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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. The Commission has adopted over 20 decisions on the basis of the current Broadcasting Communication since its inception in 2001. There have also been important legal developments, such as the adoption of new rules for the financing of services of general economic interest in 2005 and of a new regulatory framework for audiovisual media services in 2007.

The audiovisual media market has substantially evolved since 2001. There has been a multiplication of distribution platforms with digitalisation, mobile and internet television. This has increased the potential of State aid to distort competition in the audiovisual sector by affecting not only, as previously, commercial television operators but potentially also network operators, internet companies, the written press and different types of content providers.

In this rapidly changing legal and market environment, it is important to re-evaluate the rule update the State aid rules in this sector on the basis of the Commission's case practice since 2001. The update of the Broadcasting Communication is intended to deliver: (1) regulatory conditions capable of fostering a level playing field between public service broadcasters and commercial operators and of limiting distortions of competition, in particular in the so-called "new media environment"; (2) a forward-looking legal framework providing increased transparency and legal certainty; (3) effective procedures and enforcement, including increased responsibility of Member States; and (4) a contribution to wider policy objectives, such as the Lisbon strategy for growth and jobs, through State aid enforcement.

There are basically two viable options: the adoption of a revised Broadcasting Communication or the maintenance of the *status quo*. Within the first option several possibilities exist concerning the different issues covered by the current Communication.

Both options have advantages and drawbacks and both carry risks.

The preferred option is the adoption of a revised Broadcasting Communication, in particular because this approach increases coherence and transparency in this policy area and is an active and effective way of promoting the development of the sector in a balanced way with regard to the conflicting interests of the various market participants.

Maintaining the *status quo* would reveal an absence of reaction and adaptation in the face of a rapidly evolving sector. In the medium term this would also put in danger the value of the current legal basis as it fails to address the key issues at stake in the new media environment.

As compared to the 2001 Communication, the main improvements in the new Communication relate to the way the Commission controls the proportionality of State aid in this sector which rests upon better governance and more effective control at the national level ("Amsterdam test" or "ex ante test"). Consolidating its case practice, the new Communication also aligns the approach to public service broadcasting in part to the regime of the SGGEI Framework/decision by allowing for the timely retention of overcompensation for addressing revenue and cost fluctuations. The new Communication also sets out the Commission's envisaged approach with respect to pay services of public service broadcasters.

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1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

1.1. Organisation and timing

1.1.1. Leading service

Directorate-General for Competition; Information, Communication and Media State aid Unit.

1.1.2. Other services involved

Inside the Directorate-General for Competition, the State aid Policy and Scrutiny Unit, the State aid Case Support Unit and the Media Antitrust Unit were consulted.

An Inter-Service Steering Group was established involving the Directorates-General for Communication, Enterprise and Industry, Information Society and Media, Education and Culture and Economic and Financial Affairs and the Legal Service. This Group met twice on 6 December 2007 and on 2 July 2008. The new Communication takes account of all comments received during this consultation. It is proposed by the Directorate General for Competition in agreement with the Directorate General for Information Society and Media.

1.1.3. Agenda planning or Work Programme reference

The review of the Communication from the Commission on the application of state aid rules to public service broadcasting (hereafter "Broadcasting Communication") is not listed in the Commission Legislative and Work Programme for 2008.

In June 2005 the Commissioner in charge of Competition Policy presented a Commission action plan for the State aid policy field which extended until the end of its mandate. This plan included a review of the Broadcasting Communication in 2007/2008.

1.1.4. Chronology of the Impact Assessment

(1) 6 December 2007

First Inter-Service Steering Group meeting. Presentation about the overall context and scope of the exercise and discussion on the consultation document (questionnaire and explanatory memorandum).

(2) 10 January 2008 – 10 March 2008

Public consultation period.

(3) 2 July 2008

Second Inter-Service Steering Group meeting. Discussion on the results of the public consultation, on the draft impact assessment report and on the proposed follow-up.

(4) 25 July 2008

Draft impact assessment report sent to the Secretariat-General.

(5) 19 September 2008

Opinion of the Impact Assessment Board.

(6) 25 September 2008 - 8 October 2008

Internal consultation of the Commission services on a 1st draft for a revised Communication and on the impact assessment report.

(7) 5 November 2008

Date of publication of the 1st draft for a revised Communication on the internet for public consultation until 15 January 2008.

(8) 5 December 2008

Date of 1st multilateral meeting with Member States to discuss the 1st draft for a revised Communication.

(9) 20 February 2009 - 6 March 2009

Internal consultation of the Commission services on a 2nd draft for a revised Communication and on the impact assessment report.

(10) 8 April 2008

Date of publication of the 2nd draft for a revised Communication on the internet for public consultation until 8 May 2009.

(11) 5 May 2009

Date of 2nd multilateral meeting with Member States to discuss the 2nd draft for a revised Communication.

1.1.5. Opinion of the Impact Assessment Board

The Impact Assessment Board issued its opinion on 19 September 2008. While considering that the draft report was generally of good quality, the Board made several recommendations to improve both the substance and the presentation of the report. These recommendations led the leading DG to make substantial changes, notably at the level of the problem definition and of the analysis of the different alternatives. The presentation of the report was also considerably revised.

1.2. Consultation and expertise

The review of the Broadcasting Communication relies to a high degree on input from external sources. One of the cornerstones of the process are the public consultations of

Member States and stakeholders. These broad consultations, which took place three times (10 January 2008 to 10 March 2008, 5 November 2008 to 15 January 2009, 8 April to 8 May 2009) allowed all interested parties to express their views on the need for a revision of the Broadcasting Communication as well as on the proposed changes.

Both informal and formal consultations were held with several Member States, public and commercial broadcasters, regulators, sectoral organisations (notably the European Broadcasting Union which represents public service broadcasters (hereafter "PSBs") in Europe, the Association of Commercial Television operators in Europe, the Association of European Radios and the European Newspaper Publishers Association as well as the European Publishers Council) and with other stakeholders both before the consultation was launched, during and after the consultation periods.

Other Commission services were involved from the beginning of the process in the context of the Inter-Service Steering Group and already contributed to the drafting of the public consultation documents.

Several public events took place, which are directly relevant for the revision of the Broadcasting Communication.

On 27 May 2008 the BBC organised an event together with the Commission services, where technical issues related to the review process were discussed with Member States, PSBs, regulators and other stakeholders.

On 9 June 2008 Commissioner Kroes publicly announced the results of the public consultation at a Media Forum in North Rhine–Westphalia.

On 11 June 2008 the Deputy Director-General for competition policy participated in a meeting of the European Broadcasting Union, where the results of the consultation were discussed.

On 17/18 July 2008 the French Presidency of the European Union held a conference on Media Policy where the Commissioner in charge of Competition Policy presented and discussed the envisaged follow-up of the review process.

On 4 November 2008 a draft revised Broadcasting Communication was published on the internet for a public consultation which lasted until 15 January 2009 (2nd public consultation).

On 5 December 2008 a multilateral meeting was held between the Commission services and the Member States, to discuss a 1st draft for a new Communication, published by the Commission on 4 November 2008. Member States had the opportunity to express their views during this meeting, as well as to submit written comments in the context of the public consultation.

On 8 April 2009 a revised draft for a new Broadcasting Communication was published on the internet for public consultation which lasted until 8 May 2009 (3rd public consultation).

On 5 May 2009 a 2nd multilateral meeting was held between the Commission services and the Member States, to discuss the 2nd draft published by the Commission on

8 April 2009. Member States had the opportunity to express their views during this meeting, as well as to submit written comments in the context of the public consultation.

The **1st consultation** of Member States and stakeholders on the need to review the 2001 Broadcasting Communication during January to March 2008 was carried out in accordance with the Commission's general principles and standards for consultation:

- The public consultation was open to all relevant target groups and gave all interested parties a reasonable period to respond, i.e. 2 months (late responses were also taken into account);
- The consultation was broadly publicised, namely via a press release, individual letters to Member States and informal contacts with stakeholders. The consultation was publicised on the Commission's single access point for consultation "Your Voice in Europe";
- The results of the public consultation, as well as a summary of all comments received were published on "Your Voice in Europe" on 9 June 2008; all contributions were individually acknowledged;
- The leading Commission service (DG Competition) provided feedback on the consultation process both to the Commissioner in charge of Competition Policy and to all associated services. DG Competition sent a summary report on the consultation process and its main results and a draft impact assessment report to the associated services on 17 June 2008. An explanatory memorandum will accompany the proposal for a revised Communication.

Main results of the 1st consultation

Overall, 121 responses were received, which is an indication about the significant visibility and popularity of the subject. The origin of responses was very broad: Member States, public and commercial broadcasters and respective sectoral organisations, newspaper publishers, trade unions, cable and satellite operators, telecom companies, listeners' and viewers' associations, media groups, radio operators, religious organisations, independent producers, film distributors, private persons, academics, etc. From the 27 Member States, 17 replied. Norway and the EFTA Surveillance Authority, which are directly concerned (via the EEA agreement), also submitted comments. Member States were generally of the opinion that the 2001 Broadcasting Communication had worked well and that any changes to it should therefore be considered with great care. Nevertheless, some Member States recognised that there is a need for an update of the rules in view of the changes on the market and in the legal environment.

Commercial broadcasters, newspaper publishers and private operators in general were in favour of an in-depth review which would restrict or, at least, set clear boundaries on the possibility for PSBs to offer new media services. Most consider that PSBs' intervention in the advertising market, in the acquisition of rights (namely sports rights) and in new media services, offered via new platforms, such as the internet and mobile phone, are particularly detrimental to competition. Some argue that there

should be stricter control criteria in dual financing systems given the bigger potential impact on competition.

Listeners' and viewers' associations consider that the approach adopted by the Commission, both in the 2001 Broadcasting Communication and in its subsequent decision-making practice, has worked well. Nevertheless, they consider that there is now need for an update in view of the developments, in particular the entry into force of the Audiovisual Media Services Directive and the provisions of the Lisbon Treaty with an enhanced emphasis on citizenship and socio-cultural obligations which derive from the European Convention of Human Rights.

Public broadcasters (with some exceptions), trade unions, catholic organisations represented in and public bodies related to public broadcasters in general were against the review. In some cases, these bodies would accept a "light review" which would not touch upon the wide margin of discretion of Member States to define, finance and control the national public broadcasting systems or that would re-affirm and strengthen this freedom. In their view the 2001 Broadcasting Communication had worked fine and already includes the possibility for PSBs to provide new media services. They feared that any revised Broadcasting Communication would inevitably be stricter for PSBs than the current one and they consider that the Commission has no legal basis to further limit the Member States' discretion in defining the remit.

These results have been taken into account in the assessment of the impact of the different options (see section 6 below).

The 2nd consultation of Member States and stakeholders on a 1st draft for a new Broadcasting Communication took place in November 2008 to January 2009 and was carried out in accordance with the Commission's general principles and standards for consultation, as set out above.

Main results of the 2nd consultation

A majority of Member States criticised the Commission's guidance with regard to the definition of the remit. 21 Member States considered that the draft Communication was too prescriptive as regards the procedural safeguards for the respect of the material conditions set out in the Amsterdam Protocol ("ex ante test"). Several Member States also raised concerns regarding the perceived differentiation between traditional and new media services, or between so-called linear and non-linear services in the 1st draft and raised concerns with regard to the principle of editorial independence and the guidance on pay services, which several considered to be too restrictive. The UK and Spain and some smaller Member States, to the contrary, supported the 1st draft and agreed with guiding principles of the 1st draft subject to drafting comments.

Stakeholders took very polarised positions on the 1st draft. While the European Broadcasting Union and most of its members heavily criticised the 1st draft as unbalanced and too restrictive, commercial television operators and the written press welcomed it as clear framework for the control of State aid in the broadcasting sector.

The 3rd consultation of Member States and stakeholders on the 2nd draft for a new Broadcasting Communication during April and May 2009 was again carried out in accordance with the Commission's general principles and standards for consultation.

In view of the preceding two public consultations, the duration of the public consultation was however set at 1 month. Neither stakeholders nor Member States found that this was too short.

Main results of the 3rd consultation

A majority of Member States commended the 2nd draft as being more balanced and clearer than the 1st draft. Member States widely recognised that this new 2nd draft respects the principle of technology neutrality, better safeguards the editorial independence of public broadcasters and leaves Member States more flexibility in designing mechanisms to adequately control the proportionality of State aid usage in this sector.

