



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.06.2006

C (2006) 2084 final

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COMMISSION DECISION

of 22.06.2006

on the *ad hoc* financing of Dutch public service broadcasters

C 2/2004/ (ex NN 170/2003)

(Only the Dutch text is authentic)

(Text with EEA relevance)

His Excellency the Minister of Foreign Affairs
Permanent Representation of the Netherlands to the European Union
Hermann-Debrouxlaan, 48.
1160 Brussels

COMMISSION DECISION

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above¹,

Having regard to their comments,

Whereas:

I. Procedure and background

1 PROCEDURE

1. In the course of 2002² and 2003³ the Commission received several complaints alleging that the public funding system in place for Dutch public broadcasters constitutes unlawful and incompatible State aid within the meaning of Article 87(1) of the EC Treaty.

¹ OJ C 61, p. 8-21 of 10.03.2004

² By letter of 24 May 2002 from CLT-UFA S.A. and the associated subsidiaries RTL/Holland Media Groep S.A. and Yorin TV BV; by letter of 10 October 2002 from SBS Broadcasting; by letter of 28 November 2002 from VESTRA.

³ By letter of 3 June 2003 from the Dutch Newspaper Publishers Association and by letter of 19 June 2003 from publishing company *De Telegraaf*.

2. In the course of the preliminary investigation of the complaints, the Commission received additional information from the complainants⁴, as well as the Dutch authorities⁵.
3. Following the preliminary assessment of the alleged aid measures, the Commission informed the Netherlands by letter dated 3 February 2004, that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty with respect to certain measures which could be qualified as new aid.
4. The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*⁶. The Commission invited interested parties to submit their comments on the aid.
5. The Netherlands responded to the decision to open proceedings by letter dated 30 April 2004. Moreover, the Commission received comments from 11 interested parties⁷. By letter of 29 April 2004 the Commission forwarded the comments to the Netherlands. The reaction by the Dutch authorities was received by letter dated 13 August 2004.
6. The Commission asked additional questions to the Dutch authorities by letters of 4 January 2005 and 25 May 2005 to which the Dutch authorities responded by letters of 27 January 2005 and 25 July 2005. Further information was received from one of the complainants (*De Telegraaf*) on 25 July 2005 and from the Dutch authorities on 2 September. The Commission asked the Dutch authorities for further clarification by e-mails on 22 November 2005, to which the authorities responded on 25 November 2005. The Commission decided after a meeting with the authorities that further clarification was necessary. To this end a request for information was sent to the Dutch authorities on 22 December 2005 to which the Dutch authorities, having been granted a delay, responded on 3 February 2006. Regarding this reply further e-mails were exchanged between the Dutch authorities and the Commission in February 2006 and in April 2006.
7. A meeting between the Dutch authorities and the Commission took place on 24 September 2004. A meeting with *De Telegraaf* took place on 27 October 2004. A meeting with *Broadcast Partners* took place on 5 January 2005. A meeting between RTL and the Commission took place on 27 July 2005 and between VESTRA and the Commission on 23 September 2005. The Commission had another meeting with the Dutch authorities on 1 February and on 14 February 2006.

⁴ By letter of 29 June 2002, 28 October 2002, 21 February 2003 and two letters dated 19 June 2003.

⁵ By letters of 12 September 2002 and 18 September 2002, in response to an information request from the Commission of 24 June 2002.

⁶ OJ C 61, p. 8-21 of 10.03.2004.

⁷ Association of Commercial Television in Europe (ACT), by letter dated 15 April 2004; Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD), by fax dated 8 April 2004; Broadcast Partners, final version by letter dated 27 April 2004; CLT-UFA, RTL/HMG and Yorin (hereinafter referred to CLT-UFA), by letter dated 14 April 2004; De Telegraaf, by letter dated 15 April 2004; Groep Nederlandse Dagbladers, by letter dated 21 April 2004; Publieke Omroep, by letter dated 21 April 2004; SBS Broadcasting BV, by letter dated 26 April 2004; Branchevereniging van Nederlandse kabelbedrijven (VECAI) by letter dated 8 April 2004; Vereniging van Commerciële Radio (VCR), by letter dated 13 April 2004.

8. In addition to this procedure on ‘new aid’, the financing of the public service broadcasters (hereafter: PSB) through annual State payments and the Stimulation Fund (*Stifo, Stichting Stimuleringsfonds Nederlandse Culturele Omroepproducties*)⁸ are being assessed in a separate ‘existing aid’ procedure (cf. State aid No. E-5/2005). In the present decision the Commission refers to the measures which are the object of the ‘existing aid procedure’ only insofar as necessary to provide an overall picture of the financing of public broadcasting. It will not, however, deal with the issue of compatibility with state aid rules of the regular annual payments and of the payments from the Stimulation Fund.
9. This decision will also be limited to assessing the financing of the PSB’s core activities (the so-called main tasks) and thus excluding side activities like the new media services, the provision of SMS and i-mode. Similarly, this decision will not deal with the investment by NOS in the network operator Nozema, which according to complaints might not have been done on market terms. These issues will be dealt with separately.
10. Finally, the decision to open the formal investigation procedure covered the procedure as from 1992. Nevertheless, it appears that the first *ad hoc* payments were made only in 1994. Furthermore, figures up to 2005 are now available and should be taken into account. The period covered by the decision would therefore range from 1994 – when the first *ad hoc* payment was made – to 2005 – which is the last year for which final figures are available. It should be noted that the Dutch authorities invited the Commission also to take into account 2006. The figures for 2006 are however only provisional and therefore cannot be taken into account.

2 DETAILED DESCRIPTION OF THE PUBLIC BROADCASTING SYSTEM

11. This Chapter will first set out in section 2.1 the actors in the (public) broadcasting sector and then in section 2.2, the different elements of the financing system for the Dutch broadcasting sector in general. In that respect, it will describe the legal provisions entrusting the broadcasters with a public service mission, it will be explained what the different financing mechanisms are (annual payments and *ad hoc* payments), and finally, it will explain which reserves the public broadcasters have built up and use for the fulfilment of their public task. Subsequently, the commercial activities as performed by the Dutch public broadcasters will be discussed (section 2.5). Section 2.6 explains the acquisition of football rights by the NOS and section 2.7 deals with the relation between broadcasters and cable operators. Finally, section 2.8 sets out which measures are the subject of this procedure.

2.1 Actors in the (public) broadcasting sector

12. The public service broadcasting system consists of different organisations, including eight private associations (private broadcasters with members entrusted

⁸ Case NN 32/91 approved by the Commission in July 1991.

with a public service mission) and ten private foundations (private broadcasters without members entrusted with a public service mission)⁹.

13. Besides the aforementioned broadcasters, the public service broadcasting system includes another actor – the NOS – which performs a dual role. The first role is that of a public service broadcaster, responsible for TV and radio programmes (under the name of “NOS RTV”). The second role is that of coordinator of the entire public service broadcasting system and is carried out by the management board of the NOS (the so-called ‘Publieke Omroep’ hereafter referred to as PO). The PO, whose functions and tasks are entrusted by the Media Act, stimulates cooperation between public broadcasters, coordinates the three public TV channels and reports twice a year on the public broadcasters’ activities to the Media authority.
14. The NOS receives funding from the media budget for both the tasks performed as “PO” and those performed as NOS RTV.
15. The public service TV-programmes are broadcast by the public service broadcasters over three public channels¹⁰.
16. The Dutch Broadcast Production Organisation (*Nederlands Omroepbedrijf*, hereinafter referred to as NOB) is also part of the public broadcasting system. The NOB carries out the recording, transmission preparation and actual transmission of sound, moving pictures and data to all possible distribution channels. The NOB provides these services to commercial broadcasters and public service broadcasters. The services provided to the public service broadcasters are considered as public services by the Dutch government and are publicly funded¹¹.
17. A separate Foundation (*Stichting Ether Reclame*, hereinafter referred to as STER) is exclusively responsible for the sale of advertising space and the broadcasting of advertising on the public channels. The STER is responsible for the broadcasting time which it has been allocated. The revenues generated by the STER are transferred directly to the State.
18. Besides the national operating public service broadcasters, there are several commercial broadcasters operating on a national level. Those commercial broadcasters are e.g. RTL (RTL 4, 5 and 7 (all from the CLT-UFA group) or SBS6, NET5 and Veronica (from the SBS Broadcasting group) or Talpa (Talpa Media Holding). They generate their revenues mainly through TV advertising.

2.2 Framework governing public service broadcasting

19. The broadcasting sector is currently regulated by the Media Act (MA) and the Media Decree (MD). Public broadcasters are allowed by law to perform four categories of activities which are defined in the current MA as “main task”, “side tasks”, “side activities” and “association activities”. The public broadcasters are eligible for State funding for the “main task” and “side tasks”.

⁹ The associations with members are KRO, AVRO, NCRV, EO, TROS, BNN, VARA and VPRO. The autonomous private organisations are: NPS, Teleac/NOT, RVU, VKZ, RKK, HOS, NMO, OHM, NIK, BOS.

¹⁰ This covers “Nederland 1, 2 and 3”.

¹¹ Cf. Article 90 of the Media Act.

2.2.1 Legal definitions

Main tasks

20. Article 13(c)(1) MA describes the “main task” of the public service broadcasting as being:
 - a) *to ensure a pluralistic and high quality offering of programmes for general broadcast in the areas of information, culture, education and entertainment on national, regional and local level and transmitting those or having them transmitted on open channels;*
 - b) *to perform all activities relating to the offering of programmes and the transmission necessary in that respect;*
 - c) *to broadcast programmes destined for countries and areas outside the Netherlands and for Dutch citizens staying abroad.”*
21. Article 13c(2) MA lays down the general requirements for the programmes to be broadcast by the public broadcasters. The programmes must “*give an image of society in a balanced way and of interests and viewpoints on society, culture and philosophy within the population. The programmes have to be accessible to the whole population in the relevant areas; they contribute to pluralism and cultural diversity within the Netherlands (...)*”.
22. In addition, the total programming time which should be allocated to different categories, such as culture, education, and entertainment, is regulated by means of prescribed percentages.¹²
23. Article 16 MA provides that certain tasks shall be performed by the NOS RTV and lays down the details of these tasks. The provision of sports coverage, including, but not limited to, competition and cup matches and international events is covered. The percentage of total broadcasting time which should be devoted to such sports events is not pre-determined by statute. In practice the NOS RTV aims to devote 9-11% of total broadcasting time to sports programmes¹³.
24. Broadcasting associations are entitled to broadcasting time for the provision of national TV-programmes and have the right to receive State funding for the performance of this task (Article 31(4) MA).

