

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

## 1. INTRODUCTION

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

The Commission’s assessment is based on the following *guiding principles*: In accordance with the Amsterdam Protocol, Member States enjoy a large margin of discretion in defining, organising and financing public service broadcasting.

Consequently, the Commission accepts a broad public service definition, including sports and entertainment as part of a balanced and varied programme remit. The choice of funding also includes in principle the possibility for public service broadcasters to combine State funding with advertisement revenues. While Member States are free to define the public service remit, subject only to checks for "manifest errors"<sup>1</sup>, they are nevertheless required to lay down the public service obligations in a clear and precise manner. Moreover, the Commission examines possible disproportionate effects on competition through overcompensation and cross-subsidisation into commercial activities, as well as anti-competitive behaviour.

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

The Commission services consider that it would increase transparency and legal certainty if the Broadcasting Communication would be up-dated so as to reflect the experience gained from these individual investigations and the additional clarifications provided in the *Commission’s decision-making practice* since 2001. There have also been *changes in the legal environment* such as the Commission Decision and Framework on public service compensation payments<sup>2</sup> and the revised Television without Frontiers-Directive, the Audiovisual Media Services-Directive, (AVMS Directive)<sup>3</sup>. Moreover, *market developments* due to digitisation and media convergence call for a careful analysis and a possible further development of the existing rules.

<sup>1</sup> The Broadcasting Communication refers to advertisement and e-shops as examples.

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

<sup>3</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, Official Journal, 18 December 2007, N° L 332/27.

Both the current Broadcasting Communication and the recently adopted AVMS Directive refer to the Resolution of the Council and of the Representatives of the

Governments of the Member States of 25 January 1999 concerning public service broadcasting<sup>4</sup>, with the AVMS Directive "...reaffirming that the fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market."

The Commission's **overall objective** is to design an appropriate legal framework for the future financing of public service broadcasting in a new media environment. This should take into account the importance of public service broadcasting and the necessity for public support on the one hand and possible adverse effects on competition on the other.

The guiding principles should be transparency, proportionality and accountability. The rules should strike a balance between the necessity to have sufficiently clear and precise requirements at EU level and the freedom of Member States to design their system of public service broadcasting according to their legal traditions (in line with the Amsterdam Protocol) and to make their choices as regards the implementation of the requirements as laid down by the Communication.

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

## **2. HOW TO CONTRIBUTE TO THE CONSULTATION**

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

In addition, any comments beyond the scope of the questionnaire will be welcome.

The deadline for replies is 10 March 2008. Replies should be sent to the European Commission, DG COMP, State aid registry, 1049 Brussels, "HT.963", preferably via email to [Stateaidgreffe@ec.europa.eu](mailto:Stateaidgreffe@ec.europa.eu).

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

<sup>4</sup>OJ C 30, 5.2.1999, p. 1.

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

## **1. GENERAL**

This response is submitted to the Commission by the BBC Trust which is the sovereign body within the BBC and which is responsible for holding the BBC Executive to account for the BBC's compliance with the law, including European law.

The Trust has taken account of the views of the BBC Executive in preparing its response, and can confirm that the BBC Executive does not intend to submit a separate response.

This response is made solely on behalf of the BBC. The BBC is one of a number of public service broadcasters in the UK. The response does not seek to represent the views of other UK public service broadcasters or the views of the UK Government, which we understand will be making its own response.

- 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 BBC understands that the Commission's initiative in reviewing the Broadcasting Communication aims to stimulate a broad and open debate about EU state aid law and public service broadcasting, as well as take account of decisions taken in this field over the past six years. We recognise that such a debate cannot take place in the context of individual notification or complaint cases, and we welcome this opportunity to contribute.

The BBC supports the Commission's existing approach. We consider that the existing text serves its purpose well and is sufficiently flexible to cater for future changes in the broadcasting sector.

The principal value of the Communication is to set out the criteria for the application of the existing regulatory framework for the Commission's decisions on state aid in the broadcast sector, making the basis for Commission decisions more predictable and transparent for all concerned.

From the BBC's perspective the 2001 Communication has provided a reasonable and helpful indication of how the Commission would arrive at

specific decisions in actual cases. The 2001 text contains important elements of flexibility – in particular in relation to the need to take into account the development of technology – which has allowed it to remain relevant and enlightening about the way the Commission will apply state aid law to the fast moving broadcasting sector.

As far as the BBC is aware, the decisions taken by the Commission since the guidelines were introduced have been consistent with the principles and criteria they set out.

The BBC considers that the adoption of the Audiovisual Media Services Directive is in line with the 2001 Communication approach to technological development (for example under paragraphs 12 and 34). In particular the mission of informing, educating and entertaining users to fulfil social, democratic and cultural needs of society can be both linear and non linear.

In light of these considerations, the BBC supports the Commission's existing approach. We think the current text continues to provide an adequate measure of legal certainty and is sufficiently flexible to cater for future changes in the broadcasting sector.

- 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.

In the BBC's view the relative weight of PSBs in the television market has become smaller in economic terms and, the proportion of industry revenue generated by public funds is in decline. In the UK the two main sources of revenue for UK PSBs (public funds and advertising) are together a declining share of industry revenue as subscriptions' importance increases. The traditional advertiser-funded PSBs also face pressures both from the growing popularity of online advertising and from the multi-channels.

Technological convergence has blurred the lines between traditionally separate sectors like telecommunications and broadcasting. The result is stronger competitive pressure on all players. The public funding of PSBs grows only marginally and typically at below-inflation rates, and this makes them particularly vulnerable to this pressure.

