

## **Questionnaire - Revision of the Communication from the Commission on the application of State aid rules to public service broadcasting**

### **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?**

There is no need for revision or change of the Communication at the moment. The Communication on the application of State aid rules to public service broadcasting (OJ 2001/C 320/4) lays down flexible principles which have made it possible to resolve a number of cases by taking due account of the specificity of the public service broadcasting sector. The Audiovisual Media Services Directive (OJ 2007/C 332/27) takes into account the emergence of new media and recalls the importance of the coexistence of public and private providers of audiovisual media services and the firm need for the public service broadcasting remit to continue to benefit from technological progress (Recital 9).

Public service broadcasters consider that there is no particular pressing need to revise the current Communication. Any updating which may take place needs to ensure stability for public service broadcasters while maintaining the flexibility of the current system, a system which makes it possible to offer legal solutions to organizations of various sizes and operating on various markets which have a remit to offer public service output responding to the needs and choices of their respective societies.

- 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.**

For public service broadcasters with mixed funding, advertising revenue represents generally on average 14% of their total budget. They have about 20% of the advertising market. This low average figure is explained in part by legal provisions which restrict their activities on that market. Moreover, public funding does not influence the revenue of private operators.

The share of the viewers of the Czech public television on the television market compared to private broadcasters is about 30 %. The share of financing the public television represents in the latest years on average 20 % income from the advertising and others commercial activities, the rest from the television fees paid by the viewers.

The market share (in terms of audience) of radio public channels in the Czech Republic represents 21,3 %. For Czech public radio with mixed funding, advertising and sponsorship revenues represent on average 6,6 % of its total budget.

Czech Radio is diversifying its activities in specific ways. For example, the multimedia **the Revealed** project :

Czech radio is the author of the special, non profit multimedia project which was running on public TV and Radio since 7th November 2005 until the 15th January 2006 as a “Slightly different reality show”, where the contestants were not human beings but gorillas.

The actors were endangered animal species, lowland gorillas. Observing them in the nature would be preferable, but technically unbearable, therefore the gorillas were observed in a new and modern pavilion of Prague Zoo, in the same way people are in human reality-shows. Sixteen TV cameras were placed around the pavilion and the multimedia broadcast started.

**The main goal of the project is to contribute to protect lowland gorillas in wild nature.**

"The Revealed" was realised on Czech radio website ([www.rozhlas.cz/revealed](http://www.rozhlas.cz/revealed)), on public Czech radio and television. The project raised considerable attention both in the Czech Republic and abroad.

**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?**

As European countries approach the mandated analogue switch-off date of 2015, the proliferation of new-entrant channels and the fragmentation of audiences will accelerate, and especially in those markets with a high reliance on free-to-air television. Online consumption of professional audiovisual output will expand dramatically, driven by aggregators like Google and iTunes, and to an increasing degree traditional media companies. The rise of peer-to-peer networks will accelerate the trend. Advertisers will move more and more of their budgets online. Online advertising is expected to exceed radio advertising expenditure in 2008 in major global markets. High-definition broadcast channels will increasingly become prevalent. PVR (personal video recorder) penetration will significantly expand and become the principal means of time-shifted, non-linear viewing.

New technology has resulted in a great increase in the means of distribution, as well as the content available on the market, and especially content generated by users. In the face of this evolution, users' habits have changed; there is a trend away from traditional broadcasting, which was conveyed towards users (pushed services) to online services which are requested by users themselves (pulled services). Today users have access to news and other information and entertainment through such non-traditional means as cable and satellite distribution, the Internet, digital transmissions and mobile telephones. These new means of distribution have segregated demand on the part of users. There is increased use of new technology by young people, which has resulted in an erosion of the audience of public broadcasters for that category of viewers. The audience of public service broadcasters is becoming older year by year.

Consequently, one of the major challenges for public service broadcasters is to maintain, or be more attractive to, the young audience. The strategy for broadcasters involves diversifying their programmes and improving their presence with regard to new forms of distribution. They are striving for online presence so that their output reaches a wider section of the population.

Given rapid technological developments, a need for flexible rules exists. Moreover, there is less risk of market distortion as a result of a decrease in the market power of public service broadcasters.

## **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<sup>1</sup>**

#### **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 Amsterdam Protocol stressed the particular nature of public service broadcasting, as well as its important role in ensuring democracy, pluralism, social cohesion and cultural and linguistic diversity, which are principles also reaffirmed in the Resolution of the Council and of Government representatives of 25 January 1999. Moreover, the very nature of the economic activity, as well as the manner in which broadcasting organizations are structured, requires different treatment.

Public service broadcasters constitute services of general economic interest within the meaning of Community Law. The application of competition rules should not make it difficult for this mission to be accomplished; nor should such organizations be treated less favourably than other organizations offering services of general economic interest. Consequently, the obligations laid down in the framework can be included if they take into account the specificity of public service broadcasting.

#### **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 Czech Republic does not hold the position for the updating of the Communication. However, in the case of its revision the suggestions for the updating could be the following.

Firstly, the provisions regarding the amount of the compensation could be included in the Communication on public service broadcasting, and this concerns in particular the rule that public service broadcasters must not exceed the costs borne by the undertaking in executing public service obligations, taking into account the relative revenue, including a reasonable profit.