Side tasks

25. In accordance with Article 13c(3) MA, which was introduced in 2000, the public broadcasting system “*can also fulfil its task, as mentioned in the first paragraph, by providing means of supply and distribution of programme materials, other than those included within paragraph (1)(a)*”. In other words, the public service broadcasters can broadcast the public service content, aforementioned under the main task, on other media platforms (like e.g. Internet).

¹² Cf. Articles 50 and 54 MA.

¹³ See the Policy Plan 2000-2010 of the NOS.

26. These so-called ‘side tasks’ must comply with a number of conditions. They must for example not serve to make profit for third parties (Art. 55 MA). Maintaining a website or a theme channel are examples of these side tasks.
27. It should also be mentioned that the exploitation of both the ‘main’ and the ‘side’ tasks generate revenues for the public service broadcasters to be used for public service purposes¹⁴.

Side activities and association activities

28. The Dutch public service broadcasters can also perform activities which are defined as side activities and association activities. Side activities¹⁵ must comply with a number of statutory conditions. Examples of such side activities include the sales of programme guides, sponsoring, sale of programme rights and programme-related material, leasing office space and organising drive-in shows.
29. Other activities are the so-called “association activities”. Association activities are activities performed by the broadcasting associations for their members. They include publishing magazines, and organising and selling travel arrangements.

2.2.2 Entrustment and supervision

30. An independent Media authority (*Commissariaat voor de Media*) is given the task of ensuring compliance with the programming and financial requirements of the MA and the implementing legislation (Article 9 MA).
31. The Media authority has a legal task, laid down in Article 134 MA, to ensure that the public broadcasters fulfil their obligations, including the quota set on the different types of programmes. The Media Commission can impose fines if the obligations are not respected. Furthermore, the Media authority controls whether the legal restrictions on sponsoring and advertising are respected by broadcasters.
32. The authority controls annually whether the accounts of the public broadcasters, on the basis of submitted accountants’ reports, comply with requirements of the MA, the Media Decree and the financial manual. If this is the case, the authority formalises the (budgeted) amounts for the regular provision of programming (Article 100 and 101 MA).

2.3 Sources of funding of public service broadcasters

33. The main financial resources of PSB are the annual payments received by the State. In order to absorb budgetary fluctuations, PSB are allowed to keep certain reserves. In addition, the PSB have since 1994 received *ad hoc* payments.
34. Since the assessment of the compatibility of the *ad hoc* funding cannot be carried out without taking into account other sources of public funding, the following description covers both the annual as well as the *ad hoc* payments (even though the annual payments and the Stifo payments are not subject to the present decision,

¹⁴ Sponsoring, but also revenues from sales of tickets, subscriptions, SMS service etc. (See Financial Manual, version 2005, p. 18)

¹⁵ Introduced in the Media Act by an Act of 5 July 1997

but will be assessed separately in the context of the pending investigation on 'existing aid' No E-5/2005).

2.3.1 Annual payments

35. The Dutch public broadcasters receive annually financial contributions from the State's media budget. Over the period 1994-2005, these payments totalled approximately €7.1 billion. From this amount, approximately €819.6 million was transferred to the PO for its management and coordinating role; the remaining €6.3 billion were paid to the individual broadcasters. The media budget is fuelled by several resources: the State Broadcasting Contribution (collected from tax payers), advertising revenues from STER and interest revenues from the General Broadcasting Fund (*Algemene Omroepreserve*, hereafter referred to as AOR)¹⁶. The level of the media budget sets a ceiling to the amount of annual funding that could be made available to the public broadcasters (and other media organisations).

2.3.2 Stifo

36. In addition to annual payments, the public broadcasters received payments from Stifo (Stimulation Fund for cultural productions). The funds granted from Stifo qualify as a State aid measure, but the measure was approved by the Commission under State aid No. NN 32/91. The aid measure Stifo is thus to be considered as existing state aid. The Stifo payments to the individual public service broadcasters (the PO did not receive any payments from Stifo) amounted to €155 million in the period.

2.3.3 Ad hoc payments

37. In addition to the above mentioned transfers – which are considered to be the regular sources of funding of PSBs, the public broadcasters were granted several payments on an *ad hoc* basis. These payments were either made directly to the broadcasters or channelled through special funds and reserves.

2.3.3.1 Matching funds payments

38. The Matching Funds are an earmarked part of the Mediabudget. In the period 1996-1998, an amount of €[...] million was transferred from the Matching Funds to the NOS RTV. The Matching Funds were introduced in 1996 to co-finance increased programme right prices. The conditions under which the monies can be distributed have been adopted by mutual agreement between the State and the public broadcasters. If the public broadcasters are not able from their regular budgets to purchase rights which have increased excessively in price, then the State matches financially, i.e. co-finances by an equal amount, the acquisition of these rights.

¹⁶ The AOR is a reserve which is earmarked for public broadcasting and which is managed by the Media authority. The AOR serves to cover deficits caused by lower advertising revenues during the budgeted year. It also serves to cover in case of liquidation of a public broadcaster which does not have any own reserves and it serves as a current account between the Minister and the Media authority. Finally, the AOR covers in general the extra costs incurred if the prices have increased. The annual payments take the price increase only into account two years after the increase. The AOR is a buffer for that period.

2.3.3.2 FOR payments

39. In 1998 the Minister of Culture was given the possibility (Article 106a MA) to transfer money on an *ad hoc* basis from the AOR (General Broadcasting Reserve and managed by the Media authority) to a fund intended to finance specific initiatives of the PO. The fund was established in 1999 with the denomination of “FOR” and it is controlled by the PO.
40. The principle is that, if the AOR exceeds € 90.8 million, there is scope for a transfer to the FOR. This, however, is not an automatic process. Each year the Minister of Education, Culture and Science decides whether a transfer is possible and if so, how much can be transferred. Where such a transfer is approved, the rules are laid down in a protocol. Such protocols have been established in 1999 and 2001. On the basis of the Media Act (Article 99 2(d)), the budget must also contain a description of how the Board of Management proposes to spend the money. Based on this proposal, the Minister can then make available monies from the FOR to the PO, which can be used for purposes established by the Minister when making the monies available¹⁷. Although the FOR is a Fund dedicated to PO initiatives, it is not a reserve that is part of the assets of the PO.
41. The monies available in the FOR make it possible for the PO to give a qualitative impetus, improve programming and to invest in the public broadcasters in general. More specifically, the goal of the FOR is to:
 - offset reduced STER advertising income;
 - strengthen the variety and quality of programming where this involves extra initial costs; and,
 - fund investments which support Dutch public service broadcasting as a whole.
42. By 2005 the public broadcasting system had received € 191.2 million from the FOR of which € 157.4 million was transferred to the individual public service broadcasters and €33.8 million to the PO.

2.3.3.3 CoBo payments

43. The fund for Co-Production (*Coproductiefonds Binnenlandse Omroep*: hereinafter CoBo) was created to finance co-productions between Dutch public broadcasters and other programme producers. Its income arises from revenues generated by the copyright payments paid by Belgian and German cable operators for the distribution of the three Dutch channels in Belgium and Germany. The fund has been established by the public broadcasters and is managed through a foundation. The board of the Fund consists of managers from the public broadcasters.
44. In 1994, the Dutch authorities decided to make payments to two sub-funds managed by CoBo, being the “Film Fund” which finances co-productions of films and documentaries, and the “Telefilm” *project* which aims at stimulating the production of high quality programme television films.

¹⁷ Letter of 24 February 2006, p.3-4.

45. The individual public service broadcasters have received €31.7 million of public money from the CoBo fund in the period 1994 to 2005¹⁸ (the PO did not receive any payments from CoBo).

2.4 The reserves held by the individual broadcasters

46. Each public service broadcaster maintains certain reserves, which are, typically, a Programme Reserve and either an Association or a Foundation Reserve, depending on whether the public service broadcaster is a foundation or an association.

2.4.1 Programme reserves

47. Individual public service broadcasters are allowed to increase their reserves when total revenues exceed total costs. These programme reserves can be used to cover programme costs in future years.
48. According to the Dutch authorities, the value of programmes which have been produced but not yet broadcasted is added to the programme reserves¹⁹. The programme reserves thus also reflect the value of programmes already produced. In 2005, the total Programme Reserves held by the individual public broadcasters amounted to €78.6 million.
49. Also in 2005, the PO decided that part of the Programme Reserves should be transferred to the PO itself, but the broadcasters were allowed to maintain reserves up to 5-10% of their annual budget. The public broadcasters transferred to the PO an amount of €42.457 million.

2.4.2 Association Reserves

50. The public service broadcasting associations originated as private law entities. Over the years they have built up their own Association Reserves from contributions and legacies received from their members. The Association Reserves thus originated from private resources. In 1993, the Dutch government decided to “freeze” the Association Reserves. As of that moment, in principle²⁰ the profits generated by the association activities and other non-public activities had to be used for public service activities and could no longer be transferred to the Association Reserves. The public service broadcasters in the Netherlands hold a total Association Reserve of approximately €131.1 million in 2005.

¹⁸ For a further explanation of the CoBo Fund see below in paragraph **Error! Reference source not found.**

¹⁹ Letter of 27 January, telephone conversation of 3 February 2005 and response to additional request on 25 July 2005.

