

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

QUESTIONNAIRE

1. GENERAL

1.1. A number of significant legal developments have taken place in the public broadcasting area since 2001, namely the adoption of the Audiovisual Media Services Directive, the adoption of the Decision and Framework on compensation payments as well as Commission decision-making practice. Do you think that the Broadcasting Communication should be up-dated in light of these developments? Alternatively, do you consider that these developments do not justify the adoption of a new text?

For reasons of predictability and legal certainty, the Broadcasting Framework should reflect the latest legal and technical developments in the field of public service broadcasting. On this basis, we welcome an update of the Framework.

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.

The main players in the audiovisual media sector in Norway

The Norwegian Broadcasting Corporation (the NRK) is a private limited liability company in which the state holds all the shares. The NRK has a right to broadcast granted in the Norwegian Broadcasting Act (a licence is required for all other broadcasters). The company is funded by licence fee, and is subject to extensive public service obligations as reflected in the company statutes. On television, the NRK currently offers three channels (NRK1, NRK2 and NRKSuper/NRK3).

TV 2 is the sole channel licensed to broadcast commercial public service television on the analogue terrestrial network. TV 2 is funded by advertising and subject to public service requirements i.a. on content. The limited company TV 2 offers four channels that are available on DTH, cable and DTT (TV 2 Nyhetskanalen, TV 2 Zebra, TV 2 Filmkanalen, TV 2 Sport) in addition to the main channel TV 2.

TVNorge is the second largest commercial channel. TVNorge is owned by the SBS Group and funded by advertising. In the analogue universe, TVNorge cooperates with local television channels to expand its distribution range. The SBS Group has also launched a new commercial channel, FEM, available on cable, DTT and DTH.

The MTG-owned broadcaster TV3 is the third largest commercial TV channel funded by advertising. TV3 is part of the London-based MTG and thus subject to British jurisdiction. MTG operates a number of channels directed at the Norwegian and Nordic markets.

The current competitive situation

As the only broadcasters with a right to broadcast in the analogue terrestrial network, the NRK and TV 2 have been able to maintain a relatively stable dominant position in the TV-market. This is about to change, as the analogue terrestrial network is being replaced by a digital terrestrial network, enabling more channels nationwide coverage. Hence the NRK and TV 2 will be exposed to stronger competition from other domestic as well as foreign channels. A gradual shift from advertising funding to heavier reliance on pay-tv revenues is expected.

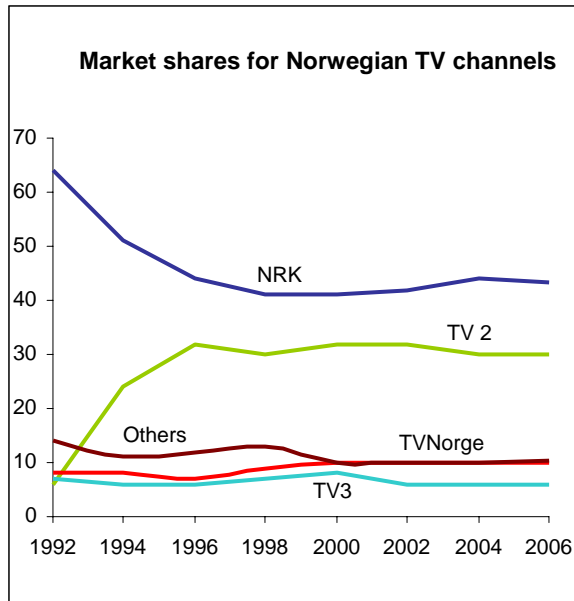
Further, the digitisation process is expected to lead to stronger platform-competition. A number of the broadcasters are owned by major companies that also controls distribution networks. Vertical integration may represent a competitive challenge to broadcasters that are only involved in content production.

In addition, the gradual development of the Internet as an important platform for audiovisual media-services implies that the public service broadcasters will be exposed to competition also from new market players previously not present in the market for audiovisual services.