Secondly, the rules for calculating costs are likely also to apply to public service broadcasters' activities.

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The present Broadcasting Communication takes due account of the specific characteristics of public service broadcasters. It acknowledges, for example, that costs which are entirely attributable to public service activities, while also benefiting commercial activities, need not be apportioned between these two kinds of activity and may be entirely allocated to public service (paragraph 56 of the Communication). Consequently, this rule should remain unchanged.

As regards the Framework requirement on separate accounting for each general interest service of a different kind (paragraph 19), it should be stressed that public service broadcasters normally have a unique public mission. Setting out the remit entrusted to public service broadcasters is usually undertaken by a single authority, whether central or regional, and the mission covers only broadcasting services or services of the same kind. Consequently, such a separation of accounts would not be justified with regard to public service broadcasters. Similarly, the 10% rule regarding the constitution of reserves is inappropriate for public service broadcasters.

## **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 Act No. 483/1991 Coll. on the Czech Television provides the following.

#### **Article 2**

(1) Czech Television shall provide a service to the public by creating and distributing television channels or other multimedia content and accessory services on the whole territory of the Czech Republic (hereinafter referred to as "public service remit in the field of television broadcasting").

(2) The main public service tasks in the field of television broadcasting include in particular:

a) providing objective, verified and diverse information, balanced as a whole, to enable free formation of opinion;

b) fostering general legal awareness among the population of the Czech Republic;

c) creating and distributing television channels and providing a balanced offer of programmes that is targeted at all groups of the population and takes into account their freedom of religious faith and conviction as well as culture, ethnic or national origin, national identity, social background, age and sex, to ensure that the aforementioned channels and programmes reflect diversity of opinion as well as of political, religious, philosophical and artistic trends, and thus enhance mutual understanding and tolerance and foster the cohesion of a pluralistic society;

d) developing the cultural identity of people living in the Czech Republic, including the members of national or ethnic minorities;

e) producing and broadcasting programmes, especially news, current affairs, documentaries, art programmes, drama, sports, entertainment and educational programmes as well as programmes for children and youth.

The Act No. 484/1991 Coll. on the Czech Radio provides:

## § 2

(1) The Czech Radio shall provide a public service through creation and transmission of radio programmes, or through other multi-media broadcasting and additional services in the whole territory of the Czech Republic and abroad (hereinafter referred to as the “Public service in the field of radio broadcasting”).

(2) The main tasks of the Public service in the field of radio broadcasting shall include in particular:

a) provision of objective, verified, generally balanced and comprehensive information for free creation of opinions,

b) contribution to legal knowledge of the population in the Czech Republic,

c) creation and transmission of broadcasting and provision of a balanced offer of programmes for all population groups with regard to the freedom of their religious belief and conviction, culture, ethnic or national origin, national identity, social origin, age or sex so that the broadcasting and programmes reflect the variety of opinions and political, religious, philosophical and artistic styles, namely with the aim to strengthen the mutual understanding and tolerance and to promote cohesion of the pluralist society,

d) development of cultural identity of the population of the Czech Republic including members of national or ethnic minorities,

e) production and broadcasting of news, publicistic, documentary, artistic, dramatic, sport, entertaining and educational programmes and programmes for children and young people above all.

## § 3

(1) The Czech Radio fulfils the Public service in the field of radio broadcasting above all by the following:

a) it operates analogue radio broadcasting with use of a part of the frequency spectrum enabling to cover the territory of the Czech Republic with three nationwide radio programmes in FM and with radio programmes of regional studios broadcasted in FM, namely through terrestrial broadcasting radio devices or through other technical devices; the Czech Radio may also broadcast in AM,

b) it operates the terrestrial digital radio broadcasting through transmission of 3 nationwide

radio programmes specified in point a), through the public service multiplex; 1a) in addition to these radio programmes the Czech Radio is entitled to transmit other radio programmes, other multi-media content and additional services through the public service multiplex; the Czech Radio may also transmit radio programmes, other multi-media content and additional services digitally through satellites and cable networks,

c) it operates the terrestrial digital radio broadcasting so that it ensures fulfilment of tasks of the Public service in the field of radio broadcasting, which corresponds to the level of development of broadcasting technologies and services. At the same time it makes use of the part of the frequency spectrum enabling to cover the Czech Republic territory with radio programmes and other content in the band reserved according to the national frequency table for terrestrial digital radio broadcasting, namely above all in the third television band,

d) it creates the network of its own reporters,

e) it creates archive funds, maintains them and participates in their use as a part of the national cultural wealth,

f) it broadcasts works from domestic and foreign production,

g) it provides a twenty-four-hour programme service at least within one programme broadcasting, including current news reports,

h) it is active in development of new broadcasting technologies and services.

(2) The Czech Radio operates the radio broadcasting for foreign countries on one radio programme in the short wave band through radio broadcasting devices on land or through other technical devices. Broadcasting for foreign countries shall comply with the conditions of § 2 (2) (a) and (c) and shall assist in promoting the good position of the Czech Republic.