²⁰ There have been a few exceptions to this rule. Some transfers to the Association reserves have been made in cases where previously Association reserves had been used for the financing of public service activities. See also paragraph 142 and following.

2.4.3 Foundation reserve NOS RTV and smaller broadcasters

51. The NOS RTV, NPS and other smaller broadcasters without members (Article 39f MA) hold a 'foundation' reserve' ("*stichtingsreserve*"). The overall level of the Foundation reserves was €42.2 million in 2005²¹.

2.5 The advertising activity on public service channels

52. As already referred to above, the STER is responsible for selling advertising on public service channels.
53. The other main TV advertising sales companies active on the Dutch market are IP and SBS. IP sells advertising on behalf of the commercial broadcasters RTL4, RTL5 and Yorin. SBS sells advertising for its commercial broadcasters SBS6, Net 5 and Veronica. Besides, IP and SBS there are a few other commercial broadcasters who also sell advertising²². The tariffs charged by the STER are calculated on the basis of forecasts from advertising agencies, tariffs of competitors, and on the basis of the price history.
54. Table 1 below shows the evolution of the audience share of the public service broadcasters for which STER manages the sale of advertising. The audience share (of viewers aged 13+) has declined in recent years from 38.8 in 1997 to 35.4% in 2005. For the category 20-49 years, the viewer share is even lower, i.e. 27.2%.

Table 1: Audience share 13+ and 20-49 years old (18.00h – 24.00h), 1997 – 2005

	1997	1998	1999	2000	2001	2002	2003	2004	2005
13+	38,8	39,9	37,8	39,8	38,8	37,9	36,8	38,9	35,4
20-49	34,6	35,8	31,6	33,3	33,0	32,5	30,1	31,8	27,2

Source: Letter NL authorities 24.02.2006.

55. As of 1994, the gross (based on list prices) and net (taking into account discounts granted) revenues generated by the commercial broadcasters on the advertising market have surpassed the revenues generated by the public broadcasters.

Table 2: Gross revenues from TV advertising 1994 – 2005 (amounts x €1 million)

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Ster	327	298	225	234	257	290	348	343	383	489	581	471
Commercial broadcasters	360	438	532	629	715	887	1.028	1.084	1.310	1.623	2.034	2.327
Total	687	736	757	863	972	1.177	1.376	1.426	1.693	2.112	2.615	2.798

Source: Letter NL authorities 24.02.2006

²¹ The Foundation Reserves are €2.288 million (NPS), €0.832 million (NOS) and €39.119 million (PO).
²² Like for example Talpa, Nickelodeon, Jetix, TMF and MTV.

Table 3: Net revenues from TV advertising, 1994 – 2005 (amounts x €1 million)

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Ster	223	202	153	150	176	187	218	197	197	197	197	169
Commercial broadcasters	239	281	324	378	405	448	508	484	520	537	549	599
Total	462	483	477	528	581	635	726	683	717	733	746	768

Source: Letter NL authorities 24.02.2006

56. As can be inferred from the tables above, there is a difference between gross revenues from TV advertising and revenues net of discounts. According to the Dutch authorities, not only the published tariffs of the public service broadcasters are higher, but also the discounts that they grant are lower in comparison to commercial broadcasters.²³

2.6 Acquisition of football rights by the NOS RTV

57. During the period under investigation the NOS RTV obtained broadcasting rights for several important football events²⁴. The commercial broadcaster Canal+ (pay-TV) obtained the rights for the live matches of the Dutch premier league. The rights for the Champions League were also partly sublicensed to Canal+ by the NOS RTV. The commercial broadcaster SBS obtained the broadcasting rights of two national football cups. It also obtained the rights to the Dutch first division matches and the qualification matches of the Dutch team for the European championship 2004. The broadcasting rights for various foreign football competitions are held by CLT-UFA, Europe's largest broadcasting group (the mother company of e.g. RTL).

2.7 Relation between broadcasters and cable operators

58. Traditional cable transmission is seen as a separate publication for the purpose of copyright under Dutch law. In principle the permission of all copyright holders is required, and the copyright holder may claim a payment from the cable operator for the publication. Since 1985 there has been an agreement between the VECAI (representing the cable operators) and the NOS RTV (representing the public broadcasters) under which the cable operators are exempted from making copyright payments to the public broadcasters (the copyright holders) when their programmes are transmitted via cable.²⁵ This agreement was made at the request of the Dutch government, on the basis that citizens already paid a contribution for public broadcasting. It was considered that a copyright payment from cable operators, which could result in higher cable subscription fees, would be undesirable. Commercial broadcasters have not asked for copyright payments

²³ Cf. letter 23 February.

²⁴ These include *inter alia*, the final round of the football world championship 2002, Champions League 2002/2003, the summary/highlights rights for the Dutch premier league 2003/2004, European championship 2004, most of the European cup matches involving Dutch clubs, and the football world championships 2006. Some of these events are part of the list of events in the Media Decree, pursuant to Directive 97/36.

²⁵ Letter of the Dutch authorities dated 18.9.2002.

from the cable operators either. However, this is not related to the afore-mentioned agreement with the public service broadcasters.

59. It should be noticed that cable operators are legally obliged to transmit all radio and TV programmes of the public broadcasters (“must carry” obligation) and cannot charge broadcasters for the transmission costs.

2.8 The measures subject to this decision

60. As set out in the decision to open the formal investigation procedure²⁶, the following measures are subject of the present decision:

- (1) The payments as referred to in Article 106a and 170c of the Media Act to the broadcasters which are categorized by the Commission as *ad hoc* payments.
 - (a) The payments are either made from the Matching Funds to the public service broadcasters or from the AOR, via the FOR, to the public broadcasters. These payments were made in the period 1994-2005, for a total amount of €[...] million. As stated above, this amount can be divided between payments made from the so-called Matching Funds (€[...] million) and the payments made from the AOR to the FOR and subsequently from the FOR to the public broadcasters (€ 191.2 million).
 - (b) Payments from the Fund for Co-production (CoBo). The CoBo consists of two specific sub-funds, the *Film Fund* and the *Telefilm project*. The State granted to the public broadcasters €31.7million in the period 1994-2005 via the CoBo funds.
- (2) Ensured access to the cable or so-called ‘must-carry’ (as referred to in Article 82i of the Media Act)
- (3) Provision of technical facilities by NOB free of charge (as referred to in Article 89 and 90 of the Media Act).

II. Grounds for initiating the procedure and arguments of the parties

3 SUMMARY OF THE GROUNDS FOR INITIATING THE PROCEDURE

61. After its initial investigation, the Commission considered that certain measures, with the possible exception of the “must carry” obligation, constituted State aid within the meaning of Article 87(1) of the EC Treaty. The Commission expressed in addition doubts regarding the compatibility of such State aid under Article 86(2) of the EC Treaty.

²⁶ Commission Decision C 2/2004, (ex NN 170/2003) *Ad hoc* financing of the Dutch public broadcasters-the Netherlands C (2004) 166fin.

62. Regarding the proportionality of the funding, the Commission doubted whether costs and revenues allocation took place on the basis of clearly established cost accounting principles. The Commission doubted whether or not non-public service revenues were fully taken into account when calculating the need for State funding, thereby risking that the funding goes beyond the net costs of the public service.
63. Furthermore, the Commission considered that the level of funds in the FOR and the programme reserves provided indications of structural over-compensation. The Commission noted that of the total *ad hoc* payments, an amount of €110 million (based on figures of 2001) had not been used.
64. Moreover, the Commission expressed its intention to investigate whether competition in commercial markets had not been unduly distorted. The Commission stressed that such distortion of competition could occur in the markets for advertising, intellectual property rights for cable transmission and football transmission rights.
65. Finally, the NOB is not allowed to charge the public broadcasters for the delivery of the services, but it receives payments for this task directly from the State. The Commission noted that the provision of technical facilities free of charge could constitute an aid to the public broadcasters.

4 COMMENTS FROM INTERESTED PARTIES

66. The following comments relevant for this decision were provided.
67. The Dutch public broadcasters argued that the measures in question should be considered existing aid, as they constitute part of the general financing system for public broadcasting. Moreover, they remarked that the Commission should only assess the financing of public broadcasting under the Protocol of Amsterdam and should not apply the criteria of the *Altmark*-judgement²⁷ or Article 87(1) or 86(2) of the EC Treaty.
68. CLT-UFA noted that it was not until 2002 that the accounts of the public service broadcasting system could be verified and approved by an independent accountant.
69. The public broadcasters commented that there is no over-compensation of €110 million as stated by the Commission. First of all, the public broadcasters and the government work with different accounting systems. The government works on a cash receipts basis of accounting and the public broadcasters work on the basis of costs and revenues which are accounted at moment of transaction. This causes discrepancies. In addition, the revenues of the FOR are according to the public broadcasters earmarked for specific future goals. Moreover, they commented that the excess financing cannot lead to distortions in other markets, as this financing can only be used for the public service activities.
70. ACT stated that STER behaves in an anti-competitive manner by undercutting prices in the advertising market. It argues that since the total annual advertising

²⁷ Case C-280/00, *Altmark Trans* [2003] ECR I-7747, paragraph 95.

time of public broadcasters is more limited than that of commercial broadcasters, the STER should charge higher prices than commercial operators.

