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**COMMUNICATION FROM THE COMMISSION ON THE APPLICATION OF
STATE AID RULES TO PUBLIC SERVICE BROADCASTING (TEXT WITH EEA
RELEVANCE)**

1. INTRODUCTION AND SCOPE OF THE COMMUNICATION

1. Over the last three decades, broadcasting has undergone important changes. The abolition of monopolies, the emergence of new players and rapid technological developments have fundamentally altered the competitive environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime, mainly as a consequence of the limited availability of broadcasting frequencies and the high barriers to entry.
2. In the 1970s, however, economic and technological developments made it increasingly possible for Member States to allow other operators to broadcast. Member States have therefore decided to introduce competition in the market. This has led to a wider choice for consumers, as many additional channels and new services became available; it has also favoured the emergence and growth of strong European operators, the development of new technologies, and a larger degree of pluralism in the sector, which means more than a simple availability of additional channels and services. Whilst opening the market to competition, Member States considered that public service broadcasting ought to be maintained, as a way to ensure the coverage of a number of areas and the satisfaction of needs and public policy objectives that would otherwise not necessarily be fulfilled to the optimal extent.
3. The increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Commission's attention by private operators. The complaints allege infringements of Articles 86 and 87 of the EC Treaty in relation to public funding of public service broadcasters.
4. The 2001 Communication from the Commission on the application of State aid rules to public service broadcasting has first set out the framework governing State funding of public service broadcasting. The 2001 Communication has served as a good basis for the Commission to develop significant decision-making practice in the field. Since 2001, more than twenty decisions were adopted concerning the financing of public service broadcasters.
5. In the meantime, technological changes have fundamentally altered the broadcasting and audiovisual markets. There has been a multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand. This has led to an increase in competition with new players, such as network operators and internet companies, entering the market. Technological developments have also allowed the emergence of media services that are not "programmes" in the traditional sense, such as on-line information services and non-linear or on-demand services. The provision of media services is converging, with consumers being increasingly able to obtain multiple services on a single platform or device or to obtain any given service on multiple platforms or devices. The increasing variety of options for consumers to access media content has led to the multiplication of content offered and the fragmentation of audiences. New technologies have enabled improved consumer participation. The traditional passive consumption model is gradually turning into active participation and control over content by consumers. In order to keep up with the new challenges, both public and private broadcasters have been diversifying their

activities, moving to new distribution platforms and expanding the range of their services. Most recently, this diversification of the publicly funded activities of public broadcasters (such as online content, special interest channels) prompted a number of complaints by other market players also including publishers.

6. Since 2001, important legal developments have also taken place, which have an impact on the broadcasting field. In the 2003 Altmark judgement¹, the European Court of Justice defined the conditions under which public service compensation does not constitute State aid. In 2005, the Commission adopted a new Decision² and Framework³ on State aid in the form of public service compensation. In 2007, following the Commission's 2004 White Paper⁴ and the 2006 opinion of the European Parliament⁵, the Commission adopted a Communication accompanying the Communication on "A single market for 21st century Europe on Services of general interest, including social services of general interest: a new European Commitment"⁶, where it presented its views on the role and approach of the EU with regard to services of general interest. Furthermore, in December 2007, the Audiovisual Media Services Directive⁷ entered into force. This directive takes into account recent market and technological developments by extending the scope of the EU audiovisual regulation to emerging media services.
7. These changes in the market and in the legal environment have called for an update of the 2001 Communication on State aid for public broadcasting. The Commission's 2005 State Aid Action Plan⁸ announced that the Commission would "revisit its Communication on the application of State aid rules to public service broadcasting. Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service activities".

¹ Judgment in case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH ('Altmark'); [2003] ECR I-7747.

² Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest; OJ L 312, 29.11.2005, p. 67.

³ Community framework for State aid in the form of public service compensation; OJ C 297, 29.11.2005, p. 4.

⁴ The 2004 White Paper - COM(2004) 374, 12.5.2004 - was built on previous consultations and Communications, in particular the Commission's 2003 Green Paper - COM(2003) 270, 21.5.2003 -, two Communications in 2001 - COM(2001) 598, 17.10.2001 and "Services of general interest in Europe" (OJ C 17, 19.1.2001) - and the first Communication on this subject of 1996 ("Services of general interest in Europe" - OJ C 281, 26.9.1996).

⁵ The resolution of the European Parliament (A6-0275/2006 of 26 September 2006) completed the large round of consultation of EU institutions and stakeholders initiated by the 2004 White Paper. The resolution supports the underlying principles and priority actions set out in the White Paper. It states that it is not possible to define services of general interest uniformly and does not call for a single horizontal legislative framework, but calls on the EU and the Commission in particular to continue acting in various domains and sectors so as to achieve greater clarity and consistency of EU rules, while fully respecting the principle of subsidiarity. The European Economic and Social Committee and the Committee of the Regions have also given their opinions (CESE/2005/121 of 9 February 2005, CESE/2006/223 of 6 July 2006 and CDR/2004/327 of 23 February 2005). COM(2007) 725 final.