Most Member States also asked the Commission services to proceed with the adoption of the 2nd draft before the end of the current Commission.

More in detail, most Member States present at the 2nd multilateral meeting on 5 May 2009 and thereafter in their written submissions no longer objected to a compulsory preliminary assessment of publicly financed significant new audiovisual services with respect to the substantive criteria of the Amsterdam Protocol ("ex ante test" or "Amsterdam test"). Most Member States also recognised that the 2nd draft is considerably less detailed with respect to guidance on the two substantive elements of this test ("public value", "market impact") and that the draft respects the freedom of Member States to define the remit of their public broadcasters.

Compared to the 1st draft, the 2nd draft also contains a special reference to the difficulties of smaller Member States in financing the public broadcasting service which was widely appreciated.

As to guidance on control of overcompensation, Member States were split. While the large majority of Member States also accept the need to limit overcompensation for delivering the broadcasting SGEI in quantitative terms (the "10% cap"), a few Member States still consider this discipline as being too rigid. These few Member States also tend to oppose the need for regular in-depth control of overcompensation and of cross-subsidisation including the control of reserves.

Public and private stakeholders are less polarised than with respect to the 1st draft. While commercial television operators and the written press deplore a certain loss of clarity and legal certainty due to the removal of examples and the increased margin of flexibility for Member States, public service broadcasters recognise these changes as improvements which facilitate their role in the new media environment. However, both public service broadcasters and private media expressed the wish that the Commission proceeds with the adoption of the 2nd draft.

More in detail, the EBU welcomes that the 2nd draft better recognises the need to guarantee the editorial independence of public service broadcasters and the enhanced recognition of the principle of technological neutrality. The EBU however still finds that the preliminary assessment of new significant services should be on a voluntary basis only and wishes less guidance on financial discipline and transparency.

The ACT considers the 2nd draft as helpful improvement as compared to the 2001 Communication but criticises that the review was a "lost opportunity" to expand the

refined economic approach in State aid control under Article 87 (1) EC to the public service broadcasting sector. ENPA and EPC express their disappointment that the draft has been shortened but still call on the Commission to come to a conclusion in its deliberations with a timely publication of an updated Broadcasting Communication in 2009. ACT, ENPA and EPC also provided detailed drafting suggestions which were taken into account as far as possible.

2. PROBLEM DEFINITION

2.1. Introduction

Most of the problems of the current 2001 Communication identified below can be attributed to legal and market developments since 2001. However, other problems originated in inadequacies of the Communication which have become visible during the seven years during which it has been implemented.

In order to place the problems into context, it is useful to consider, on the one hand, the policy and legal framework governing the broadcasting sector and, on the other hand, the current market situation and the likely future developments.

2.1.1. Policy and legal framework

The broadcasting sector is a two-sided industry, where publicly-funded broadcasters compete for audiences and, in some Member States, for advertising revenues and other commercial income with commercially funded operators.

On the one hand, PSBs need to attract audiences in order to be able to effectively fulfil their public service tasks by reaching the population on a wide scale. On the other hand, these audiences also have a commercial potential, since they are the main determinants of advertising revenues. The share of audience also affects other commercial interests, such as sponsoring and merchandising revenues.

This dual nature of the broadcasting sector has been widely recognised and accepted by the EU Member States.

The primary legal basis governing the application of EU rules to undertakings entrusted with the operation of services of general economic interest is Article 86(2) of the EC Treaty, which establishes that the provision of these services is subject to the rules contained in the EC Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance of the particular tasks assigned to them.

The so-called "Amsterdam Protocol" of 1997 recognises the specificity of public service broadcasting in relation to other services of general economic interest. It acknowledges the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted for the fulfilment of the public service remit as conferred, defined and organised by each Member State. However, it also requires that the funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest.

The Broadcasting Communication, which dates back to 2001, specifies in more detail the Commission's interpretation of Article 86(2) of the EC Treaty when applied in the broadcasting sector and of the Amsterdam Protocol. It is mainly a general policy document and, while containing guiding principles on the way the Commission will apply state aid rules to the broadcasting sector, it leaves an appreciable margin of interpretation as to its practical implementation.

Since 2001 the Commission's interpretation of the Broadcasting Communication has been reflected in over 20 decisions. The various individual investigations have given the Commission the opportunity to further clarify the general requirements set out in the Broadcasting Communication.

In 2005 the Commission adopted the so-called "Service of General Economic Interest package"¹ (hereafter "SGEI package"). The requirements laid down in the SGEI package can be regarded as being of general applicability since they clarify the requirements of Article 86(2) of the EC Treaty.

The Commission has consistently recognised the large margin of discretion of Member States to set up and finance their public services (see, for example, Commission Communication on Social Services of General Interest of April 2006²). In general, also the case law of the Court of Justice indicates that the EC Treaty gives Member States the freedom to define missions of general interest and to establish the organisational principles of the services intended to accomplish them.

However, this freedom must be exercised transparently and without misusing the notion of general interest, and the Member States must take account of Community law when fixing the arrangements for implementing the objectives and principles they have laid down.

When assessing the organisation and functioning of the broadcasting sector in Member States from a state aid perspective, the Commission's role should be rather limited and subsidiary to the Member State's role. The Commission should, for example, not question the national definition of a broadcasting public service but just check for manifest errors and ensure that this definition is transparent and precise enough to prevent unnecessary distortions of competition in the broadcasting market.

In December 2007 the Audiovisual Media Services Directive (hereafter "AVMS Directive") was adopted. This Directive takes into account recent market and technological developments by extending the scope of the EU audiovisual regulation to some new media services. The objective is to create a regulatory level playing field between television broadcasting and television/programme-like on-demand services.

State aid enforcement in the broadcasting sector must also be seen in the context of the Lisbon strategy for growth and jobs, including recent initiatives by the Directorate-general for Information Society and Media to spur investment and

¹ 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 of 29 November 2005) and Community framework for State aid in the form of public service compensation, (OJ C 297 of 29 November 2005).

² Communication from the Commission - Implementing the Community Lisbon programme - Social services of general interest in the European Union, COM (2006) 177 final, SEC(2006) 516

innovation in the media sector, such as the i2010 initiative. One of the pillars of this initiative is the creation of a *single information space* by increasing legal and economic certainty facilitating the development of new services and online content.

2.1.2. Market assessment

On the basis of the submissions received during the public consultation, some general trends can be identified.

Market environment – supply side

There has been a multiplication of distribution platforms – introduction of Digital Terrestrial Television, digitalisation in general and the subsequent gain in transmission frequencies, TV on demand, mobile TV, IPTV and other new platforms. This has caused an increase in competition not so much between public and commercial operators anymore but rather between traditional broadcasting operators and new actors in the audiovisual market, such as network operators (cable, satellite and telecom) and internet search engines, which are transforming from infrastructure providers to content providers. These new actors often have global reach and are perceived by traditional broadcasters as a serious competitive threat due to their size and critical mass. For example, international internet companies such as Yahoo and Google started competing with broadcasters through internet platforms and video offers. This trend is likely to further intensify in the future, especially with regard to the most popular content rights, in a context where an increasing amount of premium content will only be accessible against payment.

There has also been a reconfiguration of the value chains. Until recently, the media market was characterised by a scarcity of media platforms and channels. Also, there was only one element in the value chain separating the programme maker from the consumer - the operator of the broadcasting network either being publicly owned or operated by a private company. As new technologies have been developed and implemented, this traditional value chain is being reconfigured and consumers may now, and even more so in the future, access media content through a variety of different value chains. In the new value chain, the role of content aggregation and gate-keeping is in a very strong position, since it allows control over the organisation and search facilities of content made available to the consumers. This puts pressure on traditional broadcasters, who may find themselves in a position where their access to consumers is limited in comparison with their traditional reach.

The increase in competition is changing the media landscape. Broadcasters are, for example, offering "electronic written news" in their web sites, thereby competing directly with newspapers and newspapers are offering audiovisual content in their web sites, thus also competing directly for the traditional broadcasting services. This is often referred to as "media convergence" (defined in one response as "the ability of consumers to obtain multiple services on a single platform or device or obtain any given service on multiple platforms or devices"). Media convergence will continue with a convergence of service providers for telephone, internet, media/TV and print media. This move in turn will increase the dependence of TV operators on network operators and will require new business models with pay-services and subscription income becoming increasingly important. As a consequence, more content will have to be produced in the future.

One of the impacts of media convergence is to trigger, in some markets, vertical integration between infrastructure providers (telecom companies and search engines, in particular) and content providers (broadcasters, newspapers, etc.). Media concentration (vertical and horizontal) is likely to intensify in the future. There is a danger that vertically integrated infrastructure owners inhibit market access for broadcasters to networks (market foreclosure).

Traditional television will lose significance in favour of new media. The number of niche and thematic channels will tend to grow and the market for traditional television channels will be more fragmented. The large channels will continue to lose market share.

As regards the revenue structure, traditional broadcasters perceive great uncertainty about the future. The advertising market is becoming more and more unpredictable and technological challenges which change consumption habits are booming. The online advertising market and the level of media related activity have been increasing at a fast pace and are expected to keep growing. The revenue structure for television broadcasters has been changing with subscription income going up in most countries (and also income from pay services to a limited extent) at the detriment of advertising revenues which have, in most countries, been declining or being shifted to the new platforms. According to Isicult - the Italian Institute for the Cultural Industry – in the five leading European markets (France, Germany, Italy, the United Kingdom and Spain), between 25% and 50% of the total resources of television systems derive from payment by the consumer.

Traditional broadcasters and other operators will need to make very heavy investments to enter the new platforms and also to offer new formats (e.g. HD TV) for which demand is growing.

There is increasing internationalisation / globalisation in the broadcasting market as a consequence of the emergence of new platforms, in particular the internet.

In some countries, commercial operators seem to be adapting better to these changing consumption patterns than PSBs, with the market share of PSBs decreasing especially among young people (e.g. Germany, UK, Slovakia, Sweden, etc.).

Market environment – demand side

On the demand side, there has been a fragmentation of audiences / consumer markets. Dynamic consumption patterns are on the rise. Consumers (especially young people) are actively looking for content, rather than passively consuming traditional broadcasting services. They look for specific content and use multiple platforms, such as TV, games console, radio, PC, mobile phone and MP3 players. In the future, consumers will more and more expect to get access to the content they want at an individually chosen time and on different platforms (control over content).

Participation in different forms is expected to become more and more important for consumers in the future. The current success of media services like blogs, discussion forums and other channels allowing consumers to produce and ‘broadcast’ written content is expected to become more popular in the future. The development of consumer channels with shared content on, for example, YouTube and My Space is

another example of a more participatory and social media consumption pattern that is expected to become increasingly popular in the future.

National regulatory environment

National media regulation will have to cope with more complex paradigms as, on the one hand, media markets become more international and more competitive and business models become more complex and, on the other hand, the role of broadcasters becomes more important in satisfying the needs of local, regional and national communities.

Public support to broadcasters

The broadcasting sector is among the biggest recipients of public funds, along with transports and agriculture. The Association of Commercial Television in Europe indicates a figure above €15 billion in 2001 for the EU-15. The European Audiovisual Observatory estimates that in 2006 the corresponding figure for the EU-25 is around €22 billion.

Among the biggest recipients of public financing are PSBs in Germany (around €7 billion), the UK (around £5 billion), France (around €3 billion) and Italy (around €1.5 billion)³.

There are two main financing models for PSBs in the EU, namely single financing systems based exclusively on public revenues, i.e. licence fee, direct grants, etc. (e.g. UK, Finland) and dual financing systems, where PSBs get revenues both from public sources and from the advertising market (e.g. Italy, Germany).

PSBs depend on public funding to different degrees. While in Finland, Sweden, Estonia, Romania, Greece and Germany the percentage of public funds on PSBs' total revenues exceeds 80%, this percentage is below 50% in countries like Poland, Spain, Ireland and Italy⁴.

Several EU countries finance their public service broadcasting systems via a licence fee payable by consumers. The amount of the licence fee varies greatly among Member States, ranging from around €12 per household in Romania to around €90 in Denmark⁵. The licence fee is greater than €200 in Denmark, Austria, Sweden, Finland, Germany and the United Kingdom, while it is less than €100 in the Czech Republic, Poland, Portugal and Romania. The cost of public service television to European consumers broadly follows the same national distribution and ranges from around €4 per inhabitant per year in Lithuania to around €140 in Denmark⁶.

