

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

SEC(2009) 892
Version anglaise

COMMISSION STAFF WORKING DOCUMENT

SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the

**COMMUNICATION FROM THE COMMISSION ON THE APPLICATION OF
STATE AID RULES TO PUBLIC SERVICE BROADCASTING**

EXECUTIVE SUMMARY

The review of the Broadcasting Communication must be seen in a wider policy context, including the objectives pursued by the State Aid Action Plan, the Commission policy as regards services of general economic interest in general as well as the Lisbon Strategy and the relevant policy initiatives of the Directorate-General for Information Society and Media.

Following the State Aid Action Plan it was decided based on the outcome of a public consultation, that the 2001 Communication must be updated due to the large number of individual decisions by the Commission in the past years, the important legal developments ("SGEI package" in 2005, Audiovisual Media Services Directive in 2007) and several judgments of the Community courts since 2001.

The main changes as compared to the 2001 Communication relate to the way the Commission controls the proportionality of State aid in this sector taking into account new technological developments which rests upon better governance and more effective control at the national level ("Amsterdam test" or "ex ante test"). Consolidating its case practice, the Commission also aligns its approach to public service broadcasting in part to the regime of the SGEI Framework/decision by allowing for the timely retention of overcompensation in so far as necessary for the fulfilment of the public service mission (e.g. for addressing revenue and cost fluctuations). The new Communication will also set out the Commission's approach to pay services.

1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

Organisation and timing

The review process is led by the Information, Communication and Media State aid Unit of the Directorate-General for Competition. The Directorates-General for Communication, Enterprise and Industry, Information Society and Media, Education and Culture and Economic and Financial Affairs and the Legal Service were closely associated in every step of the process by means of an Inter-Service Steering Group. The draft for a new Communication is proposed by the Directorate-General for Competition in agreement with the Directorate-General for Information Society and Media.

The Commission started considering the review of the 2001 Broadcasting Communication in early 2008, by means of an open public consultation. An impact assessment exercise was carried out in order to weight the different options available and to determine whether the review is warranted, notably in view of its expected economic and social impacts. The Impact Assessment Board issued its opinion in September 2008 and made several recommendations for improvement. Directorate-General for Competition took account of these suggestions in particular by enhancing the problem definition and the analysis of different alternatives. The IA Board subsequently approved the enhanced IA Report.

After two public consultations on draft texts for a new Communication (5 November 2008 to 15 January 2009 and 8 April to 8 May 2009), the adoption has been foreseen for 2 July 2009.

Consultation and expertise

The review of the Broadcasting Communication relies to a high degree on input from external sources, in particular on three public consultations. During a first consultation (10 January

2008 to 10 March 2008) all interested parties could express their views on the need to revise the 2001 Broadcasting Communication. The second public consultation (5 November 2008 to 15 January 2009) allowed stakeholders and Member States to comment on a first draft for a revised Communication which was prepared by the Commission services building on the results of the first consultation. On the basis of these comments and the results of a technical meeting between the Commission services and experts from the Member States on 5 December 2008, the Commission services drew up a second draft. A public consultation on this new draft took place from 7 April to 8 May 2009. On 5 May 2009, the representatives of Member States gave their views to the Commission in a second multilateral meeting.

Throughout the review process, the Commission services bilaterally consulted with several Member States, with public and commercial broadcasters, with regulators and sector organizations, notably the European Broadcasting Union which represents public service broadcasters ("PSBs") in Europe, the Association of Commercial Television operators ("ACT") in Europe, the Association of European Radios (EAR) and the European Newspaper Publishers Association (ENPA), the European Publishers Council (EPC) as well as other stakeholders. The Commission services also replied to written and oral questions of members of the European Parliament and explained the proposed draft for a new Communication in a hearing by the EPP/EPD group in December 2008.

Main results of the consultations

The **1st public consultation**, which attracted a lot of interest (121 responses), showed that Member States were generally of the opinion that the 2001 Broadcasting Communication worked well and that any possible changes to it should be carefully considered. Comments from stakeholders confirmed however the fundamental changes that took place on the market and showed that there is a perceived legal uncertainty about the Commission's case practice and position on matters not addressed in the 2001 Communication.

The **2nd public consultation**, which equally attracted a lot of attention (90 replies), showed that a majority of Member States disapproved of the Commission's first draft for a new Communication as being prescriptive and thereby leaving insufficient flexibility and freedom for Member States while not sufficiently respecting the principles of technology neutrality and editorial independence. Stakeholders from public and private media had diametrically opposed views on the 1st draft with public service broadcasters largely dismissing it as infringing the prerogatives of Member States under the terms of the Amsterdam protocol while private media largely supported the draft as step in the right direction.