(3) The state authority that administers the frequency spectrum according to a special legal regulation, 1b) shall reserve frequencies for the Czech Radio, after the prior consent granted by the Council for Radio and TV Broadcasting, enabling the operation of the analogue radio broadcasting in the scope stipulated in paragraph 1 (a) and in paragraph 2. The frequencies in AM shall only be reserved if the Czech Radio requests so.

(4) For the purposes of this Act, the nationwide radio programme shall mean a radio programme the broadcasting of which may be received at least by 95 % of the Czech Republic population counted according to the data resulting from the last census. 1c)

**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?)?**

Laws or regulations which set out the mission of a broadcasting organization can thus adopt a broad definition of the public service remit, and particularly since these acts must respect the organization's editorial independence. In accordance with the different national legal traditions, it is for each Member State to define the general and specific objectives, as well as the means available to public service broadcasting organizations to carry out their mission.

Czech TV and Radio have considerable latitude for defining the scope of the public service broadcasting remit.

The creation of a positive indicative list increases legal security for the points listed but may have hardly any general impact, given the increased pace of technological evolution and innovation.

Member States are free to adopt a negative list, corresponding to the commercial activities. This list can be updated if the Commission or the Courts consider that a particular type of service is not covered by the public service remit in accordance with the concept of manifest error. Such a list would include purely commercial activities, such as advertising, sponsorship, merchandising and e-shopping.

**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?**

Services or activities of Czech Television and Czech Radio other than television and radio programmes in the traditional sense of the term must be part of the public service remit when they satisfy the democratic, social and cultural needs of society, as well as the necessity of preserving media pluralism. Consequently, there is no reason to apply additional criteria to activities other than television or radio programmes. It should be stressed that the means of distribution are not relevant for classifying a public service activity; it is sufficient that the content responds to the democratic, social and cultural needs of society.

Public service broadcasting organizations will need to adapt to the new technological environment and to citizens' new habits and requirements. In the Resolution of 25 January 1999 concerning public service broadcasting (OJ 1999 C30/1) the European Council and the Government representatives reaffirmed that "the fulfilment of the public service broadcasting mission must continue to benefit from technological progress" (point 3). Moreover, they noted that public service broadcasting "has an important role in bringing to the public the benefits of the new audiovisual and information services and the new technologies". Point 6 states: "The ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age."

**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 wonder about the legal basis of such an initiative by the Commission. It should be recalled that, in accordance with consistent case-law, Member States have broad discretionary powers to define what they regard as services of general economic interest (hereafter SGEI) and that the definition of these services by a Member State cannot be called into question by the Commission except in case of a manifest error.

The public service broadcasting remit comprises objectives linked to the democratic and social needs of society, and to culture and education, and for these the European Community has no competence. The European Union's action can only support the action of the Member States, and cannot replace it. Consequently, the Commission needs to have even more respect for the principle of subsidiarity with regard to the definition of the public service broadcasting remit.

It should also be recalled that, in accordance with both the letter and the spirit of the Amsterdam Protocol, it is the Member States which *confer, define* and *organize* the public service broadcasting remit. In its Resolution of 25 January 1999 (OJ 1999 C30/1) the Council of the European Union affirmed the Member States' competence with respect to the remit and funding of public service broadcasting. It thereby recognized that, from one State to another, public service broadcasting can be conferred and defined differently.

Firstly, it is for the Member States to *entrust* an organization with the task of fulfilling a public service broadcasting remit, in accordance with the methods and procedures which respect the legal traditions and the institutional organization of the country in question. The form of the legal act and the choice of procedure is for the country to decide. There is also the principle of Member States' procedural and institutional autonomy, and all the more so in domains or sectors which do not fall within the competence of the European Communities. Consequently, it is not appropriate to incorporate into a Commission Communication principles regarding the manner in which a public service broadcasting remit is conferred (i.e. *ex ante* evaluation).

Secondly, the *definition* of the public service remit is a matter for the Member States. Under the Amsterdam Protocol, duly taken into account by the current Communication on broadcasting services, it is for the Member States to determine the objectives and characteristics of the public service remit. The Amsterdam Protocol refers to the public service remit (in the singular) which is understood as a totality of programmes and services which complement each other so that the objectives of the remit are attained. It is thus for the Member States, taking into account their own needs, to identify the objectives and to emphasize any particular component of the remit or the means for achieving the objectives. Thus a distinct evaluation or procedure for new broadcasting services would not be in keeping with the objective of guaranteeing the public service remit (in the singular).

Beyond issues of competence, a prior evaluation of each new service would not seem necessary, for several reasons :

Firstly, the remit comprises a single, indissociable unit. Evaluating each service taken separately, in accordance with criteria which have no link to the remit itself, would be liable to atomize the remit and reduce the ability to achieve the intended objectives. Such separate evaluations would be especially harmful for the coherence of the public service remit if the evaluation criteria referred to the existing commercial offer or the market impact.

Secondly, public service broadcasting organizations enjoy editorial independence, which is indispensable in a democratic society. Member States must, in particular, respect this independence in the context of the definition, conception and production of programmes. It is therefore important to guarantee independence not only against political pressure but also against market forces. The evaluation of each new service, even if limited to new media activities, would in effect introduce a certain level of control over the organization's editorial

policy. Such prior examination would be particularly harmful to editorial independence when it included precise criteria.

