

## **REVIEW OF THE BROADCASTING COMMUNICATION SUMMARY OF THE REPLIES TO THE PUBLIC CONSULTATION**

*The services of DG Competition wish to thank all interested parties for their contributions to the public consultation process. The present staff working paper is intended to facilitate the reading of the replies by summarising the core issues addressed in the consultation and highlighting certain trends. Please note that this summary is by no means an exhaustive analysis of the replies submitted nor does it constitute an official, binding position of the European Commission.*

### **1. GENERAL**

#### **General overview**

Overall, 121 responses were received.

The origin of responses is very broad: Member States, public and private broadcasters and respective sectoral organisations, newspaper publishers, trade unions, cable and satellite operators, telecom companies, listeners' and viewers' associations, media groups, radio operators, religious organisations, film producers, film distributors, private persons, trade unions, etc.<sup>1</sup>

From the 27 Member States, 17 replied (Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Netherlands, Portugal, Slovakia, Slovenia, Sweden and the United Kingdom). In Belgium, contributions were received both from Flanders and Wallonia. Norway and the EFTA Surveillance Authority, which are directly concerned (via the EEA agreement), also submitted comments. Member States were generally of the opinion that the 2001 Broadcasting Communication had worked well and that any changes to it should therefore be considered with great care. Nevertheless, some Member States recognised that there is a need for an update of the rules in view of the changes on the market and in the legal environment.

*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 updated in light of these developments? Alternatively, do you consider that these developments do not justify the adoption of a new text?***

Private broadcasters, newspaper publishers and private operators in general are in favour of an in-depth review which would restrict or, at least, set clear boundaries on the possibility for public service broadcasters to offer new media services. Most consider that public service broadcasters' intervention in the advertising market, in the acquisition of rights (namely sports rights) and in new media services, offered via new platforms, such as the internet and mobile phone, are particularly

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<sup>1</sup> In quantitative terms, the large majority of responses were submitted by public service and commercial broadcasters, which is natural given the topic of the consultation. In reporting the results of the consultation, DG Competition chose to try to report the various positions expressed, possibly grouping similar answers. The interested readers can, of course, refer to the full responses available on the website.

detrimental to competition. Some argue that there should be stricter control criteria in dual financing systems given the bigger potential impact on competition.

Listeners' and viewers' associations consider that the approach adopted by the Commission, both in the 2001 Broadcasting Communication and in its subsequent decision-making practice, has worked well. Nevertheless, they consider that there is now need for an update in view of the developments, in particular the entry into force of the Audiovisual Media Services Directive and the provisions of the Lisbon Treaty with an enhanced emphasis on citizenship and socio-cultural obligations which derive from the European Convention of Human Rights.

Public broadcasters (with some exceptions), trade unions, catholic organisations and public bodies in general are against the review. In some cases, these bodies would accept a "light review" which would not touch upon the wide margin of discretion of Member States to define, finance and control the national public broadcasting systems or that would re-affirm and strengthen this freedom. In their view the 2001 Broadcasting Communication has worked fine and already includes the possibility for public service broadcasters to provide new media services. They fear that any revised Broadcasting Communication would inevitably be stricter for public service broadcasters than the current one and they consider that the Commission has no legal basis to further limit the Member States' discretion in defining the remit. The specific situation of each Member State deserves a case-by-case approach. Also, a number of important cases are still pending before the Commission and before the Courts. Moreover, a number of recent Commission decisions (concerning Germany, Belgium and Ireland) are currently being implemented at the national level and these countries fear that the revised Broadcasting Communication would go beyond the respective decisions by imposing further requirements on Member States to adapt their respective public service broadcasting systems. Public service broadcasters need flexibility to enter new markets and are constantly losing market share to private operators (advertising revenues, young viewers market in particular) and to new players (internet companies, telecom companies, etc.).

*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.*

On the basis of the submissions received, some general considerations can be made:

### **Market environment – supply side**

There has been a multiplication of distribution platforms – introduction of Digital Terrestrial Television, digitalisation in general and the subsequent gain in transmission frequencies, TV on demand, mobile TV, IPTV and other new platforms. This has caused an increase in competition not so much between public and private operators anymore but rather between traditional broadcasting operators and new actors in the audiovisual market, such as network operators (cable, satellite and telecom) and internet search engines, which are transforming from infrastructure providers to content providers. These new actors often have global reach and are perceived by traditional broadcasters as a serious competitive threat due to their size and critical mass. For example, international internet companies such as Yahoo and Google started competing with broadcasters through internet platforms and video offers. This trend is likely to further intensify in the future, especially with regard to the most popular content rights, in a context where an increasing amount of premium content will only be accessible against payment.

There has also been a reconfiguration of the value chains. Until recently, the media market was characterised by a scarcity of media platforms and channels. Also, there was only one element in

the value chain separating the programme maker from the consumer - the operator of the broadcasting network either being publicly owned or operated by a private company. As new technologies have been developed and implemented, this traditional value chain is being reconfigured and consumers may now, and even more so in the future, access media content through a variety of different value chains. In the new value chain, the role of content aggregation and gate-keeping is in a very strong position, since it allows control over the organisation and search facilities of content made available to the consumers. This puts pressure on traditional broadcasters, who may find themselves in a position where their access to consumers is limited in comparison with their traditional reach.

The increase in competition is changing the media landscape. Broadcasters are, for example, offering "electronic written news" in their web sites, thereby competing directly with newspapers and newspapers are offering audiovisual content in their web sites, thus also competing directly for the traditional broadcasting services. This is often referred to as "media convergence" (defined in one response as "the ability of consumers to obtain multiple services on a single platform or device or obtain any given service on multiple platforms or devices"). Media convergence will continue with a convergence of service providers for telephone, internet, media/TV and print media. This move in turn will increase the dependence of TV operators on network operators and will require new business models with pay-services and subscription income becoming increasingly important. As a consequence, more content will have to be produced in the future.

One of the impacts of media convergence is to trigger, in some markets, vertical integration between infrastructure providers (telecom companies and search engines, in particular) and content providers (broadcasters, newspapers, etc.). Media concentration (vertical and horizontal) is likely to intensify in the future. There is a danger that vertically integrated infrastructure owners inhibit market access for broadcasters to networks (market foreclosure).

Traditional television will lose significance in favour of new media. The number of niche and thematic channels will tend to grow and the market for traditional television channels will be more fragmented. The large channels will continue to lose market share.

As regards the revenue structure, traditional broadcasters perceive great uncertainty about the future. The advertising market is becoming more and more unpredictable and technological challenges which change consumption habits are booming. The online advertising market and the level of media related activity have been increasing at a fast pace and are expected to keep growing. The revenue structure for television broadcasters has been changing with subscription income going up in most countries (and also income from pay services to a limited extent) at the detriment of advertising revenues which have, in most countries, been declining or being shifted to the new platforms. According to Isicult - the Italian Institute for the Cultural Industry – in the five leading European markets (France, Germany, Italy, the United Kingdom and Spain), between 25% and 50% of the total resources of television systems derive from payment by the consumer.

Traditional broadcasters and other operators will need to make very heavy investments to enter the new platforms and also to offer new formats (e.g. HD TV) for which demand is growing.

There is increasing internationalisation / globalisation in the broadcasting market as a consequence of the emergence of new platforms, in particular the internet.

In some countries, private operators seem to be adapting better to these changing consumption patterns than public service broadcasters, with the market share of public service broadcasters decreasing especially among young people (e.g. Germany, UK, Slovakia, Sweden, etc.).

## **Market environment – demand side**

On the demand side, there has been a fragmentation of audiences / consumer markets. Dynamic consumption patterns are on the rise. Consumers (especially young people) are actively looking for content, rather than passively consuming traditional broadcasting services. They look for specific content and use multiple platforms, such as TV, games console, radio, PC, mobile phone and MP3 players. In the future, consumers will more and more expect to get access to the content they want at an individually chosen time and on different platforms (control over content).

Participation in different forms is expected to become more and more important for consumers in the future. The current success of media services like blogs, discussion forums and other channels allowing consumers to produce and ‘broadcast’ written content is expected to become more popular in the future. The development of consumer channels with shared content on, for example, YouTube and My Space is another example of a more participatory and social media consumption pattern that is expected to become increasingly popular in the future.

## **Regulatory environment**

National media regulation will have to cope with more complex paradigms as, on the one hand, media markets become more international and more competitive and business models become more complex and, on the other hand, the role of broadcasters becomes more important in satisfying the needs of local, regional and national communities.

## **State aid to public service broadcasters**

The broadcasting sector is among the biggest recipients of public subsidies, along with transports and agriculture. Although there are no precise figures available, one estimate indicates a figure above €15 billion in 2001 for the EU-15<sup>2</sup>. In 2007, the corresponding value for the EU-27 is likely to be closer to €20 billion.

There are two main financing models for public service broadcasters in the EU, namely single financing systems based exclusively on public revenues, i.e. licence fee, direct grants, etc. (e.g. UK, Finland) and dual financing systems, where public service broadcasters get revenues both from public sources and from the advertising market (e.g. Italy, Germany).

Among the biggest recipients of state aid are public service broadcasters in Germany (around €7.2 billion in 2006), the UK (around €4 billion/year), France (around €1.7 billion in 2004) and Italy (around €1.5 billion in 2006).

## **The viewers market**

According to the European Broadcasting Union, on average the market share (in terms of audience) of generalist public channels has fallen from 40% in 1999 to about 30% in 2007.

The market shares of public service broadcasters' generalist channels in terms of viewers vary quite substantially within the EU. In countries like Cyprus and Hungary, for example, the market shares are rather low (below 20%).

In other countries, such as Germany, Italy, Austria, Poland, Finland and Ireland, public service broadcasters' generalist channels have relatively high market shares around or above 40%.

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<sup>2</sup> Estimate by the Association of Commercial Television in Europe.

Somewhere in the middle are countries like France and Sweden (around 35%), the UK, the Netherlands and Portugal (around 30%) and Spain (around 22%).

## **The advertising market**

In 2005 the EU-15 advertising market was worth around €80 billion.

Even if forecasts vary according to different sources, there is consensus that TV and newspapers are losing ground to the Internet in terms of advertising expenditure but remain far and away the number one and number two media worldwide and will continue to reign for some years.

While internet advertising expenditure is still small compared to other media such as newspapers and television, its market share is increasing at a fast pace. Advertising on the internet has been rapidly growing in all EU Member States. There has been double-digit growth in internet advertising expenditure since 2002 around the world and also in the EU.

According to the European Broadcasting Union (EBU), for public service broadcasters with mixed funding systems advertising revenues represent on average 14% of their total budget and they have around 20% of the overall TV advertising market. This relatively low figure (when compared to the average public service broadcaster market share of 30% in the viewers market) is partly explained by legal provisions which restrict their activities on the advertising market (e.g. France, Italy, Spain and Portugal).

## **2. COMPATIBILITY**

### **2.1. Coherence with SGEI package**

*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 Decision on public service compensation sets out the conditions under which State aid in the form of public service compensation is to be regarded as compatible with the common market and exempt from the requirement of notification laid down in Article 88 (3). The decision already applies to the broadcasting sector, under the general conditions laid down therein regarding the annual turnover (€100 million) and the annual compensation amount (€30 million). Conversely, the 2005 Framework for services of general economic interest explicitly excludes public service broadcasting from its scope. The main question therefore is whether it would be appropriate to take over certain provisions of the Framework in the context of the review of the Broadcasting Communication.