³ Data estimated by the European Audiovisual Observatory for 2006.

⁴ Source: European Audiovisual Observatory.

⁵ Source: European Audiovisual Observatory. Data for Romania refers to year 2005 and for Denmark to year 2007.

⁶ Source: European Audiovisual Observatory. Data for year 2006.

The viewers market

According to the European Broadcasting Union, on average the market share (in terms of audience) of generalist public channels has fallen from 40% in 1999 to about 30% in 2007.

The market shares of PSBs' generalist channels in terms of viewers vary quite substantially within the EU. In countries like Cyprus and Hungary, for example, the market shares are rather low (below 20%).

In other countries, such as Germany, Italy, Austria, Poland, Finland and Ireland, PSBs' generalist channels have relatively high market shares around or above 40%.

Somewhere in the middle are countries like France and Sweden (around 35%), the UK, the Netherlands and Portugal (around 30%) and Spain (around 22%).

The advertising market

In 2005 the EU-15 advertising market was worth around €80 billion.

Even if forecasts vary according to different sources, there is consensus that TV and newspapers are losing ground to the Internet in terms of advertising expenditure but remain far and away the number one and number two media worldwide and will continue to reign for some years.

While internet advertising expenditure is still small compared to other media such as newspapers and television, its market share is increasing at a fast pace. Advertising on the internet has been rapidly growing in all EU Member States. There has been double-digit growth in internet advertising expenditure since 2002 around the world and also in the EU.

According to the European Broadcasting Union (EBU), for PSBs with mixed funding systems advertising revenues represent on average 14% of their total budget and they have around 20% of the overall TV advertising market. This relatively low figure (when compared to the average public service broadcaster market share of 30% in the viewers market) is partly explained by legal provisions which restrict their activities on the advertising market (e.g. France, Italy, Spain and Portugal).

2.2. Problems arising from legal and market developments

2.2.1. Distortions of competition and need for a level playing field

The relation between PSBs and commercial operators in terms of traditional broadcasting services has been relatively stable for a long time, except for changing shares of the viewers' and advertising markets. However, with the emergence of new platforms (digital television, internet, mobile TV) and of new forms of offering content (non linear rather than linear), the principles underlying the proper use of State aid in the sector to maintain a level playing field in the new media areas are not yet clearly defined.

While PSBs have a right and even a duty to enter new media markets in order to fulfil their remit, this intervention may create new distortions of competition.

Indeed, in traditional television broadcasting the market players are limited to public service and commercial broadcasters. In the new media areas several additional players are present, such as the written press, telecom companies, content providers, internet companies, etc. Thus, the amount and diversity of market players that can be affected by publicly-funded new media offers is greater.

Furthermore, in traditional broadcasting the potential sources of distortion of competition arising from publicly-funded services are well known, i.e. mainly the loss of advertising revenues and other commercial income for private operators. New media services provided over the internet and mobile platforms typically rely not only on advertising revenues but also on other forms of financing such as pay per content or subscription income.

It is therefore crucial to clarify the Commission's State aid policy in this field so to ensure a balance between all the interests involved in particular in the new media area and to avoid excessive distortions of competition.

2.2.2. Lack of unifying and updated legal basis

Since 2001 when the Broadcasting Communication was adopted, the Commission has further specified its provisions in over 20 decisions. Hence, there is a significant amount of "acquis" which is not reflected in the state aid rules applicable to the sector.

As mentioned above the requirements laid down in the SGEI package of 2005 are generally applicable, since they clarify the requirements of Article 86(2) of the EC Treaty. Therefore, as a matter of principle, these requirements should be included in the Broadcasting Communication. In its decision-making practice, the Commission has applied some of the provisions of the SGEI package to the broadcasting sector, while considering that others were not (or only partially) applicable to the sector.

The 2007 AVMS Directive extends the scope of the EU audiovisual regulation to some new media services. This extension is not yet adequately reflected in the Broadcasting Communication.

Given the large number of decisions already taken by the Commission, the fact that certain concepts contained in the Broadcasting Communication have been substantially developed and specified in the individual decisions and the entry into force of the 2005 SGEI package and of the 2007 AVMS Directive, a single comprehensive and transparent legal document covering in detail all aspects of state aid policy for the broadcasting sector is currently missing.

The absence of such a unifying document makes it hard for stakeholders and Member States to have a clear and comprehensive picture of the state aid approach to the sector. There is therefore a certain risk that Member States design or remodel their public broadcasting systems in ways which are not in full compliance with state aid rules. The current situation also creates legal uncertainty for public and commercial broadcasters.

2.2.3. Need to contribute to wider policy objectives

The rapidly changing environment and regulatory framework conditions for the sector risk moving the current Broadcasting Communication further and further away from

economic reality and reducing its legal value, thereby jeopardising legal certainty for Member States and stakeholders.

Several Member State are currently re-thinking, evaluating and/or reviewing their public broadcasting systems (Germany, France, UK, Portugal, Austria, Netherlands, Spain, Ireland, etc.). In some cases this revision has been a consequence of Commission investigations but, in other cases, it has been the consequence of the rapidly changing media environment and the associated need to re-define or re-evaluate the role of public service broadcasting in this new environment.

In case no action is taken, i.e. the Broadcasting Communication is not revised, Member States may proceed with their reforms with no clear guidance at EU level. Later on, the Commission is likely to be called upon to review the revised systems (e.g. via complaints) and there is a risk that manifest errors are committed, for example, in the definition of the public service remit in new media areas.

The Commission has the right (and a duty of good governance) to regularly review its secondary legislation in the state aid field not only to reflect policy and market developments but also to enhance legal certainty and transparency for Member States and stakeholders.

2.3. Problems arising from the inadequacies of the current Communication

2.3.1. Evaluation of the current Communication

The results of the public consultation show that, in general, stakeholders consider that the current Communication worked well and served its purpose. In particular, the main objectives of the Communication, which were to set general principles of good governance in public service broadcasting and to create a healthy competitive environment, were met.

However, commercial operators consider that the Communication did not go far enough in terms of establishing clear limits to the definition of the public service remit, while public broadcasters consider that it did not allow sufficient flexibility, for example concerning the possibility to keep reserves.

2.3.2. Not enough subsidiarity

Against the background of a large margin of discretion of Member States in defining and financing public service broadcasting, the number of complaints and other state aid procedures related to the sector which have been dealt with at EU level seems to be excessive.

In all likelihood, if Member States had put in place more transparent and substantive procedures for defining and entrusting the television public service and for controlling the fulfilment of the public service remit (including appropriate appeal procedures), a significant part of the problems raised by the complainants would have been better (or at least equally well) dealt with by national regulators/control bodies. National authorities are in closer contact with the specificities of the national markets and are therefore in a better position to tackle most of these issues.

This problem may be partly attributable to the lack of guidance, in the current Communication, on the procedures for defining and entrusting the television public

service and has been aggravated by market developments which allow an increasing number of innovative services to be provided by PSBs.

3. OBJECTIVES

3.1. General objectives

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

The SAAP places State aid enforcement in the context of the Lisbon strategy by emphasising the role of State aid policy to "(...) contribute by itself and by reinforcing other policies" to common objectives such as high-quality services of general economic interest (including public service broadcasting)". In general terms, the aim of the announced State aid reform is "less and better targeted aid, a refined economic approach, more effective procedures, better enforcement, higher predictability and enhanced transparency as well as shared responsibility between the Commission and Member States (...)".

In particular as regards the media sector, the SAAP states: "Media, audiovisual services, creative industries and the cultural sector as a whole have a high potential in terms of innovation, competitiveness, growth and job creation. They are also key in preserving and promoting the rich cultural and linguistic diversity in the EU. In examining state aid issues in these sectors, the Commission fully takes into account the relevant Treaty provisions (particularly Articles 151(4) and 87(3)(d)) and the Protocol on the system of public broadcasting in the Member States annexed to the Treaty of Amsterdam), and reflects the specific public interests attached to these activities. In that respect, it will 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 broadcasting activities."

The review should pursue in general the objective of establishing the appropriate balance between general principles and requirements being laid down in the Broadcasting Communication and the concrete implementation being left to the Member States. Furthermore, a revised Broadcasting Communication should incorporate principles of good governance, including increased transparency, proportionality and accountability both as regards the determination of the public service mission and third party involvement.

The review of the Broadcasting Communication is intended to deliver: (1) regulatory conditions capable of fostering a level playing field between PSBs and commercial operators and of limiting distortions of competition, in particular in the new media environment; (2) a forward-looking legal framework providing increased transparency and legal certainty in a changing media environment; (3) effective procedures and enforcement, including increased responsibility of Member States;; and (4) a contribution to wider policy objectives through State aid enforcement.

3.2. Specific objectives

3.2.1. Fostering level playing field

It is clear that the EC Treaty awards PSBs the right to be present in all distribution platforms. This right has already been recognised in the 2001 Broadcasting Communication and is implicit in the Amsterdam Protocol. The principle of technological neutrality also makes it clear that public service content which is provided in traditional platforms cannot lose its public service status when provided under the same conditions in different platforms. Against this legal and political background, the Commission would clearly be overstepping its powers if it were to prevent PSBs from providing broadcasting services over new platforms.

From an economic perspective, several reasons may be advanced to justify the presence of PSBs also in new media platforms, such as the internet and mobile telephony. In the area of traditional broadcasting, it is often argued that some services provided by PSBs present characteristics of public goods, i.e. they are beneficial for society but would not normally be provided by the market given that it is difficult or impossible to exclude anyone from using them and hence to charge for their use. The same logic could be applied in new media areas, where certain services of particular benefit for society in general might not be provided by the market or might be provided only at suboptimal conditions in terms of quantity, quality and price. There may also be positive externalities in the provision of certain broadcasting services in new media areas, for example in terms of soft skills, education and social aptitudes, that may not be fully captured by commercial offers. PSBs may in some cases be in a better position to capture these positive externalities, given their lower dependence on commercial revenues when compared to commercial operators.

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.

On the one hand, a too prescriptive approach to the review, consisting of laying down detailed rules and detailed procedures to be followed by PSBs when entering new markets, for example, could risk stifling innovation by imposing an excessive administrative burden on PSBs and by neglecting institutional specificities of each Member State.. On the other hand, a "light" approach which allowed an excessive and non-differentiated presence of publicly-funded offers with commercial characteristics on new media markets could crowd out private initiatives.

It is therefore a primary objective of the exercise to strike the right balance between all interests in the broadcasting sector, thereby minimising distortions of competition.

3.2.2. Increased transparency and legal certainty

Given the shortcomings identified previously, there is scope for increased transparency and legal certainty for Member States, public and commercial broadcasters and other stakeholders by incorporating clarifications provided in individual Commission decisions in the text of the revised Broadcasting Communication.

The various individual investigations have given the Commission the opportunity to further clarify the general requirements set out in the Broadcasting Communication. Such clarifications concerned mainly:

- The public service definition, in particular the requirement for an *ex ante* evaluation of the public service character of new media activities;
- The need for specific entrustment of new activities, thereby avoiding that, based on a vague authorisation of PSBs to offer new services, it would be up to them alone to decide on the scope of such services;
- The necessary safeguards against overcompensation, in particular the need for regular checks but also the recognition of the PSBs' need for longer-term financial stability through a "buffer";
- Safeguards against non-market conform behaviour, namely strengthening the requirements for PSBs' commercial activities to be carried out in a market conform manner as well as the respect of the arm's length principle in the financial relations between PSBs and their commercial subsidiaries.

In order to take stock and codify in a legally transparent way the Commission decision-making practice in this sector, some or all of these clarifications could be incorporated in a revised Broadcasting Communication.

The experience in individual investigations has also revealed the need for further clarifications and discussions in particular as regards the definition of the public service remit as well as PSBs' behaviour on other markets such as the market for the acquisition of sports rights and the advertisement market.