Thirdly, competition rules, and especially those regarding State aid, need to respect the principle of technological neutrality. There is no reason to accord different treatment to new media activities compared to traditional programmes when both fulfil the same democratic, social and cultural needs of society. The latter should be able to adapt to the changing needs of society and the requirements of users, and particularly young people.

Fourthly, such a procedure would be in contradiction with the very nature of these services, the nature of competition and the dynamics of the new media market.

It should also be recalled that public service broadcasters create innovative products. The new regulatory framework for electronic communications services recalls the principle that new emerging markets must be subject not to more regulation, but to less. Moreover, the new Audiovisual Media Services Directive allows for more flexibility and foresees fewer regulatory constraints or prior control mechanisms for new, non-linear services.

Finally, the Commission's decision-making practice regarding individual cases cannot be generalized vis-à-vis all public service broadcasters. The undertakings are individual and can in no case constitute the basis for drawing up general principles applicable to other States and to every type of aid.

**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?**

There is no need for it, it is for the Member States, as part of their competence for conferring, defining and organizing the public service broadcasting remit, to assess whether such *ex ante* evaluation should be introduced and, if so, to define the scope of such evaluation.

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

As it has been said it is up to the Member States to regulate this matter.

**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)?**

See above.

**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?**

As already indicated in point 2.2.4, it is for Member States to choose between a clear definition of new media services accompanied by *ex post* monitoring on the one hand and, on the other, an *ex ante* evaluation procedure. *Ex ante* evaluation can only be *one* possible way

among others for Member States to clarify the public service remit, and so far only a few Member States have made use of it. That said, we are in favour of the introduction of national procedures to improve good governance, transparency and *ex post* monitoring of public service activities in the general interests of each society.

### **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?**

The scope of the public service broadcasting is provided for in the law. The public consultation thus takes place in the legislative procedure. The public service broadcaster is in fulfilling his mission supervised by the authorities (The Czech Television Board and The Czech Radio Board), eventually by the regulatory bodies.

**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 Czech Republic, public service broadcasters – Czech Television and Czech Radio – are established by specific laws. The Czech Radio Board and The Czech Television Board are authorities through which the right of the general public to review the activities of the Czech Radio and of the Czech Television are exercised. The Boards members are elected and removed by the Chamber of Deputies of the Parliament of the Czech Republic so that important regional, political, social and cultural opinion styles are represented therein. The alleged non fulfillments of the public service can be addressed to the Boards.

The content of the public service broadcasting is at the same time supervised by the regulatory body, The Radio and Television Broadcasting Council. The position of this authority as well as the obligations of the broadcasters are specified by the Act on Radio and Television Broadcasting.

The transmission of the Czech Television and Czech Radio broadcasting is regulated by the Czech telecommunication office, the competence of which is laid down by the Act on Electronic Communications.

**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 are in our opinion sufficient. The present Communication specifies that the definition of the public service remit should be as precise as possible (paragraph 37). The Council of Europe has also emphasized the need to take reconcile the need for

clarity in the act which accords the public service remit with the editorial independence and programme autonomy of the broadcasting organization.

Attribution of the public service remit generally takes place on two or three levels. All Member States define the public service remit in a law, in the formal sense of the term, or in an equivalent act. In most Member States the text is accompanied by such other instruments as a list of tasks (*cahier des charges*), guidelines or management contracts, which can more easily be adapted and which allow a more detailed definition of the remit. Finally, in some States other complementary acts set out in detail how the remit should be implemented. There is thus a great variety in the systems whereby the public service remit is attributed.

The public service remit is defined in the Czech Television and in the Czech Radio laws. The law is accompanied by The Czech Radio Code and by The Czech Television Code with specification on how remits are fulfilled and guidelines which allow a more detailed definition of the remit.

Consequently, the objectives of the public service broadcasting remit are clearly defined in the act of a public authority, and specified in The Czech Radio Code and in The Czech Television Code, no supplementary attribution 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?**

Firstly, it should be emphasized that the public service remit must serve the general interest: it should fulfil on a continual basis the specific needs of society, and in particular the democratic, social and cultural needs of each society, as well as the necessity to preserve media pluralism. Uninterrupted provision of a service of quality corresponding to the needs of each Member State requires permanent verification of the quality of the services offered, as well as an assessment of whether the service is in keeping with the needs of society.

Secondly, the specificity of public service broadcasting should be recalled, as should, in particular, the need for a Member State to ensure editorial, institutional and financial independence for public service broadcasters. The importance of independence for public service broadcasters has been stressed by the Council of Europe on a number of occasions. When the remit accorded to broadcasting organizations clearly defines the objectives sought, monitoring may be carried out *ex post* by independent bodies.

Lastly, the principle of Member States' procedural autonomy should be recalled. The choice of the form of independent institutions, as well as the sanction mechanisms, needs to respect the legal traditions of the Member States and ensure consistency vis-à-vis their internal organization. Introducing an independent external body with broad monitoring powers entails risks for the editorial and institutional independence of broadcasting organizations. An alternative would be for Member States to allow for the participation of civil society or independent experts in internal monitoring bodies. With regard to methods for resolving disputes, there exist effective mechanisms corresponding to the legal traditions and systems of each country. Such disputes may be the subject of court action, may be examined by

administrative authorities or may simply be settled by mediation. Given the objective to be attained, sanctions do not necessarily increase the effectiveness of monitoring public service broadcasters.