In addition, PSBs are more constrained in their ability to diversify revenue streams and modulate their offer of services (and cost base) than commercial operators, due to specific obligations imposed by Member States requiring PSBs, e.g. to provide universal coverage of some services or certain amounts of some types of content (e.g. educational content for children). The public funding of PSBs in the UK has grown only marginally and typically at below-inflation rates and this makes PSBs particularly vulnerable to increasing competitive pressure.

In terms of demand, while television viewing in general is broadly stable, the proliferation of digital has meant that each PSB's share of viewing is decreasing, particularly in multi-channel homes, at a time when multi-channel homes are growing.

However, we would sound a note of caution. The emergence of alternative ways of distribution and alternative content forms has not removed the need for PSB in its traditional form. Technological convergence is only a reality for some. Many people do not use new technologies, and certainly not to their full capacity. Digital television is not yet universal, with Ofcom figures showing 85.1% of UK households now receive digital television services on their primary set. A recent report by the NAO showed that some 45% of TVs sold in the first seven months of 2007 in the UK were analogue, while according to Ofcom, by March 2006 only 53% of households in the UK had broadband.

Despite an ever-expanding range of choice on TV and online, 90% of the viewing of BBC TV is still through BBC One and BBC Two. The demise of linear TV itself may well have been heralded too early. Recently research in the UK predicted that overall viewing of television will rise by 4.6% in the next five years. Although much of this will be driven by older people converting to digital, it also noted that the decline in viewing among young adults (16-34 year olds) had levelled out. In the UK it appears that, for now, people like consuming TV in mainly traditional ways.

Total industry revenues in radio are broadly flat and radio's share of advertising spend has declined as advertisers move online.

We anticipate that these trends will continue as equipment manufacturers produce the next generation of laptop computers and mobile phones which permit accessing the Internet or broadcast content on the move: the mobility, greater personalisation of content and participation that these devices permit is likely to increase the significance of these platforms as a means of consuming and producing content over time.

The Trends highlighted above can all be verified in Ofcom's 2007 review of the UK communications market. A link to this report is included in the appendix.

- 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 BBC believes that Internet use will increase and mobile platforms will become more important, which will further increase audience fragmentation and distribution costs. In addition, while the cost per unit of producing content has fallen, it is likely that the quantity of content produced will need to

increase to meet audience expectations and demand for access to content across all platforms.

The proliferation in the number of platforms and reduction in the cost of producing content will increase the competitive pressure on PSBs. However, it is difficult to predict exactly how the relevant markets will develop, and hence we would be concerned at any change in the Communication at this time.

We think the Communication should continue to have interpretative value: foreseeable market developments, including changing patterns of consumption, point to a need for flexibility in terms of technological developments, and clarity on the basic principles. The 2001 text has performed well in both respects. This flexibility is consistent with the basis for entrustment of the BBC under its current and previous Charters which allow for the distribution of output by the use of existing and new technology. We believe that the existing Communication's focus on broad principles remains the best approach. Developing more detailed rules applicable *a priori* to cater for public funding across all the diverse EU national communications markets would, in our view, introduce both complexity and uncertainty which would risk undermining the effectiveness of the current framework.

## **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 compensations**

- 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.

The BBC considers the Decision and Framework and the Communication to be complementary, but to serve different purposes. We therefore support the Commission's existing approach in keeping them separate.

Whilst Member States must have regard to the Decision and Framework as they relate to public service broadcasting, these documents cover a much broader range of circumstances. As such they include strict requirements which would not necessarily be appropriate for all public service broadcasters in the EU. In our view the Broadcasting Communication complements this regulatory framework, giving guidance on how it is to be interpreted in the broadcasting sector.

- 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).

Not applicable - see 2.1.1.

## **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.

The BBC's remit – its objectives and purposes – are set out in its Royal Charter (RC), in particular under Articles 3, 4 and 5, and in the Framework Agreement between the Secretary of State for Culture, Media, and Sport and the BBC. Links to the Charter and Agreement are included in the appendix to this response.

The Charter specifies 6 Public Purposes that the BBC must promote:

- a. Sustaining citizenship and civil society
- b. Promoting education and learning
- c. Stimulating creativity and cultural excellence
- d. Representing the UK, its nations, regions and communities
- e. Bringing the UK to the world and the world to the UK
- f. In promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television

The pursuit of these purposes is not linked or limited to specific types of technology and services. No distinction is made between “old” and “new” media. Clause 12 of the Agreement requires the BBC to do all that is reasonably practicable to ensure that its services are made available in a range of ways which are available or which might be available in the future, in order to give licence fee payers the greatest possible access and choice in their method of consumption.

The Charter requires that the BBC's output should promote these purposes by means of “Television, radio and online services”, as well as “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.” (RC, Article 5.1). Accordingly, the BBC aims wherever possible to offer its output to all licence fee payers on a platform neutral basis, thereby enabling the greatest possible number of users to consume content by whatever means available to them.

Under the Charter, each of the BBC's public services is subject to a service licence issued by the Trust. The Agreement (Clause 11) lists the public services provided by the BBC at the commencement of the new Charter in January 2007, including online services. The Agreement requires the Trust to consult publicly before issuing a service licence. The Trust is required to review the service licences regularly and a review of [bbc.co.uk](http://bbc.co.uk) is currently under way.