The current Broadcasting Communication states that the public service remit may also comprise activities other than TV programming, referring to online information services for example, provided that they satisfy the same democratic, social and cultural needs of society. Based on this statement, the Commission followed a policy approach based on the requirement for an *ex ante* evaluation of the public service character of new media services, which was for the first time applied in the German case and then in the Irish and Flemish cases. The solution found in these cases may however not be appropriate for other Member States. The consultations therefore invited Member States and stakeholders to express their views about the scope and basic features of such an evaluation. There are also new developments in the pipeline such as the offer of certain services against remuneration as part of the public broadcasters' public service remit ("pay services"). There is no established practice in this respect and therefore the consultations invited Member States and stakeholders to give their views on this issue. Moreover, allegations of excessive adverse effects on competition due to the PSBs' acquisition of exclusive premium sports rights have been raised by commercial competitors in a number of cases. The line followed by the Competition Directorate-General in this respect has been to intervene only in extreme cases. The broad interest that commercial operators have in this matter, though, justified the inclusion of this issue in the consultations.

As regards the SGEI package mentioned above in section 2.2, some of its provisions, such as allowing PSBs to keep a certain margin of overcompensation limited to 10%

of the annual compensation have already been recognised in some recent Commission decisions on public service broadcasting. Other elements of the SGEI package, however, have not been deemed applicable to the broadcasting sector by the Commission, such as the acceptance of a reasonable profit. Some elements may need certain adaptations, taking into account the specificities of the funding of PSBs (e.g. the requirement that any surplus needs to be paid back after a certain period of time not exceeding 4 years). Thus, there is a need to clarify which aspects of the SGEI package are applicable to the broadcasting sector and in which way they are to be interpreted in light of the specificities of the sector.

There are also a number of minor issues on which increased transparency and legal certainty could be achieved, such as the appropriateness of taking into account possible difficulties of smaller Member States in assessing the compensation mechanisms, something which is included in the current Broadcasting Communication but which has so far never been applied in any of the 24 Commission decisions since 2001.

3.2.3. Effective procedures and enforcement

In light of the problems identified in section 2.3 above, one objective of the review of the Broadcasting Communication is to reduce the need for individual investigations to be carried out by the Commission, while ensuring that Member States respect the necessary requirements laid down in the Broadcasting Communication.

This could be achieved by asking Member States to introduce additional safeguards which ensure a higher degree of transparency and third party involvement in particular as regards the determination of the public service remit.

Such safeguards might ensure that the concerns about the public service broadcaster's new activities unduly affecting other business operators, for instance, are primarily dealt with at the national level.

3.2.4. Contribution to wider policy objectives

The rapidly changing environment and regulatory framework conditions for the broadcasting sector may require changes not only in the terminology used in the Broadcasting Communication but also clarifications as to the scope of application of a revised Broadcasting Communication.

In this context, the consultations asked Member States and stakeholders to give their views on the expected market developments as well as on the impacts of the possible amendments to the Broadcasting Communication as outlined in the consultation paper on, for instance, innovation, competitiveness, growth and job creation and cultural and linguistic diversity.

4. POLICY OPTIONS

4.1. Option 1: no action

One option is to maintain the status quo, i.e. not to revise the Broadcasting Communication of 2001. The State aid rules for the broadcasting sector would remain

unchanged and the policy developments since 2001 would not be reflected in the Communication. A future oriented policy development such as on pay services would have to be made through individual Commission decisions on a case by case basis, originating in complaints, notifications and on the Commission's own initiative.

Following this option would not prejudice a revision of the Broadcasting Communication at a future stage. However, since the Commission would take a public decision not to act on the legislative level after making a public consultation on the subject and would not deliver on its commitment set out in the State Aid Action Plan of 2005 to update the Communication by 2009, it would seem appropriate not to revisit the issue again within a reasonably long period.

4.2. Option 2: adoption of a revised Broadcasting Communication

Another option is to adopt an updated Communication, taking into account the Commission's case practice since 2001 (24 decisions) as well as comments made on the specific issues by Member States and stakeholders during the public consultation. Within this option, several alternative sub options are available, which can incorporate a variety of possible changes to the current Communication. Methodologically, the question is how to best compare and evaluate the possible sub options, being aware that the number of possible sub options increase exponentially with the changes to the current Communication.

One possibility would be to compare a "stricter" revision, consisting of a more prescriptive approach with tighter safeguards on public financing reflected on all areas of the Communication, with a "lighter" revision, where the safeguards on public financing would be relaxed in all areas of the Communication. However, the "softening" of a provision in the existing Communication is sometimes intrinsically linked to the "tightening" of a related provision. Therefore, the separation of stricter and softer options is largely artificial.

Another possibility would be to structure the analysis according to coherent areas or topics, for which the possible changes are then set out. For each of the areas identified, the respective merits of the proposed changes can be assessed and the best solution identified. Option 2 would then be constituted by the set of 'best solutions' from within all sub options.

The latter possibility appears to be the most appropriate for the evaluation of possible changes, and has the merit of offering a pragmatic solution to the problem at hand. Below this approach is followed for the six main areas or topics which were identified:

- Relation between the Broadcasting Communication and the SGEI rules;
- Definition of the public service remit and proportionality control;
- Pay services;
- Transparency requirements and cost allocation;
- Overcompensation;
- Control and supervision.

The choice of these six main areas was done on the basis of the results of the 1st public consultation. Market players clearly identify these topics as the main issues at stake in

the review and often structured their replies around them. This division was reflected in the summary of the results of the 1st consultation which was published together with the replies. This structure has also been used in meetings, seminars and other discussion fora between the Commission services, Member States and stakeholders and has by now become familiar to all parties.

4.2.1. Relation with SGEI legislation

Description of the issue

Currently, the scope of the Broadcasting Communication is broader than the scope of the SGEI package. Besides the rules governing the application of Article 86(2) of the EC Treaty, the Broadcasting Communication provides guidance on the general legal context governing the broadcasting sector, and the assessment of the compatibility of State aid to public service broadcasting under Articles 87(2) and 87(3).

With regard to the level of public funding, while the Broadcasting Communication requires that State aid shall 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, the SGEI Framework provides that the amount of compensation may also include a reasonable profit for discharging the public service obligations.

As regards the allocation of costs between public service and commercial activities, the Broadcasting Communication contains more flexible rules. In the broadcasting sector, cost allocation difficulties may arise from the fact that Member States may consider the whole programming of the PSBs as covered by the public service remit, while allowing for its commercial exploitation. Therefore, there may be costs which are entirely attributable to public service activities, but which also benefit commercial activities. The Broadcasting Communication allows for such costs to be entirely attributed to the public service.

The SGEI Framework allows undertakings entrusted with the provision of a service of general economic interest to maintain a certain amount of over-compensation as an annual reserve and to carry it forward for the next year. The amount of the reserves is as a rule limited to 10 % of the amount of annual compensation. Exceptionally, in case of SGEI with significant yearly cost fluctuations, annual reserves exceeding 10 % may be allowed, subject to a notification requirement. The Framework also provides that the situation should be reviewed at regular intervals of at most 4 years, at the end of which all overcompensation should be repaid. The Broadcasting Communication does not contain any provision concerning the possibility for PSBs to maintain annual reserves.

In some aspects, the Commission has already implemented some of the additional elements of the SGEI Framework in the decision-making practice concerning public service broadcasting. For example, following the adoption of the SGEI package, the Commission has consistently recognised the possibility for PSBs to maintain annual reserves, generally up to 10 %.

Sub-options

Sub-option 1 – no approximation to SGEI framework

One option is to keep all of the current differences between the SGEI Framework and the Broadcasting Communication. The Commission would re-affirm the specificities

of the broadcasting sector in relation to other SGEI sectors and maintain a broader scope than the general SGEI legislation.

Sub-option 2 – full alignment with SGEI legislation

Another option is to fully align the Broadcasting Communication with the SGEI Framework (e.g. by requiring cost allocation as a rule, allowing a reserve or a profit margin).

Sub-option 3 – partial approximation to SGEI legislation

Under this option, some of the current differences between the SGEI Framework and the Broadcasting Communication could be kept while others would be annulled.

The different options on the specific points (e.g. cost allocation) are discussed in the respective sections below.

4.2.2. Definition of the public service remit and proportionality control

Description of the issue

It is clear from the Amsterdam Protocol that the definition of the public service mandate falls within the competence of the Member States.

The current Communication states that the public service remit may include certain services that are not programmes in the traditional sense, such as on-line information services, to the extent that they are addressing the same democratic, social and cultural needs of the society in question.

In the decision of 24 April 2007 on the German PSBs, the Commission considered that a general authorisation of PSBs to offer loosely defined new media services and the resulting lack of predictability for third parties bears the risk that other market operators may be discouraged from developing and from offering such new media services. A clearly defined public service mission was therefore considered important to strike a balance between the provision by PSBs of services in the general economic interest and the maintenance of a level playing field between public and commercial operators, thus ensuring that the financing of new media activities does not run counter to the Community interest within the meaning of the Amsterdam Protocol and Article 86(2) EC. This clarification for new publicly funded audiovisual services is not yet reflected in the revised BC.

In the recent Irish, Belgian and German decisions it was moreover found that the Member States concerned did not properly specify and control whether new services offered by a PSB (such as internet portals, special interest channels and pay services) address the democratic, social and cultural needs of the society. The Commission therefore advised Ireland, Belgium and Germany to ensure on a lasting basis that before new audiovisual services are offered by a PSB, it is adequately assessed at the national level whether the activity falls within the scope of the public service remit.

The solution found in these cases is sometimes referred to as "ex ante test" or "Amsterdam test", because in all three decisions this test involves the assessment of the public value (social, democratic, and cultural needs) and of the market impact (the effect on competition and trade between Member States) of a new audiovisual service in line with the Amsterdam Protocol. The three Member States agreed to carry out the assessment for all new and significant activities of PSBs. The final authorisation to introduce the new service on the market as part of the public service mission (and therefore financed with State aid) is taken by an independent authority. Third parties

are to be heard in the decision making process to provide for an adequate empirical basis underlying the decision.

Sub-options

Sub-option 1 – no or "light" change scenario

One option here is to take a "light" approach and not to substantially change the existing provisions. Under this option, the Communication could omit to consolidate the Commission's recent case practise regarding the "ex ante test" or could "recommend" the test merely as one possibility among others to ensure a clear definition of the public service remit in the new media environment and to ensure that the distortion of competition and trade between Member States remains reasonable.

Sub-option 2 – consolidation of decision-making practice

An alternative option is to include in the revised Communication a formal requirement for Member States to implement such ex ante test. Under this option different degrees of flexibility are again possible. The Communication could be quite prescriptive, for example by imposing a specific type of test performed by independent and external bodies or by including a list of new services which must at any rate be subject to the test. Alternatively, the Communication could allow more flexibility for Member States in the specification and implementation of the test, for example by giving only a few examples of new services that could be subject to the test.

4.2.3. Pay services

Description of the issue

Member States and PSBs already offer or are considering whether to offer pay-services as part of their public service remit, i.e. partly financed with State support and partly financed by payments from the users/viewers. These considerations are to some extent driven by market developments such as the increasing wish of viewers to access specific content on demand. They are also due to the wish of dually-financed PSBs to develop new sources of (commercial) income to counter decreasing advertising revenues.

There is a multitude of heterogeneous pay services: access to archives/libraries and possibility of re-use of material/content of the public service broadcaster against remuneration; special interest TV services on a pay-per-view basis addressed to certain minorities or "deserving" groups of society; organisation of concerts and events in connection with the broadcasting service; publication of books and audiovisual material; electronic communication services with a link to the main tasks of the public service broadcaster; mobile services (such as SMS news flashes in relation to TV programmes) for lump sum payment; deferred availability of TV programmes for lump sum payment, etc.

The decisive question from a State aid perspective is whether PSBs can offer pay services as part of their public service remit (and are therefore able to benefit from state funding for these services) or whether the provision of such services should always be part of their commercial activities (and therefore have to be provided in commercial terms and without public support).

The Broadcasting Communication does not refer specifically to pay services nor to whether they could be considered as part of the public service remit. While there are

several references to the autonomy of Member States to decide on the form of financing public service broadcasting, the Communication is widely interpreted as containing an implicit presumption that pay services are associated with commercial activities.

The Commission has not taken a final view on the nature of pay services in its case practice so far. In the decision of June 2006 on ad hoc financing of PSBs in the Netherlands, the Commission recognised that in the case of services offered by PSBs through network operators which charge fees for the distribution of this content, PSBs should charge the network operator's fees to the public because otherwise the general budget would have to absorb these costs. Conversely, in its April 2007 decision in the German case the Commission stated that commercial activities the inclusion of which would constitute a "manifest error" in the public service definition "(...) normally include pay-services such as pay TV or pay-per-view services".

