues from advertising have grown by 1.5% in 2005.<sup>3</sup> Compared to 2004, revenues from the licence fee have grown steadily with a increase by 0,6% in 2005.<sup>4</sup>

**Germany** is characterised by a highly competitive market with 45 particularly strong public service channels, three thereof being purely digital channels. Due to must-carry rules these channels usually get a privileged access to terrestrial or cable distribution, thereby benefiting from a competitive advantage. The fact that even regional public channels are distributed under that privilege in cable networks in other regions leads to shortages of frequencies and cable capacities to the detriment of private operators.

German public service channels receive €7,2 bn in licence fees, €560m in advertising revenues as well as an additional €800m by other means such as the sale of own productions etc.

While public service broadcasters generated a total of €8.505m (licence fees, advertising and other income) in 2006, the private sector was able to earn €4.918m, plus €1.117m from pay TV.

Due to a combination of the unclear definition of the public service remit and their unlimited resources, public channels have been able to spend prices for FTA sports rights that exceed by far any price that a commercial operator would have been able to refinance with advertising and sponsoring. In recent years this situation has led to a totally unbalanced distribution of attractive sports rights to the benefit of public broadcasters.

Another new strategy of public broadcasters in Germany that leads to severe distortions of competition is the co-operation with the press on the delivery of audiovisual productions for the use of those on web-based versions of newspapers or other online offerings of the publishers (see cooperation of WDR and WAZ of 11.03.08). The revised Communication should ensure that productions that have been produced with public funds will be sold strictly at market conditions. Competitors should be granted a possibility to contest a cooperation agreement if the commercial sale of those productions to third parties on an exclusive basis is not done at market conditions.

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<sup>2</sup> Being the share constituted by other items ("convenzioni") still very marginal.

<sup>3</sup> In 2004 revenues from advertising were €1.040M, while in 2005 €1.056M.

<sup>4</sup> In 2004 revenues from licence fees were €1.474M, while in 2005 €1.483M.

In **Portugal** there is a dual funding system, the Portuguese pubcaster benefits from advertising income, license fee («audiovisual contribution» which was reintroduced on the 1st September 2003) and also from capital increases and State compensation, the last allegedly to cover the cost of public service obligations, according to a strict evaluation mechanism stated in the four-year contract signed with the Government.

In **Slovenia** the pubcaster is financed by licence fee and advertising. Pubcasters' total income is about 4 times bigger than commercial ones.

In **Hungary** the pubcaster enjoys the opportunity to benefit from advertising and sponsorship income as well as state funding. The new National Audiovisual Media Strategy Paper under discussion proposes the abolition of advertising with an obligation for the commercial sector to “compensate”. While precise details are not yet available, this proposal has been widely criticised, given the rate of fragmentation in the Hungarian media market (eg. since the beginning of 2008, 23 new thematic channels have launched). This means that the burden of this proposed new, discriminatory tax on commercial television – which is not applied to other media who may gain from the abolition of dual financing on the publicly-funded broadcaster – could outweigh any commercial gain from the abolition.

As in many other countries the Hungarian public channels are financed through various sources. On the one hand there is public funding. There used to be a licence fee but - partly due to reluctance among the population to pay it - the central budget has taken over and covers operational costs, distribution and framework financing directly and by issuing tenders through the Broadcasting Foundation. These tenders support the production of public service programmes and as a rule only public service broadcasters may take part in the tender.

On the other hand there is commercial income – advertising and sponsorship. There can be six minutes per hour advertising, alcoholic beverages cannot be advertised. Not all programmes can be sponsored, only art and cultural programs (including sport according to a resolution of the Hungarian regulatory authority), programmes targeting minority, and disadvantaged groups and religious programmes (not common in other European countries). Distributors and producers of alcoholic beverages cannot become programme sponsors.

In **Spain**, the issue is both structural and legal.

Structurally, the privileged position of public television, is the benefit of receiving public funds while competing in the advertising market. This has allowed public television to occupy advertising time – historically, limited only by the TVWF directive - without having to increase advertising prices (despite having lost share) and, at the same time, have enough resources to purchase attractive content. The need for the pubcaster to compete in the advertising market has a direct influence on their programming schedules, which are practically identical to those of private television stations.

Legally, the Law 17/2006 of 5<sup>th</sup> June “*de la radio y la televisión de titularidad estatal*” and the recently adopted “*mandato-marco*” establish that the RTVE benefits from a dual funding. It is financed partly by public funds subject to the limits imposed by the regulations and the criteria of transparency and proportionality established by the European Union and partly by incomes deriving from commercial activity that are subject to the market principle. Analytical accounting is put in place in order to differentiate between these two sources of income and to determine the net public service cost in order to prevent an overcompensation from the State.

The Spanish government whose mandate was renewed in the general election of 9 March 2008, has recently announced they will oblige the Spanish pubcaster TVE to reduce advertising minutage from 12 minutes per hour to nine (still a very generous allocation of airtime to a publicly-financed broadcaster, by European standards).

At this stage , the recent Law 51/2007 of 26<sup>th</sup> December “*de Presupuestos Generales del Estado para el año 2008*” provides in its “*disposición adicional quincuagésima segunda*” that in accordance with what is established in article 32.2 of the “*Ley 17/2006, de 5 de junio, de la radio y la televisión de titularidad estatal*”, the “*contrato-programa*” that will be agreed between the Government and the “*Corporación RTVE*” for the period 2008-2010 will incorporate further restrictions to the ones already established in the Law 25/1994 of 12<sup>th</sup> July. It also provides that, for 2008, the time dedicated to advertising spots and teleshopping spots, excluding autopromotion, won't be superior to 11 minutes in each natural hour in which the day is divided. For private broadcasters this reduction is totally insufficient and useless and that in order to make a real difference, the reduction in advertising minutage would have to be of at least three minutes.

For **Spain**, we would draw attention to this data from the 2007 UTECA Report:

In 2006, TVE 1's audience share was 18,3 % and La 2's was 4,8 % whereas in 1997 it was 25,1 % and 8,9 % respectively. The regional Channels, part of FORTA, went from 17,5 % in 1997 to 15,4 % in 2006. In 2006, Telecinco's audience share was 21,3 % (and in 1997 it was of 21,5 %). When it comes to audience share, the biggest losers are the public channels (whether state channels or regional ones). Indeed La 2 lost 46%, TV 1 lost 27 % and the regional channels belonging to FORTA lost 12 % of their share in the ten year period comprised between 1997 and 2006. (Informe UTECA 2007 p. 23)

Apart from TVE, the regional channels also have a relevant share in the advertising market.

In **Portugal** online services benefit from broadcasters reputation and contents, therefore unfairly competing online with commercial broadcasters. The same applies to new digital channels, which will benefit from spectrum without having to face a public tender procedure.

In **Poland** there is a concern that a pubcaster (TVP) would enjoy a further competitive advantage over commercial broadcasters by enjoying the function of a national multiplex operator with exclusive competence during switchover process.

In the **UK**, the BBC's significant licence-fee funded resources, branding and cross-promotional advantages present the market with a formidable competitor. The BBC's activities – even the mere suggestion of planned services - may mean that some commercially funded ideas never even get off the drawing board because they are clearly unviable in the light of the BBC's ambitions. This ability to make markets is linked to the vague definition of public service remit. Since there is virtually no content genre or distribution platform that the BBC considers outwith its public service remit, commercial competitors launch new services under the permanent threat that the BBC might follow suit.

**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?**

The main challenges facing the audiovisual sector are well known. These include a multiplication of platforms, the fragmentation of the mass audience, the need to constantly re-adapt the business model to anticipate and provide for new consumer uses (not least the increasing shift towards individualised, on-demand content distribution), the relatively mature state of many European broadcast advertising markets and the inability of sector-specific national and European regulation to keep up with market developments.

It is clear that publicly-funded operators also need to adapt their strategies to face those aspects of this changed environment which also apply to their operations. This adaptation will certainly call for an update of the regulations governing their activities – a point we will develop further below when considering the need for ex ante scrutiny to establish a clear line between what can and cannot legitimately be done by publicly-funded operators in this new world.

In the digital age the broadcasting industry will inevitably face substantial changes as new media and new players such as IT and telecom companies and the printed press enter the market for audiovisual content. It is all the more important in these markets to overcome the existing distortions of the dual system (coexistence of private and public broadcasting) in the classical broadcasting world and prevent those distortions from building up in new markets. Unlimited activities that are automatically regarded as public service due to the problem of the “circular” remit should not be transposed to new emerging markets. Cross subsidisation and overcompensation will lead to clear barriers to entry on nascent markets such as mobile TV or news services. Clear guidelines in the Communication on criteria to determine an ex-ante scrutiny such as an improved form of public value test, and to define the public service remit would be much needed.

## **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 compensation**

#### **2.1.1. Do you consider that (at least some of) the requirements laid down in the Decision and Framework on public service compensation should be included in the revised Broadcasting Communication or not? Please explain why.**

State Aid must comply with the Principles of the ongoing State Aid Reform, namely by becoming: i) less and better targeted, ii) having a refined economic approach, iii) more effective procedures, better enforcement (namely in case of recovery decisions), iv) higher predictability and v) enhanced transparency.

Evaluation of compatibility of aid must rely on more precisely defined concepts such as “*market economy investor principle*”, “*advantage*”, and more rigour in applying criteria such as the “*effect of trade*” and the “*distortion of competition*”, which have been identified as one of the main sources of legal uncertainty.

The necessary economic assessment must not be the cause for the introduction of more complexity in the evaluation of compatibility – we consider this proportionality issue with reference to a refined economic analysis in our Legal Analysis, which is Part II of this paper.

Concepts such as “*net cost of public services*”, “*reasonable profit*”, “*compensation/subsidy*”, “*proportionality*”, “*necessity*” “*overcompensation*”, and the Altmark criteria, must be precisely defined and conform to the Communication, in order to grant more certainty to each State Aid evaluation. Again, we consider these issues and in particular the need for an efficiency assessment analysis in more detail later in our paper.

The control of overcompensation and cross-subsidisation must not be dependent on the amount of license fee a specific public channel receives. Otherwise simple restructuring might lead to a non application of European State Aid law to a great number of smaller channels (e.g., smaller regional channels in Germany such as Mitteldeutscher Rundfunk with €558.061,38 licence fee).

#### **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).**

The following criteria should be included:

- Definition of the remit: the public service obligations that have to be fulfilled have to be defined by legal act. The core criteria should be inserted into the communication
- External control: The public values that would justify the public financing of services should be controlled by an independent, external body. An internal control only is not sufficient.
- Ex-ante determination of parameters for public service financing: The parameters for the determination of the financial compensation for the fulfilment of the public service remit have to be inserted in a legal act.
- Prohibition of overcompensation: Overcompensation clearly has to be forbidden in the broadcasting sector. It follows that excessive license fees that could not be used for the fulfilment of the public remit have to be handed back or taken into consideration for the next period.
- Market conformity: When competing on markets such as sports rights acquisition market the publicly-financed channels have act in conformity to the market.
- Clearly the shift of 10% overcompensation to the next licence fee period would provide a significant competitive advantages that would lead to a distortion of competition.
- All the requirements of the Financial Transparency directive have to be applied to the broadcasting sector.