71. SBS Broadcasting confirmed that prices in the Dutch television advertising market are set for GRP (Gross Rating Point) category 20-49. However, as the public broadcasters attract more viewers than commercial broadcasters outside this viewer group, advertisers would be willing to pay a premium on the GRP 20-49. Therefore, a comparison of the GRP 20-49 would not reflect the economic reality of the product. Moreover, SBS remarked that for GRP 13+ public broadcasters set lower prices than commercial broadcasters. To support its comments SBS submitted overviews of the average gross GRP 13+ prices for the different channels during prime time in 1995-2004 and per month in 2003 and 2004, which show that those of public broadcasters are lower than those of most commercial operators.
72. According to CLT-UFA the NOS RTV has paid excessive prices for football rights. The prices would be far above market prices. CLT-UFA submitted calculation models²⁸ to show how they calculate the prices for football rights, on the basis of which CLT-UFA concluded that the bid made by the NOS RTV for the rights for the Champions League matches of 2002 was significantly higher than that made by CLT-UFA. ACT and CLT-UFA considered moreover that the Commission should not reach the conclusion that there is insufficient evidence of overpayment of football rights on the basis of one example where a commercial operator may have overbid.
73. VECAI (the association of cable operators) raises two issues. First of all, it considers that the cable operators who are subject to the must-carry obligation should be able to ask for a payment from the relevant broadcasters. Due to the must-carry obligation, the public broadcasters have not paid a fee for the transmission of the signal over the cable networks.
74. Secondly, VECAI argued that the cable operators actually do pay a fee to the right management organisations on behalf of the NOS RTV, but the NOS RTV and the Dutch government consider this as a management fee. According to the VECAI it is a fee for intellectual property rights in disguise.

5 COMMENTS FROM THE DUTCH AUTHORITIES²⁹

75. The Dutch authorities state that the assumption of the Commission that the relevant measures are not part of the regular, annual financing of the public broadcasters as part of the State funding is erroneous. The financing which is subject of the investigation stems from the regular financing mechanism and was integrally part of the budget planning which has lead to the payments to the public

²⁸ This calculation model considers a number of factors in calculating the potential revenue which can be earned from the sports transmission rights: expected growth of expenditure in the whole television market and the expectations regarding potential advertising revenue following meetings with advertisers; impact of the broadcasting of the sports event on the market share of the commercial broadcaster (strategic positioning considerations); number of Dutch clubs (for international events such as the Champions League).

²⁹ Summary of the response by the Dutch authorities to the decision to open the formal investigation procedure, dated 30 April 2004.

broadcasters. According to the authorities, the FOR, the matching funds, CoBo and payments to the NOB are part of the regular, annual financing mechanism.

76. The Dutch authorities finally bring to the attention of the Commission that the assessment should take into account the specific context in which the public service broadcasters operate. The authorities request the Commission to take into account the application of the Amsterdam Protocol. If necessary, the subject of the procedure at hand should be qualified as compatible aid within the meaning of Article 86(2) of the EC Treaty such within the context of the principles laid down in the Amsterdam Protocol.
77. The amount provisionally indicated by the Commission as possible overcompensation is erroneous. This was inferred from the resources of funds which were wrongly qualified as reserves. Since the use of these funds is pre-determined and is subject to control there cannot be overcompensation. Moreover, the authorities argue that in case the measures concerned are to be qualified as State aid, the aid should be considered to be existing State aid within the meaning of Article 88 of the EC Treaty.
78. The Dutch authorities point out that the accounts of individual public broadcasting associations have always been subject to approval by an independent accountant.
79. The Dutch authorities consider that sports broadcasts of popular and less popular sports fall within the definition of the main task of the public broadcasters. The Dutch authorities consider that, in determining their bid for transmission rights, public broadcasters did not pay in excess of what was necessary to secure the acquisition of important rights in relation to their public service task and overall programming.
80. The authorities reiterate that public service mission of the NOB is an integral part of the public service system. The fact that the public broadcasters are not being charged for the service rendered by the NOB does not imply that aid is granted to the public service broadcasters.
81. The Dutch authorities state that given that the commercial operators do not demand copyright payments from cable operators either, the NOS RTV could be said to be acting as a normal market operator in the circumstances of this particular market.

III. ASSESSMENT OF THE MEASURES UNDER STATE AID RULES

6 EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 87(1) OF THE EC TREATY

82. Article 87(1) of the Treaty lays down the following conditions for the presence of state aid. First, there must be an intervention by the State or through State resources. Second, it must confer an advantage on the recipient. Third, it must distort or threaten to distort competition. Fourth, the intervention must be liable to affect trade between Member States.

6.1 Presence of State resources

6.1.1 *Ad hoc payments*

83. The payments as referred to in Article 106a and 170c of the Media Act and which are categorized by the Commission as *ad hoc* payments can be divided in the so-called Matching Funds payments, the FOR payments and the CoBo payments.

Matching Fund payments

84. Regarding the Matching Funds, money is first set aside within the AOR – which is a fund whose resources are owned by the State and managed by the Media authority – for the purpose of matching certain types of higher than foreseen expenditures of public service broadcasters. In a second step, the state resources represented by the Matching Funds of the AOR are transferred to the NOS RTV.

FOR payments

85. The payments made by the FOR fund are considered State resources. Although the FOR is a fund administered and managed by the “PO”, it is fed from the AOR, which is part of the media budget.
86. More importantly, as described in paragraph **Error! Reference source not found.**, the PO distributes the monies on the basis of the agreements that are made in advance on the use of the FOR monies. Although it is the PO which proposes how the money should be used, it is the Minister of Education, Science and Culture who ‘adopts the proposal’ and establishes for which purposes the monies can be used. The PO can only take the decision to spend the money once the Minister has established the criteria for the distribution of the monies. The PO has to take into account the rules laid down by the Minister. It can therefore be considered that the transfer of state resources takes place when the payments are made from the FOR to the individual broadcasters. This is a transfer of state resources, which is moreover imputable to the State³⁰.
87. The public broadcasters received in the period under investigation an amount of € 191.2 million from the FOR and an amount of €[...] million from the Matching Funds.

CoBo payments

88. The payments made by the CoBo fund are considered State resources. As described in paragraphs 43-44, the CoBo fund is fed by direct contributions from the Media Budget and by revenues generated by the copyright payments paid by Belgian and German cable operators for the distribution of the three Dutch channels in Belgium and Germany. The Commission takes the view that not only the direct contributions from the Media Budget, but also the copyright payments can be considered as State resources. Indeed, the copyright payments should have been used to finance the public service costs of the broadcasters. By setting them aside in the CoBo fund, the needs for public funding had increased accordingly. The copyright payments are therefore equivalent to resources foregone by the State.

³⁰

Cf. Case C-482/99, French Republic v. Commission, paragraph 55.

89. Moreover, although the CoBo Fund is owned and managed by a foundation (the board of which is governed by the public service broadcasters), the transfers from the CoBo Fund can only be made available to the public service broadcasters under conditions which are determined by the State.
90. The public service broadcasters received from the CoBo Fund an amount of €31.7 million in the period under investigation. This amount represents a transfer of state resources to the individual broadcasters.

6.1.2 *Free access to cable*

91. The “must carry” obligation imposed on cable operators does not involve any transfer of State resources nor can the foregone revenues of cable operators be regarded as constituting a transfer of State resources³¹. The Commission did not learn about any indication pointing to the contrary. Accordingly, the preliminary view that the measure does not constitute a State aid within the meaning of Article 87(1) of the EC Treaty can be confirmed.

6.1.3 *Free technical facilities from the NOB*

92. The public company NOB receives payments from the State for the services it is obliged to deliver to the public broadcasters. These payments involve the direct transfer of State resources. They ultimately benefit the public broadcasters who get the services free of charge³². Indeed the Dutch authorities themselves have stated that the NOB simply acts as a ‘vehicle’ of the funding from the State to the public service broadcasters who receive the services of the NOB.

6.2 **Economic advantage**

93. The *ad hoc* financing (payments to FOR and via the Matching Funds), the transfers to the CoBo and the provision of free technical facilities provide an economic advantage to the Dutch public service broadcasters, in the sense that these measures relieve them from operating costs that they would otherwise have to bear.

6.2.1 *Applicability of the Altmark judgement*

94. The Dutch government and the public broadcasters have argued that the measures under investigation compensate the Dutch public broadcasters for the net cost incurred in discharging the general service task entrusted to it. This would imply that the measures would therefore not provide an advantage to public service broadcasters and not constitute aid in line with the *Altmark*-judgement³³.
95. State measures compensating for the net additional costs of a SGEI do not qualify as State aid within the meaning of Article 87(1) of the EC Treaty if the compensation is determined in such a way that a real advantage cannot be conferred on the undertaking. In the *Altmark*-judgement the Court of Justice has

³¹ Cf. Case C-379/98, *Preussen Elektra*, paragraphs 54 and following.

³² Cf. Case C-126/01, *GEMO*, paragraph 44.

³³ Cf. Case C-280/00, *Altmark Trans* [2003] ECR I-7747, paragraph 95.

indicated the conditions that have to be satisfied in order to escape such classification. These conditions are:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;
- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of production 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.

96. The Commission is of the opinion that in the present case the last three conditions set out above are not fulfilled. First, the transfers of funds from the FOR, the Matching Funds as well as the financial contribution from the CoBo to the PSB have not been based on objective and transparent parameters established in advance.

97. Moreover, the *ad hoc* financing measures as well as the payments from the CoBo do not take into account all the relevant receipts of the PSB and do not include the necessary safeguards to exclude overcompensation. Indeed, as will be assessed in more detail below, the *ad hoc* funding actually resulted in considerable overcompensation.

98. Finally, the Dutch public broadcasters have not been chosen as providers of a SGEI on the basis of a tender, nor has any analysis been carried out to ensure that the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate production means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations. The same is true for the financing of the technical facilities made available to the PSB by the NOB.

99. Consequently, the Commission considers that not all conditions set out in the *Altmark*-judgement are fulfilled in this case.

6.3 Distortion of competition

100. The advantage provided by the *ad hoc* financing, the transfers to the CoBo and the provision of free technical facilities to the Dutch public service broadcasters are not available to any other undertaking in a comparable situation. Given that competition is distorted whenever State aid reinforces the competitive position of

the beneficiary undertaking vis-à-vis its competitors, the advantage is capable of distorting competition between the PSB and other undertakings³⁴.

6.4 Affecting trade between Member States

101. If State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid³⁵ even if the beneficiary undertaking is itself not involved in exporting³⁶. Similarly, where a Member State grants aid to undertakings operating in the service and distributive industries, the recipient undertakings need not themselves carry on their business outside the Member State for the aid to have an effect on Community trade³⁷.

