



EUROPEAN COMMISSION
EUROSTAT

Directorate D: Government Finance Statistics (GFS) and quality

Luxembourg,
ESTAT/D-3/LA/JJ/PdR/MO/dv/D(2018)

Mr Dieter Schäfer
Head of Division
Division D2: National Income, Sector
Accounts, Employment
Statistisches Bundesamt Deutschland
Gustav-Stresemann-Ring 11
65189 Wiesbaden
Germany

Subject: Request for advice
Sector-classification of the German public broadcasting agencies

Ref.: Your Email of 26 June 2018

The discussions in context of the EDP standard dialogue visit 2018

Your Email of 29 July 2016

Our Email of 13 June 2016

Your Email of 19 May 2016

The discussions in context of the EDP standard dialogue visit 2016

Dear Mr Schäfer,

Thank you for your email dated 26 June 2018 and the attached documentation including the analysis by the *Statistische Bundesamt* (DESTATIS) of the sector classification of the public broadcasting agencies in Germany. After having closely examined the documents provided, taking also into account the methodological discussions concerning the sector classification of non-profit institutions (NPIs) at a European level (*Excessive Deficit Procedure Statistics Working Group* and *Task Force on Methodological Issues*), Eurostat is in a position to express a view on this matter.

1. THE ACCOUNTING ISSUE FOR WHICH A CLARIFICATION IS REQUESTED

The issue to be analysed is the sector classification of the public broadcasting agencies in Germany. The statistical authorities of Germany have asked Eurostat to assess the issue at stake and express its opinion.

Commission européenne, 2920 Luxembourg, LUXEMBOURG - Tel. +352 4301-1
Office: BECH E3/833 - Tel. direct line +352 4301-32707 - Fax +352 4301-35199

<http://ec.europa.eu/eurostat>; luca.ascoli@ec.europa.eu

Documentation provided

The Federal Statistical Office of Germany provided to Eurostat its analysis of the sector classification of the units concerned. Two documents were provided: (i) an initial analysis, provided on 19 May 2016, and (2) an extended analysis, dated 29 July 2016, which was conducted as a response to Eurostat's feedback on the initial analysis.

Description of the case

The obligation of government to provide public broadcasting services is based on its responsibility to enable unhindered free formation of opinion, which is envisaged in the German Constitution ("*Grundgesetz*").

In principle, the German states ("*Länder*") hold the legislative competence in matters of broadcasting. As a consequence, the provision of public service broadcasting is laid down in a number of acts adopted by the *Länder*. These acts comprise:

- a. Interstate treaty on broadcasting ('*Rundfunkstaatsvertrag*'; the general regulation of broadcasting in Germany, applicable to both, public and private broadcasting providers)
- b. Interstate treaty on the broadcasting licence fees ('*Rundfunkgebührenstaatsvertrag*')
- c. Interstate treaty on the financing of public service broadcasting ('*Rundfunkfinanzierungsstaatsvertrag*')
- d. Interstate treaties applicable to "ARD" and "ZDF" ("*ARD Staatsvertrag*" and "*ZDF Staatsvertrag*")
- e. Acts applicable to the individual regional public service broadcasters (e.g. "*Gesetz über den Hessischen Rundfunk*")

Broadcasting in Germany is based on a "dual broadcasting system". This system includes the coexistence of public broadcasters and private commercial providers.

Public service broadcasting agencies use a specific legal form under public law ("*Anstalt öffentlichen Rechts*"). They are established by a legislative act, either a law, or an interstate treaty. According to the interstate treaty on broadcasting, these units are legally required to establish articles of association or comparable regulations complementing the laws or treaties under which they are created.

"ARD" (working group of the nine regional public service broadcasting units), "ZDF" and "Deutschlandradio" are mainly financed by user payments ("*Rundfunkbeiträge*"). The user payments are compulsory in nature and independent of a household's/ company's ownership of a receiving device. These payments are considered as a tax in national accounts and, accordingly, rerouted through the government accounts. However, until 2013 the broadcasting agencies were financed via licence fees ("*Rundfunkgebühren*") that were linked to the possession of a receiving device. The Federal Statistical Office considered these payments of the licence fees (prior to the change in the system in 2013) as voluntary payments for a service and not as taxes.