## **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.**

Reading this question in conjunction with Q1.2 it is clear that the European Commission does not have accurate information on either the amounts of state aid granted to European broadcasters, nor on the public service remits used to justify this aid. As a minimum outcome of this consultation, we would expect to see the publication of a scorecard of state aid for broadcasting together with a compendium of public service remits. This does not appear an unreasonable request for a sector which is, we estimate, the third-largest recipient of state aid in Europe.

We recognise of course that the powers of DG COMP in the area of public service remit are not unlimited. However, the prevalence of vague, unquantifiable and ill-defined remits around Europe lies at the core of many of the competitive distortions in our media markets. Indeed, it is arguably not in the longer-term interests of the publicly-funded operators themselves, as vague remits allow pubcasters to imitate commercial programming. In public broadcasters across Europe, more challenging material is increasingly exiled to minority channels or the margins of the schedule. Much of the peak time output of the public broadcaster, such as “telenovelas” and daily soap operas, is hard to justify in terms of added public or social value or to reconcile with the familiar rhetoric of European pubcasters, advocating that the media has a wider role than that of a “mere” economic service.

We would like to make a specific suggestion to DG COMP on the problem of the “circular” remit. By this, we mean a purported public service mission which actually does not help consumers, competitors or regulators in determining what public service is actually being delivered. **Ireland** is a striking example, where the Minister responsible for the media recently commented that public service broadcasting is “*whatever RTE does.*” This appears entirely incompatible with the obligation under the 2001 Communication that “*the definition of the public service mandate should be as precise as possible*”. The revision of the Communication is an opportunity for the Commission to clarify that the circular remit is unacceptable, and that state aid granted in fulfilment of such a “remit” will not pass the scrutiny of DG COMP.

Turning to some national remits, as examples of the need to be more precise in definition:

The public remit in **Flanders** remains vague. Although there has been some move towards introducing quantifiable measures in the most recent Beheersovereenkomst, the fact that these are expressed with reference to audience share, e.g. for news programming, will in practice tend to reinforce populist tendencies in the pubcaster’s programming. This is the case not only for issues which are familiar from analogue television – e.g., the definition of the programming mission – but there is also evidence that issues of remit definition will cause problems in the new media environment. For example, the definitions of “interactivity” and “merchandising” are sufficiently vague as to give rise to problems in defining the appropriate scope of the pubcasters’ activity. Also, while the Beheersovereenkomst sets a maximum amount for commercial financing, this applies only to linear, analogue television, allowing for unlimited commercial activity on all other media platforms such as online or digital text advertising or for blurring the lines between programme and event sponsorship.

In **France**, the public service remit is very vague as well, and it doesn’t allow any distinction between pubcasters’ and commercial channels’ offer. The description of the various missions entrusted to pubcasters in France, under Article 44 of the 1986 law (“*loi relative à la liberté de communication*”) shows that these missions are both broad and vague. Interestingly, amongst those is the mission of ensuring generalist and varied programmes, “*aimed at the largest possible audience*”. Another point regarding the French situation – in addition to those outlined above, is that problems also flow from the fact that, to some extent, the private broadcasters in France have to comply with a number of obligations, which are de facto public service (e.g. coverage or programming), without this being recognised as being such. Hence, it could be added that transparency of the system would be increased i) should the regulator adopt a clearer stance on some of the obligations imposed on some commercial broadcasters and ii) (possibly) admit therefore that they (at least rhetorically) could be granted public funding/or reduced licence access costs as a counterpart of the obligations they’re entrusted with. In relation to new media, French commercial operators argue that it is unacceptable and anticompetitive to use public money to develop activities which are not distinguishable from commercial ones, and even, to develop such activities at all with public money, while not accurately defining the boundaries of the remit for new media ventures.

In **Germany** there is clear evidence that the issues from the analogue era, primarily the lack of a specific legal mission, are allowing pubcasters to define the extent and scope of their mission for themselves, relying on general principles abstracted from constitutional court jurisprudence, but without the detailed underpinning of professional, independent media regulation. The fulfilment of even the very general “mission”, e.g., for social integration, may be called into question by the strategy of the public broadcaster, which is increasingly oriented towards individualised, on-demand programming.

§ 11 of the Interstate Treaty on Broadcasting only requires that the pubcasters’ programme schedule “has to serve information, education and entertainment. It has to offer programmes especially on culture.” According to the Interstate Treaty, pubcasters can also offer printed press magazines and telemedia for as long as they can be considered programme-related. But the definition of what would be programme-related or not lies with the pubcaster and cannot be challenged by commercial competitors.

Recent developments such as the new web-based content offer in the Mediathek show the shortcomings in the definition of pubcasters’ remits. When analysing the concrete offer on Mediathek, one realises quickly that what is planned is a vast platform for the delivery of most interesting content from all pubcasters in Germany on an on demand basis without there being any legal basis for these offers.

In **Italy**, the public service remit is very vague as well. The public service remit entrusted to the pubcaster in Italy is broadly described under different pieces of legislation (Law n. 249 1997, Law n. 112 2004, and Law n. 177 2005 “Testo Unico della radiotelevisione”). In addition, the public service obligations are further defined by the national contract between the Ministry of Communications and RAI, signed in 2007 for the duration of three years, in accordance with the guidelines approved by the Italian Communication Authority. According to the guidelines, the programming will be measured through an evaluation mechanism based on objective criteria such as the observance of the criteria of pluralism, objectiveness, social and civil growth and the respect of human dignity and children rights. The parameters of quality and indexes of satisfaction of the audience have also been introduced. Although the guidelines were meant to adjust the public service remit notion to the market developments, technological growth and to the cultural, national and local needs by introducing more precise criteria, the notion still remains very vague.

In **Spain**, until very recently, the pubcaster remit was not really defined in any law. This flaw has been theoretically repaired thanks to the new Law 17/2006, of 5th of June, “*de la radio y la television estatal*” which was published in the BOE of 6th of June 2006. Articles 1 and 2 aim at giving a definition of the “*public remit*”. The result, however, is not as satisfactory as wished because the “*public remit*”, as defined in the new Law, remains quite a vague notion.

This flaw is also not repaired by the “*mandato-marco*” because it is also very vague. Indeed, it consists of a compendium of proposals, objectives and ideas that will have to

be taken into account by the Government when elaborating the “*contrato-marco*” and also by the “*Corporación RTVE*”. As for the definition of the public service’s function, the “*mandato-marco*” doesn’t innovate. It merely states principles that are comprised in European and international regulatory norms as being applicable to the Spanish public TV. When it comes to the proper content to be broadcast, the “*mandato-marco*” refers to a generalist content (“*oferta generalista*”) which has to comply with quality requisites as well as social profitability. Article 30 of this document provides that the following content will be broadcast: information programmes, national and international fiction programmes, sports, TV-Movies, children and young peoples’ programmes, documentaries, musical and religious programmes etc...this means everything a private broadcaster would include as part of his TV programming. Moreover the same article provides that the offer will take into account the public’s tastes and will be managed according to social profitability and economic efficiency, this clearly refers to the audience share.

As for the new media in particular, the Law 17/2006 and the “*mandato marco*” consider the contribution to the information society as part of the public service function.

In **Poland** the new media sphere and exploitation of new technology is treated by the pubcaster as public mission, without any differentiation of character for new media activities and without any broadcast content analysis. The definition of “public service tasks” in the Polish Broadcasting Act is imprecise, making it impossible to assess the degree of fulfilment of those tasks by TVP. This lack of precision allows TVP to classify as public service, remit, and finance out of the license fees funds, activities which are of a purely commercial nature. The Commission is of course aware of the situation on the Polish market following the recent filing of a state aid case

In **Portugal** the new Television Law, from July 2007, dedicates a whole Chapter to Public Service and establishes the main principles of independence from the Government, and other public authorities. But once more, the criteria - universality, national unity, diversification, quality and indivisibility of programming - are very broadly stated, and must be worked out in more detail by the formal contract to be signed between the Government and the pubcaster (the current one is to be replaced shortly). References to high quality, pluralism, impartiality, etc. do not constitute criteria, which allow for the distinguishing of “*public service mission*” programmes from “*commercial*” programmes. The Television Law only contemplates a minimum offer of channels, some of them may not be universally accessed (as they may form part of pay-TV) but the law doesn’t mention any new media. However, RTP has an extensive offer of online services that were so far not scrutinized through public opinion. The service that exploits pubcaster archives (RTP Memória) is criticised by the Opinion Council for lack of a clear programming strategy, and for being accessible only to pay-TV subscribers. The new draft contract confirms that there will be at least two new PS channels, of which one is for children programming and the other is for science and learning, that is, both missions could be carried out by the current generalist programme services if their programme strategy would fit PS remit.

The **Hungarian** Media Act adopted in 1996 contains very vague definitions on “public service broadcaster”, “public service programme” and “public service broadcast”. Resolutions of the Regulator and Court decisions of the last 12 years have not substantially clarified these terms. There is no real guidance for public service and commercial content to be differentiated. Moreover there are no guarantees against public funding being used for commercial purposes. As a consequence public service and commercial televisions are operating with very similar programme profiles.

Public foundations have been set up by the Parliamentary Assembly to operate MTV1 terrestrial, MTV2 and DUNA channels and there are supervisory bodies, so called ‘board of trustees’ to supervise the operations. As the members of the board of trustees are mostly nominated by the political parties the pubcasters are politically influenced and dependent in Hungary.

Pubcasters are obliged to prepare a statute for broadcasting which includes guidelines and rules on how to produce public service programmes defined in the Media Act, but there is no obligation on the proportion. As a result there are more and more entertainment programmes, which do not fit under the classical public service programme definition.

The two main commercial television channels are also under the obligation to broadcast public service programmes in accordance with their Broadcasting Agreement. This should be 30-32% of their broadcasting time, with a minimum of 20% during peak time.

The pubcasters’ remit is not precisely defined in **Slovenia**. The definition is a broad one, including vague terms such as quality and variety of programmes. Except that “*the majority*” of the content within the above programmes must be cultural, art, information, documentary and educational programmes. What happens in Slovenia is that the pubcaster buys a programme (which is interesting for advertisers) and packages it as public service remit – as if they would show that programme anyway (regardless of whether it could be sold to advertisers). In fact the motivation is exactly the same as for a commercial operator.

In the **UK**, to the extent that the BBC’s remit is defined, it is contained in the BBC’s Charter and in its Agreement with the UK government. The BBC’s main object is the promotion of its Public Purposes, six broad statements of policy. The Charter states that the BBC’s main activities “*should be the promotion of its Public Purposes through the provision of output which consists of information, education and entertainment, supplied by means of (a) television, radio and online services; (b) similar or related services which make output generally available and which may be in forms or by means of technologies which either have not previously been used by the BBC or which have yet to be developed.*”

The Charter permits the BBC to carry out other activities which directly or indirectly promote the Public Purposes, but such activities should be peripheral, subordinate or ancillary to its main activities.

Such a purposive approach to defining the remit of the BBC enables it to be flexible in determining how it serves the public interest, but provides little certainty to the commercial operators in the markets in which the BBC chooses to operate.

Finally, in **Finland** the assignment of public service broadcasters should be defined more precisely bearing in mind their public service objective. Currently the Finnish act regulating public service broadcasting (Act on Yleisradio Oy) determines the scope of operations of the Finnish public service broadcaster Yleisradio Oy in a very wide manner (full service television and radio programmes and thereto related additional and extra services, to be offered in all telecom networks), leaving much room for interpretation.