A link to the Trust's service licence for [bbc.co.uk](http://bbc.co.uk) is included in the appendix to this response. The BBC Jam service was suspended on 20 March 2007 while BBC management prepares fresh proposals for the BBC Trust. A link to a statement from the Trust on the current position is included in the appendix to this response.

The Agreement recognises that during the 10 year life of the Charter the BBC will need to be able to modify its UK public services (to respond to changes in technology, culture, market conditions and public expectations) but makes any significant change or new service proposal subject to full and public scrutiny in the form of a Public Value Test (PVT) conducted by the Trust with input from Ofcom on the market impact of the proposals. A link to the Trust's PVT processes is included in the appendix.

Following a PVT the Trust approved a new on-demand service proposal which has significant online elements. A link to the Trust decision which contains details of the service and the terms on which it was approved is included in the appendix.

- 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)?

The BBC supports the Commission's existing approach. We think the current Communication provides sufficient clarity on the distinction between public service and commercial activities. We consider that it would be inappropriate to attempt to define any specific activity as inherently commercial (or otherwise). In a period of rapid technological development and shifting audience behaviours, making any such distinctions would be extremely difficult. Rapid change in business models, market conditions and consumption patterns militates for enabling regulators to apply the existing rules by adapting them to the context and circumstances in each case.

The lack of established business models in the online space means a number of providers are, quite legitimately, seeking individual competitive advantage from the use of closed standards or 'walled gardens'. Whether this is in the longer term interests of citizens and consumers is another matter.

In line with the Amsterdam Protocol, the BBC believes it is for Member States to define the distinction between public service and commercial activities, as this distinction depends largely on the definition of the public service mission. The fundamental question is whether an activity is consistent with the PSB mission and necessary for its achievement; and, if it is commercially funded, whether it is conducted at arm's length from public funding in a way which does not distort the market. Technology, and the habits and requirements of audiences change constantly. This is why the UK Government has chosen to

define the BBC's public service mission in terms of broad purposes rather than specific services or activities.

The Charter draws a clear distinction between the public service and commercial activities of the BBC and requires that they be operated through individually constituted commercial subsidiaries.<sup>1</sup> Article 3 specifies that the BBC may, in addition to its activities in pursuit of its public purposes (public service activities), "establish or acquire subsidiaries through which commercial activities may be undertaken". The Agreement confirms that the BBC may not provide commercial services (as distinct from commercial trading activities) other than through its subsidiaries (Article 68.2).

The basis on which the BBC may operate commercial services and the criteria for establishing whether or not those services are appropriate for the BBC to are set out in Clauses 68 – 74 of the Agreement. BBC provision of commercial services is further governed by the BBC's Fair Trading Policy (adopted by the BBC Trust after public consultation in accordance with Agreement Clause 65) and operationalised by the BBC Executive's Fair Trading Guidelines. Links to the BBC's Fair Trading Policy and Guidelines are included in the appendix.

The Agreement requires that the BBC's commercial services must comply with the following four commercial criteria:

- They must fit with the BBC's public purpose activities;
- They must exhibit commercial efficiency;
- They must not jeopardise the good reputation of the BBC or the value of the BBC brand; and
- They must comply with the BBC's Fair Trading Guidelines and in particular avoid distorting the market.

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?

The BBC's view is that the definition is consistent with the language of the Amsterdam Protocol and should be maintained. It is consistent with the approach that the UK Government has taken in the wording of the BBC's Charter and Agreement.

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<sup>1</sup> The BBC's public services are also permitted to undertake certain commercial activities. These are known as 'commercial trading activities' and are undertaken primarily to promote the BBC's Public Purposes but may (as a secondary consideration) also generate a profit. For further information please see page 13 of the BBC's Fair Trading Guidelines (available at [http://www.bbc.co.uk/info/policies/commercial\\_guides/](http://www.bbc.co.uk/info/policies/commercial_guides/))

The Charter makes clear that online services may have a role to play in fulfilling all of the BBC's public purposes. The Trust has taken the view in considering the public value of online services that the BBC should do all that is reasonably practicable to ensure that its services are made available in a range of ways in order to give licence fee payers the greatest possible access and choice in their method of consumption.

- 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?

The BBC notes that the power to “confer, define and organise” the public service remit is a matter reserved for each Member State under the Amsterdam Protocol.

The BBC considers that *ex ante* evaluation is one effective way for Member States to assess the consistency of new activities with the public service remit. The Commission has clearly found in specific cases that such *ex ante* evaluation represented an effective response to concerns raised by complainants.

In the case of the BBC, the BBC Trust has established and operates the Public Value Test - an evidence-based process conducted publicly covering the launch of new BBC services (or the significant alteration of existing ones). The Trust takes account of both the public value created and (with the involvement of Ofcom) the market impact of the proposals. This is true of activities across all platforms or media, including online service proposals.

Each Public Value test conducted by the Trust to date has attracted extensive public interest and the Trust has taken pro-active steps to gather and take account of the views of industry stakeholders including potential competitors before reaching its decision.

In our view the Commission's existing approach is correct and it would be inappropriate for an interpretative document like the Communication to prescribe a specific formula in every case.

- 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?

The BBC understands that, by “*ex ante* evaluation of the PSB remit” it is meant that there should be a process through which Member States debate and consult on the nature and scope of the PSB remit before defining it and entrusting it to PSBs.