Sub-options

Sub-option 1 – no change scenario (disregard pay services in revised Communication)

One option is not to include provisions on pay services in a modernised Broadcasting Communication. A new Communication could continue to be silent about the issue and only the decisions on individual cases would bring further guidance.

Sub-option 2 – prohibition of pay services under the public service remit

Another option is to take a strict approach and to explicitly prohibit the possibility for PSBs to offer services against remuneration at the point of consumption under the public service remit (pay services could still be provided as commercial activities).

Sub-option 3 – subsidiarity scenario (deferral of decision to Member States)

A third option would be to recognise the possibility for PSBs to offer certain pay services as part of the public service mission. Under this option the Communication could essentially defer the assessment to the level of the Member States by submitting the inclusion of pay services within the public service remit to a preceding ex ante test (see section 4.2.2. on the definition of the public service remit and proportionality control above).

Sub-option 4 – prescriptive approach (specific guidance)

A fourth option would be to give precise guidance on which pay services may and may not be part of the public service remit. The revised Communication could contain "white" and "black" lists of pay services which can / cannot be included in the remit. It would also be possible to give guidance on the level of pricing that would indicate the public service character of a pay service.

4.2.4. Transparency requirements and cost allocation

Description of the issue

In the context of the funding of PSBs, 'transparency' normally refers to the separation between public service activities and commercial activities. The aim of transparency in this sense is to avoid cross-subsidisation of commercial activities and over-compensation of public service activities. Also, a transparent separation of the different types of activities significantly facilitates the exercise of control both at national and at European level.

Two key issues arise in this context: a) whether there should be a separation of the different types of activities beyond the already required accounting separation (i.e. also functional or even structural separation); b) in the context of the accounting separation, whether there is a need to review the present rules on cost allocation for the broadcasting sector, which differ from the general framework applicable to other SGEI.

Separation of accounts between public service activities and commercial activities of public service broadcast is already required. There is a similar requirement for other SGEI.

As regards cost allocation, the current Broadcasting Communication allows for a more flexible cost allocation method than the one which is required by the Framework on SGEI. In substance, it recognises that, given the specificities of traditional public service broadcasting (generalist television), it is not possible to allocate the costs of programming between what is needed to fulfil the remit (because viewers watch the programs) and how much serves to generate advertisement revenue (again, because viewers watch the program). This difficulty is due to the subjectivity of pricing the satisfaction of the social, cultural and democratic needs of a society from watching a particular programme. The value of watching / listening to a certain programme can hardly be expressed in monetary values, which renders the allocation of the production costs either to the fulfilment of the remit or to the commercial exploitation meaningless. In the current Communication, the costs of programming are therefore entirely attributable to public service activities and can be allocated to them in their entirety. Moreover, as a general rule, the current Communication provides that whenever the same resources are used to perform public service and non public service tasks, their costs should be allocated on the basis of the difference in the firms total costs with and without non public service activities (i.e. such common costs can be attributed entirely to the public service).

However, this flexibility must be seen in conjunction with the stricter approach of the Communication in requiring that the total net income from all commercial activities related to the exploitation of the public service mission is ultimately transferred back to the public service activity, thereby reducing the respective net cost of the subsequent period and the ensuing public compensation. For other SGEI sectors, commercial profits do not need to be re-invested in the public service activity.

Sub-options

Sub-option 1 – no change scenario

One option is to keep the current requirements, i.e. separation of accounts as set forth in the Transparency Directive and the exception on cost allocation for the cost of programming.

Sub-option 2 – substantially strengthen transparency requirements

An alternative option is to strengthen the current requirements beyond the Transparency Directive by imposing functional or structural separation of commercial activities and by aligning the cost allocation rules to the general framework applicable to other SGEI.

Sub-option 3 – partially strengthen transparency requirements

A third option would be to maintain the separation of accounts requirements as set forth in the Transparency Directive and to align the cost allocation rules to the general framework applicable to other SGEI or vice-versa.

4.2.5. Overcompensation

Description of the issue

In order to ensure the proportionality of the funding, the level of compensation may, as a matter of principle, not exceed what is necessary for the fulfilment of the public service (the so-called "net cost approach"). This method is applied to broadcasting as well as to other SGEI.

However, unlike the Framework applicable to other SGEI, the current rules of the Broadcasting Communication do not explicitly recognise the possibility for PSBs to maintain reserves for the purpose of their public service activities over a given time period.

The framework for other SGEI allows for carrying forward a certain amount of over-compensation to the next year, provided that it does not exceed 10 % of the amount of annual compensation. Furthermore, it also recognises that some SGEI may have costs that vary significantly each year, notably as regards specific investments. In such cases, the Framework acknowledges that exceptionally, over-compensation in excess of 10 % in certain years may prove necessary for the operation of a service of general economic interest.

Although the Broadcasting Communication does not contain rules concerning the possibility to maintain annual reserves, in its decision-making practice, the Commission has recognised the possibility for PSBs to make reserves, also building upon the example of the SGEI framework. In its decisions, the Commission has allowed certain flexibility for Member States with regard to the amount and the conditions for such reserves.

Generally, the Commission's line has been to allow for reserves up to 10 % of the compensation amount. In the case of the German PSBs, it was also accepted that reserves amounting to more than 10 % of the annual licence fee income of the PSBs are maintained, provided that the excess amount is put into a reserve destined for foreseeable under-compensation in the following years within the same entrustment period, and subject to control by an independent authority. A previous decision concerning an ad hoc aid in the Netherlands treats 10 % of the annual budget of the public service broadcaster and 10% of overcompensation as synonym.

Sub-options

Sub-option 1 – no change scenario (disregard reserves in revised Communication)

One possibility is not to include provisions concerning overcompensation in the new Communication and to maintain the net cost principle as foreseen in the 2001 Communication. Whether and to which extent PSBs may retain overcompensation would then have to be decided in individual decisions on a case by case basis.

Sub-option 2 – consolidation of decision-making practice or more prescriptive approach

Another option is to consolidate the existing decision-making practice and to recognise the possibility for PSBs to retain overcompensation up to a certain level. Sub-options are to foresee a general cap for overcompensation such as 10% and to allow PSBs retain overcompensation above this limit based on certain safeguards (e.g. requirement to clearly earmark the funds for specific public service costs and to block them in a specific account or general requirement to spend the funds on public services, only).

4.2.6. Control and supervision

Description of the issue

The current Communication recommends that an appropriate authority or appointed body checks that the public service is actually supplied as provided for in the formal agreement between the State and the entrusted undertaking and that there is no overcompensation of the net public service costs. It is within the competence of the Member States to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. At the same time, the Communication indicates that the role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking.

The rules applicable to SGEI take a slightly different approach. The Framework does not specifically refer to the need for an independent supervision of the fulfilment of the service of general economic interest, although it is understood that Member States would assess whether the public service obligations are met. At the same time, with regard to overcompensation, the Framework explicitly provides that Member States must check regularly, or arrange for checks to be made, to ensure that there has been no overcompensation.

In practice, the decision-making practice of the Commission in the field of public service broadcasting has already required both an effective supervision of the fulfilment of the public service mandate by the public service broadcaster and adequate national control mechanisms to avoid overcompensation and cross-subsidisation of commercial activities. Although the Commission has not formally requested the independence of the body carrying out a control of overcompensation, it has only accepted as adequate control exercised by a body which is independent from the public service broadcaster. For example, regular and effective control by a State body independent from the public service broadcaster (such as the Court of Accounts) or by independent auditors has been accepted in the past.

Sub-Options

Sub-option 1 – no change scenario

One option would be to maintain the current provisions and not require explicitly independent control. Within this option, it would be possible to continue to recommend independent control in the individual cases but with no formal legal basis.

Sub-option 2 – consolidation of decision-making practice

Another option is simply to consolidate the existing case practice and explicitly require in the revised Communication independent control of the provision of public service and of over compensation.

Sub-option 3 – more prescriptive approach

Another option would be to take a stricter stance and require not only independent but also external control. This would exclude, for example, control by internal auditors of the entrusted undertaking. Under this option there might also be guidance on what type of control body would be acceptable.

4.2.7. Relation between the different options

Most of the sub-options under the six main areas identified above are predominantly independent from each other. For example, it is possible to further align the Communication with the SGEI legislation in terms of cost allocation with or without stricter provisions on control and supervision.

However, the choice of a sub-option within one main area is sometimes conditional on the choice of certain sub-options under other main areas. It is therefore useful to explain these links.

The degree of alignment between a revised Broadcasting Communication and the SGEI legislation (section 4.2.1) depends on the choice of sub-options in the areas of transparency requirements and cost allocation (section 4.2.4) and overcompensation (section 4.2.5). A full alignment implies strict cost allocation rules (abolishing the exception currently allowed for broadcasting) and the possibility for PSBs to retain overcompensation and a profit margin where this is necessary to perform the public service.

The definition of the public service remit (section 4.2.2) and the possibility to include pay services within this remit (section 4.2.3) are inter-related although the sub-options under these main areas are independent from the choices made in the other main areas. The requirement to make the inclusion of pay services in the public service remit conditional on an ex ante evaluation presupposes the choice of the sub-option to require an ex ante evaluation for new offers in general.

Finally, the different possibilities under control and supervision (section 4.2.6) are independent from the choices made in the other main areas.

4.3. Other options

Theoretically, it might be envisaged to produce a "best practices" non-paper (non-regulatory option) with limited legal value, where the Commission could take a

position on what it considers to be the best examples of organising and financing a public service broadcasting system. A few responses in the 1st public consultation indicated this possibility.

This option would, however, risk being innocuous given the legal value of the 2001 Communication, which would prevail over a "best practices" paper. It would also create legal uncertainty and bring prejudice to the ongoing investigations in individual cases, given the dubious (or non-existent) legal standing of such a document.

It would also be a non-orthodox solution since "best practices" papers have not been used in the state aid and competition fields for policy developments but only for Commission internal procedural matters.

For these reasons, this option is discarded and will not be discussed further in the following.

5. ANALYSIS OF IMPACTS

5.1. Preliminary observations

The present Communication does not have an expiry date. Therefore, there is no absolute legal need to review it, unlike in most cases of state aid secondary legislation.

A "no action" solution would not mean that the Commission's state aid policy in the broadcasting field would stagnate. Policy development would, on the contrary, continue by means of the individual investigations into Member States' public service financing systems. The recent trends in the Commission's decision-making practice (e.g. requirement for an ex ante evaluation of the public service character of new offers by PSBs taking into account existing offers on the market, requirement for independent external control procedures for PSBs activities, allowance of a reserve for PSBs, etc.) would expectedly continue in the on-going investigations and also in upcoming investigations, triggered by notifications from Member States, complaints by competitors or the Commission's ex officio procedures.

In case the "revision" scenario would, to a great extent, be aimed at consolidating this recent decision-making practice, the substantive difference between the two solutions would not be vast.

However, there are certain factors which distinguish the two options and which have a bearing on the respective impacts on the market.

Firstly, a revised Communication would be legally binding on the Commission, which would have to apply the new rules consistently across the EU. This would factually mean that all Member States would have to follow the approach set out in the Communication. Individual decisions are legally binding only on the Member States which are the addressees of those decisions. The Commission has not investigated the financing systems of all Member States so far and may not be required to do so in the future (in the absence of complaints or notifications).

Secondly, the Commission decisions on the existing general financing systems of Member States' PSBs are normally based on commitments given by the respective

Member States to introduce certain changes in their current systems which would make them compatible with the State aid rules. These commitments follow proposals for appropriate measures by the Commission but are essentially unilateral, in the sense that Member States may refuse to give them. Under such circumstances, the Commission would open a formal investigation procedure which would normally lead to a negative decision, thereby forcing the Member State to comply with the appropriate measures. This "negotiation" process can have significant delays, mainly because some Member States may contest certain requirements by the Commission (even if based on past Commission decisions) or may not have an interest in having the cases closed in a timely manner. A revised Communication would set a clear and unambiguous legal basis, which would facilitate this process and decrease the delays for decisions to be taken.