Finnish private sector players are facing increased competition and expenses in acquiring good quality programmes, as the public service broadcasters are bidding for the same programme offering as the private broadcasters. For example, the Finnish public service broadcaster Yleisradio Oy signed a three-year deal with HBO, a US production company well known for its popular, entertaining television shows.

The flow of European taxpayers' money into the Hollywood studios is of course not an exclusively Finnish phenomenon. But it raises important issues, in Finland and elsewhere:

- The public service broadcasters should, rather than competing with the private broadcasters, concentrate on their public service mission.
- The mission of the public service broadcasters is to promote democratic, social and cultural needs of society. How does the broadcasting of American movies and series serve such purposes? Public service broadcasters should rather focus on producing domestic programmes.

**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)?**

A general focus on information, culture and education is no longer sufficient because it is too broad; abstract principles such as pluralism, quality, exemption, minority promotion or accessibility must be sufficiently detailed and contractually regulated in order to allow for external monitoring and to comply with para 37 of the 2001 Communication. Instead, we would call for Member States to introduce clear and precise definitions of specific programme concepts, possibly including the maximum amount of time devoted to certain entertainment genres (soap-operas, quiz-shows, etc) and a minimum percentage of science, cultural, education, high-quality entertainment, children's programming etc. It is also important that these remits are respected not only in the so called «*minority channels*» but in all pubcaster programming services. A list of examples of activities falling in and outside of the concept of public service broadcasting would be helpful in clarifying the position.

Publicly-financed broadcasters usually raise the spectre of “ghettoisation” in this debate, however unrealistic this may be given their market share and political influence. In fact, this is not a call for public broadcasters to exit from any genre – merely to live up to their PR statements about “*distinctiveness and quality*” on screen, not just when talking to politicians. Entertainment, fiction and sports are clearly genres where the remit must be fine tuned to avoid market distortions: entertainment must be a reference in terms of quality, and minimum knowledge skills must be defined for participation in quiz-shows; in terms of fiction, the problem seems to be that high budgets tend to imply hiring the best script-writers, producers and actors thus emptying the audiovisual market of much of its best talent.

**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?**

Given that the public service remit in television is meaningless in many European countries, we clearly do not believe it is helpful in clarifying the scope of public intervention in the new media era. In the context of the revised Communication, it would be helpful to define that purely commercial services not linked to democratic and citizenship information needs should fail the test of manifest error.

**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?**

We would support the introduction of some form of EU level obligation for *ex ante* evaluation in a new Communication, in line with recent decisions of the Commission. We will spell out some of the minimum requirements – which may deviate from recent Commission precedent - for such an evaluation below.

Pubcaster activity in new media services must be subject to an analysis of what is already available on the market: online activities offered by a pubcaster (e.g. chat rooms, online games, calculators, links to third parties offers/services) do not automatically constitute services of general economic interest and may lack specific features as compared to other similar or identical already offered by the market.

**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?**

**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 e.g. 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)?**

Joint Answer to 2.2.5, 2.2.6, and 2.2.7:

The revised Communication should indeed clarify Member States' obligations to carry out ex ante evaluation of proposed expansion by pubcasters into new areas of business. As the effect of a change of use in existing services can be detrimental or at least very influential, any substantial change of use should also fulfil the ex ante evaluation as this would prevent the redefinition of services as a loophole.

If the revised Communication also includes meaningful rules on procedural, institutional and substantive aspects, then this would be a significant step forward in introducing an element of transparency into the system.

Key issues include:

- What analysis should be carried out?
- Against which criteria?
- By whom should it be carried out?
- On which services?
- Extent of third party involvement

In the absence of satisfactory guidelines in the Communication, there is a risk that ex-ante scrutiny becomes legitimisation, rather than regulation, of public broadcasters' activities.

The analysis to be carried out under an *ex ante* evaluation needs to be rigorous, objective – and above all, devoid of the subjective, abstract concepts such as “quality” which have underpinned so many distortions of competition in the broadcasting market. The ex-ante scrutiny has to follow clear criteria that are set out in legal acts, including specific evaluation criteria.

It is essential that the *ex ante* scrutiny be carried out by an independent authority. We have no particular preference as to whether this would be the broadcasting regulator (NRA), the NCA, or a stand-alone body – this would be up to the Member States to decide... so long as it was an body wholly independent of the public broadcaster. Any other scrutiny will be neither meaningful nor objective. Our insistence on independent regulation follows the logic of Recital 46c of the new Audiovisual Media Services Directive, and should ensure that scrutiny is carried out by regulators who are genuinely independent of political and industry interests.

The Communication should specify that *ex-ante* scrutiny is needed for any significant expansion of publicly-financed operators into new business areas. It is assumed in making this statement that publicly-financed operators are extending into areas compatible with their (“sufficiently clear and precise”) remit. Finally, a revised Communication should make clear that third parties have the right to be consulted at all relevant stages of the process.

As the Commission is aware, the recent introduction of a Public Value Test in the UK for new BBC services has provided operators with some early experiences of the strengths and weaknesses of one form of *ex ante* regulation. A revised Communication offers an opportunity to codify best practice standards in this area, building on recent Commission precedents.

The early operation of the PVT in the UK shows some of the weaknesses in a structure which is not adequately independent, as both the analysis and decision making in relation to new services are undertaken by the BBC Trust, which is “*sovereign body within the BBC*” whose main roles are “*setting the overall strategic direction of the BBC, including its priorities, and in exercising a general oversight of the work of the Executive Board*”, rather than being those of a wholly independent regulator.

The BBC PVT comprises two parts: a public value assessment (PVA), carried out by the BBC Trust against the BBC’s own remit (a remit which, like those of other publicly-financed operators in Europe, is very general), and a market impact assessment (MIA) carried out by OFCOM, the independent regulator for the communications industry (save in relation to certain parts of the BBC’s activities). These two assessments are undertaken simultaneously through public consultation and information gathering leading to separate reports being provided to the BBC Trust in order that it may conduct the PVT by weighing one assessment against the other to decide whether the BBC executive should be permitted to implement its proposal.

Whilst the PVT provides greater scrutiny of BBC activities (new services and material changes to existing services), there are a number of problems which undermine the PVT as a means of meaningful, *ex ante* review:

- the Trust is not independent of the BBC;
- the Trust has a number of conflicting roles in relation to the PVT, which are not resolved by OFCOM involvement;
- the structure of the PVT obliges the Trust to make a subjective assessment rendering the ‘test’ meaningless;
- OFCOM’s role in conducting the MIA is not that of an independent regulator, but rather that of a paid expert witness.

OFCEM’s terms of reference when conducting an MIA, including the markets that it is to consider, are dictated by a Joint Steering Group made up of OFCEM and BBC Trust members.

The overall relationship between the BBC Trust and OFCOM in relation to MIAs is set out in a Memorandum of Understanding that was not subject to public consultation<sup>5</sup>. Ofcom has also published a BBC agreed methodology for conducting MIAs<sup>6</sup>, according to which it will assess the market impact of BBC proposed new services, including ‘positive’ “market creation” effects, notwithstanding the difficulties of conducting such assessments on new and emerging markets.

Accordingly, the ‘test’ carried out by the Trust is a subjective assessment weighing an assessment of whether the BBC’s proposals are contrary to its public purposes, against OFCOM’s assessment of the overall impact of the service on consumers, suppliers and competitors (including benefits to consumers which would more appropriately be considered under the PVA).

To date the Trust has conducted three PVTs into BBC on-demand services, BBC HD services, and BBC Gaelic digital service. Only the last of these was turned down on the first application, and even then was subsequently approved following minor cost saving changes to the proposals.

There is also a need for clarity as to which services, or changes to services, would require *ex ante* scrutiny. Again the early operation of the UK system has shown some interesting *lacunae*. For example, the BBC was able to gain approval for its participation in the launch of a new ‘freesat’ platform without a full PVT on the grounds that this platform was, under the BBC rules, classified as a “*non-service activity*”, thereby not requiring a PVT.

The Communication should specify that effective and independent *ex-ante* scrutiny is needed for any significant expansion of publicly-financed operators into new or existing business areas, or significant change of use of existing services.

In terms of third party access, the BBC PVT system, while imperfect, is certainly to be preferred to the system outlined in § 331 of the DG COMP German decision. The German system appears to give third parties the right to make submissions on market impact - but only to the public broadcasters’ own so-called internal control bodies. Given that confidential commercial data may well be at the core of any assessment of market impact, the German system is profoundly flawed and will never gain the confidence of competitors and other stakeholders. Independent control is a necessary condition for any objective evaluation of the extent of the remit / justification of any new services.

**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**

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<sup>5</sup> <http://www.ofcom.org.uk/about/account/mou/mou.pdf>

<sup>6</sup> <http://www.ofcom.org.uk/research/tv/bbcmias/statement/>

**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?**

Entrustment of PS obligations is normally laid down by means of an official act, according to a legal or even constitutional provision, which normally sets up the legal basis, further developed by detailed contractual or regulatory procedures, that are subject to public consultation and to binding opinion by the independent NRA.

For example, in Spain, the Law 17/2006, of 5<sup>th</sup> June “*de la radio y la televisión de titularidad estatal*” (article 3) formally entrusts the “*Corporación de Radio y Televisión Española, S.A.*” with the management of the radio and television public service according to the terms specified in the Law and states that the public service will be exercised directly through its subsidiary societies that provide the radio and television service (the “*Sociedad Mercantil Estatal Televisión Española*” for television services and the “*Sociedad Mercantil Estatal Radio Nacional de España*” for radio services)

**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?**

To describe fully the regulatory mechanisms in each European Member State would require a separate paper. So we will restrict ourselves to an overview, which we will support by giving examples.

The fulfilment of the public obligations could be duly verified by three kinds of supervision authorities: the NRA for audiovisual sector, by means of an independent audit to be appointed by the NRA, the income tax auditing authorities and, last but not least, the Audit Court.

However, in too many European markets, supervision of the delivery of public service missions by publicly-financed broadcasters is neither systematic nor independent. Structures devised in the era of state monopoly broadcasting – when a part-time committee would monitor the broadcasters’ output, and when competition issues by definition did not arise (as there were no competitors) – have in many Member States endured into the modern era.

Additionally, there is often a difference between the formal legal position and what happens “on the ground”. To take one example, the **Finnish** publicly-funded broadcaster Yleisradio Oy is a state owned company, which operates under the Parliament. It is supervised by its administrative council, consisting of 21 members and nominated by the

Parliament. In practice, members to be nominated to the administrative council represent all political parties of the Parliament.

The administrative council elects members to the board of directors.

Duties to the administrative council and board of directors are defined in the Act on Yleisradio Oy (§§ 6 and 6 a).

The administrative council provides every second year a report on the public service activities to the Parliament. The Finnish Communication Regulatory Authority (hereinafter: FICORA) is authorised to supervise the compliance by Yleisradio Oy of its obligations to handle part of its operations separately in its bookkeeping.

Further, the board of directors of Yleisradio Oy provides an annual report to the FICORA on the public services offered during the year. The Authority then gives a statement on the report to the Finnish Government.