⁷ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; OJ L 332 of 18 December 2007.

⁸ COM(2005) 107 final.

8. Between 10 January and 10 March 2008 the Commission held a public consultation on the value of reviewing the 2001 Communication. The consultation was based on a set of detailed questions which invited stakeholders to comment on certain proposals for improving and updating the existing Communication. The Commission received 121 comments which were subsequently published. The replies have confirmed the Commission's preliminary impression that the clarifications set out in the 2001 Communication did not sufficiently reflect its policy as set out in individual decisions.
9. The present Communication consolidates the Commission's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultation. It clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the broadcasting sector, taking into account recent market and legal developments. The present Communication is without prejudice to the application of the internal market rules and fundamental principles in the field of broadcasting.

2. THE ROLE OF PUBLIC SERVICE BROADCASTING

10. Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.
11. Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts.⁹
12. The role of the public service¹⁰ in general is recognised by the Treaty. The key provision in this respect is Article 86(2), which reads as follows: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far 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".
13. This provision is confirmed by Article 16 of the EC Treaty, concerning services of general economic interest, which was introduced by the Amsterdam Treaty and

⁹ Judgement in the case C-260/89 ERT, [1991] ECR I-2925.

¹⁰ For the purpose of the present communication, and in accordance with Article 16 of the EC Treaty and the declaration (No 13) annexed to the final act of Amsterdam, the term "public service" as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term "service of general economic interest" used in Article 86(2).

entered into force on 1 May 1999 - Article 16 states: "Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions".

14. The interpretation of these principles in the light of the particular nature of the broadcasting sector is outlined in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty, (hereinafter referred to as "the Amsterdam Protocol"), which, after considering "that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", states that: "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".
15. The importance of public service broadcasting for social, democratic and cultural life in the Union was also reaffirmed in the Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, (hereinafter referred to as "the Resolution"). As underlined by the Resolution: "Broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting". Moreover, public service broadcasting needs to "benefit from technological progress", bring "the public the benefits of the new audiovisual and information services and the new technologies" and to undertake "the development and diversification of activities in the digital age". Finally, "public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences"¹¹.
16. Given these characteristics, which are peculiar to the broadcasting sector, a public service mandate encompassing "a wide range of programming in accordance with its remit", as stated by the Resolution, can in principle be considered as legitimate, as aiming at a balanced and varied programming, capable of preserving a certain level of audience for public broadcasters and, thus, of ensuring the accomplishment of the mandate, i.e. the fulfilment of the democratic, social and cultural needs of the society and the guaranteeing of pluralism.

¹¹ OJ C 30, 5.2.1999, p. 1.

17. The role of public service broadcasting in promoting cultural diversity was also recognised by the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention states that each Party may adopt “measures aimed at enhancing diversity of the media, including through public service broadcasting”.¹²
18. These values of public broadcasting are equally important in the rapidly changing new media environment. The Committee of Ministers of the Council of Europe has dealt with the issue in two Recommendations adopted in January 2007. In its Recommendation on media pluralism and diversity of media content,¹³ the Committee of Ministers called upon the member states of the Council of Europe “to ensure that existing public service media organisations occupy a visible place in the new media landscape” and to “allow public service media organisations to develop in order to make their content accessible on a variety of platforms, notably in order to ensure the provision of high-quality and innovative content in the digital environment and to develop a whole range of new services including interactive facilities”. Furthermore, in the Recommendation on the remit of public service media in the information society,¹⁴ the Committee of Ministers has recommended that governments of the Council of Europe’s member countries “guarantee the fundamental role of the public service media in the new digital environment, setting a clear remit for public service media”, “include (...) provisions in their legislations/regulations specific to the remit of public service media, covering in particular the new communication services”. At the same time, the Recommendation also calls upon the members of the Council of Europe to “guarantee public service media (...) in a transparent and accountable manner” and to “enable public service media to respond fully and effectively to the challenges of information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions”.
19. In its Resolution on concentration and pluralism in the media in the European Union, the European Parliament has recommended that “regulations governing state aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment, while ensuring that public service media carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expediency”.¹⁵
20. It should be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a role in achieving the objectives of the Amsterdam Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes. As recalled by the Audiovisual

¹² UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by Council decision 2006/515/EC of 18.5.2006., Article 6 (1) and (2) h).

¹³ Recommendation CM/Rec(2007)2 of the Committee of the Ministers to member states on media pluralism and diversity of media content, adopted on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.

¹⁴ Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, adopted on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.

¹⁵ European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253(INI).

Media Services Directive¹⁶ “the co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.”