Digital television in Norway

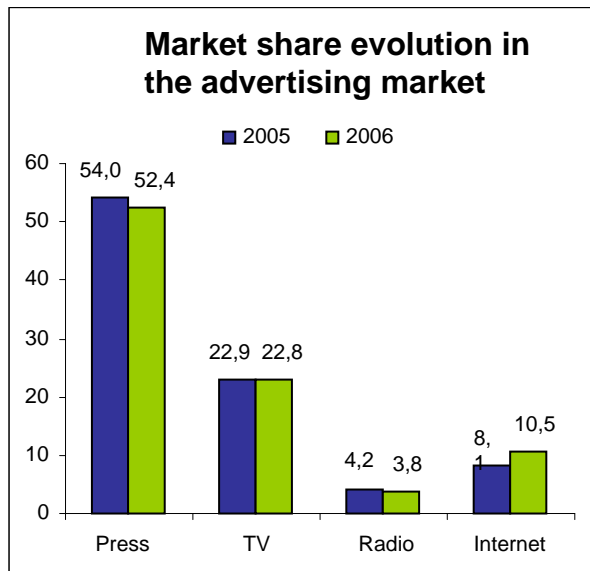
Satellite television is digital and cable television is partially digitalised. A digital terrestrial television network was launched in September 2007. Switchover will take place on a region-by-region basis, culminating in the closing of the last region by 2010. The roll-out of the digital terrestrial network is market-driven. The business plan of the licence-holder is predominantly pay-tv, probably with the NRK-service the only remaining FTA-channels after switchover. With digitisation offering nationwide coverage to more channels, a number of new domestic channels are being launched. Existing non-domestic services are simultaneously being offered the opportunity of improved coverage.

Norwegian TV channels` share of total viewing time 1992-2006 (percent)



Source: Synovate MMI (1992-1999)/TNS Gallup (2000-)/medienorge

Market share in the advertising market for the various media (percent)



Source: IRM/medienorge

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?

A major challenge for regulators and market players in the media sector is the pace of the development of the media markets. The competitive environment of public service

broadcasters is rapidly changing. The Framework must provide public service broadcasters with the necessary flexibility to adapt to the dynamics of the media markets. Further, regulators must be able to adapt regulation to the specific characteristics of each national broadcast market. This implies that the framework must leave a wide margin of appreciation for the Member States to regulate national broadcasting.

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

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

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

From a legal perspective, it would be favourable to maintain coherence between the general set of rules (public service compensation) and the specific regulations (the Broadcasting Communication). The specific character of public service broadcasting implies, however, that complete coherence is neither possible nor desirable.

As stated in the Amsterdam Protocol, public service broadcasting is related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. Thus, for the broadcasting sector the autonomy of each Member State is of particular importance. In general, the sector specific rules should leave more room for flexibility to the Member States than the general rules concerning public service compensation. The obligations in the general framework on public service compensation can only be transposed to the Framework for public service broadcasting as long as they reflect and take into account the specific role of these institutions.

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 need for public consultations:* We share the view that it is important to arrange for a third party hearing when establishing and evaluating the public service remit. However, the design of administrative procedures should be left to the Member States, as this must reflect legal and administrative traditions of each Member State.**
- ***Entrustment:* The act of entrustment could contain parameters for calculating compensation, cf our reply to 2.6 below.**
- ***Overcompensation:* The possibility for public service providers to keep under certain conditions, a certain margin at the end of the financial year, but also the requirement for any surplus to be repaid to the state and the end of any particular funding period, but not exceeding four years, cf our reply to 2.6 below.**

- ***Separate accounts:*** We do not find it appropriate that the Framework should require separate accounts for various public service activities within the public service remit. Our knowledge of the Norwegian market does not seem to justify such a requirement, cf. also our reply to 2.5.2 below.

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 Norwegian government is in the process of redefining the public service remit of the NRK, particularly regarding new media services. This process has yet to be finalised and the solutions listed below are thus only preliminary.

The definition of the public service remit in Norway will be based on a model with three basic elements:

- 1) A set of minimum requirements**
- 2) A negative list**
- 3) An *ex ante* mechanism**

The NRK's statutes will contain minimum requirements for public service activities. As regards new services, specific content requirements will be inserted for the Internet and other new services, *inter alia*, minimum requirements on news, productions for children and youth and content related to art and culture.

The negative list will encompass activities that in any case fall outside the public service remit. The list is not exhaustive but does include i.a. advertising and e-commerce. In the event that the NRK plans to introduce a new service which will represent a significant change in the current range of PSB services offered to the public, they must obtain an *ex ante* approval from the King in the Council of State¹. The *ex ante* mechanism will be included in the formal Broadcasting regulations.

The Media Authority will be responsible for the enforcement of the mechanism. A public consultation involving all concerned parties will be obligatory as part of the ex-ante procedure.

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)?

¹ The term "King in the Council of State" refers to the formal meeting where Cabinet decides on significant matters. The meeting takes place in the King's castle and is presided over by the King.

It follows from the Amsterdam Protocol that it is within each Member State's competence to define the public service remit. Consequently, the Framework should not contain rules that might undermine this principle (beyond what follows from the doctrine of manifest error).

