On 2 July 2009 the Commission revised its 2001 Communication on State aid and public service broadcasting. After three public consultations, the revised Communication clarifies the legal framework for the expansion of public service broadcasters onto new platforms, the legitimacy of theme channels and pay TV in public television and the arrangements for supervising the net cost principle.

1. Introduction

The 2009 Broadcasting Communication is the result of a review process which is firmly rooted in a wider policy that revolves around four pillars: the Lisbon Strategy, the 2005 State Aid Action Plan, the Commission’s policy on State aid for public services (‘services of general economic interest’), and the Commission’s 2007 Audiovisual Media Services Directive.

The 2005 State Aid Action Plan announced a medium-term revision of the 2001 Broadcasting Communication in view of the fast development of the media industry spurred by the digital revolution. The rationale for reviewing the 2001 Communication was enhanced by the ‘SGEI package’, also of 2005, which contained two documents of direct and indirect importance for the broadcasting sector: First, the 2005 SGEI Decision block-exempted public services of minor size including potentially those of smaller public broadcasters. Second, the SGEI Framework clarified the Commission’s approach to the net cost principle.

So, the need to harmonise these instruments, together with the ongoing digitalisation process and the Commission’s technologically neutral approach to the expansion of ‘classic’ public TV and radio to new platforms in the 2007 Audiovisual Media Services Directive, confirmed that the 2001 Communication needed updating.

2. The Review Process

In its first public consultation from 10 January 2008 to 10 March 2008, the Commission asked all stakeholders whether the 2001 Communication provided sufficient guidance on the main questions at issue in this sector. Based on the outcome of this consultation (121 replies), Commissioner N. Kroes concluded in July 2008 that there was a strong case for updating the existing text.

The ensuing public consultation from 5 November 2008 to 15 January 2009 invited comments on a first draft for a revised Communication. On the basis of...
90 submissions \(^{(14)}\) and the results of a meeting between the Commission and experts from the Member States on 5 December 2008, the Commission then drew up a second draft. A public consultation on this new draft took place from 7 April to 8 May 2009 and elicited some 70 replies. \(^{(13)}\) On 5 May 2009, the representatives of Member States gave their views to the Commission in a second multilateral meeting.

The final text was adopted by the Commission on 2 July 2009 and entered into force on 27 October. It is open-ended. \(^{(14)}\) The Commission will verify on a case by case basis whether Member States have adapted their existing aid schemes for public service broadcasters to the requirements of the revised Communication.

### 3. The 2009 Broadcasting Communication \(^{(14)}\)

#### 3.1. Amsterdam Protocol

As for the 2001 Communication, the Amsterdam Protocol to the EC Treaty remains the core legal basis of the revised 2009 Communication.

The Amsterdam Protocol \(^{(15)}\) attributes special status to the public service broadcasting sector amongst all services of general economic interest, acknowledging that public service broadcasting is directly related to the democratic, social and cultural needs of society and the need to preserve media pluralism. While the funding of public broadcasters should be in line with the EC Treaty competition rules, the Protocol at the same time emphasises Member States’ discretion to organise and finance their public service broadcasting systems and to define the scope of its public service.

### 3.2. Definition of the public service mandate

Under the EC Treaty and the Amsterdam Protocol, the Commission’s role is limited to checking whether Member States commit a manifest error in defining the mandate of a public service broadcaster and whether the remit is sufficiently clear to allow for meaningful supervision. The revised Communication provides more indications on how the Commission intends to exert this manifest error control.

**Editorial independence**

As in the 2001 Communication, the Commission expresses the requirement that the definition of the public service mandate by the Member States should be as precise as possible \(§ 45\). The clear identification of activities covered by the public service remit is important for non-public service operators, so that they can plan their activities knowing which services of public broadcasters are subsidised with State aid, and so that Member States’ authorities can monitor compliance with the remit.