Formally, the administration, regulation and control on Yleisradio Oy seems well organised. In practice, however, the following issues arise:

- Parliament is far from strategic and operative actions of Yleisradio, and therefore lacks any real possibilities to control operations of Yleisradio,

- the administrative council decides on most important issues in Yleisradio, but also its possibilities of real control are vague,

- FICORA regards, that the control of Yleisradio is set as the task of the Parliament by the Act on Yleisradio Oy. Therefore, FICORA does not have any possibilities to control it nor to correct any possible faults. The annual report of the board of directors to the FICORA is in practice a formality.

- the possibilities for the third parties to take action against alleged infringements/non-fulfilment of public service obligations in Finland are to our understanding limited to making a complaint to FICORA, as regards Yleisradio Oy's obligation to separate its bookkeeping, and to requesting for action of the Finnish Competition Authority as regards any anticompetitive measures taken by Yleisradio Oy.

- the Act on Yleisradio (14.6.2002/492, 3§) stipulates as follows:

"In developing other television and radio broadcasting activities including the related additional and extra services, the Ministry of Transport and Communications shall take into account the operating requirements of public service referred to in section 7."

In other words, interests of Yleisradio are always taken into account when any new legislation is developed and prepared (in the Ministry and State Council) and decided (in the Parliament).

Equally, in **Poland**, the fulfilment by TVP of its public service tasks is not properly monitored. The TVP Programming Councils mandated to conduct the monitoring have only an advisory role and their resolutions have no binding force. On the other hand, the annual reports of the National Broadcasting Council only enumerate statistics, reflecting the number of hours of emission of a specific genre of programs. Thus, the National Broadcasting Council annual reports do not result in recommendations concerning the proper fulfilment of TVP's public service tasks as determined by Polish and European law

**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?**

The current rules seem to be sufficient in terms of entrustment, as long as there is an official act laying down beforehand the parameters on the basis of which the PS compensation is to be calculated, in an objective and transparent manner.

**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?**

It is most important that the Broadcasting Communication establishes a minimal set of conditions in terms of control and supervision: the first requisite is that control is to be entrusted to a truly independent regulator, reporting only to the National Parliament.

This regulator must be duly equipped both in staff as in material means, to monitor full compliance of the public broadcaster with public service assignments, as well as to check for transparency of cost allocation and proportionality of any financial flows, in order to guarantee that it is limited to the necessary amount to compensate for PS costs. Carrying out such a range of complex tasks requires full-time experts in areas such as finance, accountancy, competition law and media economics. By definition, these are found in NRAs and NCAs, not in parliamentary committees or part-time boards of governors.

In case of financial overcompensation, the NRA must have the power to determine immediate recovery of the exceeding amounts.

**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?**

There should be at least a legal provision stating that commercial operators that compete against publicly-financed operators in the advertising market or in the programme acquisition market can complain to the NRA and the Competition Authority at pubcaster practices not justified by market rules and principles, leading to an increase of costs or decrease of income.

These procedures should be quick and effective.

**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?**

Even if public broadcasters manage to justify to themselves and their governments how a move into pay-TV can be reconciled with their “obligation” to provide a universal service, the impact of such services can only be negative on competition. Such moves are already proving unpopular with consumers, who – not unreasonably – query why they should pay an additional fee on top of the substantial state aid already granted to the pubcaster. In Portugal, for instance, judging from many protests that viewers have expressed through the recently created Viewer Ombudsman, most people do not agree that some public service channels are only offered on a Pay-TV package, which is the case of RTP-N (regional news service) and RTP-Memória (Archive material).

While we recognise that this is familiar ground to DG COMP, we would like to draw some analogies with the issues raised, and the remedies sought to rectify them, in dual financing systems (advertising plus state aid).

To limit the inevitable market distortions caused by dual funding, there are frequently limits to the advertising activity that a pubcaster may undertake, be it by the setting up of a lower hourly limit, or by determining the broadcasting period when advertising is allowed (e.g., until 20h00, as in Germany, although there is widespread circumvention by selling “sponsorship” packages and listing programmes so as to artificially create more “sponsorship” junctions).

In the event that public broadcasters do indeed move into pay-TV, thereby inventing in some markets the concept of “triple financing” then clearly regulators would need to devise appropriate safeguards against public broadcasters undercutting existing operators on the pay-TV market. However, it is a legitimate response to our argument on undercutting to state that public broadcasters will, by their very size and resources, also distort the market if they make content available on-demand without payment. One potential tool to minimise this inevitable distortion would be that publicly-funded operators should, when entering

secondary markets such as online distribution, make their content available to all platforms and on an at-cost basis.

**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?**

We can envisage no circumstances under which pay services can be justified against a public service remit.

It is of course impossible to treat this question in isolation; issues of remit and of *ex ante* scrutiny also arise. Germany is a good example. Public broadcasters seek to establish new services before the digital and new media remit has been established. The “Mediathek” proposals put forward by ARD and ZDF are the best-known current examples. Issues such as impact on competing VOD offers, and of the extent of consumer and third-party competitor access to these publicly funded archives have not been discussed with sufficient rigour.

## **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?**

Mere separation of accounts, while helpful, may, without published independent audits, become a smokescreen preventing third parties from understanding how the public body is run. Slovenia is an example: separate accounting is one of many measures which does not work, as it fails to solve the problem of mixing up the public and commercial money to buy a programme that is declared as public remit.

**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?**

Yes. Legal separation of the entities that carry on each field of activity, namely to always be able to establish a distinction between pubcaster and other undertakings, would clearly be in conformity with current management methods of business groups’ «spin-off»

strategies, and provide legal certainty to the market, avoiding any possibility of leveraging market power from the broadcasting sector to other sectors of the market.

Financing non public service programming activities such as e-commerce, Internet advertisement, sponsorship, merchandising, pay-TV, Pay-per-view, paid contents through public funding, is not acceptable, and these activities should be carried out with full legal and accounting transparency, preferably through different legal entities within the same Group to which the pubcaster belongs. This is necessary to ensure full transparency and help prevent the risk of market distortions; accounting separation is no longer a satisfactory guarantee for the transparency level that must be achieved.

**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?**

The issue of cost allocation is a flaw in the current Communication. See for example the Commission's Decision of 15 October 2003 on State Aid granted to RAI<sup>7</sup> where it is said to be a specificity of the broadcasting sector that one cannot identify correctly whether some costs should be allocated to public or commercial activities, and that all costs can be allocated to public service.

However, this lacuna must not lead to the compensation of all these costs by public funds. This should be clearly explained in a new Communication, because it can leave room for doubt. The ideal allocation should be made according to more detailed accounting principles, to be able to discriminate between public costs and commercial costs. Footnote 61 of the Italian case already refers to this. Today, it is possible to determine which products can generate commercial income, and it is increasingly important to identify them because the same products can be exploited on different platforms. This analysis should be a precondition for allowing publicly-funded operators to enter new media and exploit their programming stock.

The essential point is that programming costs can not all be regarded as public service costs, because i) they should not be compensated by public funds as if there was no other form of generating income through them and ii) they should be governed by competition laws and market principles, namely when the pubcaster is competing against commercial operators for the same programmes.

The need for further scrutiny in this area is borne out by examining the **German** market, where there is a lack of transparency in production aid paid to affiliate producers. Under the German system, this financing is not covered by KEF, so competitors and other stakeholders have no idea of how much money may or may not change hands. We would urge DG COMP to look into a system whereby nil returns are formally filed. Also, under a differential tax system (as DG COMP is aware from German complaints) German pubcasters pay a lump sum. Regardless of the outcome – which may or may not favour

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<sup>7</sup> (2004/339/CE) paragraph 122

pubcasters in a given year - this is a non-transparent system and their competitors are not satisfied with the rationale given to the DG COMP in the German case.

**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?**

The most important clarification in a revised Communication would be to state that auditing accounts must be carried on by professional auditors on an annual basis, with proper cost allocation made according to consistently applied, objectively justifiable and clearly established cost-accounting principles. Further, a requirement to publish independent audit reports is a basic principle that could easily be taken on board in a new Communication and in line with our general support for increased transparency and for independent, objective regulation.

**2.6. Proportionality test – Exclusion of overcompensation**

Evaluation of public service net costs – the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the PS obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (negative test).

**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?**

This would appear in line with the Commission’s overall policy under which the new state aid rules must become “less and better targeted, incorporating a refined economic approach”.

Furthermore, it is a requisite of the existing Framework that the parameters for calculating, controlling and reviewing the compensation should be established in advance

**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?**

The majority of European pubcasters certainly appear to be financially sound. While public broadcasters will always plead poverty, and while there may be some difficult restructuring in some markets, there are remarkably few examples of public broadcasters failing to find sufficient resources to acquire rights to programming that would otherwise be purchased by commercial broadcasters.

To give a few examples, the **Slovenian** pubcaster has definitely reached economic stability since they have recorded a profit for the last few years. **Polish** public television,

TVP, has also achieved economic stability, benefiting from efficient public financing and access to advertising market sources - TVP advertising market share amounts to around 40 percent, and is increasing. In **Portugal** the financial restructuring agreement signed between the government and RTP in 2003 presents the State as subsidiary responsible for the consolidated debt, to be fully paid out until 2013, through annual capital increases or in the event of insufficiency of pubcaster funds. In terms of financial stability, the RTP Group, which encompasses both Radio and TV operations, as well as a few incidental activities, has been able to reduce its losses and, although net results are still negative, there has been some improvement in terms of reducing liabilities, so it is very likely that this balance recovery will lead to a reduction in the yearly compensation that the State gives to RTP, to avoid overcompensation

In **Flanders**, there are issues relating to overcompensation. As regards overcompensation, the issue appears to be that financing is adjusted to meet the costs of broadcasting rights, rather than vice versa. This is a trend which is common across Europe: the public broadcaster simply asks for money, rather than calculating what the net cost of their activities could be.

In Spain, the old RTVE used to have enormous debts but the new “*Corporación RTVE*” set up by the Law 17/2006 has ended 2007 with surplus. This is due partly to the fact that it is the old RTVE in liquidation which is assuming the obligations that have not been transferred to the new corporation, namely the costs resulting from the manpower reduction measures agreed and authorised in 2006 as well as the debt which the old RTVE had accumulated under the previous financing regime (benefiting from the State guarantee). The old RTVE has no other purpose or activity apart from honouring these obligations. (see State Aid NN 8/2007-Financing of workforce reduction measures of RTVE)

**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?**

Like many of the questions in this consultation, a 10% cap could be useful in some markets but other weaknesses in the system will allow distortions and abuses to continue. For example, in **Portugal**, State funding is strictly limited to the compensation of public service costs, and, in case of overcompensation, there must be a refund, but the state’s contract with the pubcaster allows for a surplus amount up to 10% not to be considered overcompensation, thus rendering this provision mostly ineffective, and allowing some undesirable flexibility concerning the use of public funds. Equally, while the **Flemish** system does allow for some scrutiny by the court of auditors (Rekenhof) this institution has thus far restricted itself to examining possible overcompensation of production companies. While this is an important competitive issue, it is evidently only one among many.

In **Poland** the legislators attempted to regulate the calculation of the costs of public remit obtained from public aid sources, however the resulting legal framework is far from perfect. The financial system, for many years, did not satisfy legal requirements. Even when the public mission costs were properly investigated, using the criteria stemming from European law, a lack of strict separation of the costs connected with public mission from the other costs blurred the financial picture. There are many signs that it might cause overcompensation understood within the meaning, of the TV2/Danmark case. We would refer DG Competition to the case recently filed by Polish commercial operator TVN for more details on the distortions of competition caused by TVP carrying forward overcompensation to the next accounting period.