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?

In the digital era, it is of utmost importance that the public service broadcasters are allowed to develop new media services. Audiences spend an ever increasing amount of time on new, non-linear audiovisual services. To preserve their relevance to the general public, public services broadcasters need to be able to develop attractive and high-quality services for the new non-linear media platforms like the Internet. As mentioned above, the Norwegian Government is contemplating the introduction of a specific provision for "new media services" in the NRK statutes, to emphasize the importance of these services.

The Amsterdam Protocol leaves the Member States with a wide margin of appreciation to define the public service remit. It is within each Member State's competence to assess whether an activity serves the democratic, social and cultural needs of society. Consequently, we do not consider further clarifications necessary in the Framework.

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?

As mentioned above, the Norwegian Government is planning to introduce an *ex ante*-mechanism. However, as it is within each Member State's competence to confer, define and organise the public service remit, we see no formal basis for the possible inclusion of a requirement to establish an *ex ante* procedure in the framework.

A possible incorporation of the *ex ante*-mechanism in the Framework should in any event strictly be limited to the establishment of the mechanism itself. All issues related to procedural arrangements, substantive aspects, evaluation criteria etc, should be left to the Member States, as such details must reflect the structure of domestic markets, how the ownership of the broadcaster is arranged, administrative traditions etc.

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

Cf our reply to question 2.2.4.

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

Cf our reply to question 2.2.4.

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)?

Cf our reply to question 2.2.4.

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?

Cf our reply to question 2.2.4. As already indicated above, we consider it to be up to the Member States to determine the public service character of different activities. The Framework should not set out different options, as such options over time may be interpreted as binding on Member States.

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 public service remit of the NRK is formally entrusted by way of the company statutes. The statutes are a legally binding act of entrustment.

The fulfilment of the PSB remit is supervised by the Media Authority, cf. also 2.3.2 onwards.

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?

The Media Authority monitors the NRKs fulfilment of its PSB remit. The NRK reports to the Authority on its activities on an annual basis. The Authority furthermore submits an annual advisory report on the PSB-activities of the NRK to the Ministry. The Norwegian Government plans to include a provision in the Broadcasting Act that guarantees the autonomy of the Media Authority with respect to the drafting of the report.

The report is subject to a formal discussion at the annual general assembly of the NRK. (The Minister of Culture and Church Affairs, on the behalf of the government, is the company's sole shareholder).

The Ministry also provides its views on the NRK's fulfilment of its remit in the annual budget proposal to the parliament. Hence, the fulfilment of the fundamental principles of the public service remit is subject to political discussions in the Parliament. It should be underlined that the mechanism maintains the NRK's editorial autonomy and integrity.

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?

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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?

Each Member State needs to establish an effective system for supervision. However, as recognised by the Commission in the explanatory memorandum, it is up to the Member States to ensure effective supervision. The principle of procedural autonomy of Member States must be respected, as administrative solutions must be designed in line with national legal and institutional traditions.

We do, however, consider that the supervising body should enjoy some degree of independence, so that supervision is not left to the broadcaster itself. An element of independent supervision will therefore be included in the Norwegian system. The principle of independent supervision must, however, be carefully balanced against other important principles and values relevant to the NRK, such as the public ownership of the NRK and the editorial independence of the NRK.

As it should be left to the Member States to determine a supervision system, we find that the present, non-binding wording in the Framework is satisfactory.

In Norway, the NRK is not subject to formal sanctions. As outlined above, the NRK's fulfilment of its remit is subject to deliberations at the general assembly of the company. If the general assembly finds that the NRK does not fulfil its public service remit, the general assembly may request the board of directors of the NRK to take the necessary steps to bring the activities of the company in line with the remit. Further, the NRK's remit and the report from the Media Authority are subject to a parliamentary debate on an annual basis. The Parliament can, on the basis of the state budget and debates, specify its expectations to the Government's follow up of NRK.

We find this system to be appropriate, as it reflects the social role of the NRK as a publicly owned broadcaster. National systems for supervision and sanctions must be tailor-made to the formal and political status of the broadcasters in question. Consequently, we see no justification for making formal sanctions a mandatory requirement in the Framework.

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 Norwegian Government considers that it is important that private operators have recourse to a complaints procedure by which they may raise issues related to the public service remit. However, the principle of procedural autonomy implies that each Member State should be allowed to develop systems for third party involvement in line with national procedures and administrative traditions

2.4. Dual Funding of public service broadcasters

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

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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?