In their responses to the public service consultation, a great number of stakeholders have emphasised the specificity of the public service broadcasting sector which needs to be taken into account. In particular, the majority of public service broadcasters have underlined that public service broadcasting cannot be assimilated to other services of general. For example, the European Broadcasting Union (EBU) pointed out that "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 (OJ 1999 C 30/1). Moreover, the very nature of the activity, as well as the manner in which broadcasting organizations are financed and structured, requires different treatment."

Some Member States and public service broadcasters express the view that given the specificity of the public service broadcasting sector, the Broadcasting Communication should not be aligned to the general SGEI Framework. Other Member States and public service broadcasters take the view that certain elements of the Framework could be taken over, provided that the specific features of public service broadcasting are respected. EBU takes the view that "it is not a question of aligning the Broadcasting Communication with the Framework but retaining specific solutions which are appropriate for public service broadcasting".

An important number of private operators having submitted observations on this issue have expressed a view that it would be appropriate to consider including at least some of the obligations of the SGEI package in the Broadcasting Communication. The Association of Commercial Television in Europe (ACT) emphasised that "State aid must comply with the Principles of the ongoing State aid Reform, namely by becoming: i) less and better targeted, ii) having a refined economic approach, iii) more effective procedure, better enforcement (namely in the case of recovery procedures), iv) higher predictability, v) enhanced transparency."

*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 questions below, in particular those on overcompensation, point 2.6).*

In the course of the public consultation, stakeholders have pointed out a number of differences between the SGEI package and the Broadcasting Communication which in their view should be considered in this context. Examples of such issues are:

- Consultation on the public service remit: the Framework (part 2.2, paragraph 10) provides that "when defining public service obligations and in assessing whether those obligations are met by the undertakings concerned, the Member States are encouraged to consult widely, with particular emphasis on users".
- Definition of the precise nature of public service obligations: the Framework (part 2.3, paragraph 11) provides that public authorities are responsible for setting the framework of criteria and conditions for the provision of services of general interest. The Framework (paragraph 12) further specifies that the acts of entrustment must specify, among others, "the precise nature and duration of the public service obligations".
- Parameters of compensation: the Framework (part 2.3, paragraph 12) provides that the acts of entrustment must also specify "the parameters for calculating, controlling and reviewing the compensation" and "the arrangements for avoiding and repaying any overcompensation".
- Reasonable profit: the Framework (part 2.4, paragraph 14) foresees that "the amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations".
- Cost allocation: the Framework (part 2.4, paragraph 19) provides that regarding activities falling both inside and outside the scope of the service of general economic interest "the internal accounts must show separately the costs and receipts associated with other services as well as the parameters for allocating costs and revenues". Conversely, the 2001 Broadcasting Communication (paragraph 53) takes the view that the separation of accounts "may not be straightforward or indeed feasible on the cost side (...) due to the fact that in the broadcasting sector, Member States may consider the whole programming of the broadcasters as covered by the public service remit, while at the same time allowing for its

commercial exploitation". On this basis, the Broadcasting Communication (paragraph 56) provides that "contrary to the approach generally adopted in other utilities sectors, costs that are entirely attributable to public service activities need not be apportioned between the two and can be entirely allocated to public service".

- Control of overcompensation: the Framework (part 3, paragraph 20) provides explicitly for regular control of over-compensation, and a repayment obligation: "Member States must check regularly, or arrange for checks to be made, to ensure that there has been no over-compensation. Since over-compensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State, and for the future, the parameters for the calculation of the compensation must be updated."
- Possibility to maintain reserves: the Framework (part 3, paragraph 21) allows for a 10% annual reserve to be carried forward to the next year: "where the amount of over-compensation does not exceed 10% of the amount of annual compensation, such over-compensation may be carried forward to the next year." Moreover, in exceptional cases, the Framework also allows for over-compensation exceeding 10%: "some services of general economic interest may have costs that vary significantly each year, notably as regards specific investments. In such cases, exceptionally, over-compensation in excess of 10% in certain years may prove necessary for the operation of the service of general economic interest. The specific situation which may justify over-compensation in excess of 10% should be explained in the notification to the Commission. However, the situation should be reviewed at intervals determined on the basis of the situation in each sector, which, in any event, should not exceed four years. All over-compensation discovered at the end of that period should be repaid."
- Application of the Altmark ruling: the 2003 Altmark judgement of the European Court of Justice (Case C-280/00) sets out the conditions under which public service compensation does not constitute State aid. The Framework (part 2.1, paragraph 6) spells out these conditions.

Stakeholders take different views on the need and the rationale for considering the above issues in the framework of the Broadcasting Communication.

In general, public service broadcasters and Member States take the position that the possibility to maintain a certain proportion of reserves - eventually higher than 10% of the amount of compensation - should be taken over to the Broadcasting Communication. Their majority also considers that reasonable profit could be part of the amount of compensation. At the same time, these stakeholders would typically oppose stricter rules on cost allocation in a revised Broadcasting Communication.

Other stakeholders, typically private competitors, seem to be in favour of more transparency concerning the definition of the public service obligations, the parameters leading to the determination of the amount of compensation, and the allocation of public service and commercial costs. Some of these stakeholders take the view that the possibility for maintaining reserves could be justified, subject to the necessary safeguards. However, private operators in general do not see the need to include a reasonable profit as part of the compensation amount. These stakeholders typically express the view that the accountability of public service broadcasters should be improved by means of regular, independent control mechanisms.

A number of stakeholders have mentioned that it would be appropriate to take into account the Altmark ruling in the context of the review of the Broadcasting Communication. At present, the Broadcasting Communication provides (paragraph 19) that "according to the case-law of the Court,

any transfer of State resources to a certain undertaking – also when covering net costs of public service obligations – has to be regarded as State aid (provided that all the conditions for the application of Article 87 (1) are fulfilled)”.

There have been however diverging views regarding the application of the fourth Altmark criterion to public service broadcasting. This condition foresees that “where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations”. Several stakeholders, mainly public service broadcasters, have pointed out the difficulty to apply this condition to public service broadcasting. Some private operators have argued in favour of the application of this criterion.

## **2.2. Definition of 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 definition of the remit in the practise of the Member States**

From the replies obtained it appears that the public service remit typically contains services in the area of information, culture, entertainment, education and often also sports including premium sports.

For instance, the Polish Broadcasting Act defines as mission of its public service broadcaster to offer the Polish society diversified programme services and other services "in the area of information, journalism, culture, entertainment, education and sports". In Spain, the remit covers all genres destined to meet the needs of information, culture, education and entertainment of the Spanish society, reflecting their identity and cultural (and) linguistic diversity, promoting the pluralism and participation. In France, PSBs are also to provide a diversified program in the area of information, culture, knowledge, entertainment and sport.

Member States regularly emphasise that a PSB must achieve "diversity" of its programme as well as high quality of the content and that the programming must be well balanced (e.g.: Poland).

Some Member States also rank public service tasks (i.e.: content) according to importance. Many Member States moreover define the public service mission on several levels. They determine overall "goals" (e.g.: national broadcasting is to create programming services, produce and mediate programmes and organise other activities which support the development of national language and culture; draw attention to circumstances which may endanger the permanence of the state and nation etc.) as well as a PSB's "*functions*" which are to serve these goals (such as the duty to operate a certain number of channels, radio stations etc).

### **New audiovisual services and public service remit**

Some Member States have reacted to media convergence by broadening the existing scope of the remit. These Member States have opted for a technology neutral definition of the public service remit which entrusts the public broadcasters to provide certain services on all platforms, be they of linear or non linear nature. One such example is the UK. The BBC Charter specifies (six) such

public purposes that the BBC must promote and requires that BBC's output promotes these purposes by means of television, radio and online services. Hence, BBC aims to provide its output on a platform neutral basis.

Another example is Denmark where the law defines the remit in a technology neutral manner as no distinction is made between traditional platforms (radio and TV) and new media services (e.g. services provided via Internet). This new type of technology neutral definitions sometimes provide PSBs with a wide margin of discretion in specifying further which kind of activities they want to take up concretely. For instance, sometimes the remit is defined as broadly as to make available "to a reasonable extent" programming services and archives through electronic networks.

### **Special interest channels**

Some Member States have taken to entrusting their PSB(s) separately for operating special interest channels.

Austria, for instance, has modified its media law in order to include a new paragraph which entrusts the public broadcaster ORF specifically with operating a specific sports channel. Other Member States do not legally set out in advance the number of theme channels which public broadcasters may launch but rather leave this decision to the public service broadcasters.

In the UK, the BBC Charter does not spell out how many channels the public broadcasters may operate but the launch of any new special interest channel requires a license from the BBC Trust. The Trust may only issue such licenses after assessing (*ex ante*) the public value of the new service. In other Member States the entrustment act specifies that the public broadcaster *must* operate a certain number of programmes of pre-defined content and that it *may* operate further channels with other content.

The fact that PSBs launch new special interest channels as pay services rather than financing them with existing funds they receive from the State raises criticism from commercial broadcasters (see also below on Pay services under point 2.4.2).

*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)?*

### **Views of Member States and Public Broadcasters**

Member States oppose negative ("black") lists of non-public service tasks (manifest errors) in a revised Broadcasting Communication. They find that the Commission should not regulate exhaustively in advance of coming market developments which (non linear) services are per se excluded from the public service remit and rather allow for a flexible way of assessing this on a national level.

Public broadcasters and several Member States take the view that it would be inappropriate for the Commission to provide any guidance on manifest errors in a revised Broadcasting Communication due to the Amsterdam Protocol and due to the heterogeneity of the market conditions. The current distinction between public service remit and commercial tasks would be sufficiently clear and further specifications could render the legal framework too rigid in view of the ongoing evolution of the media.

### **Illustrative "black" lists in Member States**

However, some countries have drawn up illustrative lists meanwhile by themselves. The EFTA country Norway, for instance, told the Commission that it is in the process of redefining the public service remit of its PSB (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 a.o. advertising and e-commerce.

### **Views of Private Broadcasters and Print Media**

Commercial broadcasters and print media emphasise the need for clear criteria and examples of activities that fall outside the public service remit. Only a minority of commercial broadcasters, however, take the view that public broadcasters should limit all of their activities to linear TV and radio broadcasting. Most commercial broadcasters accept in principle that public broadcasters provide their content on all platforms, provided that the content does not unduly distort competition and indeed serves democratic, social and cultural needs.

Most commercial broadcasters find that the public service remit in their Member State is not sufficiently precisely defined. They underline that a more accurate and precise definition of the public service remit is necessary in order facilitate the implementation of the proportionality test, on the basis of a precise quantification of the net public service costs and of the ex post control of the compensation for the effective costs borne for public service obligations. Commercial broadcasters therefore regularly require that Member States should introduce clear and precise definitions of specific programme concepts. Some commercial broadcasters support the use of quantitative criteria such as the maximum amount of broadcasting time devoted to certain entertainment genres per year (soap-operas, quiz-shows etc.) and a minimum of time devoted to science, cultural education and high-quality entertainment.

Commercial broadcasters and print media moreover underline that a manifest error list of activities would provide certainty for all players in the audiovisual media sector. A revised Communication could make it mandatory for Member States to indicate by means of a positive and/or negative list the level of specification required.

Some commercial broadcasters argue that the new Broadcasting Communication should at least give guidance on the level of detail Member States must observe in defining the remit. Some argue in favour of a gliding scale regarding the level of detail in the definition of the public service remit depending on the way a public broadcaster is financed. For instance, one newspaper publisher argued that the more a PSB is financed by advertising revenues, the stronger the need for a clear and specific distinction between public and commercial activities in order to prevent the "misuse" of public funds for maximising commercial profits.