**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?**

The public service remit is conferred on broadcasters by means of a public authority act. During the legislative process the parties concerned, as well as the general public, have the possibility of expressing their views on the content of the public service. The procedure for adopting these laws is relatively long, which allows a wide public to be consulted.

The public service remit is aimed at serving the general interest (the public interest). The views of citizens and their representatives help in defining their needs, at the national or regional level and also within representative groups of cultural minorities or different sections of society. Being part of the audiovisual landscape, private operators also need to have the possibility of expressing their views in the same way as the public.

However, as regards broadcasting, taking into account the private interests of competitors must not affect its nature as a general interest service. Although the views of private operators need to be heard, taking account of their private interests should not compromise the public service remit. Concerning procedural matters, national legislation will need to ensure a balance between the independence of public service and the protection of the competitors' interests. Given that private operators do not have a particular right regarding the definition of public service, as well as the fact that Community Law has no direct impact in this connection, Member States must remain free to define the procedural rules regarding participation by third parties, the admissibility of appeals and the treatment of complaints.

**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?**

For the time being, the Czech Television and Czech Radio do not provide any pay services.

**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?**

The relevant question is whether the services in question fulfil the democratic, social and cultural needs of each society, as well as the need to preserve media pluralism. The decisive criterion, therefore, is content and the contribution of those services to society.

The means of funding, i.e. whether or not it is a pay service, should not be a criterion for determining the public service character.

**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?**

Firstly, the services which are part of the public remit cannot be limited to those which are not available on the market. In other words, the extent of the public service remit cannot depend on the extent of the offer of private operators. This principle should be applied to all new media, regardless of the technology used or the means of funding.

Furthermore, the fact that there exists on the market a similar service does not necessarily imply that the market offers optimal quality as well as an optimal level of diversity. The quality of the public service offer lies in the fact that it is made up of programmes and other services which satisfy the needs of society as a whole, taken as a community or as the different groups which comprise it. The needs of the community are satisfied by attractive programmes or services which satisfy viewers' needs. Moreover, the public service remit entails satisfying specific objectives and the interests of groups of minorities. This offer contributes to increasing the quantity of certain merit goods which the market cannot provide in sufficient quantity and with sufficient quality. Programmes with cultural and educational objectives and with a social or democratic character are part of this. The positive effects for society go far beyond the costs in economic terms. They disseminate values such as ethics and morals, respect and tolerance, democracy and media pluralism.

However, this does not mean that the public service must be confined to programmes or services which the market cannot provide. The objective of the remit is to satisfy a range of different needs within society, which justifies the offer of diversified services to the public.

Finally, it should not be forgotten that the offer of public service broadcasters contributes to increasing the offer and, more importantly, to increasing the quality and the diversity of the market. Moreover, public service broadcasters have often been forerunners in terms of new services and new technology. Restricting the offer of public service broadcasters would reduce dynamic efficiency. The positive effects are more important than any negative effects on the market. Such a criterion would consequently run counter to the objectives of effective competition on the one hand and, on the other, diversity of opinions in the media.

**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.**

It could be concluded that "pay services" form part of the public service broadcasting remit when they fulfil the democratic, social and cultural needs of each society, as well as the need to preserve media pluralism (general interest) and when any interested citizen or group of citizens may receive them, without discrimination and against adequate remuneration.

**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?**

Pay services are part of the public service remit when they respond to the needs of society or groups of citizens. Consequently, the offer of such services should not be made subject to particular conditions. Moreover, the lack of experience in this area suggests that it would be premature to introduce particular criteria. Member States and broadcasters must retain latitude

for assessing the extent to which there should be recourse to individual payment as a means of funding.

## **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 Act on the Czech Television provides for:

#### **Article 11**

(1) Under conditions stipulated by legal regulations Czech Television may pursue commercial activities related to its objects, provided that the aforementioned activities do not interfere with the fulfilment of its tasks (Article 2 a 3).

(2) Czech Television shall use its financial resources to fulfil tasks under Article 2 and 3.

#### **Article 11a**

##### **Separate accounts**

(1) Czech Television shall keep accounts according to a special legal regulation.<sup>4)</sup>

(2) In its organisational structure Czech Television shall separate the activities which consist in providing public service in the field of television broadcasting (Article 2 and 3) from business activities (Article 11 paragraph 1). Czech Television is obligated to keep accounts for each of the aforementioned groups of activities in a manner clearly distinguishing the costs and revenues connected with providing public service in the field of television broadcasting from costs and revenues connected with business activities. Czech Television shall define the methods for distinguishing costs and revenues and for the linking thereof to activities under Article 2 and 3 or under Article 11 paragraph 1 by an internal regulation (hereinafter referred to as "Accounting Standards of Czech Television"), which must comply with the requirements of the European Communities law.<sup>6)</sup>

(3) Czech Television shall preserve data on the fulfilment of the duty under paragraph 2 for a period of time stipulated by the European Communities law<sup>6)</sup> and submit the aforementioned data on request to the Office for the Protection of Competition<sup>9)</sup> together with the Accounting Standards of Czech Television and other materials required for reviewing the fulfilment of the duty under paragraph 2.