The 2009 Communication also clarifies however that the requirement for a precisely defined public service mandate must be balanced with the need for editorial independence for public service broadcasters.

\[^{(11)}\] The High Contracting Parties, considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretative provisions, which shall be annexed to the Treaty establishing the European Community: The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'
Legitimacy of broadly defined remit

As the Court of First Instance recently pointed out, the legitimacy of a broadly defined public service remit rests upon qualitative requirements for the public broadcasting service: 'There is no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order for the public service broadcaster to adopt the conduct of a commercial operator'.

This jurisprudence is now reflected in the revised Communication. The Commission must verify whether national mechanisms for supervising the remit are effective and whether they include an assessment, ex officio or complaints-based, that the public broadcaster's services live up to the qualitative requirements of the remit. While the Commission will not itself exercise such control, it must be able to rely on an effective control body at the national level. The Commission applied this approach for the first time in its ORF decision of 28.10.2009.

Technology Neutrality

The revised Communication confirms, as with its predecessor and individual cases, that the public service mandate of public broadcasters may include all types of new audiovisual services on all kinds of platforms – i.e. services beyond ‘classic’ activities such as radio and TV broadcasting in a narrow sense – provided that the general criteria of the Amsterdam Protocol are met.

This clarification was widely sought by public service broadcasters, while newspaper publishers worried that interpreting the concept ‘broadcasting’ too broadly might enable public service broadcasters to publish a kind of ‘electronic press’ on the internet by increasingly supporting audiovisual content (i.e. TV and radio news) with text. The Commission responded to this concern by consolidating its position of ‘appropriate remedies’ in so far as it is necessary to ensure compliance with public service obligations. The Commission used to verify these elements on specific procedural safeguards for public broadcasters expanding onto new platforms (the Amsterdam test, see below).

Manifest Error Control and Pay Services

The list of examples for manifest errors in the 2001 Communication was slightly enhanced. The revised Communication now also refers to ‘the use of premium rate numbers in prize games’. On the other hand, the Commission did not include pay services in the list, though this might have been possible in view of the 2007 decision concerning Germany.

Based on the outcome of the public consultations, the Commission found that a nuanced approach was needed with respect to ‘public pay TV’.

In a section on the ‘diversification of public broadcasting services’, the 2009 Communication says that while pay services may have an adverse impact on access for viewers (not all can afford to pay a fee for access), this does not necessarily mean that pay services are manifestly not part of the public service remit. Rather, it has to be decided on a case by case basis whether the pay element is the distinctive character of the public service in terms of satisfying the social, democratic and cultural needs of citizens. Moreover, the potentially adverse impact on competition must be market tested (Amsterdam test, see below).

3.3. Entrustment and Supervision

The revised Communication not only calls — as did its predecessor — for the public service remit to be covered by an official act. It now also makes the point that the entrustment act must specify the conditions for providing compensation and the arrangements for avoiding and recovering any over-compensation.

As to the supervision of the remit, the revised Communication emphasises the need for ‘effective’ independence of the supervising body from the management of the public service broadcaster. Another new element is the clarification that the national supervisory body must have the ‘powers and the necessary capacity and resources’ to carry out supervision regularly, which can lead to the imposition of ‘appropriate remedies’ in so far as it is necessary to ensure compliance with public service obligations. The Commission used to verify these elements under the 2001 Communication, even though this was not explicitly mentioned.

3.4. Transparency Requirements

The 2009 Communication maintains the requirement for proper cost and revenue allocation and for the appropriate separation of accounts for public
service tasks and commercial activities, in line with Directive 2006/111/EC.

The revised Communication also confirms the privilege of public service broadcasters — compared to other SGEI undertakings — as regards the allocation of general overhead costs. In public broadcasting, separation of accounts may be more difficult on the cost side. This is because — in traditional broadcasting in particular — Member States may consider a whole programme schedule to be covered by the public service remit, while still allowing for its commercial exploitation (24). In other words, public service and non-public service activities may share to a large extent the same inputs, and the costs may not always be strictly apportionable.

So, costs that are entirely attributable to public service activities, but which also work to the benefit of non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed with SGEIs is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to public service activities must be deducted fully from total costs for the purpose of calculating net public service costs and hence of reducing the public service compensation level. This reduces the risk of cross-subsidisation by apportioning to public service activities a larger portion of costs shared by commercial activities.