102. In line with this case-law the Broadcasting Communication explains that:

“State financing of public service broadcasters can generally be considered to affect trade between Member States. This is clearly the position as regards the acquisition and sale of programme rights, which often take place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership may extend to more than one Member State³⁸.”

103. In the case at hand, the Dutch public broadcasters are themselves active on the international market: through the European Broadcasting Union they exchange television programmes and participate in the Eurovision system. Moreover, their programmes are broadcasted in Belgium and Germany. Furthermore, the Dutch public broadcasters are in direct competition with commercial broadcasters that are active on the international broadcasting market and that have an international ownership structure.

104. Therefore, the Commission concludes that the *ad hoc* financing, the funds provided to the CoBo and the provision of free technical facilities are such as to affect trade between Member States within the meaning of Article 87(1) of the EC Treaty.

6.5 Conclusion

105. Since all conditions laid down in Article 87(1) of the EC Treaty are fulfilled and the conditions set out by the Court of Justice in the *Altmark*-judgment have not been met in their entirety, the Commission concludes that the *ad hoc* financing (financing from FOR and the Matching Funds), the funds granted through the CoBo Fund and the provision of free technical services and facilities to the Dutch public broadcasters – qualify as State aid within the meaning of Article 87(1) EC. On the other hand, the advantage deriving from free access to the cable network does not involve a transfer of State resources and does not constitute a State aid.

³⁴ See Case 730/79, Philip Morris [1980] ECR 2671, paragraph 11.

³⁵ See Case 730/79 Philip Morris [1980] ECR 2671, paragraph 11 and Case 259/85, Italian Republic v. Commission [1987] ECR 4393, paragraph 24

³⁶ Case C-75/97 Maribel bis/ter [1999] ECR I-3671 paragraph 45.

³⁷ Case C-310/99, Italy v. Commission, European Court reports 2002 Page I-02289, paragraph 66.

³⁸ See Broadcasting Communication, paragraph 18

7 QUALIFICATION OF MEASURES AS “NEW” AID

106. Pursuant to Article 1 (b) of the EC Procedural Regulation, ‘existing aid’ shall mean (*inter alia*):

“(i)..., all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty³⁹.”

107. As stated before, one can distinguish between the annual payments which are not the subject of the present decision and the *ad hoc* payments.

7.1 Annual payments

108. The annual payment are made on the basis of Article 110 MA which states that “entities which have been awarded time to broadcast are *entitled* to funding from the general budget”. The level of funding and the availability are laid down in the same MA. This system of the funding existed prior to the entry into force of the Treaty, and is qualified as existing aid as acknowledged by the Commission in the procedure E-5/2005⁴⁰.

7.2 Ad hoc payments

109. The so-called *ad hoc* payments possess a number of characteristics which distinguish them from the regular annual payments and argue against their qualification as existing aid:

- *The legal base for the payments was established after the entry into force of the Treaty.* It was only in 1996 that the State introduced through the Matching Funds the possibility to match expenditures made by the public broadcasters in case of an excessive price increase for programme rights. Before 1996, the possibility to match the payments made by the public broadcasters did not exist. Similarly, the amendment to the MA that makes it possible to make *ad hoc* payments from the FOR to the individual broadcasters was introduced in 1998. Regarding the State contribution to the CoBo, it was only in 1994 that the State decided to contribute to this Fund.
- *The actual payments were only made as of 1994.* More specifically, payments from the the CoBo fund were made as of 1994, from the Matching Fund as of 1996, and from the FOR as of 1999.
- *Contrary to the regular annual funding, the ad hoc payments cannot be qualified as payments to which the public service broadcasters are entitled.* The payment of the *ad hoc* funding is thus not an automatic process⁴¹. These payments take place upon request from the individual public service broadcasters and are granted after a specific and individual decision made by the Minister of Culture based on Article 106a MA. In the case of FOR, for example, the Minister decides while

³⁹ Council Regulation no 659/99 laying down detailed rules for the application of Article 93 EC [now Article 88], O.J. L 83 27 March 1999.

⁴⁰ See for a complete assessment the Article 17 letter by the Commission to the Dutch authorities, E-5/2005, dated 3 March 2005

⁴¹ Letter by the Dutch authorities of 13 May 2004, see Chapter F.6.

taking into account the level of the FOR whether monies should be transferred from the AOR to the FOR. It is then the PO which distributes the monies further on the basis of rules laid down in Protocols.

- The conditions under which the transfers can take place have been laid down in so-called “Transfer Protocols” established in 1999 and in 2002. As for the CoBo, the State lays down certain conditions for payments to and from the Fund which only date back to 1994..
- Finally, the funding is granted for specific purposes, as indicated in paragraph 2.3.3. They serve for example to give an impetus to broadcasters to produce better programmes, to absorb fluctuations of advertising revenues, they serve to match increased prices of sports rights and they serve to stimulate co-productions between Belgian and German broadcasters.

7.3 Free technical facilities

110. The public service broadcasters receive free technical facilities from the NOB since the “Media Act 1987” has entered into force. As of that year, the NOB started providing facilities to the public service broadcasters whereas originally these facilities were provided by the NOS. The NOB has been entrusted with a service of general economic interest and provides the facilities to the individual public service broadcasters for free and receives payments from the State directly. This measure can thus also be considered as a new aid measure.

7.4 Conclusion on the qualification as ‘new aid’

111. The *ad hoc* financing (payments from the FOR to the individual public broadcasters and from the Matching Funds), the transfers from the CoBo and the provision of free technical facilities should all be considered as new aid rather than existing aid.

8 COMPATIBILITY OF THE AID UNDER ARTICLE 86(2) OF THE EC TREATY

112. On the basis of the characteristic of the measures the only possible grounds for compatibility is Article 86(2) EC which states that: “*undertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community*”.
113. The Court of Justice has consistently held that Article 86(2) EC may provide for a derogation from the ban on State aid for undertakings entrusted with a SGEI. The Court’s *Altmark* judgement has implicitly confirmed that State aid that compensates the costs incurred by an undertaking for the provision of a SGEI can be found to be compatible with the common market if it meets the conditions of Article 86(2) EC⁴².

⁴² Cf. *Altmark* op. Cit. paragraph 101 to 109.

114. In line with settled case-law of the Court of Justice⁴³, Article 86(2) EC constitutes a derogation that should be interpreted restrictively. The Court has made clear that, in order for a measure to qualify for such a derogation, it is necessary that all of the following conditions are fulfilled:
- The service in question must be a service of general economic interest and clearly defined as such by the Member State;
 - The undertaking in question must be explicitly entrusted by the Member State with the provision of that service;
 - The application of competition rules of the Treaty must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community.
115. The Communication from the Commission on the application of State aid rules to public service broadcasting (hereinafter: Broadcasting Communication)⁴⁴ sets out the principles and methods which the Commission intends to apply in order to ensure that the conditions referred to above are complied with. It must therefore examine whether in the case at hand:
- the broadcasting activities of Dutch public broadcasters are clearly and precisely defined by the Dutch authorities as a service of general economic interest (definition)
 - the Dutch public broadcasters are officially entrusted by the Dutch authorities with the provision of that service (entrustment);
 - The State funding does not exceed the net cost of that public service, taking also into account other direct or indirect revenues derived from the public service (proportionality).

8.1 Definition

116. In this context, it should be mentioned that the *ad hoc* financing and the free provision of technical facilities were designed to support activities which are part of the general public service remit. The assessment of the overall level of funding of the public service broadcasters is thus necessary, but the present decision does not intend to assess the mechanism and conditions under which State funding is provided aside the specific measures above. Nor does the present decision concern the organisation of the public service broadcasting system as a whole.
117. As stated in paragraph 33 of the Broadcasting Communication, it is for the Member States to define the public service remit of a public broadcaster. Given the specific nature of the broadcasting sector, the Commission considers “*a ‘wide’ definition entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with its remit, to be legitimate under Article*

⁴³ Cf. e.g. Case 127/73, BRT/SABAM, ECR 1974, p. 313, paragraphs 19/22.

⁴⁴ Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320, 15 November 2001, p.11.

86(2) EC, in view of the interpretative provisions of the Protocol. Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity”.

118. However, although the definition may be broad, it should be sufficiently clear and precise to leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. As stated in paragraph 36 of the Broadcasting Communication, the role of the Commission is limited to checking whether the public service definition contains any manifest error.
119. The main task of the Dutch public broadcasters is to provide high quality and varied programmes for general broadcast on the public channels, in the general interest, as laid down in Article 13c MA. Specific programming requirements relating to the categories of content to be covered and the amount of broadcasting time to be devoted to each category are also contained in the legislation.
120. CLT-UFA stated that the Dutch public broadcasters broadcast in general too much sports and too much football in particular. Complainants have specified that the NOS RTV broadcasts the majority of all sports events in the Netherlands. As stated above, the *ad hoc* financing was intended to finance activities which are part of the general public service remit and were thus also meant for the acquisition of sports rights.
121. The Commission is of the opinion, however, that broadcasting sports programmes, within a limit of around 10% of total broadcasting time, does not constitute a manifest error. Sports can be part of the public service mission of broadcasters and a proportion of 10% of broadcasting time dedicated to sports is not inconsistent with the remit of offering a balanced and varied public service programming mix.
122. The Commission is of the opinion that the main task as defined in Article 13c(1) is rather broadly defined, but can be considered to meet – in accordance with the wording of the Amsterdam protocol – the “democratic, social and cultural needs” of Dutch society. Thus, the definition in the legislation is sufficiently clear and precise in relation to the main task, and does not contain any manifest errors.

8.2 Entrustment

123. Paragraph 40 of the Broadcasting Communication states that in order to benefit from the exemption under Article 86(2) EC, the public service remit should be entrusted to the Dutch public broadcasters by means of an official act. The Commission notes that the Media Act formally entrusts the NOS with the task of performing the public service task defined in Article 13c and the supporting legislation. The public broadcasters are given the right to broadcast programmes on the public channels by Article 31 MA, and the Commission considers that the main task of broadcasting programmes is sufficiently entrusted to the public broadcasters.