3. THE LEGAL CONTEXT

21. The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The State aid assessment is based on Articles 87 and 88 on State aid and Article 86(2) on the application of the rules of the Treaty and the competition rules, in particular, to services of general economic interest. The Treaty of Maastricht introduced Article 151 which provides that the Community shall take cultural aspects into account under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures. Moreover, it has also introduced a possible compatibility clause for State aid aimed at promoting culture (Article 87(3)(d)). The Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and the Amsterdam Protocol on the system of public broadcasting in the Member States.
22. The European Parliament and the Council have adopted Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities¹⁷ (the Television without Frontiers Directive). Directive 2007/65/EC of the European Parliament and of the Council of December 2007 has amended the Television without Frontiers Directive and renamed it Audiovisual Media Services Directive. The Commission has adopted Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.¹⁸ The Directive has since been substantially amended several times. These amendments have been codified by Commission Directive 2006/111/EC of 16 November 2006.
23. These rules are interpreted by the Court of Justice and the Court of First Instance. In particular, in its judgement in the case of *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nachverkehrs-gesellschaft Altmark GmbH*,¹⁹ the Court of Justice set out the conditions under which public service compensation does not constitute State aid within the meaning of Article 87 of the EC Treaty.²⁰
24. The Commission has also adopted several relevant communications on the application of the State aid rules. The 2005 State Aid Action Plan has set out the objectives of the State aid reform in the context of the Lisbon Strategy for Growth and Jobs of the European Union. Also in 2005, the Commission adopted the so-called “Services of General Economic Interest Package” clarifying the requirements of Article 86 (2) of the EC Treaty.

¹⁶ Directive 2007/65/EC, cf. footnote 7.

¹⁷ OJ L 298, 17.10.1989, p. 23, as amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60).

¹⁸ OJ L 195, 29.7.1980, p. 35, as last amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).

¹⁹ Case C-280/00, cf. footnote 1 above

²⁰ See footnotes 2 and 3.

4. APPLICABILITY OF ARTICLE 87(1)

4.1. The State aid character of State financing of public service broadcasters

25. Article 87(1) states: "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market".
26. The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). State financing of public service broadcasters is normally to be regarded as State aid, inasmuch as it meets the above criteria. Public service broadcasters are normally financed out of the State budget or through a levy on broadcasting equipment holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources. Moreover, and to the extent that such measures fail to satisfy the market economy investor test, in accordance with the "Application of Articles 92 and 93 of the EEC Treaty to public authorities" holdings²¹ and the Commission communication to the Member States on the "Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector"²², they favour in most cases only certain broadcasters and may thereby distort competition. Naturally, the existence of State aid will have to be assessed on a case by case basis, and depends also on the specific nature of the funding²³.
27. As the Court of Justice has observed: "When aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid"²⁴. Thus, 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 takes 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 structure of commercial broadcasters may extend to more than one Member State. Furthermore, services provided on the internet normally have a global reach.
28. According to the case-law of the Court²⁵, public service compensation does not constitute State aid within the meaning of Article 87 of the Treaty provided that four cumulative criteria are met. First, the recipient undertaking must actually have public

²¹ Bulletin EC 9-1984.

²² OJ C 307, 13.11.1993, p. 3.

²³ Aid NN 88/98, "Financing of a 24-hour advertising-free news channel with licence fee by the BBC", OJ C 78, 18.3.2000, p. 6 and aid NN 70/98, "State aid to public broadcasting channels 'Kinderkanal and Phoenix'" (OJ C 238, 21. 8.1999, p. 3).

²⁴ Cases C-730/79, Philip Morris Holland v Commission [1980] ECR 2671, paragraph 11; C-303/88, Italy v Commission [1991] ECR I-1433, paragraph 27; C-156/98, Germany v Commission [2000] ECR I-6857, paragraph 33.

²⁵ Case C-280/00, cf. footnote 1 above

service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation must be determined on the basis of an analysis of the costs which a typical, well run undertaking would have incurred.

4.2. **Nature of the aid: existing aid as opposed to new aid**

29. The funding schemes currently in place in most of the Member States were introduced a long time ago. As a first step, therefore, the Commission must determine whether these schemes may be regarded as "existing aid" within the meaning of Article 88(1).
30. Existing aid is regulated by Article 88(1), which states that: "The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market".
31. Pursuant to Article 1(b)(i) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty²⁶, existing aid includes "... 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 Treaty".
32. In the case of Austria, Finland and Sweden, State aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 in these countries is regarded as existing aid. Regarding the ten Member States which acceded in 2004 (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) and Romania and Bulgaria which acceded in 2007, measures put into effect before 10 December 1994, those included in the list annexed to the Treaty of Accession and those approved under the so-called "interim procedure" are considered as existing aid.
33. Pursuant to Article 1(b)(v), existing aid also includes "aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State".
34. In accordance with the case-law of the Court²⁷, the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission must take into account all the legal and economic

²⁶ OJ L 83, 27.3.1999, p. 1.