The commercial activities of the Czech Radio constitute only an inconsiderable part of the services (2,7 % of the total year income).

**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?**

Firstly, it is important to note the importance of separate accounting for public service activities on the one hand and, on the other, commercial activities. Transparency is one of the objectives of public service broadcasters. Structural or functional separation would result in the same objective being achieved, but with additional costs which would be out of proportion to the objectives to be attained. That is one reason why the Directive 2006/111/EC on financial transparency lays down only separate accounting and not structural or functional separation. Although such a measure may be an appropriate and adequate solution for the very large structures, for small broadcasters in particular it would entail significant costs. Consequently, it would not be appropriate to include in the Communication an obligation for functional or structural separation.

The creation of subsidiaries or other separate structures entails significant administrative costs. Another result is a loss in terms of organization and coordination of the various services, and especially for small broadcasters. Structural separation entails losses in terms of production efficiency, since it is bound to lead to some increase in costs for personnel or infrastructure. Finally, in media markets synergy and the transmission of knowledge are of great importance. A functional or structural separation would increase the relevant costs and could cause a loss in terms of quality.

**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?**

In the Czech Republic there are no specific needs for improvement.

**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 Commission's Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings makes transparent, through the obligation to maintain separate accounts, the financial and organizational structure of public undertakings which have a remit to operate a service of general economic interest for which they receive compensation. Maintaining separate accounts permits effective *ex post* control to ensure that there is no over-compensation of costs for the SGEI, or cross-subsidization to other commercial activities carried out by the undertaking. The Directive lays down very clear obligations on public service broadcasters. Application thereof being sufficient to guarantee financial transparency, there is no need for further clarification of the obligations for the public service broadcasting sector.

**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?**

The Broadcasting Communication can clarify that the amount of the compensation includes what is necessary to cover the totality of costs arising from carrying out the public service broadcasting remit, taking into account related income, as well as a reasonable profit for carrying out the remit.

**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 current rules in the 2001 Communication are fairly flexible and allow for planning over several years. It would not be appropriate to include a restriction on the amount of the reserves.

**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?**

By way of introduction it should be recalled that proper management of an undertaking includes a guarantee of sufficient resources to ensure continuity in its activities. That is particularly important in the case of undertakings with a public service remit, such as public service broadcasters. Moreover, the principle that public service broadcasters must fulfil their remit with complete independence also includes financial independence.

More specifically, public service broadcasters have to deal with fluctuations in revenue and costs, and particularly by building up reserves. Such reserves serve firstly to ensure the continuation of the public service activities and to cover operational costs. Broadcasting organizations must take into account the high level of production costs and the cost of acquiring programmes, and such payments generally have to be made a long time before the broadcast in question. Broadcasters need to anticipate inflation, as well as fluctuations in the level of the licence fee revenue actually received. For operators funded by advertising revenue, fluctuations in income may be even more significant, which requires a sufficient level of reserves.

Secondly, the reserves need to anticipate fluctuations in terms of the costs incurred for fulfilling the remit. These fluctuations may be foreseeable, as in the case of costs relating to restructuring the undertaking or concerning the purchase of sports transmission rights. As in the case of programmes, the acquisition of sports rights is carried out on the basis of payments staggered over two or three consecutive years; in this case there are fairly significant fluctuations. In contrast, such fluctuations may be unforeseeable, as in the case of costs related to covering an exceptional event (news concerning a natural disaster, war or a domestic event) or, again, in an urgent situation regarding the infrastructure used. Finally, the

level of reserves needs to take account of the need to adapt to technological developments and, above all, the need to improve the quality of programmes and other services offered.

As a general rule, for broadcasting organizations fluctuations in terms of charges and revenue are well above 10% of the total budget. This does not exclude the possibility that in some years fluctuations remain below this limit. Nonetheless, the high level of fluctuation shows that an arbitrary limit of 10% of the budget would be insufficient for public service broadcasters.

Finally, public service broadcasters must be able to respond in real time to the changing needs of society. Restrictions on reserves, without taking into account the specific needs of the broadcaster and its means of funding, will endanger their activities and, therefore, put at risk their public service remit, as well as their financial independence.

**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)?**

Given the need to deal with fluctuations in terms of costs and revenue, the surpluses represent over-compensation only if they endure and remain at a high level for a relatively long period. Thus when surpluses continue for a long time and cannot be allocated to precise tasks or to deal with unforeseen exceptional events, the needs of the broadcaster should be reassessed for the next period in which funds are to be allocated.

**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?**

As mentioned in the response to question 2.6.3, each undertaking must be able to create reserves to guarantee its future activity. The absence of such reserves is regarded as imprudent, since the organization would face a lack of resources at a time when it most needs them. To guarantee its activities for the future and improve its offer, the possibility of accumulating a certain level of reserves increases the undertaking's motivation to make efficiency gains, and particularly in the form of cost reductions.