The BBC's remit is publicly debated in the UK in advance of the granting of the Royal Charter every ten years, and in the intervening period in connection with the review of its funding arrangements. Furthermore, public debate is

constant, prompted by reviews conducted by the BBC Trust (see 2.2.6 and 2.3.2 below), the Communications regulator Ofcom – currently undertaking its second review of public service broadcasting (link attached in appendix), Government (the DCMS ‘Convergence Think Tank’) and Parliamentary discussion.

In our view it could be reasonable for the Communication to note that Member States should have appropriate means publicly to discuss and debate the nature of the PSB remit in advance of defining it and entrusting it to PSBs.

2.2.6. Which services or categories of services should in your view be subject to an *ex ante* evaluation?

All new BBC services or significant changes to existing services are subject to *ex ante* evaluation by the BBC Trust through the conduct of a Public Value Test. The test is conducted publicly, leading to an evidence based public decision which takes account of both public value considerations and the impact on the market. The Trust actively encourages industry stakeholders, including potential competitors, to participate in the process.

In addition, the BBC Trust undertakes regular reviews of BBC services against their service licence.

The BBC considers this to be an effective model for the UK. Whilst we believe it would be inappropriate for the Communication to impose any detailed framework on Member States, we think that aspects of the model now established for oversight of BBC activities might have a wider applicability.

2.2.7. Should a revised Broadcasting Communication contain the basic principles as regards the procedural and substantive aspects of such an evaluation (such as for instance the involvement of third parties or the possible evaluation criteria, including for instance the contribution to clearly identified objectives, citizen needs, available offers on the market, additional costs, impact on competition)?

Whilst the BBC Charter and Agreement provide for prior consultation and assessment of proposed services (or variations to existing PSB activities), our view is that there is a balance to be struck between ensuring that some evidence-based consideration and evaluation of the citizen benefits and market impacts takes place before new public service broadcasting activities are undertaken. The mechanisms for achieving this will vary considerably depending on the circumstances and approaches in individual member states. As such this is a matter best left to individual member states to decide on the most appropriate approach for their own circumstances.

The BBC considers that the current Communication appropriately defines principles, such as proportionality of funding, leaving to Member States the responsibility and power to develop effective implementation systems,

procedures and safeguards in light of the specific requirements in any particular Member State.

- 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?

The BBC believes the key factors in determining the public service nature of a PSB activity should be

- a. fitness with the remit as defined by the Member State (in the case of the BBC, its six public purposes); and
- b. absence of manifest error

Both these aspects are taken into account in the 2001 version of the Communication.

### **2.3. Entrustment and Supervision**

- 2.3.1. You are invited to explain in which way entrustment is granted in your country. Is the procedure leading to the entrustment subject to public consultation? To what extent is the broadcaster's remit laid down in legally binding acts of entrustment? To what extent is the implementation and determination of the exact scope of activities left to public service broadcasters? Are any such "implementing measures" publicly available?

In the UK, the procedure leading to the entrustment of the public service mission to the BBC is preceded by extensive public consultation and debate.

The acts of entrustment – the Royal Charter and the Agreement with the Secretary of State for Culture, Media and Sport – are binding legal acts. These define the processes through which the BBC's sovereign body and regulator, the BBC Trust, determines the specific activities through which the BBC promotes its public purposes.

All the documentation relating to the BBC Trust's acts is publicly available on its website – <http://www.bbc.co.uk/bbctrust/index.html>. Those acts include the granting and reviewing of Purpose Remits, Service Licenses and Public Value Tests as well as regulatory controls for the commercial activities of the BBC.

- 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?

In the case of the BBC there are a number of supervision mechanisms:-

The Trust supervises the performance of the BBC's Executive Board in delivering the BBC's public service remit. It does this by means of various controls under the terms of the BBC Charter and Agreement. In exercising its functions the Trust is required to act in the public interest. In particular it must:

- Represent the interests of licence fee payers
- Secure that the independence of the BBC is maintained
- Carefully and appropriately assess the views of licence fee payers
- Exercise rigorous stewardship of public money
- Have regard to the competitive impact of the BBC's activities on the wider market
- Ensure that the BBC observes high standards of openness and transparency

Its specific functions are set out in Article 24 of the Charter. They include:

- Setting purpose remits
- Defining performance measures
- Issuing service licences
- Assessing new service proposals (through PVTs)
- Securing content standards
- The Trust is also responsible for holding the BBC Executive to account for strategy, budgets, its discharge of regulatory functions including ongoing compliance with UK, EU and international law, the Trust's fair trading rules, value for money and risk management.

In discharging its supervisory duties the Trust consults publicly and conducts its business openly, engaging with a range of external stakeholders. A link to some examples of recent public consultations conducted by the Trust is included in the appendix.

The Market Impact Assessment element of the Public Value Test is carried out by the UK communications industry regulator, Ofcom. Ofcom also has a direct supervisory role over the BBC in respect of the compliance by the BBC with codes relating to the content of programmes (except for impartiality and accuracy which are matters on which the BBC accounts solely to the Trust). Ofcom also has a further substantial role as a competition authority.

Third parties who consider that the BBC is in breach of its public service obligations are able to pursue complaints to the BBC Executive and the BBC Trust in respect of all the matters governed by the regime of the Charter and Agreement. This includes not only Purpose Remits, Service Licences, but also the BBC's fair trading regime which provides for a two-stage complaint mechanism initially within the BBC Executive branch and then on appeal to the BBC Trust. The decisions of the BBC Trust as a public authority, are capable of being judicially reviewed through the courts in the United Kingdom, as are the decisions of Ofcom. Appeals on editorial matters are quite

common (the Trust took decisions on 43 cases between January and November 2007) but fair trading appeals to the Trust are rare (just one case since the Trust's establishment).