²⁷ Case C-44/93, *Namur-Les Assurances du Crédit SA v Office National du Ducreire and the Belgian State* [1994] ECR I-3829.

elements related to the broadcasting system of a given Member State. Although the legal and economic elements relevant for such an assessment present common features in all or most Member States, the Commission believes that a case by case approach is the most appropriate²⁸.

35. According to the case law in *Gibraltar*²⁹, not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Court of First Instance, “it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.”
36. In light of the above considerations, in its decision-making practice the Commission has generally examined (1) whether the original financing regime for public broadcasters is existing aid in line with the rules indicated in paragraphs 28 and 29 above; (2) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature³⁰; and (3) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure as a whole is transformed into new aid.

5. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLES 87(2) AND 87(3)

37. Although compensation for public service broadcasting is typically assessed under Article 86(2) of the Treaty, the derogations listed in Article 87(2) and Article 87(3) may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.
38. In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures. Article 87(3)(d) of the Treaty allows the Commission to regard aid to promote culture as compatible with the

²⁸ See for example the decisions of the Commission in the following cases: E 8/06, State funding for Flemish public broadcaster VRT, OJ C 143, 10.6.2008, p. 7, E 4/05, State aid financing of RTE and TNAG (TG4), OJ C 121, 17.5.2008, p. 5, E 9/05, Licence fee payments to RAI, OJ C 235, 23.9.2005, p. 3, E 10/2005, Licence fee payments to France 2 and 3, OJ C 240, 30.9.2005, p. 20, E 8/05, Spanish national public broadcaster RTVE, OJ C 239, 4.10.2006, p. 17, C 2/04, Ad hoc financing of Dutch public broadcasters, OJ L 49, 22.2.2008, p. 1, C 60/99 Commission Decision of 10 December 2003 on State aid implemented by France for France 2 and France 3, OJ L 361, 8.12.2004, p. 21, C 62/99 Commission Decision of 15 October 2003 on the measures implemented by Italy for RAI SpA, OJ L 119, 23.4.2004, p. 1, NN 88/98, Financing of a 24-hour advertising-free news channel with licence fee by the BBC, OJ C 78, 18.3.2000, p. 6 and NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix, OJ C 238, 21.8.1999, p. 3

²⁹ Joined cases T-195/01 and T-207/01, [2002] ECR II-2309

³⁰ See for example the Decision of the Commission in State aid E 3/2005 – State aid to public service broadcasters in Germany

common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

39. It is the Commission's task to decide on the actual application of that provision in the same way as for the other exemption clauses in Article 87(3). It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Accordingly, the Commission considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable.³¹ Moreover, the Commission takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se.³² Furthermore, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture under Article 87(3)(d)³³.
40. State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, Article 87(3)(d) would generally not be relevant. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 86(2), on the basis of the criteria set out in the present Communication.

6. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 86(2)

41. The role of services of general economic interest in attaining the fundamental objectives of the European Union has been fully acknowledged by the Commission in the 2005 services of general economic interest package and, on a more general level, in the 2007 Communication on services of general interest, mentioned in point 6.
42. The Court has consistently held that Article 86 provides for a derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:
- i. the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);³⁴
 - ii. the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);³⁵

³¹ For example, Commission decisions NN 88/98 BBC 24-hours (OJ C 78, 18.3.2000), NN 70/98 "Kinderkanal and Phoenix" (OJ C 238, 21.8.1999).

³² For example, Commission decision N 458/2004 State aid to Espacio Editorial Andaluza Holding sl., see OJ C/131/2005 of 29 May 2005.

³³ NN 70/98, State aid to public broadcasting channels Kinderkanal and Phoenix (OJ C 238, 21. 8.1999), p. 3.

³⁴ Judgement in the case 172/80 Zuechner; [1981] 2021.

³⁵ Judgement in the case C-242/95 GT-Link; [1997] 4449.

- iii. the application of the competition rules of the Treaty (in this case, the ban on State aid) 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 (proportionality test).³⁶
43. It is for the Commission, as guardian of the Treaty, to assess whether these criteria are satisfied.
44. In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the "public service remit as conferred, defined and organised by each Member State" (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting "in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (...) and (...) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account" (proportionality).

6.1. Definition of public service remit

6.1.1. General

45. In order to meet the condition mentioned in point 42(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.
46. Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level. Generally speaking, in exercising that competence, account must be taken of the Community concept of "services of general economic interest".
47. The Commission's task is to verify whether or not Member States respect the Treaty provisions³⁷. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet - in the wording of the Protocol - the "democratic, social and cultural needs of each society". That would normally be the position in the case of advertising, e-commerce, teleshopping, sponsoring or merchandising, for example. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale

³⁶ Judgement in the case C-159/94 EDF and GDF; [1997] I-5815.