As regards encouragement to make gains in efficiency, any revised Communication would need to be fairly flexible, to allow public service broadcasters to operate on the market in a similar way and with the same motivation to make gains in efficiency and to maximize revenue as in the case of private broadcasters.

**What are the mechanisms in place in your country which could be referred to as a good example?**

No references.

**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?**

As mentioned in the response to question 2.6.3, each undertaking must be able to set aside reserves for its future activities. To that end, public service broadcasters must be able to receive a margin corresponding to at least the normal remuneration of own funds.

There is no reason for public service broadcasters to be treated differently. Moreover, it should be stressed that this remuneration of own capital is regarded as a cost, and this cost serves to take account of the level of risk associated with the activity. The fact that it is impossible to keep surpluses reduces to a considerable extent the incentive to achieve efficiency gains. Finally, "profits" are a resource which make it possible to cover the risks of the activity. Taking account of the risk is made possible by the option of having a "profit margin" at least equivalent to the rate of the remuneration of own capital. In this connection, reserves created thanks to surpluses make it possible to face fluctuations in revenue and costs (see the response to question 2.6.5).

The foregoing is notwithstanding the fact that, in most cases, broadcasting organizations with a public service remit do not have as an objective the realization of economic profits (profits which go beyond normal return for own funds).

There should, however, be clarification of the rules for use of those resources. They should be used to finance public service activities and commercial exploitation of the remit. The objective of commercial activities is also to reduce the cost of public service, by ensuring, in most countries, that revenue is derived from the commercial exploitation of public service activities. Since public service revenue and the commercial exploitation thereof are subtracted from the public service costs, the funds at the disposal of the broadcaster can also be invested in the commercial exploitation of public service activities, as well as to begin a commercial activity, and particularly when all of the latter's revenue is used to alleviate the cost of the public service. In the case of commercial activities, however, investment and other transactions need to respect the private investor principle.

It need hardly be stressed that accounts must clearly indicate the amount of surpluses and the use thereof for activities related to the commercial exploitation of the public service, as well as use for commercial services. This transparency makes it possible for the use of funds to be traced, and thus permits better monitoring.

**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?**

The existing mechanisms are regarded as sufficient.

**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?**

Broadcasting organizations with a public service remit are subject to the scope of all (Community and national) competition law. Consequently, they have an obligation to respect competition rules.

The application of national and Community anti-trust legislation is an effective, sufficient mechanism for controlling possible anti-competitive behaviour on the part of public service broadcasters. All Member States without exception have a competition authority applying national and Community Law, and in particular Article 82 of the EC Treaty. On the substantive issue, national laws against cartels are fully compatible with Community Law and, in certain cases even go beyond it, and particularly with regard to abuse of a dominant position. Antitrust procedures guarantee that competitors and third parties have a high level of participation in transparency. Finally, the possibility of complaining to the Commission in case of breaches of anti-trust rules is an effective, appropriate instrument to prevent such anti-competitive conduct. Consequently, it is not appropriate to envisage additional obligations regarding the conduct of public service broadcasters on the market.

**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?**

Firstly, given the two-sided nature of the advertising market it would be difficult to transpose to the broadcasting and advertising sector rules regarding costs such as the AKZO or standalone costs. Moreover, in view of the nature of control of State aid, a more flexible approach is needed regarding means of detecting price-undercutting, by using, where necessary, a number of other methods and indicators to determine whether the results of such separate analysis are conclusive in demonstrating price-undercutting. The revenue maximization test seems to offer sufficient flexibility and makes it possible to detect conduct which does not conform to the market. Moreover, the Communication can give examples of other methods which can be used by the Commission.

The most appropriate method is to ask whether the conduct of a public service broadcaster is contrary to the requirement of maximizing revenue.

**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.**

No reference of such a method in the Czech Republic.

**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?**

Sport has important social, educational and cultural functions (see the declaration on sport in the Amsterdam Treaty, the declaration in the Nice Treaty and the Lisbon Treaty). The educational value of sport has been highlighted by the Decision 291/2003 of the European Parliament and the Council. The White Paper on sport of 11 July 2007 (COM(2007)391 final) stresses the role played by sport in society in improving public health, in education and training, and thus in helping to ensure active citizens and to strengthen the prevention and repression of racism and violence. Sport also plays an important role in integrating disadvantaged persons, and particularly young people.

Social cohesion and access to information are also reasons why the Television without Frontiers Directive guarantees broadcasting in the clear of certain major sports events. The European Parliament's Resolution of 29 March 2007 on the future of professional football in Europe (OJ 2008 C27 E/232) states that "football broadcasts should be accessible to the widest possible range of people including through free-to-air channels" (point 60). The Parliament is concerned that "the televised broadcasting of sports competitions is increasingly taking place on encrypted and pay-TV channels, and that such competitions are thus becoming inaccessible to a number of consumers" (point 64). For public service broadcasting, a restriction on the time for broadcasting sports events, as well as the financial means for such events, would run counter to the political will to make sport accessible to the widest European public.

Organizations with a public service broadcasting remit play an important role in achieving the objectives relating to sports policy. Independently of Community policy, and well before that policy was enshrined in Community texts, Member States regarded the transmission of sports events as an important component of the public service broadcasting remit, and precisely because of sport's social, cultural and educational role.