The task of the public service broadcasters is the basic provision of broadcasting services (so-called "*Grundversorgung*"), to enable unhindered formation of individual and public opinion. To this effect they shall be politically independent.

The public service broadcasting units can therefore be seen as the executing bodies for the government to comply with its duty under the German Constitution to safeguard free formation of opinion.

This task is also one distinguishing criterion between public service broadcasters and commercial broadcasters, with the other main criterion being the financing through compulsory levies of the former.

2. METHODOLOGICAL ANALYSIS AND CLARIFICATION BY EUROSTAT

Applicable accounting rules

- ESA 2010, Chapter 2, in particular, paragraph 2.12 dealing with the issue of the definition of an institutional unit.
- ESA 2010, Chapter 2, 2.38 and 2.39 on the notion of control of corporations and non-profit institutions (NPIs)
- ESA 2010, Chapter 3, 3.31 on the definition of NPIs
- ESA 2010, Chapter 20, 20.06 to 20.12 concerning government units.
- ESA 2010, Chapter 20, 20.15 providing the definition of control of an NPI. In addition, ESA 2010, Chapter 20, paragraphs 20.306 to 20.309 dealing with public sector control.
- The Manual on Government Deficit and Debt (MGDD), implementation of ESA 2010, 2016 edition:
Part I.2 "Criteria for classifying units to the general government sector"

Availability of national accounting analysis

The national statistical institute of Germany (Destatis) has provided an analysis of the case. It concludes that the broadcasting agencies are institutional units. The conclusion was reached because the broadcasters are responsible for all activities in connection with planning, production and purchase or licensing of TV and radio programmes. In addition, they can take financing decisions (e.g. take out loans) in their own name, and take decisions on the sale/purchase of assets and the participation in other companies. They also comply with ESA 2.12 in compiling a complete set of accounts.

Destatis also concludes, with regards to ESA 20.06 on genuine 'government units', that the public broadcasting agencies cannot be seen as genuine 'government units' as there is no evidence of the units enjoying "*legislative, judicial or executive authority over other institutional units*".

Concerning the financing of the units, the broadcasting agencies are predominantly financed by the user payments. The user payments are recorded as taxes and hence not included in the market/ non-market test. As a result of the exclusion of the user payments, the broadcasting agencies are non-market producers.

As the broadcasting agencies are theoretically not allowed to distribute profits, they are considered to be NPIs. According to ESA 3.31 non-market NPIs are classified either in the

Non-profit institutions serving households sector (NPISH, S.15), or, if controlled by government, in the general government sector (S.13).

Destatis assessed that particularly the criteria "appointment of officers" and "degree of financing", as stipulated in ESA 2.39 and 20.15, are to be considered concerning the assessment of control of the NPIs. In its document provided to Eurostat, Destatis used the "*Hessischer Rundfunk*" as an example since the units are all similarly structured.

With regards to the financing of the units, Destatis concludes that government is not able to determine the programme of the units. The units are predominantly financed by the user payments and hence by government, however the level of the payments is recommended by the Commission for the determination of the financial needs of public broadcasters (KEF) and therefore not in full control of government. Also, the Constitution in its Article 5 provides for the freedom of broadcasting ("*Rundfunkfreiheit*") and prohibits censorship.

The central decision making body of the broadcasting units are the Broadcasting Councils ("*Rundfunkrat*"/ "*Fernsehrat*"/ "*Hörfunkrat*"). In general the composition of the Broadcasting Council has to represent the pluralist and cultural diversity of the society and the share of government representatives may not exceed 30% of its members, according to the jurisprudence of the German Federal Constitutional Court.

Along the lines of this reasoning, the Federal Statistical Office had classified the public broadcasting agencies in sector S.15.

Methodological analysis and clarification by Eurostat

The classification of the user payments

Eurostat agrees on the recording of current user payments. They are unrequited and compulsory (the obligation is imposed by government), and hence should be recorded as a tax.