³⁷ Judgement in the case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit.

48. The definition of the public service mandate by the Member States should be as precise as possible. It should 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. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.
49. Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities. Moreover, the terms of the public service remit should be precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapters.
50. At the same time, given the specific nature of the broadcasting sector, a definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2).³⁸ Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity. As described in the following chapter, the definition of the public service remit may also reflect the development and diversification of activities in the digital age and include services which are not programmes in the traditional sense.

6.1.2. *Market developments*

51. Public service broadcasters shall be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society. In order to guarantee the fundamental role of the public service media in the new digital environment, public service broadcasters may provide audiovisual media content in the form of linear services over new distribution platforms, provide special interest programmes, as well as media services that are not "programmes" in the traditional sense, such as on-line information services and non-linear or on-demand services, subject to appropriate safeguards. These services may also be part of the public service remit, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.
52. In parallel with the rapid evolution of media services, the business models of broadcasters are also undergoing changes. Broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content

³⁸ Judgement in the case T-442/03, SIC/Commission, [2008], paragraph 201.

downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee). At the same time, the Commission notes that a number of Member States have so far opted for not allowing public service broadcasters to offer pay services within their public service remit, as they maintain that it would be difficult to reconcile with the traditional objectives to offer universally accessible, independent quality programmes.

53. The Commission considers that the remuneration of a public broadcaster's services at the point of consumption may negatively affect the universality of such service to society as it limits its provision to a part of the population that is capable and willing to pay for the service. This lack of universality may in turn deprive the underlying public funding of its legitimacy which is to provide society at large with a service that is of a social, democratic and cultural nature. At the same time, taking into account the ongoing diversification of broadcasting activities, this does not necessarily mean that broadcasting services with a pay element can never qualify as services of general economic interest pursuant to Article 86(2) EC, provided that the services are clearly not commercial in their nature. However, a special vigilance is necessary with regard to these services, in order to establish whether - taking into account their content, the level of direct contribution by the final user and the kind of services normally offered on the market by commercial broadcasters - these services actually serve the social, democratic and cultural needs of the society without unduly distorting competition.³⁹
54. For example, the broadcasting of premium content (e.g. the final of the UEFA Champions' League) on a pay per view or subscription basis, or viewers' participation in a prize game by dialling a premium rate number, manifestly qualify as commercial activities and cannot therefore be financed through State aid on the basis of Article 86(2) EC. To the contrary, depending on the content provided and the overall circumstances, other pay services may plausibly satisfy specific needs of the society and their competitive impact on the market may be proportionate in view of the social, democratic and cultural goals pursued. The provision of public services to satisfy the needs of part of the society with special interests may necessitate additional resources. In such cases, it may be equitable not to impose the burden of financing of such a public service on the whole population, but only on those interested in accessing the service, by means of collecting pay per view or subscription fees to partly cover the incremental costs of such services. Examples may include the access to particularly advanced technological features of the public service. In the same vein, Member States may entrust public service broadcasters with providing broadcasting services on new platforms such as mobile telephony where the platform operator is charging network transmission fees. The pass-on of these pure network transmission costs to

³⁹ As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society "(...) member states may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, member states may consider allowing public service media to collect remunerations (...). However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (...) When developing new funding systems, member states should pay due attention to the nature of the content provided in the interest of the public and in the common interest."

the final consumer by the public service broadcaster does not imply that the service distributed over the platform may not legitimately be part of the public service remit.

55. In summary, the Commission considers that a direct remuneration element in services provided by a public service broadcaster does not necessarily always mean that these services fall outside the public service remit. The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, Member States may entrust public broadcasters with such a service as part of their public service remit.

6.1.3. *Procedural safeguards*

56. Significant new services offered by public service broadcasters, such as in particular publicly funded non-traditional media services and pay-services, may have a significant effect on the market, and may impact on private initiatives and innovation. The same goes for significant alterations of existing services. Moreover, services offered via the internet, for example, may in some cases have a greater cross-border reach than traditional television services, thereby potentially affecting intra-Community trade to a greater extent. Therefore, such expansion of publicly funded activities shall be accompanied by adequate safeguards to ensure full respect of the Treaty.
57. It is above all up to the Member States to define the scope of the public service, and to make sure in this context that the rules governing the funding of public service broadcasters are respected. Before the introduction of significant new services on the market, Member States shall consider whether the service meets the same democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition, as provided in the Amsterdam Protocol.
58. It is primarily up to the Member States to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public broadcaster, what shall be qualified as “significant new service”. The “new” nature of an activity may depend among others on the novelty of the service both in terms of the modalities of consumption (e.g.: non linear or on-demand rather than linear), as well as of its content. The “significance” of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.
59. It is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of significant new services with the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems. In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested parties shall have the right to give their views on the envisaged new service prior to its authorisation. The outcome of the assessment as well as the grounds for the decision shall be made publicly available.