One commercial broadcaster believes that the pursuit of high audience reach cannot be considered in itself a service of general economic interest. Public financing should never be justified if the recipient's primary objective consists merely in performing high audience results.

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?*

### **Views of Member States and Public Broadcasters**

Public broadcasters and several Member States argue that the current definition of the remit in their country is sufficient and find it inappropriate for the Commission to provide any further clarifications on whether certain activities of public broadcasters can be part of the public service remit.

Public broadcasters emphasise that current technological developments show the need for Member States to be able to impose a wide public service remit including new media services. Public service broadcasting must be able to reach the general public via means other than standard television over traditional communication networks. The Irish RTÉ, for instance, refers to the Audiovisual Media Services Directive (AVMS Directive) as source of inspiration for Member States to define the public service remit for new media services.<sup>3</sup>

One public service broadcaster takes the view that the Commission's approach to the public service remit is wrongly based on types of content and platforms. It considers that the public service definition must be technologically neutral and suggests that no distinction is made between linear and non linear services. The Commission should leave the definition of the public service mandate to the Member States. Should the Commission however to draft "a centralised definition" of public services, it is suggested to focus on quality instead of types of content and platforms.

### **Views of Private Broadcasters and the Print Media**

Private broadcasters and the newspaper publishers typically wish more clarity and a precise public service mission. They find that the current Broadcasting Communication does not sufficiently provide guidance in this respect and that it can therefore be further improved.

The ACT<sup>4</sup> and individual private broadcasters put forward that in defining the remit a general focus on information, culture and education is no longer sufficient because it is too broad. Also, abstract principles such as pluralism, quality, exemption, minority promotion or accessibility must be sufficiently detailed in order to allow for external monitoring to comply with paragraph 37 of the Broadcasting Communication.

Newspaper publishers also call for lists of examples on a national level for better defining the public service remit. The ACT similarly wishes a list of purely commercial activities in a revised Broadcasting Communication. Some commercial broadcaster request that activities on new media markets must be limited to those with a clear public value "i.e.: supplying traditional radio and TV programmes, which they should do on all available platforms". Commercial broadcasters typically accept that a public broadcaster should be able to distribute its existing "classic" programming on

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<sup>3</sup> One other public service broadcaster underlined, however, that the Directive does not cover all activities which Member States may wish to include in the public service remit of public service broadcasters. These activities are radio services, stand-alone text based services and possibly other (on-line) activities.

<sup>4</sup> Association of Commercial TV in Europe.

all technical platforms. Conversely, public service broadcasters should refrain from developing new products and services on the internet.

Newspaper publishers also pointed to an increasing distortion of competition between internet portals of publishers and of public broadcasters. For example, publishers in the Netherlands provide daily news as well as weather forecasts, sport news and information on the stock exchange on their internet portals. The publishers fear for their websites in view of heavy State investments in the public broadcasters' internet portals. Most internet activities of newspaper publishers were still loss making and several publishers had to cut their internet budgets. Several internet sites had to be closed. However, news sites were the best visited sites in the Netherlands and of great importance for newspapers in attracting and keeping subscribers.

*2.2.4. Do you consider that the general approach in recent decision-making practice of the Commission (i.e. determination of the public service remit based on an **ex ante evaluation** for new media services) could be incorporated into a revised Broadcasting Communication?*

Of the 17 EU and EFTA Member States who replied to the Commission's consultation, 2 Member States (Denmark, and the UK) assess the public value of a new media service before launching the service on the market. Five others (Germany, Ireland, Belgium - Flemish region, Hungary and Norway) are in the process of implementing such mechanism.

### **Examples of Member States using ex ante evaluations**

In the United Kingdom, the procedure leading to the introduction of new services on the market by the BBC is preceded by an extensive public consultation and debate. The process is particularly detailed and hence resource intensive. It is the most thorough form of an ex ante test for new media services in Europe to date.

For each individual "service" BBC must obtain a proper licence which is issued by the BBC Trust. The issuing of such license is preceded by a public value and market impact assessment. Hence, if the BBC management proposes to launch a new service or to make "significant changes" to an existing service, the BBC Trust has to consider the proposal and decide whether to launch a Public Value Test (PVT). Where a PVT is undertaken, the new service or change may not be put on the market until that process is complete.

The BBC's ex ante assessment is ultimately a mechanism for weighing public value against market impact. The BBC Trust determines the value to the public of the new or significantly modified existing BBC service, and also takes into account its impact on the wider market – say, to other suppliers whose business might be affected by the proposed BBC launch. Only if the Trust is satisfied that any likely adverse impact on the market is justified by the likely public value of the change, will the proposal go forward for consultation. At the end of the consultation, the BBC Trust will make its decision.

A public value assessment of a proposed change includes an assessment of its value to license fee payers as individuals, its value to society as a whole through its contribution to the BBC's Public Purposes and its value for money and cost.

Public value assessments are conducted by the BBC Trust, with support from the BBC Trust unit, an independent unit that advises Trustees. As part of the assessment, the BBC Trust seeks representations on the public value aspects of the proposal.

The market impact assessment is carried out by the independent media regulator Ofcom. Based on empirical evidence, desk research and the result of public consultations, Ofcom identifies potential effects for consumers and producers of other services, including those that compete with the

proposed service as well as those in related markets (e.g.: suppliers), downstream (e.g. buyers) or two-sided (e.g.: advertising) markets.

The aim of Ofcom's "market impact assessment" (MIA) is to evaluate the extent to which the proposed service might deter innovation and investment by the commercial sector, and potentially by the BBC itself, if the market fails to grow as it otherwise might. Where any inefficiency such as crowding out is identified, Ofcom may propose changes to prevent a detrimental impact. Ofcom relies as far as possible on empirical evidence and expert opinion including interviews with stakeholders and desk research.

The BBC Trust and Ofcom hold public consultations before deciding on the launch of a new service. The ultimate decision lies with the BBC, based on the advice of Ofcom regarding the market impact.

The BBC's ex ante test is designed to determine whether and to which extent the introduction of a new service is in the public interest. After analyzing existing offers on the market, the BBC Trust assesses whether and to which extent the planned new activity would add significant public value in view of the potential market impact Ofcom established.

Examples of the BBC's ex ante test so far include the launch of four new offerings proposed by the BBC Executive to provide audio and video content on-demand – commonly referred to as "*the BBC iPlayer*" (including a seven-day catch-up television over the internet; Seven-day catch-up television over cable; Simulcast Television over the internet (live streaming of television networks, Non-digital rights management (non-DRM) audio downloads over the internet, i.e.: podcasting); the launch by the BBC Executive of a high definition (HD) television channel, the launch of a Gaelic Digital Service (GDS) on satellite, cable, radio and online (here, the approval of the service was made subject to a later review by 2010).

The BBC Trust finds that the UK public value test is one effective way for assessing the consistency of new activities with the public service remit.

In Denmark, a new legal instrument regarding new media services was included in the latest contract between Denmark and its PSB (DR). If the Danish PSB wishes to launch a new media service which is not yet entrusted in the current (four years) contract with the Danish State, DR must perform a public value test in order to make sure that the service in question fulfils the democratic, cultural and social needs of society. The public value test consists of the following four elements: (i) Effect - How many will use the service? (ii) Finance - What does it cost? (iii) New or old - To what extent is the service new and to what extent is it a direct extension of existing services and services comprised by the Public Service Contract? (iv) Duration - Is the intended use of the service of a lasting or merely temporary nature?

If DR comes to the conclusion that the service passes the public value test, the test results must be submitted to the Radio and TV Board, which is independent of DR. If DR concludes that the service does not pass the test, the service will not be performed. The Board then reviews the service by benchmarking it against the following two criteria:

1. Does the service provide value to society and/or individuals by fulfilling democratic, cultural and social needs? and
2. Is the service in general accessible to all Danish citizens?

DR must await the decision of the Board before commencing the service in question. It is unclear, however, whether this form of public value test involves a public consultation<sup>5</sup> and a market impact assessment.

As set out hereunder under point 2.3.1., Sweden entrusts its PSB on the basis of documentation which is widely circulated and publicly debated.

### **Examples of Member States planning to introduce ex ante review mechanisms**

Besides Germany, Ireland and Belgium which committed themselves towards the Commission to put in place appropriate mechanisms for the ex ante assessment of new audiovisual services of their public service broadcasters, Hungary and Norway informed the Commission in reply to the public consultation that they, too, would pursue similar plans.

Hungary signalled that its national audiovisual media strategy (finalised at the end of 2007) proposes to the legislator to apply a double test for verifying whether specific services are part of the public service remit. The test would aim at verifying the following two aspects:

1. There is a real need of the society in the provision of the given service;
2. With the free or almost free provision of the service, the state does not prevent the market from efficiently satisfying the need in question.

Norway told the Commission that it plans to introduce a procedure for the event that its public service broadcaster NRK plans to introduce a new service which will represent a significant change in the current range of its services offered to the public. NRK must then obtain an ex ante approval from the King in the Council of State. The ex ante mechanism will be included in the formal Broadcasting regulations. A media authority will be responsible for the enforcement of the mechanism. A public consultation involving all concerned parties will be obligatory part of the ex-ante assessment.

### **Views on whether or not to foresee an ex ante test**

Member States have a wide range of views on whether or not there is value in introducing an ex ante control mechanism for the inclusion of new media services in the public service remit. There is, however, a commonality of views that the details of any such test should be determined by each individual Member State rather than by the European Commission.

France believes that a revised BC should contain a reference to an ex ante test. Details of such test ought, however, be left to each individual Member State. The UK moreover sees merit in setting out "some basic minimum requirements" on the procedure the EU Member States are to follow in verifying whether activities other than linear TV programmes are part of the remit. The UK believes, however, that the Commission should limit itself to recommending such minimum requirements rather than making them obligatory for Member States. Cyprus likewise supports the inclusion of an ex ante test in a revised Communication.

Other Member States oppose an ex ante control. Finland fears that a "detailed" ex ante regulation would not be well suited for the requirements of a quickly changing communications environment. Austria and the Netherlands doubt whether an ex ante test for new media services should also include an assessment of the potential impact of new services on the market. Austria moreover raises the question whether an ex ante control mechanism is the only adequate means of verifying

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<sup>5</sup> The Danish organisation ITEK propose that the procedure for the determination of DR's public service obligations is made open and transparent so that private businesses can influence the definition of these obligations and oversee that the public service company does not enjoy unnecessary, preferential treatment (DI/ITEK, at § 2.3).

that new non-linear activities are qualified as public service. Estonia fears that the application of an ex ante evaluation would most probably exclude sport broadcasts from the remit and could moreover quickly lead to a situation where the provision of public services ends entirely.

Public broadcasters likewise oppose the introduction of an ex ante test. Besides contesting the competence of the Commission to include such test in a revised Broadcasting Communication, the EBU doubts in general terms the validity of any public value test. First, the public service remit has to be seen as single unit which cannot be broken up into independent parts. Evaluating each service separately and not as part of an entire offer is the wrong approach. Second, State aid rules must be applied in a technology neutral manner. There are no grounds for treating "new media services" differently from "classic" broadcasting services. Third, other public broadcasters such as RTÉ<sup>2</sup> fear that a "heavy" ex ante evaluation procedure would cause delay in the development process of new media services. It would require an evaluation at a moment when the role and effects of the new activities cannot be ascertained. Fourth, the ex ante evaluation is costly and these costs may be disproportionate to the service at stake. Fifth, there has so far been one single Commission decision regarding Germany where the ex ante public value test was "accepted" by a Member State. Such undertaking is individual and cannot constitute the basis for drawing up general principles applicable to other States.