The revised Communication also contains a recommendation to consider ‘functional or structural separation of significant and severable commercial activities, as a form of best practice’. This goes beyond the minimum requirements of the Transparency Directive, which only requires an accounting separation, (25) and is due to the Commission’s experience in individual cases.

3.5. Net Cost Principle and Overcompensation

In line with the 2001 Communication, the revised Communication clarifies that the amount of public compensation is only proportionate if it does not exceed the net cost of the public service mission, taking into account other direct or indirect revenues arising from the public service mission. In other words, the net benefit of all commercial activities related to the public service activity must be taken into account in calculating the net public service costs and hence the compensation amount. So far, this is nothing new. (26)

Public service reserves

The revised Communication however also aligns the control of proportionality in the public broadcasting sector to the one in the utilities sector by enabling public service broadcasters to retain limited-period overcompensation where this appears necessary for the public service.

- First, public service broadcasters may retain yearly overcompensation above the net costs of the public service as ‘public service reserves’ in so far as this is necessary to secure the financing of their public service obligations. The Commission considers that an amount of up to 10 % of the annual budgeted expenses of the public service mission may be deemed necessary to cope with cost and revenue fluctuations. Any ‘public service reserves’ left at the end of the financing period must be netted out by including them in the calculation of financial needs of the public service broadcaster for the next period. (27)

- Second, public service broadcasters may exceptionally be allowed to keep overcompensation in excess of 10 % in ‘duly justified cases’. This is only acceptable where the overcompensation is ‘specifically earmarked’ in advance of and in a binding way for ‘a nonrecurring, major expense’ necessary for the fulfilment of the public service mission. The use of such clearly earmarked overcompensation should also be limited in time.

These two principles are similar but not identical to § 21 of the SGEI Framework, as the revised Communication relies on a slightly different benchmark for calculating the 10 % buffer. The revised Communication refers to the ‘annual budgeted expenses’ rather than the ‘annual compensation amount’ (as does the Framework) as the benchmark for the 10 % buffer. This is more generous because the to-

(26) Note that in the utilities sector, Member States have a choice as to whether they want to use income from activities other the public service remit for financing the public service or rather for other activities. See § 17 of the SGEI Framework (‘The Member State may …’). This stricter approach in the public broadcasting sector is intrinsically related to and follows from the more lenient cost allocation, as explained in § … of the revised Broadcasting Communication.

(27) The requirement to net out the 10 % reserve at the end of the financial cycle is slightly more generous than the requirement in § 21 of the SGEI Framework that all overcompensation discovered at the end of a period ‘not exceeding four years’ should be repaid’. § 79 of the revised Communication applies a four years limitation for the carry forward of the public service reserve only in the absence of a financial period (‘or, in the absence thereof, a time period which normally should not exceed four years’).
tal expenses of dual-financed public broadcasters exceed their public service compensation. (28)

The revised Communication therefore takes a more flexible approach to permissible overcompensation than does the SGEI Framework, but it is stricter when it comes to the elements allowable in calculating the compensation amount.

**Reasonable Profit**

The SGEI Decision states that the amount of compensation for an SGEI may not exceed the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a 'reasonable profit' on any own capital necessary for discharging those obligations. 'Reasonable profit' is defined as ‘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.’

This concept implicitly defines profit as reward for the risk related to investing a company’s own capital, as opposed to an investment in alternative ventures (opportunity cost). The higher the risk, the more profitable an activity must be. Arguably, without a reward for taking the risk, the company would not agree to deliver the SGEI. Hence, there is a need to reward the company by including a profit element in the compensation.

The revised Broadcasting Communication takes this concept as a starting point and then concludes: ‘In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission’. (29)

On the other hand, where Member States entrust a commercial broadcaster with individual and specific public broadcasting tasks against remuneration, it may be necessary to remunerate equity capital by including an appropriate profit element in the compensation amount. (30)

### 3.6. Financial Control and recovery

While the 2001 Broadcasting Communication did not have a section on financial control, the Commission has, in its recent practice, verified whether Member States can have recourse to such mechanisms to vet overcompensation, as provided for in the SGEI Decision and the SGEI Framework.