Finally, recent decisions by the Commission on individual cases have generally been more specific on issues like the requirement for an ex ante evaluation of the public service character of new offers by PSBs, the allowance of a buffer to retain overcompensation for covering the variability of PSB revenues and costs and others. This trend is explained by the changes in the market environment and in the technological developments described above. However, this is a relatively recent trend. The most comprehensive decision was the one concerning the German public service broadcasting system in April 2007 because older decisions do not yet refer to some of these specific provisions (e.g. the ex ante evaluation requirement). Therefore, a "no action" solution will not alter the legal status of the decisions taken before the German decision and before the recent changes in the market environment. The Member States concerned may continue to have outdated and less precise requirements than the Member States concerned by the most recent decisions. On the other hand, the Commission can revisit the existing financing systems of Member States at any time, either based on complaints or on its own initiative. If it finds that these systems are no longer compatible with the common market (for example because of legal or market developments), it can propose appropriate measures to Member States that would make the scheme compatible with state aid rules at any time.

5.2. Assessment of different alternatives under option 2 (adoption of a revised Broadcasting Communication)

5.2.1. Relation with legislation on SGEI

Results of the consultation

On the basis of the answers received, it appears that most stakeholders conceive the SGEI Framework at a balance stricter than the current rules applicable to public service broadcasting. This explains the basic positions of the main interested parties: commercial broadcasters are generally in favour of harmonising the Broadcasting Communication with the SGEI package, while PSBs and Member States seem rather concerned that such an approximation may disregard the specific characteristics of the broadcasting sector and its importance to safeguard non-economic values such as media pluralism and cultural diversity. They argue in favour of maintaining sector-specific rules for the compatibility of State aid to PSBs.

Preferred sub-option

Making no approximation to the SGEI Framework (sub-option 1) would have serious drawbacks. It would go against recent decisions of the Commission (for example the possibility for PSBs to retain overcompensation in reserves). Also, this option would ignore legal developments, i.e. the adoption of the SGEI package, and would fail to improve coherence in the Commission's approach to SGEI.

Sub-option 1 should therefore be discarded.

At the same time, it is also clear that the Broadcasting Communication is based on the specificities of the public service broadcasting sector. Indeed, as Member States and PSBs have pointed out, public service broadcasting has specific features which justify specific provisions, adaptations to the general SGEI Framework rules, and at times exceptions from these rules. Public service broadcasting is both specific in terms of its social function and the related requirement for its independence and impartiality, but also in terms of its complex financing mechanisms (dual funding, licence fee funding, emerging pay services), and its exposure to new media technologies.

Adopting a strict approach, i.e. full approximation to the SGEI Framework (sub-option 2) would seriously affect the position of PSBs and involve complex adjustments to their business model, such as the implementation of stricter cost allocation rules. At the same time, a full approximation would do away with the requirement that the total net income from all commercial activities related to the exploitation of the public service mission is necessarily transferred back to the public service activity. It is not at all evident what the benefits of such change would be. This excessive approximation could also go against the Member States' decision to attribute a specific statute to public service broadcasting with regard to other SGEI, as laid down in the Amsterdam Protocol.

Sub-option 2 should therefore be discarded.

In order to enhance clarity, legal certainty and coherence of the Commission's policies in the field of SGEI, it would seem logical and useful to approximate, as far as possible and meaningful, the provisions of the Broadcasting Communication to the provisions of the SGEI "package", which dates from 2005. Therefore, the Broadcasting Communication should in principle take as a reference the text of the SGEI Framework and ensure that the two instruments are coherent while respecting the specificities of the public service broadcasting sector and the Amsterdam Protocol.

The proposed option is therefore to take utmost account of the rules of the SGEI package, without aiming at a one-to-one harmonisation of the two instruments (sub-option 3). The elements already implemented by the decision-making practice of the Commission, such as the possibility to maintain reserves and the requirement for regular checks of overcompensation, should be consolidated in the Broadcasting Communication.

5.2.2. Definition of the public service remit

Results of the consultations

Public broadcasters initially opposed any change to the existing Communication on this point. They criticise the compulsory nature of the ex ante evaluation as well as its second leg which tests the market impact of significant new publicly financed audiovisual services. . Some public broadcasters from smaller Member States also complain about the significant costs such a test would entail. Other public broadcasters also claim that such test could prevent innovation by imposing significant administrative barriers.

Commercial broadcasters and newspaper publishers generally support the introduction of an ex ante evaluation as an adequate and necessary means to prevent undue distortions of competition on the market. Some commercial broadcasters, however, cautioned that an ex ante evaluation alone may not suffice but that independent ex post control of the remit will also remain necessary.

Member States appear split about the value of an ex ante assessment but unequivocally oppose that the Commission prescribes in detail all specific aspects of an ex ante evaluation in the revised Communication. At the same time, several Member States have already put in place some form of ex ante test for new services (UK, Denmark) although with differing scope, while others are about to introduce it (Germany, Ireland, Belgium, as well as Norway in the EEA). In the last, 3rd round of consultations, most Member States provided concrete suggestions on the wording of the test. For example, one suggestion was to reduce the scope of the test by excluding the distribution of the same content on new distribution platforms as existing service. Another suggestion concerned the requirement for “clear added value to society” in the Amsterdam test which should in the views of some Member State be closer aligned to the terminology of the Amsterdam Protocol.

Preferred sub-option

In view of the ongoing market developments (see section 2.1.2 above), PSBs cannot and should not be denied the right to provide content on a technology neutral basis.

However, the provision of new services over new platforms regularly interferes with existing and/or emerging commercial initiatives on the market. Hence, a new balance must be found that safeguards flexibility for public broadcasters to adapt to the changing market environment, while preventing that public money is used to finance activities that have little public value but create disproportionate distortions of competition and of cross-border trade.

In line with the recent Commission decisions and also with the developments taking place in several Member States, a requirement for an ex ante test for significant new services (sub-option 2) seems to be an appropriate procedural safeguard for the expansion of the activities of PSBs into new areas.

The details of the ex ante assessment should be left to Member States. Member States are best placed to find a procedure which suits their institutional framework and that avoids undue delays; they also know best which authorities are best placed to carry out the evaluation.

In this context, the German decision in particular provided a very detailed account of the design of the ex ante test, including all the provisions to be put in place by Germany which in turn implemented a set of detailed commitments offered by Germany. This decision is one good example of the possible design of an ex ante test, as is the BBC's public value test. However, a 1:1 replica of the German or the UK ex ante procedures would be misplaced in the context of guidance that should apply to all Member States. In particular the German example was drawn up with particular regard to the constitutional background of the country. Thus, it is advisable to leave a sufficient degree of flexibility for Member States to design the precise procedure and the institutional setup of their ex ante tests.

Nevertheless, the Communication should contain specific guidance on the principles of the substantive test, such as the nature of the services for which an assessment would be necessary and the minimum procedural characteristics the test should display in order to be effective (e.g.: consultation of third parties).

As regards the threshold for the test, the principle of technology neutrality speaks in favour of applying the test to new activities on whatever platform they are performed. It would be hard to justify why the launching of a new digital channel should be assessed ex ante but not the launching of a new analogue channel. Hence, the ex ante assessment should be undertaken for any new and significant audiovisual media activity.

The revised Communication should provide some limited guidance on what "new" and "significant" stand for, since the grey area is otherwise too wide, but would leave it to Member States to find the most appropriate way to translate the guidance into concrete regulations. The "new" nature of an activity should depend on the way consumers can access it as well as on the content supplied.

Since small scale activities are not as likely to affect competition and intra-Community trades as large scale activities and because the ex ante evaluation may be costly and time consuming, some guidance on the notion of "significance" of the new service should be provided. The significance of the new service may depend on the financial resources required for its development and the expected impact on demand. Significant modifications to existing services should be treated like the introduction of a new significant new service.

As regards the substance of the test, two aspects should be assessed, namely whether the activity satisfies the social, democratic or cultural need of society and the potential impact on the market. Both elements of the test (public value and market impact) are important since they replicate essentially the compatibility requirements under the terms of the Amsterdam Protocol and the state aid discipline in general.

Some degree of flexibility should be introduced in the ex ante test to address the concern of public service broadcasters who fear that an ex-ante assessment may hamper their capacity to innovate. For example, public broadcasters should have the possibility to test innovative services with a sample of viewers to run test trials without having to engage in a fully fledged ex ante test.

Finally, the introduction of an ex ante test should not relieve a Member State from the requirement to have effective mechanisms for ex post control of the public service remit in line with the requirements of the CFI in its recent jurisprudence.

5.2.3. Pay services

Results of the consultations

According to the commercial operators pay-services go against the principles of universality, accessibility and maximum reach, the pillars on which public service broadcasting was founded. These services are usually not generalist services but rather directed at niche markets. Thus, these activities should not be part of the remit unless they correspond to services which are not offered by the market.

Commercial operators claim that the impact of pay services on competition is negative, especially if the services are offered below market price or even below cost. The negative impacts are already visible in the complaints from consumers, for example. If triple financing is allowed, there should be safeguards to avoid under pricing in relation to existing commercial offers and there should be a requirement for public service content to be offered on all platforms on an at-cost basis.

On the contrary, PSBs in general consider that this is a matter for the Member States to decide at the national level. It is up to the Member States to determine the way of financing the PSBs and there is no reason why the Commission should deprive the Member States of the right to recognise these services as part of the public mission, merely on the basis of a particular way of financing them. The criterion should not be the financing model but the content and contribution to society of such services.

PSBs claim that if the same principles of transparency, which are already applied to traditional public service broadcasting, are applied to pay services, there is no reason why there should be a considerable impact on competition. Offering pay-services at a reasonable price should not have a negative impact on competition. The release of archive material for free and without advertising would probably be more detrimental to competition;

Preferred sub-option

The inclusion of pay services within the public service remit has been a recurrent issue in recent individual cases and is a very important issue for most PSBs. It would therefore be inappropriate and against the objective of increased transparency not to mention the issue at all in a revised Communication. Hence, sub-option 1 should be discarded.

It seems appropriate to clarify that a direct remuneration element in a service provided by a public service broadcaster does not necessarily exclude that this service falls within the public service remit. The qualification of a particular service should be related to the overall characteristics of the service in question rather than merely to the element of remuneration. Therefore, sub-option 2 should also be discarded.

The preferred option is to state the principle that pay services, like all other new services, must be subject to an ex ante evaluation of their public service character and that the "pay" characteristic is only one of the factors to be taken into account in such evaluation (sub-option 3). As a matter of principle, the pay element shall not compromise the public service character of the services provided. The ex ante

evaluation at the national level should 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. Finally, the new Communication should only provide a very limited number of concrete examples on when pay services are clearly commercial or not commercial by nature. The inclusion of extensive "white" and "black" lists of typical pay services which can and cannot be included in the remit (sub-option 4) should be avoided as it could limit the discretion of Member States and PSBs excessively.

5.2.4. Transparency requirements and cost allocation

Results of the consultation

Regarding functional or structural separation, a variety of solutions exist in the Member States. It appears that besides the separation of accounts, in most cases, a functional separation is also aimed at by the PSBs. Member States leave the decision to structurally separate to the PSBs. Structural separation often appears in relation to the bigger PSBs, where certain commercial activities may be carried out by commercial subsidiaries.

All commercial broadcasters took the view that further rules on separation should be required in order to limit adverse effects on competition, reduce the risk of cross-subsidisation of commercial activities out of public funds and better enforce the obligation for PSBs to respect the principle of market conformity in their commercial activities. They consider that the rules of the Transparency Directive concerning the separation of accounts are not sufficient and would favour a full functional and structural separation.

At the same time, the large majority of Member States and PSBs are of the opinion that separate accounting is sufficient, and there is neither a need nor a basis for the Commission to include any further rules regarding the separation of commercial activities in the revised Broadcasting Communication. Especially in the case of smaller Member States, and PSBs with more limited commercial activities, there is a concern that structural separation would result in a significant and disproportionate increase in administrative costs. Although a number of Member States and PSBs do recognise the clear advantages of a functional separation, the general opinion is that the decision should be left for Member States and PSBs, depending on the characteristics of the broadcaster and of its commercial offer.

Regarding the provisions concerning cost allocation set out in the Broadcasting Communication, commercial broadcasters have taken the view that the relevant rules should be revised. To their mind, there is no justification for maintaining the more flexible cost allocation rules. Commercial broadcasters also believe that there would be no obstacle to a full separation and allocation of all costs also in the broadcasting sector. In their view, the current rules are not sufficient to prevent cross-subsidisation of commercial activities.