The EBU moreover believes that any ex ante evaluation mechanism must safeguard the editorial independence of broadcasters. Therefore, it must be ensured that the body carrying out such review is sufficiently independent from both political and economic pressure. As the evaluation – ex ante or ex post – of public broadcasting services is intimately linked to the principles and criteria behind the definition of the remit, the choice of method should lie with each Member State.

Individual public service broadcasters moreover doubt that the Commission could conceive of an ex ante test that fits all Member States. RAI, for instance, points out that the German decision of April 2007 (E 3/2007) was country specific. Germany's ZDF underlines its opposition to an ex ante review of non linear services by referring to the existence of a market failure in the absence of public broadcaster's contribution to online content. ARD opposes in particular the market impact assessment of the ex ante evaluation. If the EU were to "introduce" such test in a revised Communication, this would over-emphasise the economic aspects of broadcasting to the detriment of the cultural ones. PSBs should not be limited to "fill gaps" where private entities are unwilling to provide content.

The Irish RTÉ believes that an ex ante evaluation is not necessary in order to protect commercial broadcasters because an assessment ex-post is sufficient.

Private broadcasters and newspaper publishers support the introduction of an ex ante evaluation. Vestra in the Netherlands supports the introduction of an ex ante test as it could help avoid situations as those in its country where public service broadcasters launched 17 special interest channels even though private broadcasters already offered the same kind of theme channels before. Private initiatives should get a chance. The Austrian broadcaster ATV emphasises the importance of being heard prior to the launch of a new service and an effective administrative procedure for the review ex-post. TF1 in France welcomes an ex ante evaluation of new media services as increasing legal security. However, TF1 also emphasises that an ex ante evaluation alone is insufficient if a Member State does not specifically and clearly define the public service remit so that an ex post control is possible.

Newspaper publishers, however, also point out that Member States could construe an ex ante test factually in a way that it becomes nothing but a rubber stamping exercise. The German VDZ in particular emphasises the potential for a conflict of interest between the government, the public broadcaster and the legislator. An ex ante test alone was no substitute for a complaints driven ex-

post control in front of an independent judge. The German association BITKOM however emphasises the value of an ex ante review in preventing irreversible harm to private initiatives on the market. The ex post control mechanism would serve other purposes but was equally important. Private broadcasters and telecom/IT companies regularly highlight the need for certain minimum standards for the ex ante assessment in a revised Broadcasting Communication. Otherwise, the test would in practise remain ineffective.

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

Member States replied similarly as to question 2.2.4. Public broadcasters generally consider it inappropriate for the Commission to determine which services should be subject to an ex ante evaluation. Of the public broadcasters who provided a more specific reply to this question, BBC thinks that aspects of the model now established for oversight of BBC activities might have a wider applicability. The current test in the UK is conducted publicly, leading to an evidence based public decision which takes account of both public value considerations and the impact on the market. Ofcom informed the Commission in this respect that the BBC Trust performs its public value test with respect to any additional service of the BBC, regardless of its "new media" character.

Several private broadcasters (such as TVN in Poland and TF1 in France) believe that if an ex ante test was introduced, it should apply to all new services, be they of a linear or of a non linear nature. Newspaper publisher associations such as VDZ in Germany share this view. Germany's VPRT goes further and even requires a public value test for existing (linear) services of a public broadcaster. The German BITKOM to the contrary would see the need for (non linear) digital services and explains that the launch of digital services on a commercial basis is very resource intensive. Any free of charge offer by public broadcasters that is financed with public funds will render commercial initiatives much more difficult as the willingness of customers to pay dwindles if they benefit from competing "public" offers. BITKOM (as well as other private operators) see free-of charge film archives of PSBs ("video on demand" or "mediathek") as serious competition problem for commercial on-line (or digital TV) offers. They require that the launch of any such service should be subject to an ex ante assessment.

*2.2.5. Should the revised Broadcasting Communication further clarify the scope of an ex ante evaluation of the public service remit by the Member States?*

*and*

*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 contribution to clearly defined objectives, citizen needs, available offers on the market, additional costs, impact on competition)?*

### **Views of Member States and Public Broadcasters**

Similar to the questions 2.2.4 and 2.2.6, the Member States take the view that any details of an ex ante test should be left for them to decide. Public broadcasters generally reject that the Broadcasting Communication defines the scope of an ex ante test.

The BBC, however, believes that there is a balance to be struck and that some evidence-based consideration and evaluation of the citizen benefits and market impacts should take place before new public service broadcasting activities are undertaken. However, the mechanisms for achieving

this should be decided upon by each individual Member State. The BBC believes, however, that it could be reasonable for a revised Communication to note that Member States should have "appropriate means" publicly to discuss and to debate the nature of the PSB remit in advance of defining it and entrusting it to PSBs.

While Germany's ZDF opposes an ex ante test as such, ZDF could imagine that a revised Broadcasting Communication sets out which relevant markets ought to be examined for the market impact assessment. ZDF assumes that in the context of such exercise one would have to look at up-stream and side-stream markets for freely accessible services. ZDF sets out that the market impact of an on-line offer could be assessed on the on-line advertising market by assessing to which extent a new online service of a public broadcaster would attract viewers which in turn could have market relevant consequences for advertisers. Advertisers might consequently distribute their advertising funds to a more reduced number of players or else deviate them from online content to TV broadcasting and to newspapers.

### **Views of Private Broadcasters and Newspaper Publishers**

Private broadcasters and newspaper publishers request the introduction of guiding principles for an ex ante test in the revised BC.

The French broadcaster TF1 warns that an introduction of an ex ante test without specifying its main features would change little as compared to the current situation. Germany's VPRT suggests concrete elements for an ex ante test including a market impact assessment and the involvement of third parties as well as an independent regulatory authority.

In discussing the possible elements of a PVT, the ACT criticises possible shortcomings of the BBC's approach.<sup>6</sup> ACT highlights the need for clarity on which services or changes to services would trigger the ex ante scrutiny.<sup>7</sup> ACT also deplores that of three public value tests by the BBC Trust so far, only one was turned down and eventually approved subsequent to "minor cost saving changes" to the proposals. However, for all its shortcomings, the ACT still prefers the British test to the one which Germany will introduce due to the better position that third parties would enjoy in the British system as compared to the German "*Drei Stufen Test*".

*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?*

Most Member States and public broadcasters consider this to be inappropriate. The EBU for instance considers that any inclusion or even the suggestion of criteria or ways of defining or determining the public character would go beyond the Commission's competence to verify whether the definition of the public service remit is "manifestly wrong". The EBU is, however, in favour of an autonomous introduction of such procedures at national level to improve good governance, transparency and monitoring of public service activities in the general interest of each society.

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<sup>6</sup> Such as: the alleged lack of independence of the BBC Trust; in ACT's views the structure of the public value test (PVT) obliges the Trust to make a number of subjective assessments (weighing an assessment of whether the BBC's proposals are contrary to its public purposes, against Ofcom's assessment of the overall impact of the services on consumers); in their view, Ofcom's rule in conducting the market impact assessment was also rather that of a paid witness than of an independent regulator.

<sup>7</sup> The ACT quotes a "negative" example from the UK where the BBC was able to gain approval for its participation in the launch of a new "freesat" platform without the full PVT on the grounds that this platform was, under the BBC rules, classified as a "non service activity", thereby not requiring a PVT.

Private broadcasters, to the contrary, recommend describing the available options in a new Communication. The Commission could set out advantages and disadvantages of such options. VPRT considers that the enumeration of best practises may serve Member States as guideline for implementing the ex ante test. Newspaper publishers also support the use of options ("*Optionenmodell*") as an appropriate way to address the heterogeneous market situation in the Member States.

### **2.3. Entrustment and supervision**

*2.3.1. How is entrustment granted in the Member States? Is the procedure leading to the entrustment subject to public consultation? To what extent is the broadcaster's remit laid down in legally binding acts of entrustment? To what extent is the implementation and determination of the exact scope of activities left to public service broadcasters? Are any such "implementing measures" publicly available?*

#### **Entrustment through various instruments and on different levels**

The consultation has shown that the Member States use different legally binding instruments for entrusting PSBs with the public service remit. Such instrument can be a law (Austria), a treaty between regions of a State (Germany), a contract or licence agreement between the PSB and the government (France, Netherlands) and even in the company statutes of the PSB (Norway). In some States the PSBs additionally engage in certain self commitments that are subsequently made public (Germany).

The public service remit may also be defined on several levels with the broad purposes of public broadcasting being agreed on a political level while details are left to lower ranking acts and self-regulation by the public broadcasters (under the supervision of regulatory bodies). The UK, France and Germany are examples thereof.

It would also appear that several Member States leave public broadcasters wide discretion in further specifying and interpreting the entrustment act through programme guidelines or "self-commitments" that further elaborate the broadly defined remit. Commercial broadcasters criticise this practice as an insufficient way of entrusting a public service broadcaster.

#### **Examples for different forms of entrustment**

In the United Kingdom, the remit for the BBC is set out broadly in the public purposes section of the BBC Royal Charter and elaborated first by provisions in the Agreement between the BBC and the Secretary of State for Culture, Media and Sport. These are binding legal acts. The remit is further specified by the BBC Trust in its setting of BBC strategies and issuing of service licences to the BBC Executive.

In Germany, the public service remit is likewise defined on several levels. The highest level is a treaty between the German Länder. The remit is further specified in internal guidelines (*Satzungen*) of the PSBs. The internal bodies of the public broadcasters finally transpose the remit as set out in the treaty and the guidelines by incorporating the principles in self commitments regarding their TV and radio programmes.

In France, the public service remit is defined on three levels, that is by law, in specific "*cahiers de charges*" and in a "*contrat d'objectifs et de moyens*" with the public broadcasters which set out the missions and objectives in the public interest.

In Austria the remit is exhaustively defined in a single federal law.

The Netherlands and the Flemish region of Belgium entrust their public broadcaster(s) by means of a contract between the government and the broadcaster which is timely limited and defines the tasks which the broadcaster is to fulfil in exchange for State financial support.

In the Netherlands, the public broadcasters have been entrusted by means of a license agreement with the State. In order to obtain the concession the PSB had to submit a concession policy plan which explains how the public service remit shall be fulfilled by the PSB. On the basis thereof, an agreement is signed between the Minister and the PSB (the "prestatieovereenkomst"). The procedure leading to entrustment by the Minister does not appear to foresee a public consultation, but the Minister obtains the non binding advice of the Council for Culture and the Media Authority.

In Sweden, the remit is defined in a license agreement granted by the Swedish Government. The remit is decided by the Swedish Parliament following proposals by the Government in a bill. The government bill contains clarification of the remit. Before the Government presents its proposals to Parliament, a commission of inquiry usually draws up supporting documentation, which is circulated widely and openly for comment. The terms of reference for such a commission of inquiry normally also entail broad contact with all interested parties. Based on the Parliament's decision, the Government issues a broadcasting licence and subsidy conditions for broadcasters. The broadcasting licence, which normally runs for a period of 3–6 years, sets out the conditions governing broadcasting. Conditions concerning economic and organisational matters are set out in the subsidy conditions, which also lay down the allocation of resources to broadcasters. Under the terms of these documents, broadcasters may independently take further decisions on the performance of activities. The commission proposals, the consultation response and the government bills are, like the broadcasting licence and subsidy conditions, publicly available documents.