Ofcom has a further role in relation to public service broadcasting generally, including the BBC under which it is required to carry out a five-yearly review of the way in which the purposes of public service broadcasting are being fulfilled in the United Kingdom.

- 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 terms on which entrustment is to be made are contained in jurisprudence of the Court which are already reflected in the Communication. The BBC's view is that no change is necessary.

- 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?

The BBC considers that Member States should retain the freedom to adopt the system that is best suited to the delivery of the public service remit they have set out and that it would be inappropriate for the Communication to prescribe one system or another.

In the UK, the BBC is supervised by the BBC Trust, a body independent of both Government and the BBC Executive. The Trust acts and is organised independently of the BBC Executive. It has the duty to safeguard the interest of the licence fee payers on whose behalf it exercises its powers. This system, introduced in 2007, allows for a clear separation between management and oversight, whilst preserving the independence of the BBC as a whole from external influence.

In certain areas, the BBC is also under the supervision of the UK communications regulator Ofcom, which has the power to impose fines on the BBC in cases of breach of the Ofcom Broadcasting Code.

As the sovereign body within the BBC the Trust has broad discretion over the application of sanctions where it is dissatisfied with aspects of the BBC's performance. It can require the BBC to suspend or cease activities (which it did in the case of BBC Jam and also in the case of the only fair trading appeal the Trust has considered to date). It could also impose budgetary sanctions if it considered such sanctions appropriate, although in doing so it would need

to think carefully about whether such actions might be to the detriment of licence fee payers as they would reduce the funds available to be invested in public service programming.

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?

Comprehensive mechanisms for complaints against the BBC, including the possibility of appeals to the Trust, are laid down in the Agreement clauses 89-90. The Trust has set a framework for the handling of complaints. We consulted publicly on the framework and also on a range of public documents it has published to make clear to commercial parties the rules within which the BBC must operate. These include the Trust's statement on competitive impact, the fair trading policy and guidelines and the complaint procedures. Links to these documents are included in the appendix.

In addition any decisions of the BBC Trust and Ofcom in relation to Public Value Tests and other activities are subject to challenge through the process of judicial review within the courts of the United Kingdom.

Finally, the BBC is also subject to UK and EU competition law (including state aid law), as enforced by Ofcom, the UK Office of Fair Trading (OFT), the Competition Commission (CC), the Competition Appeal Tribunal (CAT), the UK Courts, the European Commission, and the CFI/ECJ.

The BBC considers these processes offer adequate opportunity for commercial operators to register their views, and that they do not require further enhancement.

More broadly, the UK Government's Charter and Licence Fee review processes, along with Ofcom's five-yearly review of the way in which the purposes of public service broadcasting are being fulfilled in the United Kingdom, create regular opportunities for commercial stakeholders to express their views on the scope of public service broadcaster activities.

In terms of BBC services the Trust conducted a public consultation before setting the BBC's purpose remits and service licences, and its Public value test process for assessing new or changed service proposals includes three elements of consultation. The Trust must also conduct regular service reviews covering all of the BBC's public services, and consults publicly on these reviews.

Accountability is at the heart of public service broadcasting and the way it is achieved is an integral part of the way individual Member States organise it.

The way in which stakeholders, including private operators, are given the opportunity to raise specific complaints, and to contribute to the debate about the scope of the PSB activities and remit, is effective if it is adapted to the

workings and structure of each individual public broadcasting system. The BBC supports the Commission's existing approach and considers that it would be inappropriate for complaint procedures to be defined at EU level in the Broadcasting Communication.

## **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?**

The BBC takes the view that licence fee and commercial funding of its services are mutually exclusive, and the UK Government has supported this view.

The BBC is not permitted to charge for any of the public services it provides within the UK (Agreement Clause 13). Any commercially funded BBC activity must be conducted separately and may not receive public funding, in line with the BBC's Fair Trading Policy and national and EU competition and state aid rules.

However, the Agreement permits the BBC to recover costs of providing "any service or facility on demand or otherwise at... [a] person's request" (Agreement Clause. 13.3).

In addition, the increase in use of non linear, on demand services, means that distribution costs may differ across different platforms, including in their structure and re-charging mechanisms. It is conceivable that access to BBC services available on a platform managed by third parties will be linked to the payment charges to that third party, as is the case in relation to cable systems, where a truly "free to air" solution is not possible.

In view of these strict constraints the BBC has not examined the market impact of any dual funding model.

More broadly there was some speculation in the UK in the context of the last review of the licence fee in 2006/07 as to whether an element of licence fee revenue might be ring-fenced as funding for one or more of the commercial PSBs (referred to as 'top-slicing') as an addition to their commercial revenue streams. The BBC considers that this form of dual-funding would create a number of problems particularly in terms of accountability. It would be unclear whether the commercial PSBs were acting in the interests of licence fee payers or shareholders.

### **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?

As stated above (reply to question 2.4.1), the BBC may not charge for the provision of any of its public services. Services which the BBC charges for must be run as commercial activities in accordance with the BBC's Fair Trading Guidelines and separated from the BBC's publicly funded activities.

Several considerations could influence our views on this set of questions, including the definition of what constitutes a pay service, and the specific market context and conditions.