In **Slovenia** there are no adequate safeguards to ensure that overcompensation does not impact on a broadcaster's commercial activity. Commercial activity exists even in selling the advertising time in the programme that itself may qualify under a public remit. This could be avoided only when there is a clear definition of what kind of programme should be financed only by public funds and what should be only financed by selling advertising time. But the catch 22 is that the broadcaster uses the public money and advertising money to buy a programme that is public remit in itself – and broadcaster is actually selling it to advertisers. So, the broadcasters are selling something that was bought with public money. How can one find out whether the programme was bought as a public service remit or just to sell it to the advertisers?

In **Spain**, Law 17/2006 (article 33) establishes that the compensation paid for the fulfilling of the public service's obligations will be comprised in the State's General Budget ("*Presupuestos Generales del Estado*") in a differentiated way for each company that provides the public service. These compensations will be annual and will not be superior to the net public service's cost in the corresponding fiscal year. The net cost is defined as the difference between the total costs of each societies and their other incomes, apart from the compensations. If, at the end of a fiscal year, the compensation has exceeded the net cost borne in that period of time, the excessive amount will be deducted from the next year's compensation.

Article 37 of the Law 17/2006 provides that an analytical accounting has to be carried out which distinguishes public remit activities from other activities, in order to determine the net cost as referred to in article 33. It also stresses that the annual accounts of the "*Corporación RTVE*" and of the societies in which it participates with a majority in a direct or indirect way have to be reviewed by auditors according to the commercial Legislation. This article further mentions other forms of control on the corporation and on its accounts as for example the one effectuated by the "*Intervención General de la Administración del Estado*".

As to external forms of control, the Law 17/2006 establishes the control by the Parliament (article 39), by the Audiovisual Authority (article 40) and by the Tribunal de Cuentas (article 41). However, the State Audiovisual Authority hasn't been created yet, neither the Law 17/2006 nor the "mandato marco" establish any sanction in case of breach, so these forms of control cannot be judged as satisfactory.

In **Italy**, the only safeguard adopted by the Italian legislator (Article 18 of the Law 112/2004) aimed at preventing that the public funding is used for purposes other than the public service is the accounting separation. This instrument consists in imposing on the public broadcaster the obligation to keep separate accounts for incomes deriving from public funding (“canone”). In principle, the aim of this measure is to prevent that the public funding is used for purposes other than the public service. Therefore, every year the public broadcaster shall submit its separate accounts to an auditor chosen by the Italian Communication Authority entrusted in checking the correctness of the separate accounts. However, the accounting separation does not fully prevent the risk of overcompensation. In addition, the Italian public broadcaster currently does not operate in the pay-tv sector, but in the event of entry into this sector there is a risk of cross-subsidisation from the public broadcaster’s current activities and in this respect, the accounting separation does not per se ensure an adequate monitoring. Therefore, should the public broadcaster start operating in a purely commercial sector, adequate instruments to prevent the risk of cross-subsidisation should be adopted.

**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)?**

While a surplus may, in certain circumstances, be permitted, strict conditions should be applied to its use and eventual repayment or reduction in future payments if the specified uses do not arise. A 10% floating surplus at the pubcaster’s free disposal could in practice enhance the dominance of many pubcasters on the FTA sports rights market.

**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?**

It is clear that the Broadcasting Communication needs improvement in providing the public broadcaster with incentive to achieve more efficiency.

There are several measures that can (and should) be adopted by public broadcaster management in order to achieve efficiency goals, such as the following, that can be assumed as good practices and duly checked in the current NRA analysis:

- Restructuring;
- Reorganisation and focus on the core-business;
- Downsizing, rationalisation and staff readjustment;
- Requalification of staff;
- Labour law and flexible internal regulation;

- Definition of an attractive wage policy, that links part of the salary to efficiency;
- Debt consolidation and prohibition of any further indebtedment;
- Renegotiation of costs within previously established parameters;
- Stock optimisation and cost rationalisation on a programme by programme level;
- Identification of a cost-benefit ratio per programme (v.g. cost/hour/point of share);
- Setting up a cost-planning and cost controlling internal structure;
- Acquisition of specific management software, compatible with setting up of indexes that allow to evaluate efficiency and productivity;
- Development of guidelines on the highest possible cost of any programme;
- Establishment of clear objectives and quantified goals;
- Enabling the economic exploitation through financial recovery;
- Measuring expenses by perspective of generated income;
- Separation between units that acquire programmes and units that negotiate them;
- Implementation of an internal Programme Classification Unit;
- Setting up practices that normalises and disciplines the pre-acquisition of programmes thus enabling a monitoring system for TV content prices;
- Setting up of a management model that includes definition of internal liabilities from those who plan and set up objectives, and budget control according to productivity and Value for Money criteria (economy, efficiency and effectiveness);

Any audit that fails to identify the existence of at least some of these items would fail to serve as an evaluation instrument for the fulfilment of a public service mission.

One good example is from **Portugal**, where the contract to be signed between the Government and RTP must prevent any behaviour that is not justified by the market principles, leading to increase of costs or reduction in profits. This will enable auditors to validate internal efficiency level and issue a well substantiated opinion on the degree of incentive that the system is providing the public broadcaster with.

#### **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?**

Allowing overcompensation to be carried forward to the next financial period simply invites pubcasters to create additional projects simply to absorb the surplus. Furthermore, there must be a management control mechanism that closely monitors rising programming costs, so that pubcasters achieve market efficiency, another requirement that the current State Aid review enhances, namely through a refined economic approach.

### **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.**

Joint Answer to 2.7.1, 2.7.2 and 2.7.3

Dual funding and the inevitable consequence of price undercutting remains a serious problem in **Spain, Ireland, Slovenia, Portugal, Poland, Austria** (and others). As the ACT argued in our White Paper on Financing of Public Broadcasters in 2004, public broadcasters should benefit from public funding, and commercial operators should be left to compete for market resources. This is the optimum system – not least from the perspective of encouraging distinctive programming. While the EU’s powers in this area are not unlimited, we would call for better co-operation with NCAs to ensure that abuses on the advertising market are ended.

In passing, the fact that the **Czech** and **Estonian** taxpayers can sustain a public service broadcasting system through public financing alone should cause some of Europe’s larger, dual-financed operators to rethink their claim that access to advertising markets is somehow a financial necessity. Dual funding can also be an issue even on markets where access to spot advertising is not permitted. The **Flemish** pubcaster is entitled to take revenue from “public announcements”, a category which has shown an unexplained increase of 400% in recent years.

However, it is not a problem merely in its own right, but is exacerbated by the lack of meaningful and effective regulation. For example, it is rarely possible for competitors to provide national competition authorities or national audit offices with adequate evidence of dumping on the market. Even when this can be done – there are successful precedents from **Denmark** and **Poland** – there is usually a lack of follow-up, as the NCA/NAO will have to switch their attention to other issues

Although our comments have so far focussed mainly on broadcasting and other media markets, it is also important that DG Competition assesses the impact of publicly-

financed operators on the programme production market. It is clearly crucial not only that the commercial arms operate on market terms but that they do not have preferential access i.e., a distribution subsidiary of a public broadcaster should not only have to pay market rates, but also should compete with third party distributors to acquire those rights. The public service broadcaster should be open equally to offers from in house and external companies.

In this area, the problem is over payment - there is a danger that the commercial subsidiary overpays to acquire rights, in order to freeze other companies out. There needs to be supervision to ensure this does not happen, and that the broadcasters' budgets are not in effect being subsidised in a non-commercial way.

If the broadcaster has non-public service channels either in the home territory or overseas, these must be pay market rates to the distribution subsidiary. Otherwise over payment can be hidden. This is not easy to monitor, because the market prices are to some degree subjective. But there ought to be regular benchmarking of the terms between broadcasters and their various commercial subsidiaries.

By way of a possible solution, the Principle of Market Conform Behaviour has to be interpreted and applied in full, and not only in particular aspects such as dumping in the advertising market. The dual funding system in particular must be very closely watched in order to avoid any market distortions caused by the fact that pubcaster can also exploit other sources of income available in the market. Examples might include:

- a) behaviour when bidding for key rights;
- b) prohibition of use of pubcaster weight or market power, or social influence, in order to obtain commercial advantages that would not be available for its competitors;
- c) need to establish commercial relations with subsidiaries or dominant companies on an «at arms length» basis;
- d) absolute refusal of any output deal policy when competing against private broadcasters;
- e) need to publicise active wage policy and hourly cost of TV production, so that it can be evaluated whether the pubcaster's contractual practice is in conformity with market principles or if it is causing major disruption by attracting key human resources.

**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?**

We would like to place on record that the ACT does not accept the notion of a separate relevant market for “premium sports rights”. We do in our response make certain reference to FTA football or sports rights. These references result from our assumption that publicly-funded broadcasters are likely to be interested predominantly or entirely in FTA rights, and that other rights are therefore not relevant to the issue of determining the proportionality of state aid granted to public broadcasters, and should not be construed as meaning we necessarily accept a separate relevant market for such rights.

Regardless of how the relevant market is construed, there is evidence that the dominance of pubcasters in many European markets is now being pushed to a point where the market is emptied of meaningful content for competitors. To give some examples:

The European Commission is aware from its scrutiny of the **Irish** state aid complaint of the overwhelming dominance of RTÉ in respect of the acquisition of free-to-air sports in Ireland. Of the Top 200 sports events broadcast free-to-air on Irish channels in 2006, 191 were broadcast by the public broadcaster. This monopoly is a direct result of the unprecedented 43% increase in state funding granted to the pubcaster in December 2002, which has had the demonstrable effect of emptying the market for desirable free to air sports rights for all other Irish players (one might question, given RTÉ’s failure, exceptional among European pubcasters, to comply with TVWF broadcast quotas, whether that increase might have been better invested in EU and Irish content).

The **Flemish** language rights to the Belgian national football team’s matches were recently acquired at prices which the commercial sector considered unsustainable – despite the public protestations of the public broadcaster that the latest funding deal in the new Beheersovereenkomst was inadequate. That the dominance of the pubcaster is reinforced by the problem of the lack of external control can be shown with reference to the proposed dedicated sports channel, Sporza. As the European Commission is aware, the public broadcaster’s request for a permanent dedicated sports channel (which they argued was necessary due to the amount of sports rights they had acquired either directly or via the EBU Eurovision system) was not accepted by the Flemish authorities. But rather than seek to sublicense the rights which could not be accommodated on the two national channels, the Flemish pubcaster has instead moved sports events to a so-called “interactive” service (the only element of interactivity being the choice of channel), thereby effectively circumventing the decision of the Flemish authorities.

In **Italy** the public broadcaster enjoys a favourable position in the acquisition of sport rights. This is partly the result of public funding, but also of the limitation imposed on other broadcasters, such as Sky Italia, which is prevented from competing on a level playing field with the public broadcaster. In particular, Sky Italia’s main limitation relates to its inability to directly negotiate with, and acquire sport rights (in particular football rights) from sport clubs. Such inability stems from the Undertakings imposed on it by the European Commission<sup>8</sup>, and in particular, from the obligation on Sky Italia not to buy football exclusive rights for platforms other than DTH and, in any case, to acquire rights for a limited period of time. The obligations imposed on Sky Italia are able to produce

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<sup>8</sup> European Commission’s Decision, COMP/M.2876 “NewsCorp/Telepiù”

significant effects on the market because the football rights holders normally prefer to sell all or most of rights exclusively as a bundle. Mediaset in turn is subject to a similar obligation regarding the purchase of exclusive rights for Serie A clubs. Ultimately, RAI is the only player able to purchase without constraints.