### **Overhaul of prevailing public broadcasting model?**

Some private broadcasters suggest that the prominent model of public broadcasting in the EU should be overhauled. They point out that for historic reasons most Member States are used to entrust one single (large) broadcaster with all public service duties in that country. In view of the changing market environment, however, Member States should better consider setting up a fund which remunerates specific public service activities that are then tendered to various broadcasters, rather than entrusting and financing one single broadcaster with providing all public services forever.

There are currently a few examples of Member States where more than one single entity is entrusted with public service missions. The most prominent example is perhaps the United Kingdom, where commercial channels have been entrusted with public service duties regarding the content of their programmes. Besides the main public broadcaster BBC, the UK has entrusted Channel 3, Channel 4 and Channel 5 with public duties. Only BBC benefits from a compensation for its public duties. The public service remit of the other broadcasters is therefore financed exclusively from commercial revenues such as advertising. The scope of the public service remit for BBC is wider than that for the other channels. The public service remit for the commercial broadcasters focuses on the content (e.g.: local news, children programmes).<sup>8</sup> In France, the commercial broadcaster TF1 informed the Commission that its rights and duties are similar to the rights and duties of the public broadcasters. One example mentioned is the duty to provide certain content for children. In Portugal, the commercial broadcaster SIC stated that it must reserve broadcasting time for political messages

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<sup>8</sup> They must provide a broad range of high quality and diverse programming demonstrating innovation, experiment and creativity in the form and content of programmes. The programmes are moreover to exhibit a "distinctive character" and must include programmes of an educational nature and other programmes of educative value.

during national elections. The Netherlands have entrusted 19 broadcasters with public service duties.

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?

### **Different forms of supervision for remit and overcompensation**

Member States have devised different methods of controlling the fulfilment of the entrusted public service mission. As the consultation showed, the control of the remit can be *internal* (by bodies that control the executive management of a PSB) and/or *external* (a public authority, the government etc.). In most Member States the financial control of overcompensation is external. Often, this task is bestowed upon a court of auditors. Sometimes, internal bodies and the PSB's auditors are involved in the verification process, as well.

In Belgium/Flanders, for instance, the Flemish VRT is subject to the following forms of control: (1) A delegate of the Flemish Community supervises the correct execution of VRT's duties in compliance with the legal provisions - legal control. Second, VRT must annually report to the Flemish government and the Flemish parliament whether it fulfills the duties under the "*beheersovereenkomst*" (a contract between the State and VRT). Third, the Court of Auditors exercises an annual control over the accounts of VRT. This control is three-fold: financial, legal and efficiency. Fourth, the Executive Board of VRT supervises the VRT's activities. It is appointed by the Flemish Community according to the composition of the political parties in the Flemish parliament. Fifth, a commissioner revisor for media verifies whether the substance matter (the content) of the "*beheersovereenkomst*" is fulfilled.

In Germany, the fulfilment of the public service remit by the PSB's is subject to several forms of internal and external control. The Länder control the legality of the PSB's actions including the public service remit. Internally, actions of the PSBs are subject to scrutiny by "*Aufsichtsgremien*", i.e.: supervisory boards. The PSBs are financially controlled by Court of auditors and by the KEF, an independent regulator who calculates the amount of financial compensation needed by the PSBs to provide the public service.

In Poland, the National Broadcasting Council supervises both radio and TV broadcasting. It submits annual reports to the parliament and the president. The Council also appoints the so-called Programme Councils whose task it is to adopt resolutions evaluating the quality of the programming (advisory function). Private broadcasters find that there is a lack of effective control of the PSB in Poland.

In Portugal, the statutes of the PSB foresee a control of the fulfilment of the remit by two internal bodies (the "Opinion Council" and an ombudsman), as well as an external control by the Media Regulation Body. The Media Regulation Body controls both public and private broadcasters. A commercial broadcaster in Portugal criticised that in practise the regulator is complacent with the PSB but critical towards private operators regarding their content. This regulator is also competent to hear complaints against the non-fulfilment of the public service remit by the PSB, but according to SIC this control is "not effective".

In the UK, the BBC's executive is supervised by the BBC Trust, a body independent both of the Government and of the BBC Executive. The BBC have adopted a "fair trading regime" which provides for a two-stage complaint mechanism (since 2007) within the BBC Executive branch and

then on appeal to the BBC Trust. Decisions of the BBC Trust as a public authority are capable of being judicially reviewed through the courts of the UK as are decisions of Ofcom.

### **Possibility for third parties to take action**

The possibility for third parties to invoke an infringement of the public service remit through administrative or judicial review appears still generally limited. However, there are exceptions.

In the UK, third parties can address concerns either to the BBC Trust or to Ofcom, if they believe that BBC or another licensed public broadcaster failed to deliver on its public service obligations. If Ofcom considers that a public broadcaster is not delivering its remit or is not making an adequate contribution to the fulfilment of the purpose of public broadcasting, it can issue remedial directions; ultimately, it can impose specific and detailed licence conditions to correct the failure.

In Austria, the *Bundeskommunikationssenat* (BKS) can impose administrative penalties for an infringement of the *ORF-Gesetz* and therefore also for an infringement of the remit. Its decisions are subject to scrutiny by the Supreme Courts of Austria. Individuals can bring an action to the BKS for an infringement.

*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?*

Member States and public service broadcasters take the view that the Commission should generally not interfere in the way Member States entrust a public broadcaster. Some Member States such as Slovakia also believe that the current rules on entrustment are adequate and sufficient. One public broadcaster finds that an additional act of entrustment only becomes necessary when a PSB exceeds the scope of the original act of entrustment regardless of the type of activity and the platform used to distribute content (technology neutrality).

Turning to private broadcasters, the ACT emphasises that self-commitments are not sufficient and refers to the Commission Decision E-3/2005 (Germany). Control must be effective and the supervising authority must have "competence". The ACT moreover finds that the current rules of the Broadcasting Communication seem to be sufficient in terms of entrustment, as long as there is an official act laying down beforehand the parameters on the basis of which the public service compensation is to be calculated, in an objective and transparent manner. ACT and Germany's VPRT request that the Broadcasting Communication must render a new act of entrustment necessary if a PSB is to expand its activities to "new media services". Such additional entrustment act should be preceded by public consultation and by a market impact assessment.

Private broadcasters require that Member States should be obliged to tender licenses for public broadcasting. In the absence of such a public tender, the national law must be much more detailed with the regard to the concessionary's duties than in the presence of a tender. Private broadcasters also find it important that a revised Communication includes clarifications on the content of the public service remit. Some require that a new BC should specify better the need for a transparent and motivated entrustment act.

*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?*

### **Independence of supervisory authority**

In several Member States, PSBs dispose of internal supervisory bodies which are composed of persons appointed by various social and political groups outside the PSB. The main task of this internal body is to advise the executive management on the programmes to safeguard aspects of plurality and democracy in the interest of the viewers. Some of these bodies are also charged with controlling limitations on advertising, the laws protecting minors and more broadly good quality of the programming ("value for money"). Examples of internal supervisory bodies within PSBs include the *Rundfunk- und Verwaltungsräte* of ARD and ZDF and ORF's *Stiftungsrat* in Austria. These internal bodies are partially appointed by political parties, partially by churches, associations, education entities and others. A recurring issue discussed in the replies to question 2.3.4. is whether the control of the remit can be entrusted to the internal bodies of PSBs, alone.

Member States emphasise that matters relating to the control of the public broadcasters are anyhow within the sole discretion of the Member States and should not be "regulated" at EU level. The existing control mechanisms were at any rate "sufficient". The UK government however underlined that supervisory powers correctly lie with independent regulators. This was the only way to give confidence to competitors and the general public. The UK agree that complaints about the PSB remit should in the first instance be referred to the national independent regulator(s). They have the investigatory powers and can take direct action. The UK also points out that a national complaints system which worked properly could also reduce the Commission's work load.

Public broadcasters tend to argue that their respective internal bodies are sufficiently independent from the PSB because the PSB's executive cannot appoint the members of these internal advisory bodies. Hence, they could control the public service remit sufficiently without there being a need to transfer such powers to an independent media authority.

Private broadcasters to the contrary point to an inherent conflict of interest where internal bodies of a PSB are to supervise the public service remit. In their view, the independence of the internal bodies from the executive of the PSB does not suffice for controlling the public service remit in the interest of other stakeholders. Despite their formal independence from the executive board, members of internal supervisory bodies would be used to taking decisions in the interest of the institution they serve. Private broadcasters, telecoms and the print media therefore typically require "true independence" for the supervisor as well as the possibility of judicial review.

### **Sanction mechanisms**

Member States and public broadcasters consider that sanctions are a matter for the Member States and that the text of the current Broadcasting Communication should not be too specific in this respect. One Member State and some public broadcasters also believe that there was no need for sanctions. The mere fact that a PSB was subject to some form of control would as such suffice as deterrence to infringe the public service remit.

Private broadcasters to the contrary emphasise the need to improve sanction mechanisms. The ACT for instance believes that the new Broadcasting Communication should establish a minimum set of rules including a "truly independent" body reporting with full-time experts to the national parliament. In case of overcompensation, national regulators should have powers to order recovery. Individual commercial broadcasters listed further possible sanctions such as the withdrawal of the broadcasting licence, the interdiction of broadcasting and pecuniary fines.

In several Member States the private broadcasters underlined that they were subject to more severe sanctions than the public sector. Private broadcasters would be threatened with losing their broadcasting license if they repeatedly infringed the national laws regulating private broadcasting. The PSBs, however, were not subject to the threat of losing their licence in a comparable situation. The private broadcasters require a level playing field regarding the sanctions for commercial and public 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?*

Member States and public broadcasters regularly underline that the existing procedures in force at national level are sufficient and that the Commission has no powers to provide specifications in a revised Broadcasting Communication. The UK considers that complaints about the PSB remit should in the first place be referred to the national independent regulator(s) who have the investigatory powers and can take direct action. The UK underlines that a national complaints system - which worked properly - could reduce the workload of the Commission, as they would not have to open investigations simply because competitors had no other means of redress.

The Swedish public broadcasters consider the scope of the public service broadcasting to be a matter for the whole society and should be defined solely by bodies that represent the society. Private operators as well as other interested parties and the general public are invited (in Sweden) to express their views on the scope of the remit in the course of reviewing the remit. However, once the remit is defined, complaint procedures concerning the remit in force only serve the private interest of the complainant, but not the general interest.

Private broadcasters and newspaper publishers, to the contrary, point to the respective weaknesses of the national systems and regularly demand true independence for the media regulator and the possibility of a judicial review of its decisions. The ACT calls for complaint procedures to be "quick and effective". Newspaper publishers also sometimes underline that private parties other than broadcasters should be able to lodge a complaint against the infringement of the remit. The German association of commercial broadcasters VPRT underlines that any complaint procedures should give private parties the right to introduce a complaint.

## **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?*

There are opposing views on this issue mainly between private operators and public operators.

According to the commercial broadcasters the impact on competition is negative, especially if the services are offered below market price or even below cost.

In some cases, public service broadcasters use licence fee revenues to produce programs to be broadcasted for free on traditional platforms and then offer these programs on demand over the internet against payment.

The negative impacts are already visible in the complaints from consumers, for example. If triple financing is allowed, there should be safeguards to avoid under pricing in relation to existing commercial offers and there should be a requirement for public service content to be offered on all platforms on an at-cost basis.