60. In order to determine whether such new broadcasting services meet the democratic, social and cultural needs of the society, Member States should consider, *inter alia*, their distinctive features such as in terms of objectives, content, design, target audience and reach (including, for pay services, the impact on universality and the adequacy of the price level with regard to fair access by citizens); the impact of the services on the balanced and varied overall offer of the public broadcaster; as well as their public service value added in view of the already existing offers (including, in the case of pay services, whether the public value added of the service justifies a direct pay element from the point of view of the final users).
61. In order to consider the potential effects of the services in question on the market and to avoid undue distortions of competition, Member States shall assess the distortive impact, if any, of a new service on commercial offers by comparing the situation in the presence and in the absence of the planned new service. In the assessment, Member States should consider, *inter alia*, the existence of similar or substitutable offers in the market, potential for commercial exploitation, market structure, market position of the public service broadcaster, level of private competition, potential crowding-out of private initiatives, potential effect on neighbouring markets, potential effect on other Member State markets, e.g. in terms of cross-border audience.⁴⁰
62. In the interest of ensuring impartiality and of safeguarding the rights of third parties (e.g. with regard to the confidential treatment of the information submitted), the assessment would only seem effective if carried out by a body which is external and independent from the management of the public broadcaster. Where exceptionally a body within the public service broadcaster itself is charged with undertaking the above assessment, the Member State concerned must ensure its independence from the executive management of the public service broadcaster. Adequate measures to that end shall include (i) the creation of special procedures for the appointment of the decision makers within the internal control body, in order to avoid conflicts of interest with the executive management of the broadcasting company, (ii) special safeguards to ensure that the decision makers within the internal control body are not removed from their functions in the absence of duly demonstrated objective justifications, (iii) the grant of sufficient financial and human resources to the internal control body and the guarantee that it would be functionally independent in the organisation and utilisation of such resources, (iv) the creation of effective "Chinese walls" to avoid any undue flow of information towards the management of the broadcasting company and to protect confidential information submitted by third parties.
63. The considerations outlined above shall not prevent public broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the

⁴⁰ For example, the closer the new service is to existing commercial offers, the more likely it is to drive viewers away from commercial operators and the more it will distort competition. The greater the potential for commercial exploitation of the new service, the more important this effect will be. The stronger the position of the public service broadcaster on the viewers and advertising markets, the more likely it is that the new service will have a distortive effect on competition. If the new service is to offer a greater extent of premium content where such content is only available to a limited extent, it is appropriate to assess the impact of the increase on this neighbouring market.

feasibility of and the value added by the foreseen service, in so far as such test phase does not amount to the introduction of a fully-fledged, significant new service.

64. The Commission considers that a thorough assessment at national level, carried out in an independent manner, taking into account the above safeguards will contribute to ensuring compliance with the EC State aid rules. Of course, this is without prejudice to the competences of the Commission to verify that Member States respect the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative.

6.2. **Entrustment and supervision**

65. In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference).
66. The entrustment act shall specify the precise nature of the public service obligations in line with part 6.1 above, and shall set out the parameters for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.
67. Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment act should be modified accordingly, within the limits of Article 86(2). In the interest of allowing public service broadcasters to react swiftly to new technological developments, Member States may also foresee that the entrustment with a new service is provided following the assessment outlined in part 6.1.3 above, before the original entrustment act is formally consolidated.
68. It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. In accordance with the Commission communication on the principles and guidelines for the Community's audiovisual policy in the digital era,⁴¹ it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States.⁴²
69. In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by an external body independent from the public service broadcaster, which has the powers and the necessary resources to carry out supervision regularly, and to impose appropriate remedies (e.g. binding obligations, appropriate sanctions) in so far it is necessary to ensure respect of the public service obligations.

⁴¹ COM(1999) 657 final, section 3(6).

⁴² Judgement in the case T-442/03, SIC/Commission, [2008], paragraph 212.

70. In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

6.3. **Funding of public service broadcasting and the proportionality test**

6.3.1. The choice of funding

71. Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.

72. Funding schemes can be divided into two broad categories: "single-funding" and "dual-funding". The "single-funding" category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. "Dual-funding" systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial or public service activities, such as the sale of advertising space or programmes and the offering of services against payment.

73. As stated by the Amsterdam Protocol: "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting (...)". The Commission has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.

74. While Member States are free to choose the means of financing public service broadcasting, the Commission has to verify, under Article 86(2), that the derogation from the normal application of the competition rules for the performance of the service of general economic interest does not affect competition in the common market in a disproportionate manner. The test is of a "negative" nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the interests of the Community.

75. The Amsterdam Protocol confirms this approach also for public service broadcasting, stating that funding should not "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".