As noted above, convergence causes audiovisual services to be distributed across a wide range of platforms with different charging practices and cost structures. A narrow definition of "pay-service" could encompass services provided free of charge by a PSB, but only available at some additional (e.g. connection) cost for the user.

Market conditions might also influence the financing system chosen for PSBs. For example it is conceivable that public service broadcasting in a small market should seek funding additional to direct public funding (through the licence fee or otherwise), including from agreed types of pay-services, in the same way as it draws on advertising revenue.

It is not inconceivable that specific targeted services which are part of the public service broadcasting remit and aim to fulfil the democratic, cultural and social needs of society may be funded through subscription or other forms of payment.

It would be difficult to draw a clear line, *a priori* and in general, making pay services and public services mutually exclusive. As in other areas, each case should be considered against the background of its specific context and nature.

This leads us to conclude that it would be very difficult – and could be inappropriate – to develop a general EU-wide approach.

## **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?

The Agreement permits the BBC to conduct commercial activities as well as public service activities, but sets out a clear framework to ensure that adequate separation and transparency is achieved.

All of the BBC's commercial services must be carried out through individually constituted commercial subsidiaries with clear and separate management structures, and all transactions with the BBC's publicly-funded services must be undertaken on an appropriate arms length basis.<sup>2</sup>

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?

See response to section 2.5.1.

The BBC considers that functional separation (with commercial activities undertaken on arm's length basis) can provide sufficient transparency to ensure non discrimination and protect against potential concerns linked to the provision of public funding for public service activities, and can facilitate supervision and enforcement of the rules governing commercial activities. The BBC does not consider that full structural separation necessarily affords any greater degree of transparency and may in addition be associated with significant costs. However, the BBC considers that it would be inappropriate for the Communication to specify any particular model. Rather, Member States should be capable to define the requirements that are most appropriate, given the definition of public service and the way in which its delivery is organised in any particular Member State.

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 provisions on cost allocation in the Communication (section 6.3.2 and in particular paras 55 and 56) are clear and consistent with the Trust's Fair Trading Policy and the BBC's Fair Trading Guidelines, and have been implemented by the BBC in the operation of its commercial activities. The BBC does not consider that there is any need for these rules to be amended in light of its experience in the UK.

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?

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<sup>2</sup> As noted in footnote 1 (in response to 2.2.2), the BBC's public services are also permitted to undertake certain commercial activities, known as 'commercial trading activities' that are undertaken primarily to promote the BBC's Public Purposes but may (as a secondary consideration) also generate a profit.

No. The BBC supports the Commission's existing approach. We think the Communication already sets helpful and adequate rules, such as separation of accounts and general transparency requirements. These provide sufficient clarity. Beyond those provisions, the appropriate degree of separation between a PSBs public service and its commercial activities is a matter more appropriately dealt with at national level.

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

- 2.6.1. Do you consider that the Broadcasting Communication should include a requirement for Member States to clearly lay down the parameters for determining the compensation amount?

This is a matter for the UK Government. The Government publishes its decisions on the funding of the BBC. These decisions include the parameters applied in reaching them. In the BBC's view, this is good and helpful practice. In doing so, the Government takes account of both rules and jurisprudence in the field of state aid law. This jurisprudence offers clear guidance even as it evolves over time. In our view it would be confusing and inappropriate to associate it with general EU-wide principles contained in the Communication.

- 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 BBC views multi-annual funding plans as crucial both for PSBs – in order to enable effective planning, leading to efficiency, and ensure independence from the Government of the day – and for the commercial sector's own planning requirements. We support the Commission's existing text which does not limit the pluriannual settlement of PSB funding.

- 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?

The BBC's financial performance is closely monitored by the Trust. The Trust ensures that the BBC constantly seeks to deliver efficiencies, which are the source of most of the funding for new content and activities. Subject to this supervision by the BBC Trust (see above), there must be an incentive to effect transfers of resources with a reasonable degree of flexibility in the interest of maximising the benefit of public investment. Whilst it would be exceptional for surplus on any given year to exceed 10% of the BBC's turnover, it does not seem appropriate or desirable for organisations as diverse as Europe's PSBs to share a common cap to "surplus" which could be of very different origin (e.g. savings, increased profits from commercial

services) and based on different funding systems or aimed at funding different types of long term investments. The very base for the calculation of the percentage could be hard to harmonise (10% of what?) and given lengthy commissioning cycles would require some form of harmonisation of broadcasting accounting policies.

What should be ascertained and agreed in each case by the national supervising authority of the PSB is whether the allocation of any surplus has been planned over an acceptable period, for purposes consistent with the PSB remit. Subject to these provisos, the BBC's view is that the percentage per se is not a meaningful concern. Introducing it would be unnecessary and generate more confusion than clarity.

More generally, provided there is a process in place – as in the UK – that regularly reviews the funding requirement for the public service, persistent surpluses should not be a problem. Any capping of surpluses introduces additional constraints which, the BBC believes, can only have negative effects compared with providing maximum flexibility subject to the regular review process.

- 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)?

See reply to question 2.6.3 above. Provided that the mission is clearly defined, and effective control and supervision are in place, the existence of surplus per se, even if considerable, should not be a concern – except in specific cases where it is relevant to a specific complaint. But this is an argument for consideration case by case, not in the context of general guidance.

Examples of cases where PSBs may be required to use surpluses could be multi-annual investments in infrastructure and to meet fluctuations in programming costs due to unexpected news events such as the recent Tsunami in Asia or covering long wars (Afghanistan and Iraq).