8.3 Proportionality

124. In Chapter 6.3 of the Broadcasting Communication, it is explained that the proportionality assessment that the Commission must carry out is twofold⁴⁵.
125. On the one hand, the Commission has to calculate the net cost of the public service task entrusted to the Dutch public broadcasters and verify whether or not this cost has been overcompensated. When compensating an undertaking, the State aid must not exceed the net costs of the public service mission. To arrive at the net cost, account should also be taken of other direct or indirect revenues derived from the public service mission. Therefore, the net benefit of the exploitation of the public service activity will be taken into account in assessing the proportionality of the aid.
126. On the other hand, the Commission has to investigate any information at its disposal suggesting that public broadcasters have distorted competition in commercial markets more than it is necessary for the fulfilment of the public service. For example, a public service broadcaster, in so far as lower revenues would be covered by the State aid, might be tempted to depress prices of advertising or of other non-public service activities on the market, so as to reduce the revenues of competitors. Such practice would require additional state funding to compensate for the foregone revenues from commercial activities and would therefore indicate the presence of over-compensation of public service obligations.

8.3.1 Transparency and cost-allocation

127. The Commission first needs to determine the cost of the SGEI. As the Dutch public broadcasters also carry out non-public service activities, they are required by the Transparency Directive⁴⁶ to keep separate accounts for the different activities carried out. Costs and revenues must be correctly assigned on the basis of clearly established, objective cost accounting principles. Only the costs entirely attributable to public service activities, while benefiting also commercial activities, need not be apportioned between the two and can be entirely allocated to public service⁴⁷.
128. The Transparency Directive has been implemented in the Netherlands through an amendment of the Competition Law (“Mededingingswet”)⁴⁸. Moreover, a special Decree⁴⁹, obliges public broadcasters to keep separate accounts for all side activities and association activities. On the basis of this, the Dutch authorities have provided information on the costs and revenues of public broadcasters in the period 1994-2005.
129. According to the requirements of the Transparency Directive Member States should not only ensure that separate accounts are kept for public service and non-

⁴⁵ Cf. Broadcasting Communication paragraph 57 and 58.

⁴⁶ Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ L 193, 29.7.2000, p. 75.

⁴⁷ Cf. Broadcasting Communication paragraphs 53-56.

⁴⁸ Cf. Article 25a of the Dutch Competition Law.

⁴⁹ Decree of the Secretary of State of 13 June 2001, which includes the annex “Manual Financial Accountability”.

public service activities, but also that all costs and revenues are correctly allocated on the basis of consistently applied and objectively justifiable costs accounting principles and that the cost-allocating principles according to which separate accounts are maintained are clearly established.

130. However, in the case at hand, the Commission notes that the Decree does not determine how the public broadcasters have to allocate costs that are shared by the public service and the non-public service activities. Information from the Dutch authorities confirms in addition that the public broadcasters use different methods to allocate costs. The authorities argue that on an individual level the allocation is correct, but that due to the choices individual broadcasters make regarding the allocation, the allocation may differ from one broadcaster to the other. The Commission finds however that the fact that there is no consistency between the different broadcasters is an indication that the Decree does not sufficiently prescribe how the cost allocation should take place.
131. Therefore, on the basis of the information submitted by the Dutch authorities, it cannot be concluded that the costs are correctly allocated on the basis of accepted cost allocation methods. Consequently, the Commission considers that all the net revenues of the commercial activities of the public service broadcasters should be taken into account in determining whether state funding has been proportional to the public service costs. This is also consistent with the Dutch legislative framework that applies to the public service broadcasting system and which obliges broadcasters to use for public service purposes all of their profits, including those from commercial activities⁵⁰.

8.3.2 *Proportionality of public funding*

132. According to paragraph 57 of the Broadcasting Communication, it is necessary that State aid does not exceed the net costs of the public service incurred by the broadcaster. Thus, after having determined the net costs of the public service it has to be established whether the total amount of state funding does not exceed this figure.
133. As noted above, if a complete or meaningful cost allocation has not taken place, the net revenues of all the activities that have benefited directly or indirectly from public funding have to be taken into account for the calculation of the net public service costs⁵¹. Only the revenues of the commercial “stand alone” activities do not have to be taken into account in establishing the net costs of the public service mission. These are activities which have not benefited directly or indirectly – for example by way of cheaper production inputs – from state funding or which have paid the full value of inputs which they share with or result from the public service activity.
134. As already remarked, there is neither the concept of “stand alone” activities in the Dutch public service broadcasting system nor a meaningful and complete allocation of resources between different activities of broadcasters. Moreover, the

⁵⁰ The figures provided by the Dutch authorities show that in the period under investigation the commercial activities of public service broadcasters have globally been profit making.

⁵¹ Cf. Broadcasting Communication, paragraphs 55 and 56.

Media Act stipulates that all the net revenues of main and side tasks⁵², side activities and association activities⁵³ have to be used for the fulfilment of the public service mission⁵⁴.

135. Consequently, the net costs of the public service activities are determined by taking into account the revenues from all activities of the public service broadcasters. Accordingly:

- first, the net cost of the public service are determined by deducting from the total costs of providing the public service, the net revenues derived from the exploitation of the public service (main and side tasks)⁵⁵;
- second, all other net commercial revenues are taken into account (side and association activities);
- third, all the forms of public funding are added up. First, the annual State financing and the *Stifo payments* which are considered to be ‘existing aid’ measures. Second, the *ad hoc* financing (payments from the FOR and the Matching funds) and payments from *CoBo*, which are considered ‘new aid’ measures.

136. The sum of all the above items determines whether or not the total State funding exceeds the total net public service costs or, in other words, whether or not there has been overcompensation of the public service tasks.

137. As regards the free provision of technical services and facilities by the NOB, the measure should, in principle, be taken into account in the assessment of the overcompensation. However, it is not necessary to explicitly include the measure in the calculations since the benefits from the free technical service can be considered as compensating costs that otherwise would have had to be financed. Thus, having to pay the costs in question would have increased by the same amount the costs of the public service entrusted to the Dutch public broadcasters. The inclusion of these costs would therefore not alter the final net result⁵⁶.

⁵² Revenues from intellectual property rights, revenues from sms, sponsoring, advertising, sales of tickets, etc. This can be inferred from the afore mentioned “Handboek Financiële Verantwoording” which lays down the accountancy rules and principles as they should be applied by the individual public broadcasters (Version 2005, Model VII, page 18).

⁵³ Revenues from side and association activities are:

- (1) Revenues from association activities: these are generally in the form of contributions by members, revenues from association magazines and received legacy’s;
- (2) revenues from capital: these are revenues from interest, lease and participations;
- (3) revenues from programme magazines: revenues from the publishing of programme magazines (magazine with programme details, reviews, advertising, etc.);
- (4) revenues from other activities : revenues from CD and DVD’s, sales of programme formats.

⁵⁴ Letter by Dutch authorities in the context of the procedure E-5/2005, dated 2 June 2005 and registered on 7 June 2005.

⁵⁵ Cf. paragraph 27.

⁵⁶ This is in line with the Commission’s position in the decision regarding the Italian public broadcaster RAI: Commission Decision of 15 October 2003 on the measures implemented by Italy for RAI SpA, OJ L 119, p. 1 of 23.4.2004.

8.4 Opening decision and period under investigation

138. In the opening decision, the Commission had, on a preliminary basis, quantified overcompensation amounting to € 110 million. The calculation was based on incomplete figures on the actual amount of transfers to the reserves and of the level of reserves held by the public service broadcasting system as a whole during the years 1992-2002. The authorities had not provided at the time complete data on individual broadcasters.
139. After the opening of procedure, the Commission received costs and revenues figures of the individual broadcasters which are more detailed than the overall figures provided at the time of the opening of the procedure. Moreover, the new information provides actual data up to year 2005 and also includes an estimate for 2006.
140. This decision concerns the *ad hoc* payments which were paid as of 1994 and covers the period up to 2005. As regards the end date, the Dutch authorities invited the Commission to take into account also the figures from 2006. However, the Commission does not consider this to be appropriate, since figures from 2006 are only estimates for the ongoing budget year.

8.4.1 Assessment of the compensation of the individual public service broadcasters

141. It appears that 14 out of the 19 public service broadcasters have been overcompensated in the period 1994-2005. The overcompensation generated €32 million profits which have generally been transferred to their Programme Reserves.
142. However, part of the overcompensation has in some cases been used to balance under-compensation in the period before 1994. Some broadcasters had, at the beginning of 1994, a negative Programme Reserve⁵⁷. Broadcasters were only allowed to register negative Programme Reserves when the public service costs exceeded the various sources of public service funding. In other words, negative Programme Reserves could only result from undercompensation of public service costs.
143. On the other hand, any possible loss from commercial activities had to be financed through the Association Reserves and could not be reflected in the Programme Reserves. According to the Dutch authorities, the Association Reserves were built up with private funds.
144. There are also cases in which the undercompensation of public service costs was temporarily financed with Association Reserves. In 1993, the Association Reserves were 'frozen' by the Dutch authorities; as of that moment, revenues from public service and commercial activities could no longer be added to these Association Reserves. However, an exception was made for the reimbursement of payments made out of Association Reserves before 1994 to cover for unfunded

⁵⁷ E.g. the VARA had in the beginning of 1994 a negative Programme Reserve of €8.5 million.

public service costs. According to the Dutch authorities, this is the only circumstance in which funds were still added to these reserves after 1994⁵⁸.