**Portugal:** in October 2007, the Government published its annual list of events of general interest to society, which must be broadcast live and on FTA. The new list for 2008 includes Euro 2008 (both under-21 and main team) and the coverage of the opening and closing ceremony of the Beijing Olympic Games, in which as well as all the events involving Portuguese athletes. Rights to official games of the national football are entrusted to the Portuguese Football Federation, which grants them to the rights trading agency Olivedesportos, and subsequently it is this company that licenses it to the FTA operators. It is generally at this stage that RTP puts in a bid that is too high in comparison with the income that the market is expected to produce, and commercial broadcasters can not match it because it is assumed that it leads to a loss, and commercial broadcasters' losses are not covered by any compensation from the State. The same thing has happened with other football rights, notably the National League Cup and RTP's offer to the clubs for the broadcasting rights of the qualification games for the UEFA Champions' League, which often exceeds the reasonable market value by one third to one hundred percent.

This is evidence that for RTP, as for other broadcasters, broadcasting football games at this price is clearly a loss-leading operation. However, as it is only the major football games that are able to give it market leadership, other sports become neglected, simply because they don't bring the audiences that football can deliver.

In **Spain** there is a Law which governs sports broadcasting: "*Ley 21/1997 de 3 de Julio reguladora de las emisiones y retransmisiones de competiciones y acontecimientos deportivos*". Article 40 of the "*mandato-marco*" is also concerned with the subject and gives guidelines as to what kind of sport event have to be preferably broadcasted by the "*Corporación RTVE*". There has also been some case law as to sports rights and competition law. For example, *GESTEVISIÓN TELECCINCO v. Federación de Organismos de Radiotelevisión Autonómicos (FORTA)* and others. This case concerns the exclusive acquisition by the Regional Channels of sports events broadcasting rights of a national interest (this Channel bought the National League Rights paying astronomical and non competitive prices, excluding private broadcasters from the market). Finally, the FORTA was condemned to pay fines and to compensate the private broadcasters excluded from the market at that time, *Telecinco & A3*.

Turning to some potential remedies:

Sports rights, as with all rights, as part of public broadcasting should be the subject of particularly careful attention in order to prevent pubcasters from any practice that distorts or threatens to distort the market for rights. Public intervention on rights acquisition markets must be limited to what is necessary for the fulfilment of the properly entrusted remit, if they are part of a balanced programming schedule. There are a number of ways

in which this could be done, and one way which has been attempted recently but which will prove ineffective in practice:

- Publicly-financed operators' investment in sports rights should be limited by global value or linked to the price that commercial broadcasters can pay, based on a cost/benefit analysis - the maximum bid by commercial broadcasters states, in fact, the market value of those rights. Therefore, the financing regime of public broadcasters can not allow them to structurally outbid private competitors, because that would lead to a market distortion, as market prices for sport rights will raise to speculative level;
- Unused rights are not necessary for the fulfilment of the public service; State financing used for exclusive rights which the public service broadcaster cannot or does not intend to use would not, in principle, be justified under Article 86 (2) EC Treaty. There must be forms of effective access based on a transparent and foreseeable procedure. For example, the definition of "unused rights" must be set out in advance by an independent regulator, acting on objective criteria, not by the publicly-financed operator.
- The "remedy" put forward in the German case by DG COMP of regulation via a percentage of the yearly schedule of the totality of the public broadcasters' bouquet is entirely inadequate and should not be taken forward in the new Communication. There is clear evidence on this point from the Irish market, where the emptying of the market in free to air sports rights (as mentioned above, the Irish pubcaster broadcasts all but nine of the top 200 sports programmes in 2006) was achieved on only 8% of total broadcast hours – i.e., the German "remedy" of 10% of total hours would not prevent such an extraordinary and unprecedented monopoly in sports rights. To be meaningful, any such remedy would need to be drawn much tighter - perhaps a lower percentage of the pubcaster's schedule, or calculation on a daily rather than an annual basis, and certainly applied to each channel in a pubcaster's portfolio.
- A meaningful quantitative restriction could rather be on the proportion of a pubcaster's budget which was spent on sport. While it may be marginal as to whether DG COMP has the power to oblige Member States to enforce such a restriction, it could certainly be included as a recommendation to Member States in the revised Communication. This would need to be tied in with strict rules on transparency and must encompass not only rights acquisition costs but also production and personnel costs which, absent meaningful transparency rules, can too easily be 'hidden' and absorbed in overall costs.
- The publicly-financed broadcaster should also live up to their PR rhetoric in sport, and include in its main programmes a wide range of sport, not devote all their scheduling and financing resources only to football or other popular sports. Member States should ensure, through the supervision of the independent NRA,

that minority sports appear in the main national channels rather than being marginalised to secondary channels or magazine programming.

- In line with our overall line on publicly-financed intervention in new media, usage of sport in pay-TV and new media services should also be strictly limited, especially the offer of sport programmes on non-linear basis should be explicitly not allowed. The activities of publicly-financed broadcasters in sports rights must be examined in the light of their remit: therefore, individualised exploitation of sport events through on demand services (against remuneration or not) is not in the interest of the general public and should therefore not be allowed, considering it additionally hinders the development of commercial services, by preventing the commercial sector to even have access to such rights necessary for the success of such services.

## **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?**

No. There are equally valid arguments why establishing a viable commercial broadcasting and/or new media sector may be harder in a smaller Member State, and that these markets should therefore be subject to particular scrutiny. Para 62 of the 2001 Communication could be deleted.

Indeed, the scope of the public service offering should be adapted to the amount of population in a particular country.

## **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.**

As we mentioned earlier, the 2001 Communication has been a useful tool in introducing an element of certainty and stability to our sector. Subject to the issues we raise in our response, an update and an extension to cover new media activities of the publicly-funded sector could be helpful.

Compliance costs and regulatory and administrative burdens are a fact of life in any business, not least in commercial broadcasting, and we would argue are a reasonable price to pay also for our publicly-funded competitors in exchange for the enormous privilege and competitive advantage of state-guaranteed public financing.

## **PART II: LEGAL ANALYSIS – STATE AID REFORM AND NEW GUIDELINES FOR PUBLIC BROADCASTING**

Between 1998 and 2007, the Commission has carried on a thorough analysis of 20 State cases, most of them following complaints from private broadcasters who are actively competing against public service broadcasters, not only for viewer's share but also for advertising income.

The Commission Communication on the application of State aid rules to public service broadcasting, of 15 November 2001 brought into the daylight the criteria that the Commission would use for the evaluation of compatibility with the Treaty that each notified case would have to go through.

The above referred Communication stated that the EC Treaty dispositions that were to be taken into account were Articles 87 and 88 on State aid, and also Art.86 (2) on the application of the rules of the Treaty and the competition rules to services of general economic interest, given the fact that public service broadcasters are normally financed by the State Budget, capital injections or a levy on TV-set holders (§17).

The Commission is entrusted by the Treaty with the duty to analyse each State aid on a case by case basis with the purpose of determining where and if such aid strengthens the position of the public undertaking benefiting from it in competition with other companies, thus affecting intra-Community trade. If that is the case, Member States must refrain from implementing it, and new State aid measures must be reimbursed.

**One clear example of the affection of intra-Community trade as stated by the Communication is the market of acquisition and sale of programme rights, which takes place at international level (§18). The other obvious example is advertising, for those public undertakings who are allowed to sell advertising.**

According to the ECJ, Article 86 (2) of the EC Treaty provides a general derogation to competition rules, and therefore it must be restrictively interpreted: it only applies to cases where the following conditions are cumulatively fulfilled:

### **Definition**

The service must be a service of general economic interest, defined as such by the Member State;

### **Entrustment:**

The above mentioned definition needs an official act which shall specify, in particular:

- a) The nature and the duration of the public service obligations;
- b) The undertaking and territory concerned;
- c) The nature of any exclusive or special rights assigned to the undertaking;

- d) The parameters for calculating, controlling and reviewing the compensation;
- e) The arrangements for avoiding and repaying any overcompensation.

### **Proportionality test:**

The State aid is necessary to the performance of the particular tasks assigned to the undertaking and the legal impossibility of such aid due to the application of competition rules would obstruct to those tasks. However, there are some limits: the exemption of competition rules must not affect the development of trade to an extent that would contradict EC interests, or, as the Amsterdam Protocol's interpretative provisions say, the "common interest" and should not go «*beyond what is required by the realisation of the remit of that public service*».

In terms of Definition, it falls under the mandate of Member States, which should take account of the Community concept of «*services of general economic interest*», but are allowed to consider a «*wide*» definition, encompassing a balanced and varied programming within the public service remit, and also meant to preserve a certain level of audience. The main objective of such programming service, as well as other ancillary services, would be to fulfil the democratic, social and cultural needs of each society, and guaranteeing pluralism, including cultural and linguistic diversity.

The Commission is only expected to interfere in case of manifest error on behalf of the Member State, namely, the inclusion of purely commercial activities, or any other activities that could not reasonably meet the democratic, social and cultural needs of each society, according to the Protocol.

There is still much to be done in the field of Definition, but most cases so far analysed by the Commission do comply in general terms, normally leading to a recommendation in order to be more precise in the description of public service remit.

However, the Commission made clear that the sale of advertising space in order to finance programming is not to be viewed as part of the public service remit (§36<sup>9</sup>).

Nevertheless, the Member States are free to decide whether financing of public service broadcasting is only provided by public funds (single-funding) or it is also provided by advertising (dual-funding), and, in this case, to what extent.

The Amsterdam Protocol clarifies that there can be no objection (to Member State competence on the funding issue) «*as long as competition in the relevant markets (e.g.*

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<sup>9</sup> Cf Decision E3/2005 (Germany) §266 «The Commission considers that activities such as sale of advertisement or other activities concerning the exploitation of public service can not be considered as service of general economic interest and are therefore other activities within the meaning of the Transparency Directive

*advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest<sup>10</sup>».*

**So, we may conclude from this references that definition of public service mission as «wide» as possible will not, in any circumstances, include activities such as advertising and programming acquisition, which are purely market activities.**

An immediate consequence to this assessment is that public undertakings must behave in both activities according to Market Principles, in level playing field with private broadcasters. Nothing justifies a status of exception in both these relevant markets.

The proportionality test demands an economic assessment focused on the level of compensation: Services of general economic interest are entitled to compensation for those supplementary costs that normal broadcasters would never have incurred, that is, only those costs that are in strict connection with the public service mission assigned to the undertaking.

So, the amount of compensation shall not exceed what is necessary to cover the costs incurred in discharging the PS obligations, taking into account the relevant receipts and a reasonable profit on any own capital necessary.

Reasonable profit means a rate of return on own capital that takes account of the risk or absence of risk, incurred by the undertaking by virtue of the State intervention.