However, Eurostat disagrees with the conclusion drawn by the Federal Statistical Office regarding the recording concerning the payments prior to the changes taking effect in 2013. The licence fees prior to the year 2013 were linked to the possession of a receiving device (Eurostat understands that starting with 1 January 2007, also computers and mobile phones with the ability to allow internet access were deemed to be receiving devices). In general, allowing for some exemptions, the only possibility to opt out of paying the fees was the choice of not possessing a receiving device. Therefore possible users of private broadcasting services, who did not want to consume public broadcasting services, were *de facto* prevented from making a choice and had to remain contributors to the financing the public broadcasting agencies without consuming their services.

Thus Eurostat is of the opinion that the licence fees were also unrequited by nature and compulsory and hence should be recorded as taxes imposed on the owners of receiving devices and not as a sale of service, even prior to 2013. The current version of the MGDD clearly provides in paragraph 82 of section I.2.4.7 that "*If it is possible to opt out from the consumption of public broadcast services while not affecting the ability to consume private broadcast services, i.e. only those users who wish to consume public broadcast services would have to pay, then this would imply that they agree with the price for the service. The payment can therefore be considered requited, and thus, treated in national accounts as a sale of services.*"

The Commission for the determination of the financial needs of public broadcasters (KEF)

Currently KEF is classified by Destatis in the Non-financial corporations sector (S.11), which implies that the unit is an institutional unit and a market producer.

In the context of the EDP standard dialogue visit of 2018 to Germany, Eurostat expressed its doubts on KEF being an institutional unit – i.e. having genuine autonomy of decision. KEF has 16 members, all delegated by the prime ministers of the *Länder*. It seems that the activity of being member of KEF is only a secondary activity of the members. All of the members have another profession; the commission includes e.g. presidents of the Regional Courts of Auditors or heads of university departments. The office, including logistics such as email servers, of KEF is situated in the state chancellery of Rhineland-Palatinate. Eurostat requested further information on KEF with regards to it fulfilling the criteria for being an institutional unit.

Notwithstanding the above, Eurostat opines that, even if KEF should be considered to have the features of an institutional unit, it should be nonetheless be classified in the general government sector, on the basis of its activity – that cannot be considered "market".

KEF is created through the Interstate treaty on the financing of public service broadcasting. Its tasks are the calculation of the financing needs of the public broadcasting agencies, and hence the recommendation of the level of the user payments, and the assessment of the compliance of the public broadcasting agencies with article 1 paragraph 3 of the Interstate treaty on the financing of public service broadcasting regarding the provision that the broadcasting agencies shall only take out loans if they are linked to investment in necessary assets for the provision of the broadcasting services.

In that context, it is an obligation of the public broadcasting agencies to notify loans to KEF ("*Die Anstalten sind verpflichtet, gegenüber der Kommission Kredite anzumelden.*", Tz. 455 – 21st report of KEF; https://kef-online.de/fileadmin/KEF/Dateien/Berichte/21._Bericht.pdf). In addition, KEF has the right to monitor and assess *ex-post* the factual use of funds, encompassing also the notified loans ("*Die Kommission behält sich vor, die Mittelverwendung des BR zu überprüfen.*", TZ. 459 – 21st report of KEF).

It seems to Eurostat that government has delegated a regulatory task with attached authority over the broadcasting agencies to KEF. Having authority over other institutional units is a characteristic of genuine 'government units' according to ESA 2010. ESA 20.06 defines genuine 'government units' as units that "*legal entities established by political process which have legislative, judicial or executive authority over other institutional units within a given area.*" According to ESA 20.05, general government (S.13) comprises so-called 'government units' (described in ESA 20.06 to 20.12), NPIs that are controlled by government and non-market producers (described in ESA 20.13-20.15), and other institutional unit (such as corporations) that are controlled by government and non-market producers (described in ESA 20.17).

Moreover, KEF is financed by a tax. Its source of financing are the user payments for the public broadcasting agencies. Hence it is also a non-market producer.