- 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?

The BBC's view is that the current provisions do not act as a disincentive, but more detailed constraints in relation to surpluses could. (See reply to questions 2.6.3 and 2.6.4)

- 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?

The BBC itself exists to fulfil its public purposes. It does not exist to make a profit.

Under the BBC Agreement “commercial services” are defined to mean services which are carried on primarily with a view to making a profit to be reinvested in public service activity. The BBC’s commercial subsidiaries are set challenging profit targets in order to maximise the value of licence fee payer’s assets and return funds that can be re-invested in the BBC’s public service activities. These services must be carried out by separate commercial subsidiaries. They are subject to a clear regulatory framework set out in the Agreement and overseen by the Trust (see reply to question 2.2.2).

The BBC considers that other public service broadcasters should be allowed to make and retain normal profits<sup>3</sup> to supplement their basic funding, provided these profits are re-invested in services which deliver their public service remits, and are not indicative of overcompensation.

## **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?

As mentioned in the response to 2.3.5, comprehensive mechanisms for complaints against the BBC, including the possibility of appeals to the Trust, are laid down in the Agreement clauses 89-90. The Trust has set a framework for the handling of complaints. It consulted publicly on the framework and also on a range of public documents it has published to make clear to commercial parties the rules within which the BBC must operate. These include the Trust’s statement on competitive impact, the fair trading policy and guidelines and the complaint procedures. Links to these documents are included in the appendix.

In addition, the BBC is subject to UK and EU competition law (including state aid law), enforced by Ofcom, the OFT, the CC, the CAT, the UK Courts, the European Commission and the CFI/ECJ. These provisions offer effective safeguards for the private sector. Inquiries into anti-competitive behaviour are

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<sup>3</sup> returns consistent with an appropriately defined cost of capital

not precluded into any aspect of the BBC's activity, including potential or alleged price undercutting.

The Trust conducts its business transparently and actively encourages input from consumers and industry stakeholders into its decision making processes. Taken cumulatively across the 3 PVTs the Trust has undertaken in its first year (on-demand services, HDTV and Gaelic Digital Service) the Trust received over 11,000 public responses and 111 industry stakeholder responses to its consultations and has held around 30 meetings with stakeholders to hear their views directly.

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?

The BBC considers that the rules governing its own operations including general competition law, the BBC's Fair Trading Policies (e.g. the obligation to form separate subsidiaries for all commercially funded activities), its complaint procedures and the BBC Trust's ex ante and ex post supervisory powers represent an effective mechanism to ensure that it does not behave anti-competitively.

Indeed, in the European Commission's own case of 2002 relating to the Secretary of State's decision to approve the BBC's running of 9 new digital channels via the licence fee (2002, N 631/2001), the Commission made a number of statements in relation to the proportionality of the funding suggesting the approaches adopted by the BBC provided, in principle, adequate safeguards. It noted in particular that the mechanisms put in place by the BBC, including accounting separation, its fair trading commitments and its commercial policy guidelines, if properly applied and controlled on an ex-post basis, should prevent any cross subsidisation such as low transfer prices for programmes sold for commercial exploitation. In the same case, the Commission also noted that, according to the BBC's guidelines, all resources are transferred between the BBC and BBC Worldwide at market prices, thereby helping to ensure that the commercial pricing policies of the BBC do not lead to market distortions.

In cases where the Commission considered that such principles were not present (e.g. the case relating to the financing of the German public sector broadcasters (2007, E 3/2005), or the EC case in relation to compensation payments to Portugal's public service broadcaster RTP (2005 E 14/2005)), it could and did require the national authorities to implement measures delivering more stringent accounting separation and the respect by PSB of market principles in relation to both third parties and commercial subsidiaries.

There may be different systems elsewhere in Europe. Provided those systems are equally effective, the Communication should not constrain Member States' ability to develop a diverse and innovative set of systems, in line with the Amsterdam Protocol.

- 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.

The BBC's activities are governed by the BBC's Fair Trading regime as well as by general competition and state aid laws. The BBC's Fair Trading Guidelines provide detailed guidance on pricing both between its public service and commercial activities as well as by its commercial services, in order to ensure that prices are 'fair'.

The operation of the Fair Trading regime is subject to regular scrutiny by sub-committees of both the Executive Board and the Trust and are regularly audited by independent auditors commissioned by the Trust. The BBC's Fair Trading systems and processes are also accredited with the ISO 9001:2000 standard and are assessed against this standard every 6 months. We support the Commission's existing approach and do not believe that further clarification is required in this area.

- 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?

The relative position of the BBC and other PSBs in relation to the acquisition of premium sport rights has become weaker over time. This is a result of, amongst other factors, increased competition for rights, the spiralling costs of rights and the decrease of overall PSB funding in real terms. The BBC must provide a balanced schedule including the most popular sport events. It will therefore continue to bid within the constraints of its resources, for the right to broadcast high profile sport events free to air. However, the BBC's expenditure is likely to come under pressure in the foreseeable future in line with pressure on overall PSB funding. In the UK, other broadcasters (in particular Sky and Setanta) are highly competitive in bidding for sports rights and such public funding does not give rise to concerns regarding the acquisition of sports rights.

Against this background of pressure on overall PSB funding and strong existing competition, we support the Commission's existing approach. We note that antitrust rules have so far proven highly effective in addressing competition concerns and do not consider any more detailed rules on the acquisition of sport rights by PSBs to be needed.