In order to determine «net cost» for the public service mission, the costs to be taken into consideration shall be calculated as follows:

iii) If the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with that service shall be taken into consideration;

ii) The revenue to be taken into account shall include, at least, the entire revenue earned from the service of general economic interest; all revenue is, in fact, somehow connected to the public service mission, even because it is this particular mission that justifies the existence of the undertaking; it derives positive side effects for acting as public service player.

iii) The internal accounts shall show separately the costs and receipts associated with a service of general economic interest and those of other services, as well as the parameters for allocating costs and revenues, according to cost-accounting principles. This is standard procedure for Transparency, as demanded by an EC Directive for the relationship between the State and public undertakings.

In theory, Member States should be able to ensure that undertakings do not receive compensation in excess, after adding the costs related to the public service and comparing to all the revenue obtained from the market, plus the public funds granted.

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<sup>10</sup> § 46 of 2001 Communication and also COM (2000) 580 final, p. 36

In case of overcompensation, shown as an excess of income towards public service costs, this exceeding amount should be repaid to the Member State. However, according to Commission case law, in cases where the amount of overcompensation does not exceed **10%** of the amount of the annual compensation, such overcompensation may be carried forward to the next annual period and deducted from the amount of compensation payable in respect of that period.

One identified issue that concerns separation of accounts was the difficulty to distinguish between programming costs, because Member States may consider the whole programming as covered by the public service remit, while attracting commercial income. This leads to an approach where all costs are allocated to public service activities, despite the fact that it also helps to sell advertising space (§ 56). This simple fact removes these costs from the range of competition rules.

In the 2001 Communication, the Commission also referred to examples of possible market distortions, which are not necessary for the fulfilment of the public service mission, such as undercutting of advertising prices below the level necessary to recover the stand-alone costs that an efficient operator would have to recover, and also to the possible positive effect of maintaining an alternative source of supply for advertising in some relevant markets (§ 61).

However, this was only an example, because market distortions can be caused as well by failure to minimise costs, which leads to the same results as failure to maximise commercial income through an undercut in advertising prices: there is no reason why the Commission should overlook the former and only look for evidence of the latter.

**The need to evaluate compensation in the light of Art. 86 (2) has always implied an investigation into possible failure to maximise commercial income but never lead to a thorough analysis of public undertakings' behaviour in the market of programming acquisition, where private operators complain from practices that raise their own costs. This failure should be clearly addressed in the new guidelines.**

The commitments given by Germany, as stated in §375 of Decision in Case E 3/2005 must be considered as standard minimum for separation between commercial activities and public service activities. Structural separation should include all advertising as well as programming acquisition in the national and international markets. This is the only way to make sure that the public undertakings comply with Market Behaviour Principles in the relevant markets where they compete against private commercial operators, unprotected against competition rules by the SGEI exception.

### **The Altmark Case**

In July 24<sup>th</sup> of 2003, the ECJ issued the most important judgment concerning State aid, which was established as a clear benchmark for the assessment of the qualification as State aid under article 87(1) – it became known as the Altmark case<sup>11</sup> and it established four criteria to avoid being qualified as a State aid, of which at least the first three (Definition, Entrustment and Proportionality) had, in fact, been previously used in the evaluation of compatibility under Art. 86 (2), as mentioned above.

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<sup>11</sup> Altmark Trans GMBH and Regierungspraesidium Magdeburg, C 280/00 [2003] ECR I-7747 of 24/07/2003, §88-94)

So, the only innovation was the criterion we may call «Market Investor test»: Where the undertaking is to discharge public service obligations without being chosen in a public procurement procedure, the level of compensation needed is to be determined on the basis of an analysis of the costs of a typical undertaking, well run and adequately provided to meet the necessary public service requirements:

If all the above mentioned criteria and this new one were fulfilled, then the funding would not be classified as State aid, under Art. 87 (1) and therefore it didn't have to be scrutinised by the Commission nor undergo any compatibility analysis. It didn't qualify as State aid because any private investor would also be willing to make it.

So, in fact, when the State funding in question corresponds to an investment decision, aimed at bringing as much return as a private investor would seek, this doesn't grant the undertaking benefiting from it any kind of advantage over its competitors.

This Decision was, in a way, a negative contribution to the «acquis communautaire» in the subject of State aid, because, although it developed the depth of the economic assessment of compatibility with EC competition rules, it did so in a restricted manner, that only applies to qualification as State aid, thus leaving the field of compatibility analysis under 86(2) to a degree of some uncertainty.

In addition, by adding the fourth criterion to qualification, it automatically lead to an interpretation according to which, in case of services of general economic interest, under art.86 (2) **any requirement of management efficiency is to be luminary excluded**, because it only matters for the previous stage (assessment of qualification as State aid). Once that stage is over, it doesn't matter to evaluate whether the undertaking is efficient or not.

This has lead, for instance, to the Decision in cases such as the Spanish NN8/2007, (ex N 840/2006) of 07.03.2007, relating to the financing of workforce reduction measures of RTVE where the Commission assesses that *«the “Altmark” criteria are not fulfilled, in particular because a “typical well run and adequately equipped undertaking” would not have built up such an excessive workforce and would consequently not have needed compensation for the respective reduction»*.

However, *«contrary to the “Altmark” conditions under which a State measure is not regarded as State aid, the level of compensation permissible under Article 86 (2) EC Treaty is not limited to the costs of an efficient operator»*(§ 46).

This means that under an Art 86 (2) analysis, the Commission is not required to scrutinise whether the costs incurred by the public undertakings are, in fact, reasonable, but only if they refer to the public service, i.e., if they relate to PSB remit.

**This is a flaw of the compatibility assessment, and must be rectified in the future.**

When we consider the above referred difficulty in identifying and correctly distinguishing between programming costs that relate to public service mission, and programming costs that attract advertising, leading to the common assimilation of all costs into the category of public service costs, we can clearly conclude that this methodology allows enough room for market distortions, even in cases where the definition of the public service remit and the entrustment of a service of general economic interest are in accordance with EC law.

Competition between commercial broadcasters and public undertakings in markets that are clearly identified as being international in scope, and by nature totally outside the field of public service (hence completely subject to EC competition rules) is clearly distorted where some competitors are allowed to be «cost inefficient», namely because the State is always there to compensate for such inefficiency, under art. 86(2).

This is exactly what the State Aid Group of European Advisory Group on Competition Policy states in its opinion paper on «Services of General Economic Interest» of June 29, 2006. After having declared that SGEI are, by definition, services which are provided at a loss by firms that need to be compensated for them, frequently in areas where there used to be a monopoly with no incentive to strive for efficiency, and that overcompensation may have significant distorting effects on the international market, the «opinion» focuses EC policy issues.

According to that Group, *«the main principle of the Altmark judgement, saying that there is no State Aid if there is no overcompensation relative to the costs that an efficient company would have incurred, is perfectly consistent with the economic approach identified above. Absent over-compensation, the presumption is that the SGEI would have effects of minor (indirect) size and of unclear sign, and would therefore not be worth investigating. Hence, we also endorse the general approach of the Altmark judgement which is adopted by the Community Framework.»*

*The approach of the Community Framework with respect to firms that are not overcompensated but are inefficient (or, at least, not shown to be efficient) is less defensible. It may entrench the position of inefficient incumbents and may fail to ensure competition for the market in circumstances in which it could be feasible. It may also provide governments with an incentive to try and abuse the SGEI status of the aid in order to prevent the exit of inefficient firms.»*

The authors conclude that *«it would help for the framework to be more explicit that incentives to achieve productivity gains are a desirable feature of compensation schemes (whether compensation is evaluated relative to an efficient firm or not).»*

**To put market efficiency back in the Art. 86 (2) analysis of compatibility is precisely the path that a new Commission Guideline must follow, in order to provide new instruments for eradication of market distortions.**

As we know, most cases analysed by the Commission have been considered not to be in breach of the EC State aid framework because of falling under the SGEI exception, which only requires any kind of repair when it becomes impossible for the undertaking to justify its level of funding in face of its operative costs, even when any management efficiency criterion is absent. The well-known cases of the Dutch Public Broadcasting System (NOS), where there was one excess of funding of nearly M€ 100 and the Danish Broadcaster TV2, where as overcompensation of DKK 628,2 million remain as the only examples, in the broadcasting sector. The first case was coupled with the fact that grounds for calculating public service costs were not well established in advance, and a case by case analysis was, instead, to be conducted by the PO (a sort of Board that runs a Public Fund). In the second case, the Commission has stated that there is no efficient private broadcaster for cost comparison between public undertakings and efficient players. Otherwise, their costs could be compared.

Most cases become justified under Article 86 (2), eventually with the need for some commitments under Art. 18 and, as such, the only potential problems are the ones that arise from overcompensation or advertising undercutting, where undertakings also carry on commercial activities. Normally, in the most difficult cases, a number of commitments from the Member State ensure the Commission that any outstanding issues will be dealt with in the future, in order to comply with standard principles.

However, complaints from commercial operators systematically continue to point out that the system doesn't work fairly because the funding that the State provides to the public undertakings does in fact grant the latter a competitive advantage, namely in markets where it is assumed that no public service status is (or should be) of any importance. This is clearly the case of the programming acquisition market, and especially where sports broadcasting rights are concerned.

The EC State aid framework has, in fact, not been able to prevent these distortions of competition, clearly because the Commission has not assessed nor established any economic criteria for assessing the structure and development of programming price mechanisms.

We must bear in mind, as the Commission constantly reminds us, that the markets of sale and acquisition of broadcasting rights and sale and acquisition of advertising should be completely subject to competition rules, therefore public undertakings must not enjoy any special status – these activities must be explicitly out of public service remit. Therefore,

the Principle of Market Conform Behaviour must be fully valid, and if public undertakings that are dually funded (by State funding and by advertising) present offers or engage in paying sums that are clearly above the market value, as may be presumed from the fact that no commercial broadcaster is willing to overbid them, this is clearly a case of market distortion where the public undertaking only behaves in this manner because of the reassurance provided by the compensation that will certainly be paid, despite of the eventual disproportionate nature of the cost involved.

Accepting that all programming costs are to be considered as part of the public service remit, because of the fact that a large share of the production that is part of the public service can at the same time be commercially exploited, as opposed to determining a proportional allocation, combined to the absence of a thorough economic analysis of what would the market price for those programs be, leads to a status of discrimination and affects competitors whose losses don't get compensated by the State budget.

**As long as all programming costs are wrongly considered to be public service remit, therefore outside the range of competition rules, this approach will lead to a wrong conclusion that all programming costs incurred by the broadcaster can be accepted as able for compensation without any further questioning for their rationality.**

Let us quote, for example, from the Commission Decision on the Italian RAI ( C62-1999) *«that is the case with programmes that are defined as a public service but simultaneously generate an audience that permits the sale of advertising or the sale of programmes to other broadcasters. These costs can be allocated in their entirety to the public service since a full distribution of these costs between the two activities risks being arbitrary and not meaningful»* (§ 122).

The Commission Decision on the Dutch case, for example, has declared, according to § 55 and § 56 of the 2001 Communication, that *«if a complete or meaningful cost allocation has not taken place, the net revenues of all the activities that have benefited directly or indirectly from public funding have to be taken into account for the calculation of the net public service costs»*. This sum of all costs and of all revenue has lead to several situations of overcompensation in the Dutch case, but most of them below the 10% threshold, and therefore not liable to be reimbursed by beneficiaries.