6.3.2. Transparency requirements for the State aid assessment

76. The above-described assessment by the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities.

77. Separation of accounts between public service activities and non-public service activities is normally already required at national level to ensure transparency and accountability when using public funds. A separation of accounts is necessary to allow the Commission to carry out its proportionality test. It provides the Commission with a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of

proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Amsterdam Protocol.

78. The transparency requirements in the financial relations between public authorities and public undertakings and within undertakings granted special or exclusive rights or entrusted with the operation of a service of general economic interest, are indicated in Directive 2006/111/EC, which codifies the amendments to Directive 80/723/EEC.⁴³
79. The Member States are required by Directive 2006/111/EC to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, i. e. public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established.⁴⁴
80. These general transparency requirements apply also to broadcasters, in so far as they are entrusted with the operation of a service of general economic interest, receive public compensation in relation to such service, and also carry out other, non-public-service activities.
81. In the broadcasting sector, separation of accounts poses no particular problem on the revenue side. For this reason, the Commission considers that, on the revenue side, broadcasting operators should give detailed account of the sources and amount of all income accruing from the performance of public and non-public service activities.
82. On the cost side, all the expenses incurred in the operation of the public service may be taken into consideration. Where the undertaking carries out activities falling outside the scope of the public service, only the costs associated with the public service may be taken into consideration. The Commission recognises that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side. This is because, in particular in the field of traditional broadcasting, Member States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.
83. Costs specific to non-public service activities (e.g.: the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously, for example the investment costs for purchasing a

⁴³ Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings has been subsequently amended by Commission Directives 85/413/EEC, 93/84/EEC, 2000/52/EC and 2005/81/EC.

⁴⁴ Article 4 of Directive 2006/111/EC

bundle of broadcasting frequencies that will be used for launching both commercial and public channels, for developing a new platform or for launching a new branch of activities - should be allocated proportionately to public service and non-public service activities respectively.

84. In other cases, whenever the same resources - personnel, equipment, fixed installations, etc. - are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities⁴⁵. In such cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed in other utilities sectors is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to the public service activities have to be taken into account for the purpose of calculating the net public service costs and therefore to reduce the public service compensation level. This reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.
85. The main example for the situation described in the preceding paragraph would be the cost of producing programs in the framework of the public service mission of the broadcaster. These programs serve both to fulfil the public service remit and to generate audience for selling advertising space. However, it is virtually impossible to quantify with a sufficient degree of precision how much of the program viewing fulfils the public service remit and how much generates advertising revenue. For this reason, the distribution of the cost of programming between the two activities risks being arbitrary and not meaningful.
86. The separation of accounts as outlined above is essential to ensure transparency and enable fair and effective control of public financing. The Commission considers that such transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.
87. Whenever in line with the principle of structural separation, public service broadcasters carry out non-public-service activities through commercial subsidiaries, the relations between the broadcasters and their commercial subsidiaries must be at arm's length and respect market principles.

⁴⁵ This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

6.3.3. Proportionality

6.3.3.1. *General*

88. In carrying out the proportionality test, the Commission will consider whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service as defined by the Member State and to provide for its funding. The Commission will assess whether there are sufficient guarantees to avoid overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities. When necessary the Commission will also take action in the light of other Treaty provisions such as Articles 81 and 82 EC.
89. In its assessment, the Commission will take into account the fact that, to the extent that public funding is necessary to carry out the public service obligation, the system as a whole has the positive effect to ensure universal, reliable and balanced offer in a context of increasing fragmentation of audiences and diversification of media services. However, this effect has to be balanced against possible negative effects of the public funding, such as preventing other operators from entering media markets, leading to increased market concentration or to possible anti-competitive behaviour of public service operators in the relevant markets.
90. The analysis of the effects of public funding on competition and trade must be based on the specific characteristics of each national system. The Commission is aware of the differences in the competitive structures and other characteristics of the Member States' media markets. Therefore, the assessment of the compatibility of State aid to public broadcasters under Article 86(2) has to be made on a case by case basis, according to Commission practice,⁴⁶ in line with the principles set out in this present Communication.

6.3.3.2. *Over-compensation*

91. Member States shall provide for appropriate mechanisms to ensure that there is no over-compensation. Since over-compensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State.
92. The Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.