The **3rd public consultation** led to 70 replies. Most Member States asked the Commission services to proceed with the adoption of a new Communication on the basis of this revised second draft, taking account their individual drafting comments. Member States widely recognise that the second draft respects the principle of technology neutrality, that it safeguards the editorial independence of public broadcasters and that it leaves Member States considerable flexibility in designing mechanisms to adequately control the use of State aid in this sector. Stakeholders from the public and from the private side express the wish that the Commission proceeds with the adoption of the new draft still in 2009, even if their views on the substance of the text still differ considerably. When elaborating the final version proposed for adoption, the Commission has duly considered the results of the 3rd public consultation.

2. PROBLEM DEFINITION

The broadcasting sector is among the biggest recipients of public funds, along with transports and agriculture. The use of public funds in this sector is subject to the State aid rules of the EC Treaty and in particular to the Protocol to the Treaty of Amsterdam on public service broadcasting.

In 2001, the Commission has adopted a Communication which explains its approach to the control of State aid to public service broadcasters. However, since 2001, the audiovisual markets have changed significantly due to the multiplication of distribution platforms and the emergence of new actors. New technologies lead to media convergence, and favours vertical integration between infrastructure and content providers, which create new competitive situations. Additionally, revenues from advertisement are dwindling among others due to the entry of new competitors such as internet search engines. Consumption patters and consumer behaviour has also been changing over the past years consumers are also increasingly expecting content on demand, hence broadcasters but also newspaper publishers must change their services and business models to satisfy the needs of the younger generation.

Due to these developments, the relation between PSBs and commercial operators which has been relatively stable for a long period of time, gained new momentum. Moreover, due to media convergence public broadcasters now compete with other operators as well such as network operators, internet companies, the written press and different types of content providers.

Furthermore, since its adoption in 2001 the Communication has been interpreted and reflected on in over 20 decisions by the Commission. Additionally, the Commission adopted the so called "Services of General Economic Interest package" ("SGEI package"), clarifying the requirements of article 86 (2) of the EC-Treaty in the field of State aid, in 2005. The Audiovisual Media Services Directive, adopted in 2007, takes into account recent market and technological developments by extending the scope of EU audiovisual regulation to some new media services.

In view of the new market circumstances and the changed legal background, the 2001 Broadcasting Communication no longer provides sufficient legal certainty and clarity for stakeholders.

3. OBJECTIVES

In a rapidly evolving media environment, it is crucial to have regulatory conditions capable of fostering a level playing field between PSBs and commercial operators and of limiting distortions of competition in the overall interest of safeguarding Europe's media pluralism in the long term. The modernisation of the 2001 Communication is based on the principles deriving from more than 20 individual decisions which the Commission adopted since 2001 in the broadcasting sector. These individual investigations have given the Commission the opportunity to further clarify the general requirements set out in the 2001 Communication. In order to provide legal certainty and to consolidate the Commission's decision-making practice in this sector, these principles should be reflected in a revised Broadcasting Communication.

4. POLICY OPTIONS

There are two broad policy options: One is to maintain the status quo and hence the 2001 Communication as it stands and the other option is to update it. The preferred option is updating the 2001 Communication. The specific sub-Options under option 2 are set out hereunder and it is explained which sub-Options are retained in the new Communication.

Relationship of the Communication with rules applicable to other SGEI's

The 2001 Communication differs in many respects from the SGEI "package" which was adopted in 2005. The SGEI "package" sometimes goes beyond the 2001 Communication (reasonable profit in compensating an SGEI, possibility to build up a reserve of up to 10% rather than strict "net cost" principle) the SGEI Framework rules are however less flexible than those in the 2001 Communication when it comes to cost allocation.

Sup-Option 1: No approximation to SGEI Framework/Decision

Sub-Option 2: Full alignment with SGEI Framework/Decision

Sub-Option 3: Partial approximation to SGEI Framework/Decision

Definition of the public service remit and proportionality control

The definition of the public service remit falls into the competence of the Member States. Member States have to ensure a clear definition of the public service also when it comes to new media services. Furthermore, Member States also have to ensure proportionality of funding as regards new media services. The Commission has repeatedly accepted in its case practice appropriate measures from Member States which, by means of an "ex ante assessment" of new services, enable both a transparent definition and preventing disproportionate effects on the market which would be contrary to the common interest.

Sub-Option 1: No or light change scenario.

Sub-Option 2: Consolidate case practice and provide guidance on the necessary assessment.

Pay services

The question from a State Aid perspective is whether it can be accepted that PSBs offer pay services as part of their public service mandate.

