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

## 1. INTRODUCTION AND SCOPE OF THE COMMUNICATION

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

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<sup>1</sup> OJ C 320 of 15.11.2001, p. 5-11

led to the multiplication of audiovisual services offered and the fragmentation of audiences. New technologies have enabled improved consumer participation. The traditional passive consumption model has been gradually turning into active participation and control over content by consumers. In order to keep up with the new challenges, both public and private broadcasters have been diversifying their activities, moving to new distribution platforms and expanding the range of their services. Most recently, this diversification of the publicly funded activities of public service broadcasters (such as online content, special interest channels) prompted a number of complaints by other market players also including publishers.

6. Since 2001, important legal developments have also taken place, which have an impact on the broadcasting field. In the 2003 Altmark judgement<sup>2</sup>, the European Court of Justice defined the conditions under which public service compensation does not constitute State aid. In 2005, the Commission adopted a new Decision<sup>3</sup> and Framework<sup>4</sup> on State aid in the form of public service compensation. In 2007, the Commission adopted a Communication accompanying the Communication on “A single market for 21st century Europe on Services of general interest, including social services of general interest: a new European Commitment”<sup>5</sup>. Furthermore, in December 2007, the Audiovisual Media Services Directive<sup>6</sup> entered into force, extending the scope of the EU audiovisual regulation to emerging media services.
7. These changes in the market and in the legal environment have called for an update of the 2001 Communication on State aid for public broadcasting. The Commission's 2005 State Aid Action Plan<sup>7</sup> announced that the Commission would “revisit its Communication on the application of State aid rules to public service broadcasting. Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service activities”.
8. In the course of 2008 and 2009, the Commission held several public consultations on the review of the 2001 Broadcasting Communication. The present Communication consolidates the Commission's case practice in the field of State aid in a future-orientated manner based on the comments received in the public consultations. It clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the public funding of audiovisual services in the broadcasting sector,<sup>8</sup> taking into account recent market and legal developments. The

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<sup>2</sup> Judgement in case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (‘Altmark’) [2003] ECR I-7747.

<sup>3</sup> Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest; OJ L 312, 29.11.2005, p. 67.

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

<sup>5</sup> COM(2007) 725 final.

<sup>6</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities; OJ L 332 of 18 December 2007.

<sup>7</sup> COM(2005) 107 final.

<sup>8</sup> For the purpose of the present communication, the notion "audiovisual service(s)" refers to the linear and/or non linear distribution of audio- and/or audiovisual content and of other neighbouring services such as on-line text based information services. This notion of "audiovisual service(s)" must be

present Communication is without prejudice to the application of the internal market rules and fundamental freedoms in the field of broadcasting.

## 2. THE ROLE OF PUBLIC SERVICE BROADCASTING

9. Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector. There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and influences both individual and public opinion.
10. Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union<sup>9</sup> and Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts.<sup>10</sup>
11. The role of the public service<sup>11</sup> in general is recognised by the Treaty, in particular Articles 16 and 86(2). The interpretation of these provisions in the light of the particular nature of the broadcasting sector is outlined in the Amsterdam Protocol, which, after considering "that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism", states that: "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".
12. The importance of public service broadcasting for social, democratic and cultural life in the Union was reaffirmed in the Council Resolution concerning public service broadcasting. As underlined by the Resolution: "Broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting". Moreover, public service broadcasting needs to "benefit from

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distinguished from the narrower concept of "audiovisual media service(s)", as defined in Article 1(a) of the Audiovisual Media Services Directive.

<sup>9</sup> OJ 2000 C 364, p. 1

<sup>10</sup> Judgement in case C-260/89 ERT, [1991] ECR I-2925.

<sup>11</sup> For the purpose of the present communication, and in accordance with Article 16 of the EC Treaty and the declaration (No 13) annexed to the final act of Amsterdam, the term "public service" as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term "service of general economic interest" used in Article 86(2).

technological progress", bring "the public the benefits of the new audiovisual and information services and the new technologies" and to undertake "the development and diversification of activities in the digital age". Finally, "public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences"<sup>12</sup>.

13. The role of public service broadcasting in promoting cultural diversity was also recognised by the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was approved by the Council on behalf of the Community and thus forms part of EC law.<sup>13</sup> The Convention states that each Party may adopt "measures aimed at protecting and promoting the diversity of cultural expressions within its territory". Such measures may include, among others, "measures aimed at enhancing diversity of the media, including through public service broadcasting".<sup>14</sup>
14. These values of public broadcasting are equally important in the rapidly changing new media environment. This has also been highlighted in the Recommendations of the Council of Europe concerning media pluralism and diversity of media content,<sup>15</sup> and the remit of public service media in the information society.<sup>16</sup> The latter Recommendation calls upon the members of the Council of Europe to "guarantee public service media (...) in a transparent and accountable manner" and to "enable public service media to respond fully and effectively to the challenges of information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions"
15. In its Resolution on concentration and pluralism in the media in the European Union, the European Parliament has recommended that "regulations governing state aid are devised and implemented in a way which allow the public service and community media to fulfil their function in a dynamic environment, while ensuring that public service media carry out the function entrusted to them by Member States in a transparent and accountable manner, avoiding the abuse of public funding for reasons of political or economic expediency".<sup>17</sup>

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<sup>12</sup> Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999, OJ C 30, 5.2.1999, p. 1.