The public broadcasting agencies as institutional units

An institutional unit is defined by its decision-making autonomy. To this effect, an institutional unit has to be:

- a) "*entitled to own goods and assets in its own right; it will be able to exchange the ownership of goods and assets in transactions with other institutional units;*"

- b) *"able to take economic decisions and engage in economic activities for which it is responsible and accountable at law;"*
- c) *"able to incur liabilities on its own behalf, to take on other obligations or further commitments and to enter into contracts; and"*
- d) *"able to draw up a complete set of accounts, comprised of accounting records covering all its transactions carried out during the accounting period, as well as a balance sheet of assets and liabilities." (ESA 2.12)*

Based on the acts/ interstate treaties applicable to the individual regional public service broadcasters, as well as the interstate treaty on the "ZDF", complemented by the respective articles of association, the public broadcasters can be deemed to be institutional units.

They are able to take out loans, purchase and sell goods and assets, and are allowed to own stakes in other companies, as well as set up subsidiaries. In addition, they compile a complete set of accounts.

However some restrictions apply, as e.g. loans shall only be incurred for the acquisition of assets to improve or guarantee the broadcasting function. In addition, the servicing of the loans has to be ensured by the funds stemming from the income of the units.

The public broadcasting agencies cannot distribute profits to their owners. They may generate profits, however the profits have to be reused for the benefit of the agencies, either directly or indirectly (e.g. *"Betriebsüberschüsse sind nur für kulturelle Einrichtungen und Zwecke zu verwenden, die unmittelbar oder mittelbar der Förderung des Rundfunks und seiner Leistungen dienen."* – article 18 paragraph 3 of the law on the Hessian broadcasting agency).

According to ESA 2010, an NPI is defined as *"a legal or social entity acting for the purpose of producing goods and services whose status does not permit them to be a source of income, profit or other financial gains for the units that establish, control or finance them. Where their productive activities generate surpluses, such surpluses cannot be appropriated by other institutional units."* (ESA 3.31)

It can therefore be said that the public broadcasting agencies are structured as NPIs.

Once it is established that the German broadcasting agencies have autonomy of decision (and are therefore institutional units) and are structured as NPIs, it needs to be clarified if they are genuine NPIs or rather genuine "government units".

German broadcasting agencies as genuine "government units"

ESA 20.06 states *"Government units are legal entities established by political process [...]"*. It is Eurostat's view that this sub-criterion is satisfied in this case. The broadcasting agencies are established as specific entities under public law (*"Anstalten öffentlichen Rechts"*): their creation is subject to parliamentary legislation of the German *Länder*, either under an individual law, or through an interstate treaty. In both cases, the draft law or draft treaty produced by the State government has to be voted for by the majority of the State parliament. Without this political process the broadcasting agencies cannot exist in their current corporate form.

ESA 20.07 establishes that *"A government unit usually has the authority to raise funds through compulsory transfers from other institutional units."* In addition, ESA 20.10 provides *"[...] there are government entities with [...] a direct source of revenue, such as earmarked taxes. Such entities are often established to carry out specific functions [...]"*. The German

broadcasting agencies are financed via TV and radio user payments. Under current German legislation these charges are not considered as being a tax but as contributions. In National Accounts, however, the user payments are treated as a tax, since they are compulsory and unrequited by nature. (MGDD 2016 I.2.4.7 paragraph 81: "*If it is not possible to opt out from making the payments for public broadcast services [...], this compulsory payment should be regarded as unrequited and treated in national accounts as a tax [...]*"). The broadcasting agencies are established to execute government's obligation under the German Constitution to safeguard unhindered formation of individual and public opinion. They provide the public with basic broadcasting services ("*Grundversorgung*"). Therefore, the public broadcasting agencies possess the mentioned features concerning resources.

However, one other sub-criteria of ESA 20.06 have to be fulfilled. "Genuine" government units, in addition to being established by political process, have to have legislative, judicial or executive powers. The provision of broadcasting services itself cannot be seen as needing either a legislative, judicial, or executive power over other institutional units. Hence, government also did not delegate such powers to the units with direct regards to the provision of broadcasting services. Nevertheless, the public broadcasting agencies do have executive power over other institutional units concerning the user payments, and thus it can be argued that they have executive authority over other institutional units with regards to the collection of tax-like payments and related penalties.