Sub-Option 1: Disregard the issue in a new Communication

Sub-Option 2: Prohibit pay services as part of the remit as such

Sub-Option 3: Set out basic conditions

Sub-Option 4: Prescriptive Approach: Give precise guidance

Transparency requirements and cost allocation

The two questions arising here were: a) whether there is a need to go beyond the Transparency Directive by imposing structural or functional separation and b) whether there is a need to align the Communication to the precise wording of the SGEI Framework / Decision which contain stricter rules on the allocation of overhead cost.

Sub-Option 1: No change scenario

Sub-Option 2: Substantially strengthen transparency requirements

Sub-Option 3: Partially strengthen transparency requirements

Overcompensation

The issue at stake here was whether the new Communication should adapt the rules concerning overcompensation taking into account the decision-making practice and the approach in the SGEI Framework.

Sub-Option 1: No change

Sub-Option 2: Consolidate decision making practice

Control and supervision

The 2001 Communication requires an appropriate authority or appointed body to check whether the public service is supplied as provided for in the agreement between state and the entrusted undertaking. The 2001 Communication does not contain explicitly the need for regular financial control, although this has been regularly verified by the Commission in individual decisions since 2001. The main question is therefore whether to update the rules taking into account the more specific requirements formulated in individual decisions, taking also into account the jurisprudence of the Court of First Instance. Sub-Option 1 – No change

Sub-Option 2: Consolidation of case practice

Sub-Option 3: More Prescriptive Approach

5. ANALYSIS OF IMPACTS

5.1. Preliminary observations

Although the present Communication does not have an expiry date, a "no action" solution would not mean that the Commission's state aid policy in the broadcasting field would stagnate. Policy developments would only occur on a case-to-case approach by means of individual Commission investigations. This would be burdensome and legal uncertainty on many issues would prevail.

The proposed revision aims at consolidating the Commission's recent decision-making practice (more than 20 decisions since 2001). A new Communication will contribute to legal certainty. Delays caused by "negotiation" processes between Member States and the Commission prior to individual decisions could be significantly shortened. In particular, legal certainty would also be ensured with regard to current and potential future new media services.

5.2. Assessment of different alternatives with regard to the adoption of a revised Broadcasting Communication

5.2.1. Relationship with the rules concerning other SGEIs

In order to enhance clarity, legal certainty and coherence of the Commission's policies in the field of SGEI, it would seem useful to approximate the provisions of the Broadcasting Communication to those of the SGEI package. However, the Communication should take as a reference the SGEI Framework and ensure coherence with this instrument while taking due account of the specificities of the broadcasting sector. The proposed approach is thus to take utmost account of the rules of the SGEI package, without aiming at a one-to-one harmonisation of the two instruments.

The new Communication therefore follows Sub-Option 3 (see above, section 4). For instance, the new Communication will abandon the strict net cost principle which is still enshrined in the 2001 Communication. Subject to regular external controls, the new Communication will allow public service broadcasters to retain (i) an amount of up to 10% of the annual budgeted expenses of the public service mission to withstand cost and revenue fluctuations; (ii) an amount above 10% if such overcompensation is specifically earmarked for a major non recurring investment to fulfil the public service mission. This is conceptually similar to the approach of the SGEI framework, albeit the specific rules are not entirely the same taking into account the specificities of the broadcasting sector..

5.2.2. Definition of the public service remit and proportionality control

The preferred option for the new Communication is Sub-Option 2 (see above, section 4). The new Communication should consolidate the principle that Member States may entrust public service broadcasters with both linear and non linear audiovisual services provided they respect the principles of the Amsterdam Protocol.

At the same time, in view of the legitimate concerns with respect to the risk of distortions which may arise from the public funding of the expansion of public service broadcasters on all kinds of new platforms and as a measure to ensure the respect of the Amsterdam Protocol, the new Communication should consolidate the Commission's case practice on the so-called "ex ante evaluation" or "Amsterdam test". This assessment of new significant audiovisual services aims at safeguarding the proportionality of State aid in the sector in line with the principles of the CFI's more recent jurisprudence.

A new Communication should therefore spell out the principle that Member States must verify the criteria of the Amsterdam Protocol *before* putting new publicly financed services on the market while leaving them sufficient flexibility to tailor the test to their national broadcasting systems in institutional and procedural respects.

5.2.3. Pay services

The inclusion of pay services within the public service remit of PSBs is widely debated in Europe and should thus be mentioned in the new Communication to provide legal certainty. The preferred option for the new Communication is Sub-Option 3 (see above, section 4). 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. The ex ante evaluation at the national level is to determine whether

a direct remuneration element in such new services compromises the distinctive character of the public service in terms of serving the social, democratic and cultural values of citizens.

5.2.4. Transparency requirements and cost allocation

As to accounting separation, the preferred option is sub-Option 3. The new Communication should limit the current exception in the 2001 Communication on general cost by encouraging Member States to require a proportionate allocation of general cost where this is sensible. Moreover, as there is a general consensus that structural and functional separation help increasing financial transparency, the new Communication should also underline this by recommending these measures. Sub-Option 3 is therefore the preferred choice.