<sup>13</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by Council decision 2006/515/EC of 18.5.2006. In accordance with Annex 2 to of the Council decision, "the Community is bound by the Convention and will ensure its implementation."

<sup>14</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Article 6 (1) and (2) h).

<sup>15</sup> Recommendation CM/Rec(2007)2 of the Committee of the Ministers to Member States on media pluralism and diversity of media content, adopted on 31 January 2007 at the 985<sup>th</sup> meeting of the Ministers' Deputies.

<sup>16</sup> Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society, adopted on 31 January 2007 at the 985<sup>th</sup> meeting of the Ministers' Deputies.

<sup>17</sup> European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253(INI).

16. At the same time and notwithstanding the above, it must be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a significant role in achieving the objectives of the Amsterdam Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes. Moreover, newspaper publishers and other print media are also important guarantors of an objectively informed public and of democracy. Given that these operators are now competing with broadcasters on the internet, all these commercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of new business models. As recalled by the Audiovisual Media Services Directive<sup>18</sup>, “the co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.” Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment.

### 3. THE LEGAL CONTEXT

17. The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The State aid assessment is based on Articles 87 and 88 on State aid and Article 86(2) on the application of the rules of the Treaty and the competition rules, in particular, to services of general economic interest. The Treaty of Maastricht introduced Article 151 concerning culture and Article 87(3)(d) on aid to promote culture. The Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and the Amsterdam Protocol on the system of public broadcasting in the Member States.
18. The regulatory framework concerning "audiovisual media services" is coordinated at European level by the Audiovisual Media Services Directive. The financial transparency requirements concerning public undertakings are regulated by the Transparency Directive.<sup>19</sup>
19. These rules are interpreted by the Court of Justice and the Court of First Instance. The Commission has also adopted several communications on the application of the State aid rules. In particular, in 2005, the Commission adopted the Services of General Economic Interest Framework<sup>20</sup> and Decision<sup>21</sup> clarifying the requirements of Article 86 (2) of the EC Treaty. The latter is also applicable in the field of broadcasting, to the extent that the conditions provided in Article 2 (1) (a) of the Decision are met.<sup>22</sup>

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<sup>18</sup> Cf. footnote 6 above.

<sup>19</sup> Commission Directive 2006/111/EC of 16 November 2006.

<sup>20</sup> Cf. footnote 4 above.

<sup>21</sup> Cf. footnote 3 above.

<sup>22</sup> According to Article 2 (1) a) of the Decision, it applies to State aid in the form of “public service compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million”.

#### 4. APPLICABILITY OF ARTICLE 87(1)

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

20. In line with Article 87(1), the concept of State aid includes the following conditions: (1) there must be an intervention by the State or by means of State resources; (2) the intervention must be liable to affect trade between Member States, (3) it must confer an advantage of the beneficiary, (4) it must distort or threaten to distort competition.<sup>23</sup> The existence of State aid has to be assessed on an objective basis, taking into account the jurisprudence of the Community Courts.
21. The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). Public service broadcasters are normally financed out of the State budget or through a levy on broadcasting equipment holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources.<sup>24</sup>
22. State financing of public service broadcasters can also be generally considered to affect trade between Member States. As the Court of Justice has observed: "When aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid"<sup>25</sup>. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public service broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State. Furthermore, services provided on the internet normally have a global reach.
23. Regarding the existence of an advantage, the Court of justice clarified in the *Altmark* case<sup>26</sup> that public service compensation does not constitute State aid provided that four cumulative conditions are met. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of

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<sup>23</sup> Judgement in joined cases T-309/04, T-317/04, T 329/04 and T-336/04 "TV2" at 156.

<sup>24</sup> Regarding the qualification of licence fee funding as State resources, see judgement in joined cases T-309/04, T-317/04, T 329/04 and T-336/04 "TV2" at 158-159.

<sup>25</sup> Cases C-730/79, Philip Morris Holland v Commission [1980] ECR 2671, paragraph 11; C-303/88, Italy v Commission [1991] ECR I-1433, paragraph 27; C-156/98, Germany v Commission [2000] ECR I-6857, paragraph 33.

<sup>26</sup> Case C-280/00, cf. footnote 2 above.

compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.

24. To the extent that the funding fails to satisfy the above conditions, it would be considered as selectively favouring only certain broadcasters and thereby distorting or threatening to distort competition.