It is Eurostat's understanding that according to the interstate treaty on the broadcasting contributions ("*Rundfunkbeitragsstaatsvertrag*", RBStV), the broadcasting agencies have the right to the user payments and the task to collect them (RBStV article 10 paragraphs 1 and 2). In addition, they possess the power to issue payment orders ("*Festsetzungsbescheide*"), in their nature comparable to tax payment orders, as Eurostat understands, against payers in arrear and can execute these orders (RBStV article 10 paragraph 5). The payment orders seem to be administrative acts which the broadcasting agencies can issue without any consultation of a court; their enforcement is an administrative enforcement (this seems to be due to the legal form of the units).

These rights and obligations concerning the user payments and penalties thus provide the public broadcasting agencies with executive (collection of the payments and penalties) and judicial authority delegated by government. Judicial authority because ESA 2010 provides that "*The payments of taxes, fines and penalties are by mutual agreement, in that the payer is a citizen subject to the law of the land.*" (ESA 1.79) Thus, it can be implied that judicial power is a prerequisite for the determination of such payments as ESA 2010 refers to the obligation of citizens to abide by the law of the land.

The task for which the public broadcasting agencies have been equipped with authority over other institutional units concerns the levying and collection of taxes/ penalties. The power to raise taxes and related fees and penalties is an exclusive power of government. ESA 20.02 defines that "*Governments have powers to raise taxes and other compulsory levies [...]*". Hence, if a unit is able to levy taxes and other compulsory levies in its own name, and not solely as a delegated task from government, it should be seen as a genuine 'government unit', even if the raising and collecting of the payments is not its primary activity.

In summary, although the provision of broadcasting services is not per se an activity necessitating a legislative, judicial or executive authority, the German broadcasting agencies can be considered to be government units according to ESA 20.06 and following, since they are institutional units, established by political process, funded through compulsory payments, and have the executive and judicial authority over other institutional units in relation to the payment of the user payments and related penalties.

German broadcasting agencies as non-profit institutions that are non-market producers and are controlled by government

Alternatively, only taking into account the primary activity of the units, therefore neglecting here their executive powers delegated by government analysed in the previous section, the German broadcasting agencies could be seen as non-market NPIs that are controlled by government.

To be classified inside the general government sector, an NPI has to be (1) a non-market producer, which was already established due to the predominant financing via taxes, and (2) controlled by government – directly or indirectly (ESA 20.306).

In general, control over an institutional unit is assessed by using the criteria stipulated in ESA 20.309 on public sector control, as the public sector includes, according to ESA 20.306, all resident units which are controlled by government.

Nevertheless, for NPIs, ESA 2010 recognises a difference to other institutional units and provides a *lex specialis* in providing special control criteria for control of an NPI. The criteria are stipulated in ESA 2.39 and 20.15:

"(a) *the appointment of officers;*

(b) *other provisions of the enabling instrument, such as the obligations in the statute of the NPI;*

(c) *contractual agreements;*

(d) *degree of financing;*

(e) *risk exposure.*"

ESA 2.39 and 20.15 provide that whereas one indicator of government control over NPIs that are institutional units may sometimes be sufficient to establish public control, in many cases a number of indicators may be needed to collectively establish government control. Hence all five criteria have to be analysed, with a need to assess the extent of public control existing in each of them.

- *The appointment of officers*

Although the share of government representatives must not exceed 30% of the total number of members of the broadcasting councils (the central decision taking bodies of the broadcasting agencies), this does not exclude per se the possibility of government control via the modalities of the appointment of officers.

ESA 20.15 does not specify the meaning of "appointment of officers", however, this paragraph should be interpreted in line with ESA 20.309 on public sector control. Also chapter I.2.3 of the MGDD 2016 provides further explanations. Concerning the appointment of officers, the MGDD 2016 is in line with ESA 20.309, as the appointment of officers is interpreted as *the right* to appoint the officers.

The composition of the broadcasting councils is laid down in the individual laws or interstate treaties. It is government's right and obligation to define the sending institutions which send a representative to take a seat on the broadcasting council. Government therefore delegated its right to appoint officers to the sending institutions. In general, the sending institutions themselves seem to be not belonging to the public sector (i.e. being controlled by government).