5.2.5. Overcompensation

The Commission's decision-making practice and the results of the public consultation show that there is a need for certain flexibility in terms of allowing PSBs to maintain surpluses. This is not yet provided for by the 2001 Broadcasting Communication. PSBs have submitted convincing arguments in favour of reserves to be able to withstand cost and revenue fluctuations and more importantly, to adapt to technological changes. The preferred option is therefore sub-option 2: On the basis of the Commission's decision-making practice, overcompensation amounting as a rule to no more than 10 % of the public service budget seems sufficient to guarantee the necessary flexibility for the operation of PSBs. PSB may be allowed, exceptionally, to retain overcompensation above this threshold only if the funds are clearly earmarked for a non recurring major public service expense in the future.

5.2.6. Control and supervision

The option retained is sub-option 2. The new Communication will consolidate the requirement for regular external financial control and the requirement for effective independent verification of the public service remit. This approach considers the recent CFI jurisprudence, particularly the SIC judgment. Regarding supervision, any mechanism to supervise the fulfilment of the public service mandate of PSBs must exclude risks of a conflict of interest between the body in charge of the control and the PSB's management. It is therefore necessary to ensure effective independence of the supervisory body. Furthermore, in order for supervision and control to function effectively, there is a need to carry out controls on a regular basis, with the possibility to impose remedies.

5.3. Overall impact assessment of the preferred options

5.3.1. Potential positive impacts of adopting a revised Communication

The continued development of the Commission's policy through individual decisions in a rapidly changing environment leads to a decrease in legal certainty and transparency for all players in the broadcasting market. In this context, the adoption of a revised Communication would presumably have the following positive consequences:

- Legal security for PSBs would be enhanced and the number of negative Commission decisions (possibly with recovery) would likely decrease.
- Reduced risk of crowding out of commercial operators by PSBs if a revised Communication establishes clear principles for determining the public service character of new offers by PSBs.

- Decrease in the number of state aid procedures initiated by the Commission concerning PSBs, both on the basis of complaints and on its own initiative and an overall decrease of litigation before the European Courts, while – at the same time – the quality and speed of the procedures to be dealt with at Commission level could significantly be increased.
- Improved coherence and equal treatment of Member States by the establishment of same standards in the Community and improvement of the level of subsidiarity.

5.3.2. Potential negative impacts of adopting a revised Communication:

- There is an alleged risk that – depending on the implementation of the principles set out in a revised Communication with regard to the "Amsterdam test" at national level – too bureaucratic procedures may stifle the ability of public broadcasters to become first movers and it might dampen their willingness to take on extra risks. If the “Amsterdam test” was to be implemented in a particularly “heavy” way, this could also raise the barrier for new public service broadcasters to enter new markets. At the same time, if efficiently implemented, the test could reinforce the opportunity of public broadcasters to offer quality public services on new platforms. While existing examples indicate that the test does not inhibit public service broadcasters from rolling out significant new audiovisual services as first movers (e.g.: the BBC iPlayer), there is no representative sample to draw safe conclusions. To limit this risk, the new Communication should exempt pilot projects from the test.
- Increased compliance costs for PSBs and Member States could be another possible negative consequence of introducing the ex ante evaluation. The new Communication should therefore leave Member States a maximum freedom to design a procedure that fits their market.
- The adoption of a new Communication may in particular be unpopular with those opposed to enhancing the control and the accountability of public service broadcasting.

5.4. **Wider Impact**

5.4.1. Economic impact

As – in view of the important role of the national implementation models which fall within the competence of the Member States - it is difficult to assess the impact of the new Communication on the capacity of PSBs to innovate, and as it is not possible to make a qualitative comparison between the capacity to innovate of PSBs and of commercial operators, it is very difficult to predict the overall economic impact of the revised Communication.

5.4.2. Social impact

Concerning the social impact, the Communication would facilitate the provision of new types of audiovisual services by PSBs, by establishing a clear legal framework for the use of State aid. At the same time it would help safeguard media pluralism in the long run by requiring Member States to prevent disproportionate effects on the market.

5.4.3. Environmental Impact

N/A.

5.4.4. Impact outside EU

Concerning, finally, the impact outside the EU, EFTA countries would also have to respect the revised Communication and they therefore participated in the consultation process. Beyond the EEA, the impact of the Communication would be very limited. While media markets for audiovisual content are increasingly international, public broadcasting services tend to remain national in scope.

5.5. Monitoring and evaluation

In case a new Communication is adopted, the ability to meet the objectives outlined in section 3 would be monitored and evaluated.