The market for the acquisition of sports rights has become very competitive. Broadcasting sports events is part of the commercial strategy of pay-TV, and the rights for acquiring sports events, and particularly football and Formula One motor-racing, have increased considerably. For example, the fee to be paid for the 2008 European Football Championship is six times higher than the figure for the 2000 event. Very often, public service broadcasters do not have the financial means to match offers made by private purchasers and have had to give up the prospect of buying such rights. Public funding and transmission in the clear are two factors which make it difficult to fund the purchase of sports rights. This explains why some sports events are broadcast by pay channels, thereby excluding viewers who are interested but cannot pay the access rights.

Consequently, the public or mixed funding of public service broadcasters does not create an advantage vis-à-vis other operators (see the response to question 2.2.4). On the contrary, the budgetary constraints of public service broadcasters means, together with the rigidity inherent in public funding, that public service broadcasters are often unable to accept the increase in prices and the fluctuation. Thus it is improbable that public service broadcasters could, through their very presence on the market, restrict competition. The drafting of abstract rules

in the context of State aid, without taking into account the economic context relating to the acquisition of such rights, would not be justified.

## **2.8. Other issues**

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

Smaller Member States encounter difficulties of their own, such as under-compensation and the lack of funds for major technological projects, and this complicates planning of their activities over several years. Under-compensation clearly harms the quality of the service. Whereas buffer capital of a certain level is useful for public service broadcasters who are sufficiently well funded, the amount needs to be higher in the case of smaller Member States, so that they can deal with fluctuations in their income and in public funding. Moreover, the accumulation of reserves would make it possible to increase investment accorded for the production of new diversified programming, as well as investment in infrastructure, which would have the effect of increasing the quality of the service.

Funding difficulties also exist for organizations which have mixed funding. The advertising market is small, and this source of funding often fails to compensate for the lack of financial means.

The Czech Television for example gives the income from advertising to state funds to support the designated activities connected with the transition to digital broadcasting or the support of the national cinematographic works.

It should be recalled that planning over several years and financial stability are *sine qua non* conditions for the existence of an independent public service which is able to propose services of quality and to contribute to fulfilling the democratic and social needs of society.

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

Traditional broadcasting activities are characterized by high fixed costs (programming, the purchase of transmission rights, infrastructure), and this implies the presence of economies of scale and economies of scope. Although the marginal cost of broadcasting may be very low, the average cost of production is very high. Consequently, in small countries - defined in terms of size of the population and in terms of the State's ability to contribute - the cost per inhabitant is **rather** high compared to large countries. It follows that there is a risk of underfunding due to the limited number of contributors or, in certain cases, the relative inability of the State to contribute.

More specifically, for certain programmes the cost is very high in comparison with the market; children's and cultural programmes are examples. For instance, the production of cultural output (drama, comedy, operas, documentaries) entails high fixed costs and is labour-intensive. Moreover, the production costs of local content are far higher than the acquisition costs of imported content. The result is a fall in local production and a loss of cultural diversity and identity. Finally, broadcasters in small countries suffer the effects of increases in sports rights acquisition costs. This leads to a low level of coverage of such events.

The high fixed costs for broadcasting also have an impact on revenue derived from the advertising market. As a result, there is more fluctuation in advertising revenue, which results in greater difficulties in planning over several years.

Consequently, the application of State aid rules has to take account of these difficulties. For instance, there is a need for greater flexibility regarding surpluses and the level of reserve funds set up, and it is important not to impose additional regulatory costs, i.e. costs related to special procedures for the attribution of the public service. Finally, the rules concerning market conduct would introduce a disproportionate additional cost; constraints regarding costs and funding provide sufficient encouragement for organizations to pursue the objective of maximizing profits in commercial activities.

### **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 introduction of specific requirements for new media services, and particularly in the form of *ex ante* evaluation, would reduce innovation, choice and the availability of audiovisual media services (see the response to question 2.2.4). The quality of the overall public service offer would be reduced. Excessive rules which limit to a fixed percentage the amount of surpluses carried over, as well as the sum freely available to public service organizations, would harm the latter's capacity to plan their activities, and this could have harmful effects on the quality of the offer and thus on media pluralism (see the responses to questions 2.6.2, 2.6.4, 2.6.5 and 2.6.6). The monitoring of State aid and transparency obligations entail regulatory costs which public service broadcasters assume in the interests of free competition. However, additional constraints regarding market conduct or concerning the acquisition of sports rights or, again, regarding possible funding means would create an unjustified disadvantage for public broadcasters and would thus impede them in fulfilling their public service remit.

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

As already mentioned, *ex ante* evaluation for each new service or, again, the requirement of a functional separation between the public service activities would result in an increase in costs.

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

The current Communication has proved itself an appropriate instrument for the public broadcasting sector. Possible modifications would be liable to increase administrative costs, and to create a disadvantage for public service broadcasters, and particularly in the field of new media and in the new media environment.

**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.**

Overall, the modifications envisaged could have negative effects, and particularly in terms of costs, quality and media diversity, and these effects would outweigh certain potential clarification of the current rules.