In the case that government delegates its right to appoint the officers, it has to be assessed to what extent it remains able to influence the selection of the officers, i.e. if, although having delegated the rights, government ultimately has kept the said right.

Given that the parties elected to be appointed to public broadcasters' boards are designated by law, it seems difficult to consider the latter as "private".

At the same time, although the State governments can theoretically amend the composition of the sending institutions, with the restriction that the composition of the council has to broadly represent the composition of the society of the *Land*, it is unclear if this could be practical. It is unclear how far government could react in the case that it does strongly disagree with the selection of representatives made by individual sending institutions. Given that a change in the sending institutions would require a change in the law, or the interstate treaty, such a change seems rather unlikely (but not impossible) as the laws and treaties are not exempted from being amended.

Through their creation as entities under public law, the State governments would theoretically have the right to appoint the officers of the broadcasting agencies. However, because of the requirement of political independence ("*Staatsferne*"), government has delegated its rights to other institutions, seemingly not controlled by government. At the same time, as developed in a section below, independence does not preclude public control.

Overall, the appointment of officers of public broadcasters in Germany is a borderline case. Eurostat considers that while the set-up for the appointment of their officers provides some element of public control, it is not satisfied in a way that it would be sufficient in itself to constitute public control. Nevertheless, government's ability to specify the sending institutions has to be taken into account in the overall analysis of government control and hence constitutes an element of control to be considered together with other elements (other criteria) to form a final judgment.

- *Other provisions of the enabling instrument*

ESA 2010 does not further provide information on what the enabling instrument may be, next to the other provisions being for example "*the obligations in the statute of the NPI*". 2008 SNA paragraph 4.92 is more detailed on this, as it states that "*The enabling instrument may contain provisions other than the appointment of officers that effectively allow the government to determine significant aspects of the general policy or programme of the NPI. For example, the enabling instrument may specify or limit the functions, objectives and other operating aspects of the NPI, thus making the issue of managerial appointments less critical or even irrelevant. The enabling instrument may [...] prevent the NPI from changing its constitution, dissolving itself, or terminating its relationship with government without government approval.*"

It is thus clear that the enabling instrument does not solely refer to the statute of the NPI, but rather encompasses all legal acts applicable to the individual unit. Whenever a piece of legislation, other than in the form of general regulations, moves authority of relevant aspects of the statute from the unit to government itself, this would indicate that government is controlling the unit to some extent (even if it might not have the right to appoint officers).

The legal acts (laws and interstate treaties) solely applicable to the individual public broadcasting units have to be seen as the enabling instruments of the units. Among others they:

- Determine the public tasks of the broadcasters and set the boundaries, in which the units can set their programme

- Set the corporate structure of the units
- Provide that loans may only be taken out for the enhancement, or improvement, of the operational facilities
- Provide that the units cannot be liquidated
- State that the units are subject to audit by the German regional audit institutions, and have to report to the State governments concerning the fulfilment of their public task and their financial situation

The MGDD 2016 states with regards to the other provisions of the enabling instrument (Chapter I.2.3 paragraph 17): "*An NPI would be considered to be controlled by government if approval of government would be required to change the statute of the entity (or the type of activity carried out by the entity), or if the entity could not dissolve itself or terminate any relation with government without such approval.*"

It is clear that the broadcasting agencies cannot dissolve themselves without approval of government or terminate the relation with government, as their entire corporate structure is laid down in laws and interstate treaties.

Given the detailed and tight regulations in the legal acts solely applicable to the individual public broadcasting units, it has to be assumed that government controls the entities via the enabling instruments.

In addition, the interstate treaty on broadcasting (RStV) also defines the programme task (RStV, article 11), the range of programmes (article 11a and the following), financing (articles 12 – 14), and regulates advertising (articles 15 and the following defining permissible advertising and the duration of advertisements).

Overall, Eurostat considers that the enabling instrument are very particular in the case of German broadcasters in a manner that private control can be overruled, and that public control is established.

- *Contractual agreements*

Not applicable, as the broadcasting agencies provide a public task determined in interstate treaties.