Under the revised Communication, Member States shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of ‘public service reserves’. Such control mechanisms must be ‘effective’, which can only be presumed if the control is carried out by an external body independent of the public service broadcaster. The control must be ‘at regular intervals, preferably on a yearly basis’.

Moreover, Member States must put in place ‘effective’ procedures recover aid where a public broadcaster was unduly overcompensated. The financial situation of a public broadcaster must be subject to an in-depth review at the end of each financing period. In the event of ‘public service reserves’ repeatedly exceeding 10 % of the annual public service costs, Member States must check whether the level of funding is appropriate to the public service broadcasters’ actual financial needs.

### 3.7. Ex Ante Assessment

(Amsterdam Test)

The revised Communication on the one hand confirms that public service broadcasters may use State aid to provide all kinds of audiovisual services on new distribution platforms, applying a broad interpretation of the concept ‘broadcasting’ as used in the Amsterdam Protocol (31). However, this presupposes that the material conditions of the Amsterdam Protocol are in fact met. (32) To ensure that these substantive conditions apply to new publicly financed audiovisual services, the procedural solution follows the same lines that the Commission had already applied in three preceding cases concerning

(28) This difference to § 21 of the SGEI Framework has a reason. Using the annual compensation as benchmark for the 10 % buffer would have treated dually financed broadcasters (income from State aid and advertising) worse than single-funded broadcasters (income only from State aid) and hence have distorted competition between them. Also, the rationale for granting financial flexibility is stronger for dually funded public broadcasters because their income from advertising is difficult to predict, while any income of single-funded broadcasters from State aid is typically fixed years in advance and hence tends to be stable.

(29) This merely excludes any consideration of a hypothetical return on equity in the calculation of the public service compensation. It does not prevent public service broadcasters from maximising profits from their commercial activities. This may even be necessary to prevent further distortions of competition (see § 94).

(30) For instance, to exclude advertising and to observe quality criteria for children programmes.

(31) See section 2 above.

(32) ‘... provided that they are addressing the same democratic, social and cultural needs of the society in question and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit’.
Germany (33), Ireland (34) and Belgium (35): the ‘Amsterdam Test’.

This test at the national level (i.e.: by a national body rather than the Commission) addresses the legitimate concern of commercial media, including the print media, that public broadcasters might use public money to offer new online services which are not remotely similar to a TV or radio broadcast, which do not add any clear value for society and which considerably distort competition. In several Member States, the debate focused on the question whether broadcasters could start using public service compensation to finance a kind of ‘electronic online press’. (36)

The Amsterdam Test reads as follows in the revised Communication: ‘Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of society, while duly taking into account its potential effects on trading conditions and competition’.

This prior evaluation therefore consists of two substantive elements:

• First, there must be consideration of whether the new service adds value for society in terms of satisfying the social, democratic or cultural needs of the population.

• Second, the potential impact of the new service on the market must be assessed.

Member States must balance the effect on the market with the added value for society. If there are likely to be predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if justified by an added value in terms of satisfying the social, democratic and cultural needs of society, taking into account the existing overall public service supply.

During the consultation process, critical views on the Amsterdam Test were essentially twofold:

• First, the Amsterdam Test would reduce the editorial independence of public service broadcasters.

• Second, the test would impose a heavy administrative burden on public service broadcasters, especially in smaller Member States.

The Communication does not request governments to get involved in the Amsterdam Test and underlines the need to safeguard the editorial independence of public service broadcasters. The Communication merely affirms the (common sense) requirement that the national testing body be effectively independent of the management of the public service broadcaster. (37)

As to the administrative burden, the Communication sets out only a handful of minimum requirements, viz.: a public consultation; the consideration of certain criteria for assessing the competitive impact; and the effective independence of the national body in charge of the evaluation. Conversely, the Communication leaves it up to each Member State to work out the details of the procedure and the institutional solution. The procedure may remain ‘proportionate to the size of the market’, a clear signal to smaller Member States as to the legitimacy of pragmatic solutions. Furthermore, it is applied only to ‘significant new services’, without defining these, thereby giving Member States flexibility in defining the benchmark which triggers the test – of course within the limits of the Amsterdam Protocol. Finally, public service broadcasters may try out new ideas, in the form of pilot projects, without conducting the test.