The large majority of Member States and PSBs are on the other hand strongly opposed to any change in the rules of the current Broadcasting Communication concerning cost allocation. They consider that the current rules appropriately address the specificities of the broadcasting sector, represent a balanced solution and are sufficient. Concerns

have been voiced that changes in the rules could represent an additional burden for smaller Member States and PSBs.

Preferred sub-option

As to **accounting separation**, the preferred option is to maintain the current requirement for accounting separation, without going further and imposing functional or structural separation.

As the results of the consultation have shown, the extent and the types of commercial activities carried out by the PSBs are very different. PSBs may have very limited commercial activities, which may be closely linked to public service activities (for example in the case of selling on the rights of the public service programmes produced by the broadcaster). In such cases, structural or even functional separation may bring about greater added administrative costs than efficiency gains.

It would be very difficult for the Commission to differentiate between the different situations and the different types of commercial activities. Requiring clear structural or functional separation would also represent a strong intervention in the internal organisation of PSBs, without it being absolutely necessary for the fulfilment of the State aid rules. On balance, a "best practices" approach seems more suitable to further separation than a binding requirement. Hence, sub-option 2 should be discarded and sub-option 3 endorsed (guidance through best practices).

As regards **cost allocation**, sub-option 3 is again the preferred choice. The new draft should spell out that input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously are allocated proportionately to public service and non-public service activities respectively, whenever it is possible "in a meaningful way". In all other cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, can be entirely allocated to the public service activity. This relatively lenient approach to cost allocation in the public service broadcasting sector as compared to the utilities sector is in line with the 2001 Communication. It is justified because in the field of public broadcasting, the net benefits of commercial activities related to the public service activities must be taken into account for the purpose of calculating the net public service costs and therefore reduce the public service compensation level. This in turn reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.

A stricter line (sub-Option 2) which would be closer to the approach taken in the SGEI "package" would imply giving further guidance on how to allocate costs in the case of programming, for example. This would mean giving concrete guidance on the way to price the satisfaction of the social, cultural and democratic needs of a society from watching a particular programme. Besides the intrinsic difficulties that such an exercise would entail, the Commission would in this case likely limit the freedom of Member States to decide upon this matter according to the Amsterdam Protocol.

5.2.5. Overcompensation

Results of the consultation

Member States and PSBs generally take the view that the Broadcasting Communication should allow PSBs to maintain annual reserves concerning their

public service activities. In their view, such reserves are necessary to enable PSBs to deal with fluctuations of revenue and costs, to be able remedy possible problems regarding the transmission infrastructure, as well as to adapt to technological developments and to realise technological improvements of existing public service offers.

The majority of commercial broadcasters consider, on the other hand, that annual reserves are not strictly necessary for PSBs to fulfil their mandate. They seem to be concerned that it may need to distortions of competition (for example if larger sums are invested in programme rights), and increase the danger of cross-subsidisation of commercial activities. However, some commercial broadcasters do recognise that certain flexibility may be needed for PSBs in terms of the annual reserves. In order to avoid any misuse, they take the view that such reserves should be exceptional, clearly earmarked for specific public service objectives or to cover unforeseeable events, and subject to strict control requirements.

Regarding the conditions for the use of the reserves, the large majority of Member States and PSBs argue in favour of having a maximum flexibility both concerning the amount and the purpose of the reserves, provided that they are spent for public service activities. They mostly consider that limiting the annual reserves to 10 % would not be appropriate. Moreover, they emphasise that there is a need to consider eventual over-compensation over a longer time period.

Furthermore, most PSBs also seem to oppose the earmarking of the reserves for specific purposes, which in their view would not allow them to cope with the unpredictability of fluctuations of costs and revenues in the broadcasting sector.

At the same time, Member States seem to agree that consistent surpluses point at a need for review of the public service broadcaster's financial needs. Most of them also recognise that there needs to be effective supervision by the national regulators of the way the surpluses are spent to ensure that they support the public service remit.

Preferred sub-option

The Commission's decision-making practice and the results of the public consultations 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 current Broadcasting Communication which is based on the net cost principle. 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. Hence, sub-option 2 is preferred.

Taking into account the specificities of the broadcasting sector, the amount of "annual compensation" is probably not the most appropriate basis for calculating the amount of the overcompensation which may be retained by PSBs at the end of a financial period. In view of the differences in the financing systems of PSBs (single funding v. dual funding), such an approach could discriminate against the broadcasters which are to a significant extent commercially funded and which may therefore be even more exposed to cost and revenue fluctuations. The annual budget of the public service activities seems to be a more reliable basis for calculating the amount of the reserves. The annual budget of the public service activities is the sum of the compensation and the commercial revenues derived from the exploitation of the public service activity.

On the basis of the Commission's decision-making practice, the retention of overcompensation which equals as a rule up to 10 % of the public service budget seems sufficient to guarantee the necessary flexibility for the operation of PSBs. In order to prevent any misuse, the revised Broadcasting Communication should also set out safeguards concerning the use of such overcompensation. The amount of overcompensation should as a rule be limited to 10 %, and be subject to regular review and control. Beyond this 10%, overcompensation should only be allowed as far as it is blocked in an account that serves to finance a specific non recurring major investment necessary for the public service remit such as the funding of digitisation.

5.2.6. Control and supervision

Results of the consultation

Member States have adopted very different forms of control mechanisms to verify the fulfilment of the public service. Some systems are based on annual reports to the Government or Parliament, others are based on a review by internal bodies composed of representatives of various social and political groups and others are based on review by an external body, based on complaints or on regular ex officio control. In a number of countries, separate mechanisms exist for the supervision of the fulfilment of the public service remit (for example by the national Parliament) and for the financial control of the level and the use of the compensation amount granted to PSBs (frequently by the Court of Accounts or by an independent media regulator).

Commercial broadcasters and newspaper publishers doubt that even pluralistic internal bodies are sufficiently independent from the day to day business of a public service broadcaster to exercise an objective supervision of the public service remit (conflict of interest). They moreover request an *external* and fully independent review of the remit, as well as a judicial review. The importance of a complaint-driven mechanism is regularly emphasised. Commercial broadcasters and newspaper publishers moreover request adequate sanctions for a breach of the remit ranging from pecuniary penalties to the withdrawal of the broadcasting license in case of repeated infringements.

Generally speaking, Member States and PSBs consider that the control mechanisms existing in their respective countries are sufficient. They underline that the Commission has no powers to prescribe any particular procedure for the control of the proper entrustment and of the remit. Some Member States find that capacity of stakeholders to make their views known publicly (i.e.: through the press) or by writing letters to the Government or the PSB is as such sufficient. They also argue that competition authorities and civil courts can exercise adequate control over the remit. Public service broadcasters and Member States argue that the Commission has no powers to prescribe specific sanctions under the powers vested to it under Article 86(2) EC and the Amsterdam Protocol.

Preferred sub-option

Any mechanism to control that publicly financed activities of PSBs are strictly within the remit and thereby comply with EC State aid law must be effective and hence ensure adequacy and transparency.

Effective control implies as a matter of common sense that there must be no risk of a conflict of interest between the body in charge of the control and the PSB's management. It is therefore necessary to ensure that Member States adopt safeguards

that sufficiently ensure the independence of the control body, be it for the supervise of the remit, for the ex ante control of new audiovisual services or for financial control. Independence is of key importance both to ensure that public funds are effectively used for providing the public service and that there is no cross-subsidisation of commercial activities and also to ensure fulfilment of the public service mandate. The formulation of such requirement in an updated Communication would not go beyond what has already been consistently required by the Commission in its decisions. Furthermore, it would contribute to further aligning the Broadcasting Communication to the Framework applicable to SGEI.

Sub-option 2 is therefore preferred. The new Communication should spell out that financial 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. The ex ante assessment of new audiovisual services would only be deemed objective if carried out by a body which is "effectively independent" from the management of the public broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. Finally, the supervision of the remit would only seem effective if carried out by a body "effectively independent" from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies in so far it is necessary to ensure respect of the public service obligations.

Going further than this by specifying in detail which bodies in the Member States could be accepted as adequate to control PSBs (sub-option 3) would be going against the principles of the Amsterdam Protocol and of subsidiarity.

5.3. Overall impact assessment of the preferred options

The two principle options, i.e. adoption of revised Communication along the lines described above on the one hand or alternatively maintenance of the current rules on the other hand, are "symmetrical". The positive impacts of one option are identical to the negative impacts of the alternative option (e.g. adopting a revised Communication should increase legal certainty, while no action would maintain the current level of legal certainty). Therefore, the assessment below will concentrate on the pros and cons of adopting a revised Communication according to the preferred options discussed in the previous section.

Positive impacts of adopting a revised Communication

Currently, a single legal document laying down in detail the Commission's approach to state aid for public service broadcasting, as developed in over 20 decisions on individual cases since 2001, does not exist. The continued development of the Commission's policy through individual decisions in a rapidly changing environment and in the current financial and economic crisis, where more and more doubts about the proportionality of State aid in this sector arise, leads to a decrease in legal certainty and transparency for PSBs, commercial competitors and national governments. In this context, the adoption of a revised Communication would presumably have the following positive consequences:

- **Reduced risk of crowding out of commercial operators (broadcasters, newspaper editors, content providers, etc.) by PSBs** if a revised Communication establishes clear principles for verifying the substantive requirements of the Amsterdam Protocol for new audiovisual services by PSBs. If commercial broadcasters have a clear indication of what type of criteria will be used by Member States for assessing whether a new significant audiovisual service by a PSB is part of the public service remit without creating disproportionate effects on the market, they will know better how to position themselves in the market and what type of services to provide. The risk of market foreclosure would consequently be reduced. At the same time, Member States will have a clear framework in which to determine which services from PSBs deserve public funding in the light of the Amsterdam Protocol and in line with the subsidiarity principle.
- The consolidation of the Commission's case practice regarding an ex ante evaluation for new audiovisual services would also reduce the risk that decisions on the provision of new audiovisual services and on their inclusion in the public service remit taken by public broadcasters and/or by Member States authorities would represent manifest errors under EU law and/or and to distortions of competition and cross-border trade contrary to the common interest. Thus, **the number of negative Commission decisions (possibly with recovery if new aid is involved) would likely decrease and legal security for PSBs would be enhanced.**
- **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. In particular, a decreasing number of complaints by commercial broadcasters to the Commission about the introduction of new audiovisual services by public service broadcasters, such as new digital / high-definition channels, on-demand services and pay services, can be expected if these parties have the possibility to be heard at national level before such services are introduced.
- **Litigation before the European Courts would likely decrease** both because of the reduced amount of procedures started by the Commission and the increased legal certainty and transparency from a revised Communication. The gap between the general provisions of the Broadcasting Communication and the detailed assessment of specific issues in the Commission decision-making practice would tend to decrease.
- **Improved coherence and equal treatment of Member States.** The Commission's decision-making practice has evolved significantly. The outcome of individual investigations depends mainly on negotiations with the Member States' authorities and on commitments provided by these authorities. As mentioned above, the decision on the German public service broadcasting system can be considered as a landmark decision, in the sense that it established the requirements for compatibility in the light of the latest market and technological developments. The Irish and Belgian decision followed this path. Member States concerned by Commission decisions taken before the German decision and Member States for which the Commission has so far not initiated investigations arguably have an advantage over Member States which were the subject of recent decisions, since they keep a greater margin of flexibility in financing their PSBs.

A revised Communication would have the effect of legally applying the same standards for all Member States, thereby promoting equal treatment between Member States.

- As mentioned above, the large number of complaints since 2001 concerning the use of State aid in the public service broadcasting sector is a clear indication not only of the lack of legal certainty as regards the EU policy on State aid to the broadcasting sector but also of the absence of adequate control mechanisms at national level. A revised Broadcasting Communication should place more responsibility in the hands of national authorities by favouring the setting up of adequate, transparent and effective control mechanisms in the Member States. For example, it is easier for the Member State authorities to determine whether a new offer can be considered as a public service, taking into account the national context than for the Commission to assess ex post whether such new offer constitutes a manifest error of assessment and/or distorts competition disproportionately. The Commission's role could be to concentrate on supervising the effectiveness of national control mechanisms, as indicated in the CFI Jurisprudence (SIC) and interventions in exceptional cases. This would be coherent with the spirit of the Amsterdam Protocol which indicates that Member States have a wide margin of discretion to set up and finance their public services. Therefore, the consolidation of the Commission's more recent case practice with regard to the ex ante test will defer the centre of the gravity of the proportionality assessment to the national level in the spirit of **subsidiarity**.
- **The quality and speed of the procedures** that would be dealt with at Commission level would likely increase, given the narrower margin of appreciation from clearer and more transparent rules.