- *Degree of financing*

The revenue of the user payments contributes to approximately 86% of total revenue (source: 20th report of KEF, planned revenue for the period 2017 – 2020). The remaining share of total revenue is composed of revenue from advertising and sponsoring.

Although the Commission determining the financial needs of public service broadcasters (KEF) proposes the level of the licence fees, the decision lies ultimately with the *Länder*. KEF recommends the level of the user payments. This recommendation is the basis for the final decision of the state governments and parliaments. If the governments elect to deviate from this recommendation, this needs to be discussed with the broadcasting agencies as well as with KEF. However, deviations from the proposed level are possible, if justified, as could be observed in 2016 when the Prime Ministers of the *Länder* declined to reduce the level of the user payments although KEF recommended it.

In the context of "financing" as indicator for control ESA 2010 states that "*if a NPI that is mainly financed by government remains able to determine its policy or programme to a*

significant extent [...] it would not be considered as being controlled by government." (ESA 20.15). Hence this indicator alone may not be sufficient to determine government control. However, it could also be. A sufficient influence through financing can be given in the case that government is the sole, or close to 100%, financing source, since without present alternatives for other funds, the NPI existence would be threatened. However, if financing is unconditionally provided, it might be concluded that the financing itself does not suffice alone to result in government control.

It is Eurostat's understanding, that the public broadcasting agencies provided in 2017 the *Länder* with cost saving proposals which were discussed in October 2017 in the conference of the Prime Ministers of the *Länder* ("*Ministerpräsidentenkonferenz*"). These proposals appear to have been demanded by the *Länder* in relation to the envisaged structural reforms of the public broadcasting agencies to be able to maintain the user payments on a stable level. Hence, it seems that the *Länder* can dictate cost savings, and therefore changes in the programme, to the broadcasting units in case that they see the need to stabilise the license fee level, which would be an indication of government control.

Overall, Eurostat considers that the financing arrangement point to significant elements of public control, although perhaps not sufficient on its own to establish public control. These elements are to be considered together with other elements (other criteria) to form a final judgment.

- *Risk exposure*

In accordance with the jurisprudence of the German Federal Constitutional Court, the State is under an obligation to guarantee the existence and further development of public service broadcasting. ("*Bestands- und Entwicklungsgarantie*")

The entities established in the form of institutions under public law enjoy the maintenance and guarantor obligation of their founders ("*Anstaltslast*" and "*Gewährträgerhaftung*").

As it is stipulated in the legal acts that the total expenditure shall not exceed the total revenue, it may, however, be unlikely that the State governments will be exposed to the materialisation of the financial risks.

Overall, Eurostat considers that the risk exposure points to considerable elements of public control, that however may perhaps be sufficient on its own to establish public control. In any case, these elements are to be considered together with other elements (other criteria) to form a final judgment.

Conclusion on government control

Even when not taking into account government's right in the appointment of officers of the German broadcasting agencies, it is Eurostat's view that the entities should be considered as being controlled by government under ESA 2010, as indicated by the enabling instrument and also risk exposure, and to some extent the criteria of financing.

The public task of broadcasting and in particular the required fields to be broadcasted may be seen as the corporate policy; the broadcasting programme, which means the daily programme of transmissions, itself can be seen as the day-to-day activity. The 2008 SNA explains (paragraph 4.79) that control of the general policy by government does not "*necessarily include the direct control of the day-to-day activities or operations of a particular corporation*".

The individual laws and treaties leave the broadcasting agencies with little room to manoeuvre, except for its day-to-day programme. For example, the task of the broadcasting agencies is stipulated in detail in the laws, listing e.g. which fields have to be broadcasted (news, culture, etc.), the number of radio programmes, or also the participation in the "ARD" (working group of the nine regional public service broadcasting units).¹

This also means that the broadcasting units are, in fact, also limited in their decisions concerning the day-to-day programme. For example, even if a unit would like to not broadcast a daily news programme, it is our understanding that it would not be able to do so without the approval of government as the broadcasting of news is stipulated in its public task.

The fact that the political independence of the German broadcasting agencies is guaranteed does not interfere with the notion of government control under the ESA 2010 regulation.