On the contrary, public service broadcasters in general consider that if the same principles of transparency, which are already applied to traditional public service broadcasting, are applied to pay services, there is no reason why there should be a considerable impact on competition.

Public service broadcasters should be allowed to pass-on the fees charged by a network operator for showing special interest channels. Public service broadcasters should also be able to charge consumers directly, for example for access to a media archive over the internet. Payment by consumers for on-demand services is an important source of income besides advertising and State subsidies. In order to be able to keep up with private broadcasters in providing special interest channels, public service broadcasters should not be prohibited from charging fees for TV. The provision of such services at a reasonable price should not have a negative impact on competition.

Pay-services by public service broadcasters would only have an impact on competition if they were offered for artificially low prices when compared to similar quality offers by private operators. However, this type of anti-competitive behaviour is already covered by point 58 of the current Broadcasting Communication.

The principle of user-payer enhances transparency in public service financing. New platforms, such as the internet or mobile phones have different characteristics and are much more prone to a pay-per-content financing model than traditional platforms. A mere change in platform for providing the public service, which implies payment for content, does not change the competitive situation.

The release of archive material for free and without advertising would probably be more detrimental to competition.

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

There are opposing views mainly between commercial broadcasters and public service broadcasters on the issue of the qualification of pay-services as commercial or public service activities.

According to private operators, pure Pay TV services are not part of the public service remit. In Germany, for example, they are explicitly excluded from the remit because they run counter to the concept of public broadcasting ("free TV for all"). Also, any expansion of the existing commercial activities of public service broadcasters would be a problem for competition. In Austria, there is currently no legal basis for the ORF to offer Pay TV through specific channels.

Pay-services also go against the principles of universality, accessibility and maximum reach, the pillars on which public service broadcasters were founded. They are not generalist services but rather directed at niche markets.

Pay services should therefore not be part of the remit unless they correspond to services which are not offered by the market. No derogation to this principle should be allowed.

On the contrary, public service broadcasters consider that this is a matter for the Member State to decide on a national basis. As recognised by the Amsterdam Protocol, it is up to the Member State to determine the way of financing the public service broadcasters. There is no reason why the Commission should deprive the Member State of the right to recognise these services as part of the public mission, merely on the basis of a particular way of financing them.

The source of financing in mixed financing systems is indifferent for assessing whether a service is within the public service remit. Pay per content or subscription income is just another option for financing the public service as is advertising. In other Service of General Economic Interest sectors, public service is provided against payment (e.g. transports). The general economic interest of a service is not "lost" because it is not for free. The manner of financing says nothing about the character of a service. This is already recognised in par. 36 of the Broadcasting Communication. The criterion to judge whether a specific service is part of the remit should not be the financing model but the content and contribution to society. It follows that on-demand services could be part of remit. The distinction between free and paid for financing models is increasingly artificial.

Public service broadcasters are financed by sources provided by the whole society. However, new media services, such as online services are "niche" services which are only accessible for part of the population. In order to provide for a fair distribution of the charges, there cannot be an objection of principle to provide these services for payment.

Public service broadcasters must adapt to the business model of network operators which distribute the content of the public service broadcasters and charge fees for the distribution of this content. In the decision of June 2006 on ad hoc financing of public service broadcasters in the Netherlands, the Commission already mentioned that in such situations the public service broadcaster must charge the network operator's fees to the public because otherwise the general budget would have to absorb these costs.

According to public service broadcasters there is no reason why pay-services as part of the public service remit should be limited to those not offered by the market. The range of the public service broadcasters' offer should depend on the social needs and not on the offer provided by the private operators. Public service is not residual / complementary to existing offers, it is characterised by its socio-cultural objectives.

The principle of user-payer also enhances transparency in public service financing. A mere change in platform which implies payment for content does not change the situation.

Public service broadcasters cannot provide their public service in a satisfactory manner without offering new media services such as catch-up TV, video on demand and TV on mobile platforms. The capacity of public service broadcasters to provide new media services should not be limited because similar services are already provided by the market. The commercial nature of Pay TV should be carefully evaluated on a case by case basis. For example, mobile TV operators typically require the viewer to pay for access. If one were to impose on public service broadcasters to ensure free access to mobile TV, this would effectively go against the business model of mobile TV and could jeopardise public service broadcasting via this new platform.

## **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?*

On the basis of the information received in the context of the public consultation, the level of involvement of the public service broadcasters in commercial activities seems to present significant differences from one Member State to the other, and at times even among the different public service broadcasters within the same Member State. For example, according to the information provided, commercial revenues cover 2.6% of the revenues of the Danish Broadcasting Corporation (DR), as compared to 25% in Wallonia or over 30% in Austria.

In all Member States represented in the public consultation, public service broadcasters are carrying out commercial activities. However, in some countries, public service broadcasters are not allowed to engage in advertising (for example in Sweden, Denmark, Finland), or in certain cases the share of advertising is limited.

On the basis of the submissions, it seems that the requirements of the Transparency Directive (Directive 80/723/EC) regarding the separation of the accounts between public service activities and non-public service activities are considered to have been implemented in most of the Member States concerned.

Regarding functional or structural separation, a variety of solutions exist in the Member States, mainly depending on the volume of the commercial activities carried out by the public service broadcasters, as well as the types of commercial activities concerned. The accepted model can be different among the different public service broadcasters within the same country (for example in the United Kingdom or Denmark), and different levels of separation may also exist in parallel within one public service broadcaster. On the basis of the results of the public consultation, it appears that besides the separation of accounts, in many cases, a functional separation is also aimed at by the public service broadcasters. In many cases, commercial activities are carried out by purely commercial subsidiaries, in which case a structural separation is also ensured. However, a complete structural separation of all commercial activities is relatively rare.

*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 be the positive or negative effects of either a structural or a functional separation?*

Commercial broadcasters having submitted comments concerning the issue of separation take the view that further rules on the separation of commercial activities would need to be required in order to limit adverse effects on competition, reduce the risk of cross-subsidisation of commercial activities out of public funds and better enforce the obligation for public service broadcasters to respect the principle of market conformity in their commercial activities. They consider that the rules of the Transparency Directive concerning the separation of accounts are not sufficient and many of these stakeholders would favour a full functional and structural separation.

SCBG (Satellite & Cable Broadcasters' Group) would for example support an explicit requirement for functional separation. Based on literature, as well as examples from mainly the telecommunications and the utilities sectors, SCGB expresses the view that "the lack of effective functional separation increases the probability of discrimination. (...) Where the ex ante prohibition of cross-subsidy is not fully effective, then the upstream operator faces a choice of price-based or non-price discrimination, depending on the nature of regulation, the risk of being caught and the relative benefits. Where the risks of detection are equal, non-price discrimination is typically optimal, given the cost of implementation and the equivalence of the effects on downstream operators." SCBG also takes the view that as "functional separation exists along a spectrum of separation models" there is a need for "an explicit interpretation of the principle".<sup>9</sup> Based on information from the French telecommunications regulator, ARCEP (*Autorité de Régulation des Communications Electroniques et des Postes*) the submission of SCBG also includes a summary of "several relevant approaches to functional separation (...)" and suggests that the appropriate form [shall be for] each Member State to consider in consultation with stakeholders."

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<sup>9</sup> According to SGCB: "Functional separation requires that the downstream activity of the regulated party be placed within a separate business unit along with operational rules to establish effective Chinese Walls between the business unit and the regulated party's other operations. This represents a more restrictive intervention than is permitted under accounting separation, but it falls short of complete ownership separation".

At the same time, the large majority of Member States and public service broadcasters are of the opinion that separate accounting is sufficient, and there is no need to include any further rules regarding the separation of commercial activities in the revised Broadcasting Communication. Although a number of Member States and public service broadcasters do recognise the clear advantages of a functional separation, the general opinion is that the decision should be left for Member States and public service broadcasters, depending on the characteristics of the broadcaster and of its commercial offer. A full integration of commercial activities may be justified, for example, as long as these activities are of small scale and/or newly introduced, or if they are closely linked to the public service activities (such as the sale of the rights on programmes produced by Belgian public service broadcaster RTBF).

Finally, all Member States and public service broadcasters having submitted comments seem to take position against a requirement for a full structural separation in the revised Broadcasting Communication. Even those countries where a structural separation is in place take the view that the decision should be left for national authorities and public service broadcasters. Especially in the case of smaller Member States and public service broadcasters with more limited commercial activities, there seems to be a concern that structural separation would result in a significant and disproportionate increase in administrative costs.

*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?*

Regarding the rules concerning cost allocation set out in the Broadcasting Communication, the views of public service broadcasters and their competitors seem generally opposed. At present, the Broadcasting Communication (paragraphs 53 to 56) provides for more flexible cost allocation rules than those which apply in the case of other services of general economic interest. The current Communication considers (paragraph 53) that in the broadcasting sector, a separation of accounts “may not be straightforward or, indeed, feasible on the cost side” and foresees (paragraph 56) that “contrary to the approach generally adopted in other utilities sectors, costs that are entirely attributable to public service activities need not be apportioned between the two and can be entirely allocated to public service”.

In general, private operators have taken the view that the relevant rules should be revised. In their view, there is no justification for maintaining the more flexible provisions of the current Broadcasting Communication. In the opinion of the commercial broadcasters, there would be no obstacle to a full separation and allocation of all costs also in the broadcasting sector. In their view, the current rules are not sufficient to prevent cross-subsidisation of commercial activities.

The large majority of Member States and public service broadcasters seem on the other hand opposed to any change in the rules of the current Broadcasting Communication concerning cost allocation. They consider that the current rules appropriately address the specificities of the broadcasting sector, represent a balanced solution and are sufficient. Concerns have been voiced that changes in the rules could represent an additional burden for smaller Member States and public service broadcasters.

*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**?*

In line with the diverging positions of the stakeholders outlined above, commercial broadcasters typically consider that the revised Broadcasting Communication should include further transparency

requirements such as functional or structural separation, full application of the cost allocation rules, reinforced by independent auditing, or the publication of audit reports. Some of the submissions (EFTA, VPRT) propose that best practices in the field of the transparency of accounts could be useful. Member States and public service broadcasters are typically against further requirements: as a matter of principle, they usually consider that the current rules of the Transparency Directive are sufficient.

## 2.6. Proportionality – 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?

By way of difference to the Framework on services of general economic interest, the current Broadcasting Communication does not contain an explicit requirement for Member States to clearly lay down the parameters of compensation in advance. It merely states the key principle that “it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission” (paragraph 57).

In general, commercial broadcasters are clearly in favour of including the obligation upon Member States to lay down the parameters for determining the compensation in advance. In their view, this requirement is necessary to be able to carry out a proper control preventing overcompensation. Furthermore, some parties argue that there should also be a requirement to set out the arrangements for avoiding and repaying any eventual overcompensation, similarly to the provisions of the Framework referred to above. It has also been suggested that the parameters should be established by an independent body, and should also specify the source of funding.

The answers received from Member States and public service broadcasters have been more divergent, although a majority has given a negative response to the question concerning the parameters of the compensation in the public consultation. Member States have expressed concerns in particular regarding the difficulty to calculate the costs of the fulfilment of the overall public service remit of public service broadcaster, and the risk of jeopardizing the independence of broadcasters from the Government. Member States and public service broadcasters would generally oppose to lay down the parameters in the Broadcasting Communication.