Overall negative impacts of adopting a revised Communication

- **Risk of creating barriers to entry for PSBs in new media service areas** because of the expected delay and administrative burden caused by the requirement for an ex ante evaluation of the public service character of new offers. There is a risk, difficult to estimate, that a too bureaucratic implementation of the ex ante test at the national level could make it more difficult for PSBs to take on a leading role in technological advancements. The main existing example is that of the BBC, where the requirement for an ex ante assessment has visibly not brought prejudice to its expansion into new media areas, where it continues to have a leading role in terms of innovation and market presence. On the contrary, the ex ante test has allowed the BBC to roll out significant new services (e.g. the iPlayer) after having introduced changes to the initial design which ensured an acceptable impact on competition. However, it should be borne in mind that not all PSBs have the financial and operational capacities to execute the BBC's type of public value test. Therefore, especially for smaller PSBs, it cannot be excluded that the implementation of a comparable ex ante test to the BBC type may delay their offer of certain new services. The preferred option concerning the definition of the public service remit (see above) should allow Member States sufficient flexibility to tailor the chosen system to the market in institutional specificities of each country.

- The introduction of publicly funded offers on the market carries a risk but also a potential for gains if such services are innovative. This risk to launch innovative services can be taken by PSBs which, being publicly financed and in general not subject to profitability requirements, are potentially less risk averse than commercial operators. If successful, these new services may create new audiences / new markets which can subsequently be exploited by commercial operators with a reduced level of risk. To the extent that the ex ante test introduces delays and administrative costs to introduce new offers on the market, PSBs may be **less willing to be first movers** and to take on the extra risks. In the preferred sub-option, the new Communication should therefore exempt pilot projects from the test so to reduce such risk.
- Increased **administrative burden and compliance costs** for PSBs would be a possible consequence of the introduction of a requirement for an ex ante evaluation of the public service character of new services and of stricter control procedures. The requirement for an ex ante test would mainly require the allocation of appropriate human resources at the level of the PSB or in other bodies, in case parts of the test are outsourced. Other costs, such as equipment, materials and infrastructure are likely to be less relevant, in particular since the public consultations could be based on a publication on the internet. However, it is difficult to quantify these costs. Indeed a revised Communication would only set out general principles of the test, leaving most of the implementation details to the discretion of PSBs and Member States. For example, PSBs may choose to carry out the test in-house or to outsource it to external bodies. They may carry out an unrestricted public consultation or choose representatives of all the stakeholders. The number of replies to be assessed and the consequent duration and cost of the consultation would be significantly different in the two instances. The market impact assessment may focus predominantly on the directly affected market or may be broader and consider several related markets. All of these variables are left at the discretion of Member States and therefore the costs incurred with the ex ante test may vary to such an extent that it would not be meaningful to make estimates or to provide indicative ranges. These additional costs would, however, concern mainly PSBs which were the subject of decisions prior to the decision on the German public service system and those which have not yet been the subject of a Commission decision, since the recent Commission decisions already foresee some type of ex ante test. The stricter control procedures envisaged under option 2 are already in accordance with Commission decision-making practice and would therefore only represent an added administrative cost for those Member States whose regular public service financing systems have not yet been the subject of a Commission decision. It is however very difficult to estimate the cost of these stricter control procedures as it depends on the procedures already in place in each Member State.
- The adoption of a revised Communication may go against the will of some Member States and may also be **unpopular** for sections of the public opinions in some Member States. Public service broadcasters may perceive some aspects of the new Communication as tightening the previous regime, in particular the ex ante evaluation of new significant services, while commercial media may regret the increased flexibility which PSBs enjoy in terms of retaining overcompensation and the recognition of the PSBs' right to expand their publicly financed activities onto new platforms. In view of the written replies to the last

consultation, however, it would appear that the majority of Member States share the Commission's views on the need for the principles underlying the new Communication.

5.4. Wider impact of a revised Communication

5.4.1. Economic impact

The results of the public consultation show that there are contradicting views on the economic impact of a possible revised Communication.

On the one hand, PSBs in general see themselves as engines of technological development. They bring innovation and quality to the sector. If PSBs were over-regulated, they would no longer be able to fulfil their role as engines of innovation in the media sector. If the objective of EU policy in this field is to allow innovation and new services of public interest, a stricter approach would be counter-productive. Stricter rules will lead to less quality and availability of supply, less consumer choice, pluralism and cultural diversity.

On the other hand, commercial operators, including broadcasters, publishers, content producers, etc., also see themselves as the drivers of innovation in the market and consider that an excessive presence of PSBs in new media service areas would foreclose their presence in such areas and therefore reduce innovation and investment.

Although it is not possible to strike a definitive balance between these symmetrical positions, it should be stressed that a revised Communication would not necessarily hamper the competitive position of PSBs and their capacity to innovate. The main goal of such revised Communication would be to help establish a stable and predictable environment where public service and commercial broadcasters alike can devise and implement innovative offers to the public without undue distortions of competition and with increased legal certainty.

It should also be noted that, besides from commercial broadcasters, an increasing number of other private actors are competing in the same market, namely telecom companies, newspapers, content providers, etc. On the other hand, public actors tend to be limited to PSBs.

It is not possible to make a qualitative comparison between the capacity to innovate of PSBs and of commercial operators. However, given the larger and growing number of players from the private sector in the audiovisual services market, it can be expected that most innovative products in the market will come from private initiative.

The impact of a revised Communication on employment in the audiovisual media services sector and on economic growth in general is uncertain. Theoretically, a more transparent legal framework and a better definition of the different roles of public and commercial broadcasters will allow both classes of players to develop their activities further and to lower the risks of such expansion.

In practice, however, it cannot be predicted to what extent a revised Communication will affect the relative competitive positions of public and commercial broadcasters as well as that of other market players, such as telecom companies, newspapers, content providers, etc. Thus, the overall economic impact of a revised Communication on the

sector concerned cannot be predicted. Nevertheless, it is likely that any possible decrease in welfare related to a potentially weaker competitive position of PSBs would be very limited and would, in any case, be compensated by the increase in welfare derived from the improved competitive position of commercial operators in general, leading to an overall positive result in terms of total welfare.

The impact of a revised Communication on public financial resources is quite uncertain. According to commercial operators, by indirectly promoting PSB efficiency (e.g. by imposing more effective control procedures, promoting multi-annual financing, etc.), a revised Communication would free public financial resources which are currently being wasted. This would represent gains for citizens. On the other hand, the effect of a revised Communication on PSB efficiency is not certain, given that they would still be able to get compensation for all their public service. Also, possible increased administrative costs with enhanced control procedures go in the opposite direction. Therefore, the net impact of a revised Communication on public financial resources is unpredictable.

5.4.2. Social impact

In the definition of the public service remit in most Member States, public service broadcasting is aimed at fulfilling the cultural, social and democratic needs of society. Generally, the principles of universality, affordability and content quality also underlie the definition of the remit. The principles that should guide the definition of the public service remit, in particular as regards new audiovisual services, would be clarified in the revised Communication. Examples include the ex ante evaluation of the social, democratic and cultural needs of new publicly financed offers or the need to preserve the distinct public service character of pay services. These clarifications in a new Communication are expected to favour the emergence of national public service remits which bring about new audiovisual services that truly serve cultural, social and democratic needs of society.

As mentioned above, the public consultation has shown that consumers (especially young people) are actively looking for content, rather than passively consuming traditional broadcasting services. A revised Communication would favour the provision of public services by PSBs, by establishing clear principles that should be followed by Member States to analyse the role of public service broadcasting in new media areas that would normally lead to the exclusion of commercial activities from the public service remit. PSBs would have further incentives to provide high-quality and differentiated services which expectedly will stimulate and meet demand by consumers for these services.

5.4.3. Environmental impact

N.A.

5.4.4. Impact outside the EU

Via the EEA agreement, EFTA countries would also have to adopt the revised Communication and they are therefore directly concerned by this process.

As mentioned above, the market for audiovisual media services is increasingly international as a consequence of the emergence of new platforms, in particular the

internet, which make it possible for suppliers to meet demand from anywhere in the world. However, several "natural" barriers to this globalisation process still persist, such as language, culture, different national consumption patterns and copyright issues.

Traditionally, the Commission has received complaints against PSBs almost exclusively from national competitors. Indeed traditional broadcasting services tend to be mainly national in scope. On the other hand, new audiovisual services based on alternative platforms may have a more international scope. Therefore, such services offered by PSBs may have a greater impact on competition and trade than traditional services (especially services provided in the most widely spoken languages).

In this sense, a revised Communication that would introduce further safeguards for such services, namely by imposing an ex ante evaluation of their public service character, would reduce the risk that such services would affect trading conditions.

5.5. Summary: Comparison of the different options and their expected impact

The following table summarises the impacts of option 2 (adoption of a revised Broadcasting Communication) assuming the different preferred sub-options against the baseline scenario of no change (option 1)

Cost efficiency	<p><u>Commission</u></p> <p>More costs with human resources used for the review process in the short run (approximately the equivalent of 1 person working fulltime for 1.5 years) but lower costs with increased case load in medium term*. Decreasing costs with litigation*.</p> <p><u>Public Service Broadcasters</u></p> <p>Additional compliance costs / administrative burden in short run; decreased costs with procedures before the Commission and the Courts because of improved legal certainty in medium run*.</p> <p><u>Commercial operators</u></p> <p>Decreased costs with procedures before the Commission and the Courts*.</p>
Effectiveness	<p>Effective means to have broad and modern approach to state aid in broadcasting sector. Expectedly, will serve the objective of reducing the impact on competition of public financing of PSBs, while</p>

* It is virtually impossible to estimate these costs.

	<p>promoting the development of the sector in a balanced way between all players.</p>
Coherence	<p>The case by case approach is increasing the gap between the provisions of the 2001 Communication and Commission decisions / Court case law, thus adding an increasing degree of incoherence between legal developments and the text of the Communication.</p> <p>A revision would constitute a coherent approach taking into account normal practice for State aid secondary legislation, i.e. the regular revision of legal texts to take into account policy / legislative / market developments.</p> <p>Increased coherence with Commission decisions and Court case law.</p> <p>Increased coherence with other EU policy areas (e.g. Audiovisual Media Services Directive).</p>
Possible risks	<p>Risk of disproportionate increase in compliance costs / administrative burden of PSBs if ex ante evaluation is implemented at the national level in too bureaucratic a way.</p> <p>Risk of creation of barriers to entry for PSBs in new audiovisual media service markets if ex ante evaluation is implemented at the national level in too bureaucratic a way.</p> <p>Risk of increased risk aversion and less innovation from PSBs if ex ante evaluation is implemented at the national level in too bureaucratic a way.</p>
Overall assessment	<p>Preferred option, in particular because it increases coherence in this policy area and is an effective way of promoting the development of the sector in a balanced way.</p>

5.6. Monitoring and evaluation

In case a revised Communication is adopted, its ability to meet the objectives outlined in section 3 above will be continuously monitored and evaluated.

Indicators of the success of a revised Communication include the trend in the number of complaints submitted to the Commission, the number of Commission decisions appealed before the European Courts and the number of decisions annulled by the Courts. The smaller these indicators, the more likely it is that a revised Communication will have met its objectives of fostering a level playing field,

increasing legal certainty and transparency and creating effective procedures and enforcement.

It would be difficult to measure the success of a revised Communication in the development of the sector in general as many other factors will also intervene, such as technological developments, economic and social issues, regulatory and legal questions, etc. The ability of PSBs to maintain a relevant position on the respective markets (in particular new media markets) may give an indication that a revised Communication has worked well in establishing an appropriate regulatory framework. However, the success of PSBs is mostly dependent on their strategy and financing.

The date of a future review of the revised Communication depends crucially on market and legal developments which cannot be foreseen at this stage. However, in light of current practice in the state aid field and of the timeframe of application of the current Communication (around 8 years in case a revised Communication is adopted in 2009), it is likely that a revised Communication would be revisited in a period between 5 and 10 years from its adoption.