Control versus Independence

Indeed, it is sometimes provided as an argument for the public broadcasting agencies not being controlled by government that they have to be independent from government ("*Staatsferne*"). However, this argumentation mingles different concepts.

ESA 2010 notion of government control does not necessarily imply not being an independent entity. Some entities are public, and thus government controlled, in spite of the fact that there are independent from the "cabinet", i.e. the ministers – also defined as the executive of the State.

Firstly, some entities are, in their own, genuine 'government units' in the meaning of ESA 20.06 to 20.12. For instance the Supreme Court, the Parliament, the Court of Auditors, and numerous independent agencies are public and classified inside the general government sector (S.13), because of their specific powers and functions: they are government – despite being fully independent from the "cabinet".

Secondly, entities can be controlled by government while nonetheless being delegated considerable independence of action for professional or efficiency reasons. The argument, sometimes invoked, that asserting ESA public control on a given unit could put a question mark on its independence is thus entirely misleading. Central banks are generally considered as public (even when with formally private shareholders – see ESA 20.311), despite being at the same time fully independent in determining monetary policy. Similarly, statistical offices should also exercise professional independence, nevertheless they are to be included in S.13. These are only a limited number of examples and not exhaustive.

The independence of the public broadcasting agencies is a political concept not a statistical one. It concerns the possibility of the agencies to report without fear or favour and thus have a political independence from the cabinet or parliament. This requirement flows from the German Constitution, article 5 providing for the freedom of broadcasting and the prohibition of censorship.

The prohibition and the professional independence of the free press, including broadcasters, is a characteristic of a modern democracy. Censorship is forbidden in all Member States of the European Union. Public broadcasters are nonetheless classified within the general government

¹ As an example article 2 ff of the law on the Hessian broadcasting agency ("*Gesetz über den Hessischen Rundfunk*")

sector in other Member States. The reason for that is the fact that the classification has to be purely based on the statistical concept described in ESA 2010.

Hence, Eurostat is of the opinion that, as already expressed, the independence of the German broadcasting agencies has no impact on the statistical concept of the notion of control as defined in ESA 2010.

3. CONCLUSION

The TV user payments are taxes in national accounts. In Eurostat's view, this was already the case before the change in the system at the beginning of the year 2013.

KEF should be classified in the general government sector. It seems not to fulfil the criteria of an institutional unit and thus should be classified with its controlling unit. KEF reports to the *Länder* and the *Länder* send the members of KEF to the Commission (one member per *Land*). Hence, KEF should be classified in the state-government sector.

The German public broadcasting agencies are institutional units. Eurostat provides two possibilities on how to classify them.

Firstly, they can be seen as genuine 'government units' on the basis of having executive and judicial authority over other institutional units with regard to the user payments and penalties, and being financed by taxes.

Secondly, as an alternative, the public broadcasting agencies would be seen as genuine NPIs. However, they are non-market producers, financed predominately via taxes, and controlled by government.

The government control is established primarily through (a) the other provisions in the enabling instrument and (b) risk exposure, and to some extent through the (c) degree of financing. The criterion of appointment of officers is generally inconclusive, as some element of public control seems to exist, although to a limited extent. In total, three or four criteria out of five for government control of an NPI (as stipulated in ESA 2.39 and 20.15) are fulfilled or partially fulfilled – two of them sufficient or close to sufficient to establish control on their own.

In both cases, the broadcasting agencies should be classified in the general government sector.

4. PROCEDURE

This preliminary view of Eurostat is based on the information provided by the German authorities. If this information turns out to be incomplete, or the implementation of the operation differs in some way from the information presented, Eurostat reserves the right to reconsider its view.

We would like to remind you that Eurostat is committed to adopting a fully transparent framework for its decisions on debt and deficit matters in line with Council Regulation 479/2009 and the note on ex-ante advice, which has been presented to the CMFB and cleared by the Commission and the EFC. Eurostat therefore publishes all official methodological advice (ex-ante and ex-post) given to Member States, on the Eurostat web site.

Yours sincerely,

(e-Signed)

Luca Ascoli
Acting Director