The prior evaluation in the Amsterdam Test will help meet the EU State aid rules. It is however without prejudice to the powers and duties of the Commission to verify that Member States comply with the Treaty, and to its right to act, whenever necessary, on the basis of complaints or on its own initiative. In practice this means that the Commission will take account of a prior evaluation at the national level if faced with a complaint on the subject. The test however does not in itself rule out the Commission opening an investigation, in particular if it finds that a test was unfair or ineffective. Without the test, the Commission has no choice but to enter into a detailed substantive assessment of new services. (38)


(39) This discussion was particularly fierce in Germany, where the Länder eventually decided to considerably limit the scope of ARD and ZDF to offer online services which are similar in appearance and structure to newspapers or magazines. See § 11 d (2) Z 3 of Germany’s inter-state treaty on broadcasting (‘nichtsendungsbezogene pressähnliche Angebote sind nicht zulässig’).

The test acts in effect like a national consultation and dispute settlement mechanism which should render complaints to the Commission redundant. It will facilitate the fine-tuning of planned new audiovisual services of public broadcasters in such a way that their value for society is maximised while the impact on the market is reduced to an acceptable level. The Amsterdam Test thereby also reflects Member States’ wish for more subsidiarity in the public broadcasting sector. At the same time, it will enhance legal security on the use of public money. (39)

3.8. Proportionality Control and Market Behaviour

The Commission’s check on proportionality in the public broadcasting sector includes vetting a public broadcaster’s market activities. Without prejudice to Articles 101 and 102 of the Treaty, the Communication sets out the principle that public service broadcasters should not use State aid to finance activities which would result in distortions of competition ‘that are not necessary for fulfilling the public service mission’. The revised Communication gives a number of examples of this.

First, public service broadcasters must have regard to the market economy investor principle (MEIP) when they act through commercial subsidiaries. This means essentially that the publicly financed mother company must honour the arm’s length principle when dealing with the commercial daughter company.

Second, prices of advertising or other non-public service activities must be market-conform. There must be no ‘undercutting of prices’ for commercial offers by leveraging on the availability of State aid.

Third, public service broadcasters must observe the principle of proportionality with regard to the acquisition of premium rights. In other words, they should not unduly use State aid to buy up a market.

Fourth, public service broadcasters may purchase exclusive premium rights (in particular for sport events). However, if they do not use them entirely or partially, these rights must be offered for sublicensing in a transparent and timely manner. The notion of ‘unused’ is not defined in the Communication. In that respect, the Commission has in individual cases considered the EBU as the point of reference (40) for sublicensing Eurovision programmes with regard to ‘general events’.

3.9. Conclusions

The 2009 Broadcasting Communication did not revolutionise the existing rules, which were generally appreciated by all stakeholders. It does, however, mark an important evolution in terms of the State aid approach to public service broadcasting which is in line both with the refinement of State aid policy under the State Aid Action Plan and with the dramatic changes the sector is undergoing. With this instrument, the Commission is well placed to track the digitalisation process and the creation of new platforms for public service broadcasting, while guaranteeing a level playing field for private media, to the benefit of media pluralism.

(39) Before the BBC introduced their version of an Amsterdam Test, the ‘Public Value Test’, it used to put new services on the market without properly testing their impact on private initiatives. This cost the BBC around £75 mio when its BBC Jam service had to be shut down due to a legal challenge concerning fair trading. BBC Jam was an online educational service launched by the BBC in January 2006 and suspended on 20 March 2007. The service was available free across the UK offering multi-media educational resources. Jam was the BBC’s provision for the ‘Digital Curriculum’, an initiative launched by the British Government to provide computer-based learning in UK schools, and had a budget of £150 million. According to the BBC, ‘half of that budget’ was lost when the BBC Trust decided to withdraw the service after massive complaints from the British Educational Suppliers Association (http://news.bbc.co.uk/2/hi/uk_news/education/6449619.stm).