⁴⁶ See for example the recent decisions of the Commission in the following cases: E 8/06, State funding for Flemish public broadcaster VRT, OJ C 143, 10.6.2008, p. 7, E 4/05, State aid financing of RTE and TNAG (TG4), OJ C 121, 17.5.2008, E 3/2005, Aid to the German public broadcasters, OJ C 185, 8.8.2007, p.1, E 9/05, Licence fee payments to RAI, OJ C 235, 23.9.2005, p. 3, E 10/2005, Licence fee payments to France 2 and 3, OJ C 240, 30.9.2005, p. 20, aid E8/05, Spanish national public broadcaster RTVE, OJ C 239, 4.10.2006, p. 17, C 2/04, Ad hoc financing of Dutch public broadcasters, OJ L 49, 22.2.2008, p. 1

93. Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission. However, in other cases, for example where specific public service obligations are entrusted to commercially run undertakings which need to remunerate the capital invested in them, a profit element which represents the fair remuneration of capital taking into account risk may be considered reasonable, if duly justified and provided that it is necessary for the fulfilment of the public service obligations.
94. In order to guarantee the continuous fulfilment of their public service obligations, public service broadcasters shall be able to maintain reserves up to 10% of the annual budgeted expenses of their public service mission, for the purpose of financing their public service activities. In the interest of transparency, Member States shall lay down the conditions under which such reserves may be used by the public service broadcasters.
95. Public service broadcasters may only be allowed to keep reserves in excess of 10% of the annual budgeted expenses of their public service mission in exceptional and duly justified cases. Such excess reserves are only acceptable provided that they are specifically earmarked in advance and on a binding way for the purpose of non-recurring, major investments necessary for the fulfilment of the public service mission. The use of such exceptional excess reserves should also be clearly limited in time. This time period may not exceed the entrustment period or an equivalent period which may not be longer than four years
96. For example, excess reserves may be justified for major technological investments (such as digitisation) which are foreseen to occur at a certain point in time and are necessary for the fulfilment of the public service remit; or for major restructuring measures necessary to maintain the continuous operation of a public service broadcaster within a well-defined time period.
97. The public service compensation, as well as the reserves mentioned above, shall be used for the purpose of financing public service activities.

6.3.3.3. *Control mechanisms*

98. Member States shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of reserves. It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.
99. Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a

yearly basis. In order to ensure effectiveness of the controls, Member States shall make sure that effective measures can be put in place to remedy any eventual misuse such as recovery of cross-subsidisation or reimbursement of reserves not used for the earmarked purpose and timeframe.

100. The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each entrustment period, or an equivalent period which, in any event, should not exceed four years. In case it is established that the public service broadcaster has consistently maintained a high level of yearly reserves, the parameters for providing the public compensation should be revised. Any reserves existing at the end of the entrustment period shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period.

6.3.3.4. *Market distortions*

101. In accordance with the Amsterdam Protocol, the funding of public service broadcasting shall “not affect trading conditions and competition in the Community which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account”. It follows that Member States shall make sure that the activities of public service broadcasters do not lead to market distortions which are not necessary for the fulfilment of the public service mission.
102. When performing their public service activities, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition. For example, the broadcasting of premium content may be part of the public service mission of public service broadcasters. However, disproportionate market distortions would arise if public service broadcasters were to maintain such rights for premium content (e.g. premium sports rights) unused without sublicensing them. Also, if public service broadcasters were to use their public compensation to consistently overbid private competitors for premium rights, such conduct could lead to the crowding out of private competitors, which could affect trading conditions and competition contrary to the common interest, without being necessary for the fulfilment of the public service. In order to avoid such anti-competitive behaviour, the Commission invites Member States to enhance transparency concerning the general framework governing the acquisition, use and possible sub-licensing of premium rights by public service broadcasters.
103. When carrying out commercial activities, public service broadcasters shall be bound to respect market principles. On the one hand, public compensation and public service reserves cannot be used for the purpose of financing non-public service activities. Such cross-subsidisation is not justified and constitutes incompatible State aid. On the other hand, Member States shall ensure that public service broadcasters respect the arms' length principle in their relationships with their commercial subsidiaries, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors.
104. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or to offer other non-public service activities (such as commercial pay services) below cost so as to reduce the revenue of competitors, in so far as the resulting lower revenues are covered by the

public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the Amsterdam Protocol.

105. In view of the differences between the market situations as referred to above, the Commission considers that it is in the first place up to the national authorities to assess whether public broadcasters are respecting market principles. In particular, the questions whether public service broadcasters are undercutting prices in their commercial offer, or whether they are overbidding for programme rights in the context of the public service mandate, shall primarily be assessed at national level, taking into account the specificities of each case and of each market. In this assessment, the following criteria may be used, for example: costs of delivering the service, comparison with the average prices of competitors on the market, respective audience shares, coherence with previous pricing policy of the public service broadcaster, etc.
106. Member States shall have appropriate mechanisms in place to prevent disproportionate market distortions and to control the market behaviour of public service broadcasters. Without prejudice to the enforcement of competition rules, such mechanisms should enable the control of eventual anti-competitive practices of public service broadcasters which are directly linked with the public funding they receive. Third parties shall have the right to submit complaints concerning such alleged anti-competitive behaviour to an external body independent from the public service broadcaster. The supervisory body shall have the necessary powers to impose appropriate remedies and proportionate sanctions in case anti-competitive behaviour is demonstrated.