At the same time, a number of countries (for example Belgium/Wallonia, Portugal, Finland, Norway) would find it reasonable for the Broadcasting Communication to require Member States to lay down the parameters for defining the compensation amount, provided that Member States would remain free to define these parameters. Some public service broadcasters also recognise that this would be beneficial. For example the Danish Broadcasting Corporation takes the view that a regulation regarding the handling of overcompensation would provide the needed legal certainty regarding the financial planning and consolidation of public service broadcasters.

### 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?

On the basis of the replies received from Member States and public service broadcasters, it appears that the current framework of the Broadcasting Communication is generally perceived as allowing for sufficient stability and flexibility for the operation of public service broadcasters, and in most of

the cases, it is not considered as an obstacle to pluri-annual financial planning. Some Member States (for example Slovakia, Finland) have expressed the view that eventual problems of financial stability of national broadcasters were not due to the rules of the Broadcasting Communication.

At the same time, Member States and public service broadcasters generally stress the need for public broadcasters to maintain an appropriate amount of reserves in order to be able to withstand cost fluctuations. They emphasise that there needs to be a possibility to transfer surpluses and deficits over several years within a given period, in the interest of realising a pluri-annual financial planning (the issue of reserves is addressed in more details under point 2.6.3. below). However, only few of the Member States and public service broadcasters have pointed out the lack of such explicit provisions in the current Broadcasting Communication as a serious stability problem (for example Belgium/Wallonia and Denmark, as well as RTÉ from Ireland, DR from Denmark).

According to the general position of the commercial broadcasters, the current rules of the Broadcasting Communication allow a wide margin of discretion and a high level of flexibility to public service broadcasters. They stress that private broadcasters are significantly more exposed to fluctuations of income than public service broadcasters and typically consider that there is no justified need for public service broadcasters to maintain a level of overcompensation over several years.

*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 difference to the Framework on public service compensation, the 2001 Broadcasting Communication does not set out the possibility for public service broadcasters to maintain reserves.

Member States and public service broadcasters take the view that the Broadcasting Communication should allow public service broadcasters to maintain annual reserves concerning their public service activities. The submission of EBU provides a summary of the reasons why public service broadcasters need reserves to ensure a continuous fulfilment of their public service mandate. In their view, such reserves are necessary at the first place to enable public service broadcasters to deal with fluctuations of revenue and costs. On the revenue side, broadcasters need to anticipate inflation, and, in the case of broadcasters funded out of licence fees, the possible fluctuations in the licence fee revenues. For operators funded by advertising revenue or by other commercial revenues, fluctuations of income may in their view be even more significant and require a sufficient level of reserves to maintain their public service commitments. The United Kingdom has also pointed out that certain market situations, such as the current credit difficulties may also be an example of unforeseeable events where reserves would be needed.

On the cost side, they have pointed out that broadcasting organizations must take into account the high level of production costs and the costs of acquiring programmes, which may result in payments to be made long time before the broadcast in question. They have stressed that such fluctuations may be unforeseeable, for example in the case of programme costs relating to covering an exceptional event (natural disaster, war or domestic event), or in an urgent situation regarding the infrastructure necessary to maintain the transmission chain. Finally, they also draw attention to the fact that reserves are needed to adapt to technological developments and to realise technological improvements of existing public service offers which may necessitate serious investment.

At the same time, one Member State has for example also pointed out the need for having a differentiated approach to surpluses. In its view, public service broadcasters should be allowed to maintain efficiency gains as a matter of principle. However, would the surplus arise from the fact that the public service broadcaster has not, or has only in part fulfilled their tasks, in its view, the amount of overcompensation should be repaid.

An important number of Member States and public service broadcasters consider that limiting the annual reserves to 10% of the compensation amount would not be acceptable. Many of them argue that this would be an arbitrary restriction, and consider that the Broadcasting Communication should allow for annual reserves without setting an upper limit. They consider that provided that there is an adequate review of the surpluses, the upper limit is not necessary and would only impose additional constraints on public service broadcasters. Moreover, several Member States emphasise that there is a need to consider eventual over-compensation over a longer time period and not from one year to the other, to be determined at national level.

A high number of commercial broadcasters consider, in general, that annual reserves are not absolutely necessary for public service broadcasters for the fulfilment of their public service mandate. They seem to be concerned that it may lead to distortions of competition (for example if it provides an incentive to invest large sums in programme rights), and would increase the danger of cross-subsidisation of commercial activities.

At the same time, some of the commercial broadcasters (for example SIC, TF1) do recognise that certain flexibility may be needed for public service broadcasters in terms of the annual reserves. In order to avoid any misuse of the surpluses, some of them have put forward that the revised Broadcasting Communication should also include the conditions for the use of the reserves. They take the view that such reserves should be exceptional, clearly earmarked for specific public service objectives or to cover unforeseeable events, and subject to strict control requirements.

*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)?*

On the basis of the results of the public consultation, there seems to be a consensus among most of the interested parties that surpluses should be used for public service activities. However, some public service broadcasting organizations (for example France Télévisions, EBU) express the view that surpluses could also be used to finance commercial activities, provided that the market economy investor principle is respected.

Furthermore, public service broadcasters stress that the use of the reserves should be left at the discretion of the public service broadcasters, and most of them seem to oppose the earmarking of the reserves for specific purposes. In their view, the allocation of the surpluses for upfront defined objectives would be difficult to reconcile with the unpredictability of fluctuations of costs and revenues in the broadcasting sector. Most Member States take a similar view regarding the earmarking of the reserves. At the same time, for example Norway recognises that it may be desirable for the national regulator to set specific parameters for the use of the reserves. However, it emphasises that this should remain for the discretion of the Member States.

A number of Member States seem to agree that consistent surpluses point at a need for review of the public service broadcaster's financial needs. For example, Hungary points out that continuous surplus may be an indication that resources are not used in the interest of the society: either there is

a problem with the level of compensation, or the public service broadcaster is not fulfilling its public service tasks. In such cases, the United Kingdom suggests that the level of funding, or the funding mechanism, would need to be reconsidered. They also stress that there needs to be supervision by the national regulators of the way the surpluses are spent to ensure that they support the public service remit.

In general, commercial broadcasters raise doubts as to the necessity of maintaining surpluses. They stress that if such reserves are to be allowed, they should be deduced from the funding in the next year, and not be carried over throughout the entrustment period. Furthermore, they argue in favour of a clear, binding earmarking of the surpluses for specific purposes and strict control mechanisms over the use of surpluses in regular, short intervals.

***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?***

There seems to be a general consensus among interested parties, that the current rules of the Broadcasting Communication do not act as a disincentive for public service broadcasters to achieve efficiency gains. The majority of Member States and public service broadcasters consider that the possibility to retain surpluses constitutes an important incentive for broadcasters to reduce costs and to achieve efficiency gains. In their view, a lack of reserves and a strict obligation of repaying any overcompensation could induce public service broadcasters to spend surpluses before the end of the budgetary year. Some of them have also voiced concerns that stricter rules concerning the maximum amount and the use of reserves may act as a disincentive.

Commercial broadcasters, on the other hand, generally do not see reserves as an incentive for public service broadcasters to realise efficiency gains. Among mechanisms to increase efficiency, they have referred to measures such as restructuring, reorganisation, rationalisation, down-sizing, more efficient licence rights management, and legal obligations to respect the principle of “economical administration”.

***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 current rules of the 2001 Broadcasting Communication do not refer to the possibility for public service broadcasters to keep profits. The Framework on public service compensation (paragraph 14) provides that “the amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and reasonable profit for discharging those obligations”. It further provides that “the reasonable profit may include all or some of the productivity gains achieved by the undertakings concerned during an agreed limited period without reducing the level of quality of the services entrusted to the undertaking by the state.” According to the Framework (paragraph 18) “reasonable profit should be taken to mean a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State, particularly if the latter grants exclusive or special rights. This rate must normally not exceed the average rate for the sector in recent years. In sectors where there is no undertaking comparable to the undertaking entrusted with the operation of the service of general economic interest, a comparison may be made with undertakings situated in other Member States, or if necessary, in other sectors, provided that the particular characteristics of each sector are taken into account. In determining what amounts to a

reasonable profit, the Member State may introduce incentive criteria relating, among other things, to the quality of service provided and gains in productive efficiency".

The responses received from interested parties concerning the issue of profit vary to a large extent depending on the national broadcasting systems, as well as the interpretation they have given to the meaning of "profit margin".

A high number of Member States and public service broadcasters seem to have interpreted the question in a broad sense and have reinstated their response concerning the necessity for public service broadcasters to be able to maintain surpluses. Other Member States and public service broadcasters have interpreted the question on the basis of the above provisions of the SGEI Framework concerning the possibility for the amount of compensation to include a reasonable profit. Most of these Member States and public service broadcasters appear to be in favour of allowing for a reasonable profit to be included in the amount of compensation also in the case of public service broadcasters. At the same time, some other Member States and public service broadcasters (in particular the United Kingdom, Norway, Sweden, Finland; as well as NRK) considered that as in their countries public service broadcasters were not profit-orientated, the issue of profit was not relevant for their national broadcasting systems.

Commercial broadcasters were in general negative about the possibility for public service broadcasters to retain profits, or have requested the same strict requirements for earmarking, control, and yearly deduction from the public funding as in the case of annual reserves.

## 2.7. Proportionality – market distortions

*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?*

Regarding the mechanisms for private operators to challenge alleged anti-competitive behaviour of public service broadcasters, the replies received from interested parties in the different Member States show common tendencies.

General antitrust rules apply to the commercial activities of public service broadcasters in the same way as to private undertakings, and provide the basis for private competitors to challenge eventual anti-competitive practices at the national competition authorities and in court. In addition, competitors may submit complaints to the respective organisations in charge of supervising the functioning of public service broadcasters at the national level.

The majority of Member States and public service broadcasters consider that these mechanisms are efficient and are sufficient to control eventual anti-competitive behaviour of public service broadcasters. Some countries (for example Norway, Belgium) have mentioned that price undercutting is considered in the context of the control of overcompensation. It is not entirely clear from the replies received, how far the antitrust rules are being used in practice in the public service broadcasting field.

As far as commercial broadcasters are concerned, they mainly consider that the current mechanisms for challenging anti-competitive behaviour of public service broadcasters cannot be considered effective. In their view, these procedures are not frequently used, partly because the burden of proof would be on the private operators to demonstrate the anti-competitive behaviour, which is in their

view difficult to meet in practice. Furthermore, they also expressed regret that only specific anti-competitive practices can be challenged, and there is no opportunity to question the level of compensation, nor the adverse effects on competition resulting from other privileges granted to public service broadcasters. Regarding the complaints procedures to the national supervisory bodies, several private operators seem to consider that additional safeguards for independence would be needed.

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?*

On the basis of the replies received from Member States and public service broadcasters, it seems to be known and accepted, as a basic principle, that public service broadcasters are bound to respect market conditions when carrying out commercial activities. The replies of the Member States are however divergent on the question whether such requirements for market conformity, as well as for adequate control mechanisms, should be included in the Broadcasting Communication.

Part of the Member States (for example France, Sweden, Portugal and Finland) considers that there is no need to refer to market conform behaviour explicitly in the Broadcasting Communication, mainly because this requirement already exists in their national systems. Other countries (such as Denmark, Norway, or Hungary) recognise that there may be a benefit in including such an obligation in the Broadcasting Communication. In the view of Denmark, this may help highlighting the importance of public service activities and their funding not being misused as competitive market distortion. However, they have also pointed out that the overall effect of such provision would depend to a great extent on its actual drafting and interpretation. Several Member States have emphasised that it should be left for the individual Member States to develop and design the most appropriate control mechanisms in the national context.