145. The Commission considers that the negative amounts recorded in the Programme Reserves and the positive variations of Association Reserves after 1994 only occurred as a result of previous ‘undercompensation’ of public service costs. The consequent balancing of these sums is therefore considered as eligible costs of the public service task. The corresponding amounts therefore do not have to be taken into account for the establishment of the overcompensation.
146. As stated above, the overcompensation has in general flowed into the Programme Reserves. In 2005, the PO decided for the first time, on the basis of Article 109a and Art 19a(1)h of the MA, that reserves held by the individual broadcasters in excess of 5 to 10% of their annual budget should be transferred to the PO⁵⁹. This transfer is also considered part of the *ad hoc* measures and is taken into account in determining the proportionality of the compensation. As a result, this transfer has reduced the overall compensation of the individual public service broadcasters, while increasing the overcompensation of the PO.
147. By subtracting – for each year from 1994 to 2005 – the net cost of the public service from the overall funding received from the state, in the way described in paragraph 135, the Commission comes to the conclusion that none of the individual broadcasters has received public funding in excess of 10% of its annual budget. Since the costs of public broadcasting may vary every year, the State may indeed wish for budgetary reasons to keep the fluctuations in State financing to a minimum and permit a certain percentage of the annual over-compensation to be carried forward to the next year. The Commission has recognised this principle in the Danish public broadcasting case⁶⁰.
148. The Commission stated in that case that these reserves must be established for this specific purpose and that they must be regularised at fixed times, i.e. being deducted from the next year’s compensation if overcompensation has been determined. Thus, if the overcompensation does not exceed 10% of the amount of the annual compensation, such overcompensation is compatible with the EC Treaty and may be carried forward to the next annual period and deducted from the amount of compensation payable in respect of that period.
149. As already indicated, the Dutch authorities have decided that each individual public service broadcasters can only maintain a dedicated reserve of maximum 5 to 10% of its annual budget⁶¹. In view of this constraint, the PO ordered in 2005 the transfer of €42.457 million of reserves from the individual broadcasters to the PO. The authorities have also committed themselves to carry out regularly the monitoring of the reserves and order the reimbursement of the excess amounts

⁵⁸ This applies to the AVRO, KRO, NCRV and VARA. Letter Dutch authorities, 30 April, registered on 13 May 2004.

⁵⁹ Letter “Publieke Omroep” dated 28 July 2005 sent by the Dutch authorities on 1 September 2005 (registered 5 September 2005).

⁶⁰ Commission Decision of 19 May 2004 on measures No C2/2003 (ex NN 22/02) implemented by Denmark for TV2/Danmark, C(2004) 1814 (fin), paragraph 113.

⁶¹ It is 5 or 10% depending on the size of the budget of the broadcaster.

above 10% of the annual compensation as of 2006⁶². It is therefore considered that the conditions are fulfilled for accepting as compatible an amount of overcompensation that does not exceed 10% of the annual budget of the public service broadcasters⁶³.

150. Since the overcompensation does not exceed the 10% margin of the annual budget, it can therefore be considered as justified for the fulfilment of the public service and the aid is thus considered compatible with Article 86(2) EC Treaty.

8.4.2 Overcompensation of the PO

151. The PO has also received compensation for its management and coordination role of the broadcasting system. This role is performed by a separate organisation, the so-called PO, which holds internal separate accounts. The Dutch authorities have stated that although the NOS RTV and the PO are parts of a single legal entity and also present consolidated accounts, under no circumstances could they have access to each other's funds.
152. On the basis of the separate accounts for the PO and following the approach described in paragraph 135, the Commission comes to the conclusion that the PO has received a total overcompensation of € 55.908 million, not including the reserves which were transferred in 2005 from individual broadcasters. The transfer of the reserves amounted to € 42.457 million. When this transfer is taken into account, the total overcompensation of the PO amounts to €98.365 (€55.908 + € 42.457) million⁶⁴.

Table 4: Overview of annual funding of PO (1994-2005) amounts x €1 million⁶⁵

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Total
Public activity costs	53,1	60,5	61,8	64,6	69,3	77,3	89,0	94,7	100,4	91,2	91,9	95,2	948,9
Public activity revenues	0	0	0	0,7	3,3	3,5	2,5	2,6	3,4	0,2	0	0	16,2
Net public activity costs	53,1	60,5	61,8	63,9	66,0	73,8	86,4	92,0	97,0	90,9	91,9	95,2	932,7
Net result of commercial activities	5,7	5,9	6,5	7,3	10,7	16,0	13,7	12,0	10,8	13,1	22,3	9,7	133,7
Need for public funding	47,5	54,6	55,3	56,5	55,4	57,8	72,7	80,0	86,2	77,8	69,6	85,5	799,0
Annual payments	49,4	55,6	58,3	58,9	62,3	70,7	68,7	74,6	78,6	85,4	78,0	79,3	819,6
Annual payments from Stifo	0	0	0	0	0	0	0	0	0	0	0	0	0
Total annual compensation	49,4	55,6	58,3	58,9	62,3	70,7	68,7	74,6	78,6	85,4	78,0	79,3	819,6

⁶² In the draft proposal for a new Media Act (Media Act 2007), the Dutch government has introduced a rule that lays down that reserve will be monitored yearly and that any excess reserve (reserve above 10% of the annual compensation) has to be transferred back to the AOR administered by the Media Authority. The Dutch government has committed itself – by letter of 4 May 2006 – to introduce this rule in the Budget law 2006, which guarantees the application until the adoption of the “Media Act 2007”.

⁶³ In practice 5% or 10%, as determined by the Dutch authorities.

⁶⁴ €42.5 and 55.9 million is in total €98.4 million.

⁶⁵ Differences between text and table due to rounding differences.

Result before ad hoc payments	1,9	1,0	3,0	2,3	6,9	12,8	-4,0	-5,4	-7,6	7,6	8,4	-6,2	20,7
Payments from FOR	0	0	0	0	0	0	7,1	6,1	5,2	7,0	5,6	2,8	33,9
Payments from Matching Fund	0	0	0	0	0	0	0	0	0	0	0	0	0
Payments from CoBo	0	0	0	0	0	0	0	0	0	0	0	0	0
Transfer of excess reserves	0	0	0	0	0	0	0	0	0	0	0	42,5	42,5
Total ad hoc payments	0	0	0	0	0	0	7,1	6,1	5,2	7,0	5,6	45,3	76,3
Extraordinary items	0	0	0	0	0	0,9	0	0,2	0,2	0	0	0	1,4
Total over/undercompensation	1,9	1,0	3,0	2,3	6,9	13,7	3,1	0,9	-2,1	14,5	14,0	39,1	98,4

153. It is considered that the overcompensation of €98.365 million is not necessary for the functioning of the public service and it can thus not benefit from the Article 86(2) derogation to the prohibition on state aid. Therefore, the overcompensation is not considered as compatible aid and should in principle be recovered from the PO.

154. Nevertheless, it appears that the overcompensation exceeds the total *ad hoc* payments accrued to the PO. The PO has received € 33.870 million as *ad hoc* payments from the State's media budget, plus the *ad hoc* transfer of € 42.457 million from the other broadcasters. This gives a total of € 76.327 million of payments received from *ad hoc* measures. In addition, the *ad hoc* payments have also generated interests which should be taken into account in determining the amount of funds which were not received in the context of the "existing aid measures". Therefore the recovery would have to be capped at €76.327 million plus interests because the 'remaining' overcompensation was granted through existing aid and cannot be recovered.

8.5 Anti-competitive behaviour on commercial markets

As explained in the Broadcasting Communication, the Commission is of the opinion that anti-competitive conduct by public service broadcasters cannot be considered necessary for the fulfilment of the public service mission. In the decision to initiate formal investigation procedures the Commission mentioned the following possible market distortions.

8.5.1 Cable transmission

155. In the model contract concluded in 1985 between broadcasters and cable operators, it is stipulated, on request of the Dutch government, that cable operators do not remunerate the intellectual property rights for transmission of Dutch public television programmes. By foregoing the intellectual property right payment from cable operators, it may be questioned whether the PO acted as a normal market operator since it waived commercial income.

156. The Dutch authorities argue however that the fact that the PO does not claim a fee for the intellectual property rights is not necessarily in contradiction with market

behaviour. After all, commercial broadcasters do not require a fee from the cable operators for the transmission of their programmes either⁶⁶.

157. Indeed, commercial agreements between broadcasters and cable operators can take various forms particularly in view of the fact that the transaction involves an exchange of transmission services versus availability of content which is valuable to both parties. The Commission finds accordingly that there are no clear indications that the PO acted contrary to market behaviour and that by renouncing to commercial revenues it increased the need for State funding.

8.5.2 Advertising market

8.5.2.1 Alleged undercutting of prices for GRP 20-49

158. At the opening of the formal investigation procedure, the Commission did not have sufficient indications that the Ster had actually undercut prices. Nevertheless, the information which has been submitted after the opening of the investigation by the complainants and the Dutch authorities has to be assessed.
159. Paragraph 58 of the Communication indicates that public service broadcasters might be tempted to depress the prices of advertising so as to reduce the revenue of competitors. However, one should keep in mind that the public broadcasters in the Netherlands do not directly carry out advertising activities, but the advertising activities are carried out by a separate organisation called the Ster. The mission statement of the Ster is to exploit the time available for advertising in such a way that it can deliver an optimal contribution to the central financing of the public service broadcasters. It functions as an intermediary, which has the mission to maximise profits from the sale of the advertising space of the public broadcasters. As already mentioned, the Ster transfers the advertising revenues directly to the media budget.
160. A possible price undercutting behaviour by the Ster should be reflected into some or all of the following circumstances: lower prices of Ster vis-à-vis its competitors, increase of market share and loss of revenues for the Ster.
161. First, as the Commission also indicated in the decision to open the formal investigation procedure, a comparison between the prices of the public and private advertising sales companies could be regarded as a meaningful proxy of the criteria indicated at paragraph 58 of the Broadcasting Communication.
162. In order to compare prices, the target group of 20-49 years old is the most relevant one. As can be inferred from the Table 5 below, there are different sub-groups, many of which target viewers within the age range of 20-49:

Table 5: Percentage of acquired target GRP's by the STER (confidential 2004)

Target	13+	20-34	35-49	50-64	20-49	Shoppers 20-49	Shoppers 20-49 +	Man 20-34	Women 20-34
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⁶⁶ According to the VECAI (organisation of cable operators), the NOS does actually receive, a payment from the VECAI, although it is called differently. The NOS does however not regard this payment as a fee for intellectual property rights.