## **2.8. Other issues**

2.8.1. Do you consider that the reference to the difficulties of smaller Member States is necessary?

The BBC is not in a position to comment.

2.8.2. What would you consider to be typical difficulties of smaller Member States and how should these be taken into account?

The BBC is not in a position to comment.

## **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.

The BBC considers that the Commission's existing guidance set out in the 2001 Communication has served the sector well during a period of rapid change and development in the broadcasting sector. It has delivered clarity and predictability in the way the Commission has applied state aid law in a large number of cases pertaining to public service broadcasting.

The interpretation of existing rules in the 2001 Broadcasting Communication has been helpful in providing clarity and legal certainty, enabling the BBC Trust since its establishment, and the BBC until then, to meet the challenges brought by a changing communications market. This in turn has benefited public service broadcasting in the UK and, we believe, the communications industry as a whole.

In our view the Commission has the balance and level of detail in its existing text right. More detailed provisions could offer more clarity on specific points, but this would be at the expense of Member State flexibility and freedom to develop a diverse range of solutions to concerns about the relationship between PSBs and the market. It could also in some cases undermine the balance between PSB and the commercial sector specific to each Member State. This could harm PSBs and reduce their impact in terms of innovation, universality and quality.

The Communication as currently drafted gives sufficient clarity to industry about how the rules will apply and enables the Commission to deal effectively with potential state aid cases. On balance we see no compelling case for changing the interpretative guidance in the Communication.

- 3.2. To what extent do you expect that the possible additional clarifications outlined above could create new administrative burdens and compliance costs?

The BBC's view is that most of the proposals hinted at in the questions would generate indirect rather than direct additional costs. The BBC is concerned that, if introduced, they could create duplication with existing provisions regulating the operation of the BBC's supervisory bodies, primarily the BBC Trust. There is a risk that they could introduce too much rigidity and a broader, blunter approach across all the diverse European market, reducing the ability of regulators (including the Commission) and operators alike to respond to rapid change in a case by case basis. Finally, by making interpretation more detailed, they might create confusion between the interpretation itself and rules, in particular the Amsterdam Protocol, leading to a less clear and predictable environment. The risk is that at best, this could lead to inefficiency and overlaps. At worst, it could reduce the ability of Member States to organise and support public service broadcasting.

- 3.3. Do you consider that the possible additional clarifications as outlined above would create a better regulatory framework?

The BBC's view is that most of the modifications hinted at in the questionnaire seem either inappropriate or unnecessary. Their effect would be, as a minimum, to confuse the respective roles of Member States and the Commission in outlining the detailed arrangements pertaining to PSB, thus creating legal uncertainty. Further, there is a risk that, they could generalise solutions or criteria applicable only in one specific case and undermine the effectiveness of PSB, possibly contrary to the requirements of the Protocol. The only possible exception, in the BBC's view, is a general requirement for Member States clearly to lay down the parameters for determining the compensation amount (Question 2.6.1).

- 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.

The BBC believes that for the reasons given in its responses above, the negative impact would be likely to outweigh the positive.

## Appendix

### Links to BBC documents referred to in this response

<b>Charter</b>	<a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf</a>
<b>Agreement</b>	<a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bbcagreement_july06.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bbcagreement_july06.pdf</a>
<b>Service licence for bbc.co.uk</b>	<a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/service_licences/online/online_servicelicences/bbc_co_uk_servicellicence_30apr2007.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/service_licences/online/online_servicelicences/bbc_co_uk_servicellicence_30apr2007.pdf</a>
<b>BBC Trust statement on BBC Jam</b>	<a href="http://www.bbc.co.uk/bbctrust/framework/bbc_service_licences/jam.html">http://www.bbc.co.uk/bbctrust/framework/bbc_service_licences/jam.html</a>
<b>BBC Trust Public Value Test</b>	<a href="http://www.bbc.co.uk/bbctrust/framework/public_value_test/index.html">http://www.bbc.co.uk/bbctrust/framework/public_value_test/index.html</a>
<b>BBC Trust decision on on-demand services</b>	<a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/decisions/on-demand/decision.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/decisions/on-demand/decision.pdf</a>
<b>BBC's Fair Trading Policy</b>	<a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/fair_trading/policy.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/fair_trading/policy.pdf</a>
<b>BBC's fair Trading Guidelines</b>	<a href="http://www.bbc.co.uk/info/policies/commercial_guides/">http://www.bbc.co.uk/info/policies/commercial_guides/</a>
<b>Recent Trust consultations</b>	<a href="http://www.bbc.co.uk/bbctrust/consult/index.html">http://www.bbc.co.uk/bbctrust/consult/index.html</a>
<b>BBC Trust statement on competitive impact</b>	<a href="http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/fair_trading/competitive_impact_statement.pdf">http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/fair_trading/competitive_impact_statement.pdf</a>
<b>BBC Trust complaints and appeals arrangements</b>	<a href="http://www.bbc.co.uk/bbctrust/appeals/index.html">http://www.bbc.co.uk/bbctrust/appeals/index.html</a>
<b>Ofcom Communications Market report 2007</b>	<a href="http://www.ofcom.org.uk/research/cm/cmr07/cm07_print/">http://www.ofcom.org.uk/research/cm/cmr07/cm07_print/</a>
<b>Ofcom review of public service broadcasting</b>	<a href="http://www.ofcom.org.uk/tv/psb_review/psb_2review/">http://www.ofcom.org.uk/tv/psb_review/psb_2review/</a>