The requirement to respect market conditions in their commercial activities seems to be also generally accepted by the public service broadcasters having submitted comments to the questionnaire. Against this background, the majority of public service broadcasters consider that there is no need to include such an obligation in the Broadcasting Communication. For example RTÉ (Ireland) refers to the fact it follows directly from Article 86 (2) of the EC Treaty that public service broadcasters are subject to the rules of competition, except to the extent that the application of these rules would obstruct their public service task. Thus, they argue that there is no need to provide for market conform behaviour in the Broadcasting Communication. The submission of France Télévisions - which already has binding obligation for market conformity, as well as regular independent checks, further to the 2005 Commission decision - expresses the concern that additional rules in the Broadcasting Communication may reverse the burden of proof in competition proceedings, to the detriment of public service broadcasters.

Commercial broadcasters are generally in favour of clarifying the requirement for market conform behaviour, and requiring adequate control mechanisms in the Broadcasting Communication. Some commercial broadcasters, such as TVN (Poland) also suggest reversing the burden of proof concerning anti-competitive behaviour. In their view, if a prima facie analysis indicates that the market conditions have not been respected, it should be up to the public service broadcasters to demonstrate that they have not undercut prices.

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 one of the examples in the Broadcasting Communication of possible market distortions not necessary for the fulfilment of the public service mission of public service broadcasters. The Broadcasting Communication (paragraph 58) provides that “for example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors. Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster.”

The Broadcasting Communication further provides for the following method for detecting price undercutting: “whenever a public service broadcaster undercuts prices in non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of an overcompensation of public service obligations and would in any event ‘affect trading conditions and competition in the Community to an extent which would be contrary to the common interest’ and thus infringe the Protocol”. At the same time, the Broadcasting Communication (paragraph 60) emphasises that “the analysis of the effects of State aid on competition and development of trade will inevitably have to be based on the specific characteristics of each situation” and specifies that “this Communication cannot ex ante define the conditions under which the prices of the public service broadcasters are in line with the principles explained in point 58”.

Regarding the methodology for detecting price undercutting, most of the Member States and public service broadcasters have emphasised the difficulty to establish a general test at a pan-European level. In their view, a case-by-case approach at national level is the best suited to address this problem.

Regarding the current rules in the Broadcasting Communication, mixed comments were received in the course of the public consultation. Some of the Member States and public service broadcasters (for example Hungary, Sweden; as well as the BBC) considered that the existing rules are sufficient. A number of other Member States and public service broadcasters have expressed criticism with regard to the current test in the Broadcasting Communication. Some of them questioned the added value of such a common test (for example Belgium/Flanders, UK, Norway, as well as NBC, TVP). Norway has for example taken the view that there is no need for a specific test in the Broadcasting Communication, but the Commission could eventually initiate an exchange of best practices among Member States concerning the methods to detect price undercutting.

Others have taken the view that the test would need to be adapted. For example Belgium/ Wallonia, France Télévisions or RTBF have proposed that a test which would focus on the overall objective of profit maximisation, taking into account a number of relevant market indicators such as average advertising prices, audience shares, regulatory impact and eventual limitations imposed on public service broadcasters, elasticity on the demand side, etc. would be more suitable than the reference to the return of stand-alone costs and the comparison to an “efficient commercial operator” which is in their view very difficult to use in practice. They have also pointed out that the Commission has not been using the test provided in the Broadcasting Communication in its decision-making practice.

Commercial broadcasters generally would seem to favour a more precise test, with clear parameters fixed at the level of the Broadcasting Communication, and with compulsory control mechanisms.

They typically find that normal competition rules do not provide sufficient guarantee to address potential anti-competitive behaviour by public service broadcasters. A number of commercial broadcasters, such as SIC or TVN) have also expressed criticism concerning the current test, which they find difficult to apply in practice. They have also pointed out other issues of anti-competitive behaviour besides price undercutting which are in their view of similar significance. For example ATV has taken the view that purchase of sports rights above the market value (“overpricing”) is equally detrimental to private competitors as the selling of advertising rights below the market value (“under-pricing”).

*2.7.5. 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?*

Regarding the public funding of premium sports rights, the majority of Member States and public service broadcasters have taken the view that given that sport is part of the public service remit of public service broadcasters, in line with the Amsterdam Protocol, there should be no limitation in this regard in the Broadcasting Communication. Their general view has been that any further rules or clarifications regarding the acquisition of sports rights would go beyond the powers of the European Commission and interfere with the right of Member States to define the public service mandate. They consider that any problems concerning the acquisition of premium sports rights by public service broadcasters can be dealt with on the basis of the general antitrust rules. Denmark has submitted concrete examples on how the competition authority has addressed the sale of sports rights for popular sports events at the national level.

The replies received also suggest significant differences between the situations in the different Member States, depending on the size of the public service broadcasters and their level of involvement on the premium sports rights market. For example Sweden or France Télévisions consider that with the increase in the prices of programme rights, public service broadcasters have more and more difficulties in acquiring such rights. Therefore, in their view, the related competition issues have become more limited. Some public service broadcasters, for example Channel 4, are not active in the premium sports rights market. One Member State took the view that in view of the high interest for the general broadcast of premium sports events by commercial broadcasters, there was no need to include such events in the public service mandate of the public service broadcasters.

In the general opinion of commercial broadcasters, the public funding of the acquisition of premium sports rights by public service broadcasters gives rise to serious distortions of competition and should be limited. In their view, antitrust rules are not sufficient to address the competition concerns arising from the purchase of exclusive sports rights by public service broadcasters. Some commercial broadcasters (for example ATV) have proposed that the transparency of the existing sports rights owned by public service broadcasters should be enhanced, for example by making a list of those rights public. Certain commercial broadcasters also argue that the share of sports programming should be limited to a certain share of the total programming time, annual compensation or budget.

In addition, a number of commercial broadcasters consider that further safeguards would be needed, such as: prior approval of an independent authority of the acquisition of sports rights by public service broadcasters, limitations to the amount which can be offered by public service broadcasters when bidding for sports rights, measures to prevent unused rights, limitation of the share of sports

programmes per day and per programme, obligation to include minority sports, etc. Some of the commercial broadcasters and associations, for example ATV and VÖP (Austria) have in particular referred to the need to restrict or to exclude the purchase of premium sports rights by public service broadcasters for the purpose of transmitting in the context of new media or pay-television services, and to exclude the provision of premium sports events in the form of non-linear services. In their view, this would lead to a significant crowding-out effect and would make it difficult for private operators to establish themselves on these new markets.

## **2.8. Other issues**

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

Opinions are mixed. Some parties are in favour and some are against. Most respondents do not comment on this question.

Parties in favour of this reference claim that in small countries public service broadcasters are particularly exposed to commercial risks as they depend largely on revenues from advertising (e.g. Austria). The market is too small to finance public service broadcasters exclusively via licence fee. Also, poorer countries where for social reasons there are difficulties in financing public media (and not just smaller countries) should be positively discriminated. Also the stability of the legal system of a country should be taken into account. In small Member States, the rationale for allowing dual financing of public service broadcasters and for allowing the public service broadcasters to build up reserves in order to safeguard their independence is particularly strong.

One party argued that in small Member States, public service broadcasters distort the market even more and therefore the reference should actually stand for a negative discrimination.

One party suggested that the reference may not be needed but that, in the application of the principles of the Broadcasting Communication, account should be taken of the size of the Member State. A case by case approach is preferred.

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

The following seem to be the main constraints: small dimension of markets, national budgetary situation, high infrastructure costs, high production costs and programme transmission rights, less stable legal system, high fluctuation of revenues (impeding multi-annual planning), etc.

One party argued that new public service channels are particularly penalising for private operators in small Member States.

One suggestion is advanced - public service broadcasters in small Member States should not be subject to a fix "cap" for the buffer of overcompensation. The Broadcasting Communication could confirm the right of public service broadcasters in small Member States to retain surpluses and to create reserves (without capping these at an arbitral level).

### 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 and other media services, media pluralism and cultural diversity.***

There are opposing views on this issue mainly between commercial broadcasters and public operators.

According to the private operators a revised Broadcasting Communication would free financial resources which are currently wasted, would represent gains for citizens, would allow new private services to appear and would increase employment.

On the contrary, public service broadcasters consider that they are an engine of technological development. They bring innovation and quality to the sector. If public service broadcasters are over-regulated, they would no longer be able to fulfil their role as an engine of innovation in the media sector. An increasing number of public service broadcaster staff is entirely occupied with dealing with red tape. A revised Broadcasting Communication would increase red tape further. If the objective is to allow innovation and new services of public interest, a stricter approach would be detrimental. Stricter rules will lead to less quality and availability of supply, less consumer choice, pluralism and cultural diversity.

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

There are opposing views on this issue mainly between private operators and public operators.

According to the private operators, a revised Broadcasting Communication would not represent further costs for public service broadcasters. Moreover, compliance costs and regulatory and administrative burdens are a fact of life.

Public service broadcasters, on the contrary, consider that a revised Broadcasting Communication will increase costs and red tape. This is the case in particular for the ex ante evaluation for each new media service, which may prevent public service broadcasters from competing with commercial initiatives, for the obligation of structural and/or functional separation of activities outside the remit (on top of the existing separate accounting obligation) and for a possible limitation of the possibility for financing services (pay per content) and the introduction of specific rules related to market compliance and the acquisition of sports rights.

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

There are opposing views on this issue mainly between commercial broadcasters and public service broadcasters.

According to the private operators, a revision is needed and would create a better regulatory framework. For example, clearing the doubt as regards the right of public service broadcasters to keep surpluses and specifying the calculation of costs (including profit margin) could have a positive impact.

Public broadcasters in general consider that maintaining the flexibility of the Communication, while taking into account the specificity of public media and respecting the different conditions in various

countries, would keep the positive role of the public media in promoting creativity in new media services, would increase variety of offer to consumers, quality and availability of media services, media pluralism and cultural diversity.

Some public operators consider that the questions asked in the consultation go far beyond a "clarification" of the existing rules but seem to put them into question. Such "specifications" of the rules will lead to less flexibility for public service broadcasters and to a loss of freedom to adapt their offer to individual market circumstances. The current rules are sufficiently clear. Modifications which would deprive the Communication of good features (e.g. applicability in changing social, market and technological environment) should be avoided.

***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.***

There are opposing views on this issue mainly between private operators and public operators.

According to the commercial broadcasters the balance is positive. The foreseen changes would have positive effects for the private media industry.

The adaptation of the Broadcasting Communication would ensure the appropriate use of public money for specific activities according to the budget which is assigned to a cost position or a profit centre. Such an enhanced cost transparency would increase the efficiency of public service broadcasters and lessen the cost for citizens to finance the public service, thereby counterbalancing the increased administrative cost of managing an ex ante evaluation test.

The current insecurity has a negative impact on the willingness of private media companies to invest. The creation of a clearer legal framework for new media services would help re-establish a balance between private and public broadcasters.

Public service broadcasters consider that the envisaged changes will neither enhance legal clarity nor transparency. They will not change anything in the private broadcasters' willingness to introduce complaints with the EU Commission namely because, contrary to national procedures where complainants face considerable costs, a complaint in Brussels is "free of charge".

One party praises the aim of reducing complaints and of increasing subsidiarity. However, the enhanced regulatory details of a revised Communication could not achieve this result. There are no "one size fits all" solutions.