The fact that it may be very difficult to properly allocate costs, and therefore, to accept that all programming costs are to be allocated to public service mission, must not mean that all programming costs should be treated as SGEI given the exceptionality treatment that would prevent enacting of competition rules.

The Commission must require and confirm that each Member States has implemented sufficient and effective control mechanisms to make sure that the programming costs generally presented as public service costs are, in fact, wherever possible, market

oriented costs, and this analysis must be carried out before evaluating whether there is any overcompensation or not.

**This analysis is fundamental even for the limited effects of Art 86 (2) because only by an evaluation of reasonableness of costs may one conclude on the issue of overcompensation. Therefore, it is also necessary to scrutinise the respect for «management efficiency», in order to determine «proportionality of compensation».**

For example in State aid E3/2005 (ex- CP2/2003, CP232/2002, CP43/2003, CP 243/2004 and CP 195/2004) – Financing of public service broadcasters in Germany, the Commission urges Germany to empower the KEF ( “*Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten*”), whose main task is to determine the financial needs of public service broadcasters, as well as other auditing bodies, to effectively implement control of the respect of “*principles of efficiency and thriftiness as well as whether the financial transactions within a holding company are market conform*”. Such control is also meant to evaluate to what extent public service broadcasters act in an efficient way (“*Wirtschaftlichkeitsprüfung*”).

According to Kabel-BW’s position, in order to provide data for such an efficiency analysis, *«the KEF would need to question the programme decisions of public service broadcasters and [ ] the KEF procedure did not allow for any benchmarking with other undertakings (either private broadcasters or public broadcasters in other Member States). Based on comparative data on costs per broadcasted minute, data comparing licence fee revenues of public service broadcasters with revenues/turnover from advertisement in the commercial sector, the complainant takes the view that the costs of public service broadcasters are not those of an efficient operator. The complainant does not consider that higher programme costs of public service broadcasters compared to private competitors could be justified by specific public service obligations since the highest costs per broadcasted minute were generated by sports and fiction whereas production costs in the area of culture, information and news would be relatively low»* (§ 133).

The Commission agrees with this complainant by stating that *«even though the KEF examines the public service broadcasters’ submission in light of the principles of efficiency and thriftiness (Prüfung der “Wirtschaftskeit und Sparsamkeit”), this examination is not equivalent to an analysis of an efficient operator, in particular since the KEF procedure is based on the financial needs of the public service broadcasters. The financing regime does neither foresee the carrying out of such an analysis, nor does it establish the criteria according to which the costs of an efficient operator would be determined and compared to the financial needs as submitted by the public service broadcasters. The Commission is not convinced that the legal framework [ ] requires the KEF to carry out market comparisons (“Marktvergleiche”) comparable to an evaluation of the costs of an efficient operator»*

*«The Commission does not agree that it is impossible and purely hypothetical to establish the costs of an efficient operator as a benchmark. Germany has also not provided the*

*necessary information which would have pointed to such impossibility: in fact, the various costs items of the public service broadcaster may very well be benchmarked against the costs incurred by other private competitors, while taking into account the specific public service obligations. Furthermore, even if one were to accept the argument that a benchmark with private operators would not be adequate, the Commission observes that, while the KEF looks into the diverging costs of the individual public service broadcasting corporations (which are subject to the same public service obligations), this comparison does not lead to the establishment of a single benchmark against which the submitted costs of all public service broadcasters would be compared and therefore –if necessary- reduced.»*

In order to evaluate whether there is overcompensation or not, in case of SGEI, the new Guidelines must incorporate a deep economic assessment of management efficiency, because there is absolutely no point in assuming that all costs incurred by the public broadcaster are connected with the public service remit, when it's clear to see that some programmes do not fulfil any particular public service characteristics, and are, in fact, also exhibited by commercial broadcasters.

We agree that it may be difficult to distinguish public service programmes from commercial programmes, especially because public service also encompasses entertainment (sports, for example, or international hit series like «Grey's anatomy»).

But at least there must be a way to determine, on the basis of an economic model, whether the cost that the public undertaking is paying for that hour of programming is in line, or above, or below the market price that commercial broadcasters are willing to pay for it. If it turns out that the public broadcaster is, in fact, paying a premium over the market price, than it must be clearly concluded that this is a distortion to market principles that falls completely outside the SGEI exception to competition rules. And, of course, this means that the public broadcaster is not trying hard to maximise income, as it should, according to standard analysis that the Commission carries through ... on the income side, and not on the costs side.

So, what is clearly lacking, in the current compatibility procedure, is a refined economic analysis, that is able to demonstrate that the compensation which the public undertaking is receiving on account of being an SGEI is, in fact corresponding to the effective additional costs that wouldn't exist if it wasn't for the public service mission.

This analysis must consider that, since there is now competition in the broadcasting market, there are comparable costs between both kinds of undertakings, private and public, and if the comparison shows major deviations from market prices, either this deviation can be justified by the significant differences between the compared activities (screenplays, actors, studios, props, transportation, beams, technical facilities) or because

of quality or coverage matters, or it can not be justified. If this is the case, the only explanation has to be lack of competitiveness, or of management efficiency, and, as such, the State can not be authorised to compensate it whatsoever.

The State can not also compensate for lack of competitiveness in the advertising market, i.e. to fill in any gaps created for lack of commercial strategy or aggressiveness.

If the public broadcaster is to be partially financed through advertising, than it must be capable of providing that yearly budget portion that is provisionally set up for that.

If, at the end of the year (or longer period) it becomes clear that advertising objectives were not fully accomplished, the State can not compensate that failure, even under allegations that it was the public service programming that failed to produce audiences. If there is a part of the budget that is to be covered by advertising, than it must be covered by advertising, not by public compensation of any kind.

Comparing all costs incurred by the public broadcaster to all the commercial income, and then allowing the State to fill in the gap, compensating for market inefficiency, is a procedure that must be strictly forbidden, as being contrary to EC competition rules.

Instead, the provisional costs that the public service broadcaster is expected to face in the next four or five years must be established in a provisional budget, as all commercial and public income that is expected to cover for those costs. If commercial income obtained turns out short towards the budget, public funds must not compensate; if commercial income exceeds the budget, in any given years, this must of course be taken into consideration for lowering the following year's public compensation. Otherwise, the undertaking would be benefiting from overcompensation.

At the end of each year, an independent accountancy or auditing company must verify in a transparent but effective manner, whether the reported costs are in line with market benchmarks, if such benchmarks do exist, at least at national level. If not, and after searches conducted at international level, maybe there is some room for wider discretion, probably motivated by the fact that there are no commercial broadcasters interested in that particular activity. This would probably qualify it as being a genuine component of public service. But the majority of programming items would most certainly allow a comparison, for the determination of the adequate level of compensation.

Only this way would fair competition be maintained in a market where public broadcasters compete against commercial broadcasters and simultaneously receive State Aid.

These lines match some of the main principles of the on-going Reform of all State aid Communications, as stated in the Consultation document issued in 7<sup>th</sup> June, 2005, where the Commission proposes to include a «refined economic approach» as part of a general strategy aiming at a «less and better targeted State aid».

Showing a total alignment with our concerns for SGEI efficiency, in paragraph 33, the Commission explains that «the provision of effective and High Quality SGEI is a key component of the EU welfare state and is essential for ensuring social and territorial cohesion, including in the field of education, training and culture, and for the exercise of

effective citizenship. High Quality SGEI also contribute to the competitiveness of the EU economy.

As former Commissioner Karel Van Miert wrote in the Discussion Paper on the application of Articles 90 (2), 92 and 93 of the EC Treaty (now corresponding to Art. 86 (2) and 87 and 88), which anticipated the 2001 Communication, *«in the long run, any State intervention covering possible inefficiencies of the public broadcasters would avoid such operators to strive for efficiency, to remain on the leading edge of technologies and technique. In the long run, this behaviour would prove to be unsustainable and may cause serious damage to public broadcasters themselves, as well as to the consumers.»*

*«Only efficient broadcasters with state of the art technologies and a sound financial situation would be able to sustain the increasing pace of competition. Inefficient broadcasters would require ever increasing State funding to remain on the market and, given the limited amount of resources available (...) they might run into serious difficulties.»*

So, in conclusion, the compatibility assessment under art. 86 (2) must include an evaluation of cost-efficiency on behalf of the public broadcaster, in order to determine whether the compensation is proportional or if there is over-compensation.

This is, in our view, the strategic approach that should be given in the forthcoming Communication on State aid for the Broadcasting Sector.

## **CONCLUSIONS:**

[1] According to §18 of the 2001 Communication on State Aid, the market of acquisition and sale of programme rights, which takes place at international level, is to be considered a market where trade may be affected by the exemption to the scope of competition rules that SGEI benefit from.

**[2] The other obvious example is advertising, for those public undertakings that are allowed to exploit it. According to §36 of the 2001 Communication, the sale of advertising space in order to finance programming is not to be viewed as part of the public service remit.**

**[3] The Amsterdam Protocol also clarifies that there can be no objection (to Member State competence on the funding issue) «as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest».**

[4] The need to evaluate compensation in the light of Art. 86 (2) has always implied an investigation on possible failure to maximise commercial income but never lead to a thorough analysis of public undertakings behaviour in the market of programming acquisition, where private operators complain from practices that raise their own costs. This failure should be clearly addressed in the new guidelines.

[5] Under an Art 86 (2) analysis, the Commission is not required to scrutinise whether the costs incurred by the public undertakings are, in fact, reasonable, but only if they refer to the public service, i.e., if they relate to PSB remit. This is a flaw of the compatibility assessment, and must be rectified in the future.

[6] To put market efficiency back in the Art. 86 (2) analysis of compatibility is precisely the path that a new Commission Guideline must follow, in order to provide new instruments for eradication of market distortions.

[7] So, what is clearly lacking, in the current compatibility procedure, is a refined economic analysis, that is able to demonstrate that the compensation which the public undertaking is receiving on account of being an SGEI is, in fact corresponding to the effective additional costs that wouldn't exist if it wasn't for the public service mission.

[8] The EC State aid framework has, in fact, not been able to prevent these distortions of competition, clearly because the Commission has not assessed nor established any economic criteria for assessing the structure and development of programming price mechanisms.

**[9] The fact that it may be very difficult to properly allocate costs, and therefore, to accept that all programming costs are to be allocated to public service mission, must not mean that all programming costs should be treated as SGEI given the exceptionality treatment that would prevent enacting of competition rules.**

**[10] The new Guidelines must incorporate a deep economic assessment of management efficiency, because there is absolutely no point in assuming that all costs incurred by the public broadcaster are connected with the public service remit, when it's clear to see that some programmes do not fulfil any particular public service characteristics, and are, in fact, also exhibited by commercial broadcasters.**

[11] This analysis is fundamental even for the limited effects of Art 86 (2) because only by an evaluation of reasonableness of costs may one conclude on the issue of overcompensation. Therefore, it is also necessary to scrutinise the respect for «management efficiency», in order to determine «proportionality of compensation».

[12] At the end of each year, an independent controller or auditing company must verify in a transparent but effective manner, whether the reported costs are in line with market benchmarks, if such benchmarks do exist, at least at national level. If not, and after searches conducted at international level, maybe there is some room for wider discretion, probably motivated by the fact that there are no commercial broadcasters interested in that particular active. This would probably qualify it as being a genuine component of public service.

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