Commercial broadcasters	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
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167. From Table 9 can moreover be inferred that there is a clear correlation between the decrease of audience share and advertising share for the public broadcasting. There is no evidence that due to possible price dumping the Ster is increasing its market share or, at a minimum, maintaining its market share despite the decrease in the audience share of its client broadcasters. On the contrary, the Ster is losing advertising market share at a similar pace as the public service broadcasters are losing audience.

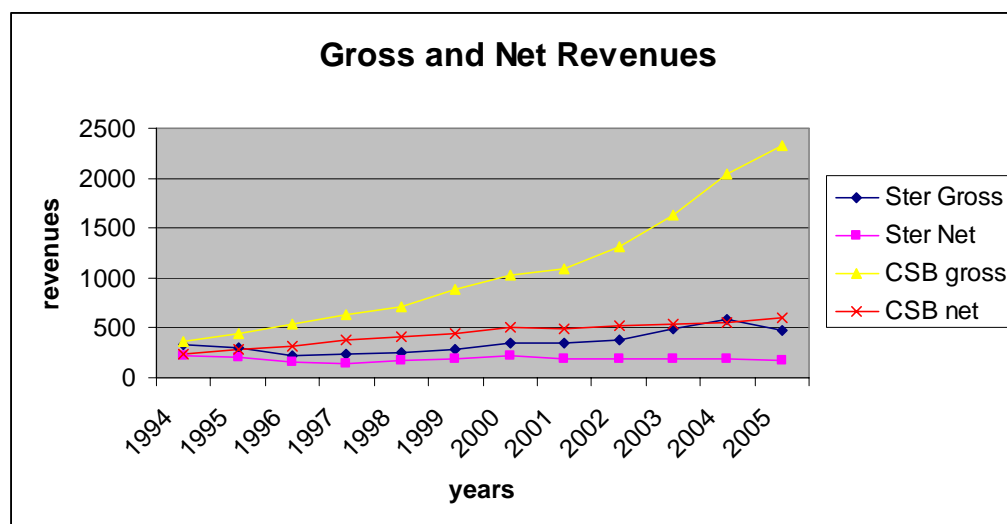
Table 9: Audience and advertising market shares

	1998	1999	2000	2001	2002	2003
CSB Audience	[...]	[...]	[...]	[...]	[...]	[...]
CSB Advertising	[...]	[...]	[...]	[...]	[...]	[...]
PSB Audience	[...]	[...]	[...]	[...]	[...]	[...]
PSB Advertising	[...]	[...]	[...]	[...]	[...]	[...]

Source: Letter Dutch authorities 03.02.2006

168. Finally, there is no evidence of the Ster losing advertising revenues in order to increase its market share.

Figure 1: development of gross and net revenues



169. From Table 7 and Figure 1 it can be concluded that the Ster has offered considerable discounts. Nevertheless, from Graph 1 it can also be concluded that, despite those discounts, the net revenues from advertising remained relatively constant. The use of discounts has not led to a major change in the revenues.

170. Consequently, none of the circumstances which typically accompany price undercutting behaviour – that is: lower prices, increase in market share and temporary loss of revenues – seems to have taken place in the Dutch advertising

market. Again it should be emphasised, that the Ster is a company independent of the public service broadcasters whose revenues go directly into the Media Budget. Accordingly, the Commission has come to the conclusion that there are no indications that the Ster has undercut prices to an extent which led to an undue loss of revenues which increased the need for additional State funding of the public service broadcasting system.

8.5.2.2 Benchmark for advertising prices

171. SBS Broadcasting BV argued that “just the price comparison between the prices of GRP 20-49 paid to the Ster or to the IP and/or SBS can not be an exclusive criterion for establishing whether or not the Ster undercuts the price”.
172. SBS states furthermore that first of all, advertisers are willing to pay an additional premium for the GRP 20-49 offered by the Ster because of the fact that it also reaches people outside the target group. In addition, the prices of the Ster for GRP 13+ (the category of teenagers) for real delivery are actually much lower than the prices of the commercial competitors for GRP 13+. These issues were submitted by the Commission to the Dutch authorities⁶⁷.
173. Regarding the first issue, it should be made clear from the outset that marketing companies intend to reach a target group when advertising their products. Audiences outside the target group are irrelevant. One of the criteria for acquiring advertising time is selectivity of the target audience. If the advertising slot is not selective, i.e. there is a lot of so-called “waste” (advertising reaching people outside the target group) than the advertising slot becomes less interesting. Due to the fact that the advertising sold by Ster has a low selectivity – it attracts a broad range of viewers – it is, according to the Dutch authorities, actually difficult for the Ster to maintain its advertising tariffs. Secondly, the GRP 13+ is of less importance than GRP 20-49. The information in Table 5 shows the relative low importance of GRP 13+ (confidential information) and clearly indicates that the GRP 13+ is not decisive when establishing a comparison of prices. As the Dutch authorities stated, the GRP 20-49 is much more relevant. The fact that the price of GRP 13+ is lower at the Ster does as such not proof that there is a general undercutting of prices by public service broadcasters.

8.5.2.3 Conclusion on advertising

174. Consequently, despite the fact that the Ster has offered considerable discounts, the total revenues stemming from advertising did not decrease but remained stable. Having assessed the other arguments and the answers of the Dutch authorities, the Commission concludes that there is currently no evidence that the Ster did not attempt to maximise its advertising revenues and that its behaviour would have led to an increased need for State funding.

8.5.3 *Football rights*

175. At the stage of the opening of the procedure, the Commission stated that there were no clear indications to conclude that broadcasters paid a price for football transmission rights which were structurally above market value. One of the

⁶⁷ Letter Dutch authorities of 4 January 2005.

reasons was that public service broadcasters offered higher amounts during the negotiations than the commercial broadcasters were willing to offer. CLT-UFA complained that the Dutch public broadcasters pay excessive prices for football rights. The Commission indicated that it would further assess this situation.

176. The following investigation did not provide evidence that the public broadcasters have outbid the commercial broadcasters, nor that public service broadcasters have acquired rights to football event to an extent liable of foreclosing the market for the competitors. Indeed, examples are found of important football rights held by commercial broadcasters during the period under investigation (see paragraph 57 above).
177. However, whereas specific anticompetitive practices could not be identified in the present procedure, the issue of whether the system as such offers sufficient safeguards against the possibility of anticompetitive behaviour will be the subject of the procedure E-5/2005 on existing aid.

9 CONCLUSION

178. For the reasons set out above, the Commission concludes that there has been overcompensation of €98.365 million granted through State aid measures that cannot be considered as compatible with the common market on the basis of Article 86(2) of the EC Treaty and should therefore be recovered from the NOS for the functions performed as PO.
179. Nevertheless, due to the fact that the overcompensation exceeds the total *ad hoc* payments accrued to the PO and amounting to a total of €76.3 million, the recovery would have to be capped at €76.327 million plus interests, because the ‘remaining’ overcompensation was granted through existing aid and cannot be recovered.

HAS ADOPTED THIS DECISION:

Article 1

1. The *ad hoc* State aid which the Netherlands has granted to PO for its public service tasks within the public service broadcasting system in the Netherlands is incompatible with the common market.
2. The incompatible *ad hoc* State aid shall be recovered from the POPO. The amount to be recovered from the PO is €76.327 million, plus interests.
3. The *ad hoc* State aid granted to the individual public service broadcasters is compatible with the common market provided that, insofar as such aid results in overcompensation of the public service tasks, the surplus is held in a special purpose reserve, the amount of which does not exceed 10% of the broadcaster’s annual budget and provided that respect for this limitation is regularly monitored by the Netherlands.

Article 2

1. The Netherlands shall take all necessary measures to recover from the PO the aid referred to in Article 1 and unlawfully made available to the beneficiary.
2. Recovery shall take effect without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery.
3. The interest to be recovered under paragraph 2 shall be calculated in accordance with the procedure laid down in Articles 9 and 11 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.
4. Within two months of the notification of the present decision, the Netherlands shall enjoin the beneficiary referred to in Article 1 to reimburse the unlawful and incompatible aid and the interests due.

Article 3

The Netherlands shall inform the Commission, within two months of notification of this Decision, of the measures already taken and planned to comply with it. It will provide this information using the questionnaire attached in Annex 1 of this Decision. The Netherlands shall submit within the same period of time, all documents giving evidence that the recovery proceedings have been initiated against the beneficiary of the unlawfully granted and incompatible aid.

Article 4

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels,

For the Commission

Ms Neelie Kroes

Member of the Commission

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission

Directorate-General for Competition

Directorate H, State Aid, Unit H-3 Telecommunications and Media

Building/Office J-70, 4/166

B-1049 Brussels

Fax No: +32.2.2969016

Annex

Information regarding the implementation of the Commission decision C 2/2004

1. Total number of beneficiaries and total amount of aid to be recovered

- 1.1 Please explain in detail how the amount of aid to be recovered from individual beneficiaries will be calculated?
- The principal
 - The interests
- 1.2 What is the total amount of unlawful aid granted under this scheme that is to be recovered (gross aid equivalents; prices of ...):
- 1.3 What is the total number of beneficiaries from which unlawful aid granted under this scheme is to be recovered:

2. Measures planned and already taken to recover the aid

- 2.1 Please describe in detail what measures are planned and what measures have already been taken to effect an immediate and effective recovery of the aid. Please also indicate where relevant the legal basis for the measures taken/planned.
- 2.2 By what date will the recovery of the aid be completed ?

3. Information by individual beneficiary

Please provide details for each beneficiary from whom unlawful aid granted under the scheme is to be recovered in the table below.

Identity of the beneficiary	Amount of unlawful aid granted (*)	Amounts reimbursed (°)
	Currency:	Currency:....

(*) Amount of aid put at the disposal of the beneficiary (in gross aid equivalents; in prices of

(°) Gross amounts reimbursed (including interests)