Commercial activities falling outside the public service remit should be offered on market terms and not receive public support. The Norwegian government is, however, of the opinion that certain non-profit services where the payment only covers variable costs may be included in the public service remit. One example is on-demand services where the NRK may require the user to pay for clearance of the rights related to the individual download, in cases where the owner of the IPR demands remuneration related to each individual download. In practice it might not be possible for the Broadcaster to offer programs subject to right clearance on demand without having these costs reimbursed by the individual users downloading the program.

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 NRK's commercial activities are with minor exceptions carried out by subsidiary companies. Commercial services provided by the mother company are subject to separate accounting.

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?

The Norwegian system is for all practical purposes based on the principle of functional separation between commercial and public service broadcasting services. However, no formal obligation is imposed on the NRK to organise itself according to this principle. The principle of functional separation has not been implemented for all services, due to practical reasons as some services are difficult to split from the mother company.

As functional separation may not be an appropriate or practical measure in all instances, the Framework should not include binding requirements beyond what follows from other set of rules (Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings). In our view, the principle of separation of *accounts* is an adequate and sufficient safeguard.

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?

All transactions between the NRK and its commercial subsidiaries are carried out at an arm's length basis, according to current market tariffs and terms. The specific tariffs and terms are negotiated on a regular basis in order to reflect the prevailing market conditions.

The NRK is obliged to order its auditor to issue an annual report concerning the fulfilment of the arm's length principle.

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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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?

We find it reasonable that the Framework includes a requirement for Member States to clearly lay down the parameters for determining the compensation amount by introducing

a model for estimating the public service compensation. Clear parameters would provide clarification to all parties concerned, including third parties.

However, the requirement for specific parameters should be kept on general level. The Framework should leave details on the specific parameters to the competence of the Member States.

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?

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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?

Provided that the initial net public service costs are calculated on the basis of clear parameters, it may be justified that the Broadcasting Company keeps a possible surplus at the end of the year. We find it reasonable to incorporate the related provisions on services on general economic interest in the new Framework.

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)?

Public service broadcasters should not use overcompensation for purposes other than public service. A system by which the public services broadcaster may keep a surplus/margin for free disposal (public service purposes) provides the option of dynamic adjustment within the public service remit. On the other hand, it may be desirable for the national regulator to set specific requirements on the use of reserves, for instance on content for children.

Consequently, we believe that it should be within the competence of the Member State to decide whether the 10 % margin should remain at the public service broadcaster's free disposal within the limits of its public service tasks, or be earmarked for particular predetermined purposes/projects.

Overcompensation over time is an indication that the parameters for public service compensation should be revised.

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?

An obligation to recover any surplus would act as an incentive to spend public service compensation at the end of the year. Encouragement of pluri-annual financial planning would be appropriate. A proposal as outlined in 2.6.4 would therefore be desirable.

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 Norwegian authorities consider that a broadcaster in principle should be able to set aside reserves for public service and commercial activities in line with other entities granted a service of general economic interest. However, it is stated in the NRK's statutes that the company should not generate profit. Consequently, it is not an option for the NRK to keep a profit margin.

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

2.7.1. What are the available mechanisms in your country under which private operators could challenge alleged anti-competitive behaviour of public service broadcasters? Please indicate whether you consider that these mechanisms ensure a sufficient and effective control. Are lower revenues due to demonstrated anti-competitive behaviour (e.g. price undercutting) taken into account when determining whether or not the public service broadcasters have been overcompensated?

The Norwegian Competition Authority enforces domestic competition law. Third-parties may file complaints on anti-competitive behaviour.

An element in the Norwegian model for calculating the net public service costs is that non-generated revenues derived from subsidiaries' anti-competitive behaviour (such as price undercutting) shall be deducted from the gross public service costs.

The NRK is under an obligation to order its auditor to check the compliance of the NRKs commercial daughters to the principle of market conform behaviour.

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 detailed regulation of market principles and control mechanisms should remain within the competence of the Member States. However, the Framework may in our opinion refer to the basic principles of market behaviour and require appropriate control mechanisms.

2.7.3. Do you consider that the methodology for detecting price undercutting should be clarified, possibly also including other tests which could be used as an alternative to the methodology currently referred to in the Broadcasting Communication? Please make reference to tests applied in your country to the pricing behaviour of public service broadcasters and which could be used as an example of good practice.

Price-undercutting is a difficult topic to clarify within the borders of the Broadcasting Framework. Thus, the Framework should not include concrete proposals for methodologies. On the other hand, it would be useful if the the Commission initiated an exchange of best practice examples from the Member States.

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?

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2.8. Other issues

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

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

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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.

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

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

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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.

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