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

25. The funding schemes currently in place in most of the Member States were introduced a long time ago. As a first step, therefore, the Commission must determine whether these schemes may be regarded as "existing aid" within the meaning of Article 88(1). In line with this provision, "the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market".
26. Pursuant to Article 1(b)(i) of the Procedural Regulation<sup>27</sup>, existing aid includes "... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty".
27. In the case of Austria, Finland and Sweden, State aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 in these countries is regarded as existing aid. Regarding the ten Member States which acceded in 2004 (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) and Romania and Bulgaria which acceded in 2007, measures put into effect before 10 December 1994, those included in the list annexed to the Treaty of Accession and those approved under the so-called "interim procedure" are considered as existing aid.
28. Pursuant to Article 1(b)(v) of the Procedural Regulation, existing aid also includes "aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State".
29. In accordance with the case-law of the Court<sup>28</sup>, the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission believes that a case by case approach is the most appropriate<sup>29</sup>, taking into account all the elements related to the broadcasting system of a given Member State.

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<sup>27</sup> Council Regulation (EC) N° 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

<sup>28</sup> Case C-44/93, *Namur-Les Assurances du Crédit SA v Office National du Dueroire and the Belgian State* [1994] ECR I-3829.

<sup>29</sup> See for example the decisions of the Commission in the following cases: E 8/06, *State funding for Flemish public service broadcaster VRT*, OJ C 143, 10.6.2008, p. 7, E 4/05, *State aid financing of RTE*

30. According to the case law in *Gibraltar*<sup>30</sup>, not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the Court of First Instance, “it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.”
31. In light of the above considerations, in its decision-making practice the Commission has generally examined (1) whether the original financing regime for public service broadcasters is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (2) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (3) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid.

## **5. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 87(3)**

32. Although compensation for public service broadcasting is typically assessed under Article 86(2) of the Treaty, the derogations listed in Article 87(3) may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.
33. In accordance with Article 151(4) of the Treaty, the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures. Article 87(3)(d) of the Treaty allows the Commission to regard aid to promote culture as compatible with the common market where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.
34. It is the Commission's task to decide on the actual application of that provision in the same way as for the other exemption clauses in Article 87(3). It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Accordingly, the Commission considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable.<sup>31</sup>

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

<sup>30</sup>

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

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

Moreover, the Commission takes the view that the notion of culture must be applied to the content and nature of the product in question, and not to the medium or its distribution per se.<sup>32</sup> Furthermore, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture under Article 87(3)(d)<sup>33</sup>.

35. State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, Article 87(3)(d) would generally not be relevant. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 86(2), on the basis of the criteria set out in the present Communication.

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

36. In accordance with Article 86(2), “undertakings entrusted with the operation of services of general economic interest or having the character of revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.”

37. The Court has consistently held that Article 86 provides for a derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:

- i. the service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);<sup>34</sup>
- ii. the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);<sup>35</sup>
- iii. the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test).<sup>36</sup>

38. In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the

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

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

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

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

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

"public service remit as conferred, defined and organised by each Member State" (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting "in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (...) and (...) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account" (proportionality).

39. It is for the Commission, as guardian of the Treaty, to assess, on the basis of evidence provided by the Member States, whether these criteria are satisfied. As regards the definition of the public service remit, the role of the Commission is to check for manifest errors (see section 6.1.). The Commission further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations (see section 6.2.).
40. In carrying out the proportionality test, the Commission considers whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Commission assesses, in particular on the basis of the evidence that Member States are bound to provide whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities (see sections 6.3 and following).
41. The analysis of the compliance with the State aid requirements must be based on the specific characteristics of each national system. The Commission is aware of the differences in the national broadcasting systems and in the other characteristics of the Member States' media markets. Therefore, the assessment of the compatibility of State aid to public service broadcasters under Article 86(2) is made on a case by case basis, according to Commission practice,<sup>37</sup> in line with the basic principles set out in the following sections.
42. The Commission will also take into account the difficulty some smaller Member States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher<sup>38</sup> while equally considering potential concerns of other media in these Member States.

#### 6.1. Definition of public service remit

43. In order to meet the condition mentioned in point 37(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only

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<sup>37</sup> See for example the recent decisions of the Commission in the following cases: E 8/06, State funding for Flemish public service broadcaster VRT, OJ C 143, 10.6.2008, p. 7, E 4/05, State aid financing of RTE and TNAG (TG4), OJ C 121, 17.5.2008, E 3/2005, Aid to the German public service broadcasters, OJ C 185, 8.8.2007, p.1, E 9/05, Licence fee payments to RAI, OJ C 235, 23.9.2005, p. 3, E 10/2005, Licence fee payments to France 2 and 3, OJ C 240, 30.9.2005, p. 20, aid E8/05, Spanish national public service broadcaster RTVE, OJ C 239, 4.10.2006, p. 17, C 2/04, Ad hoc financing of Dutch public service broadcasters, OJ L 49, 22.2.2008, p. 1 .

<sup>38</sup> Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.

then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.

44. Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level, in accordance with their national legal order. Generally speaking, in exercising that competence, account must be taken of the Community concept of "services of general economic interest".
45. The definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.
46. Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities. Moreover, the terms of the public service remit should be sufficiently precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapter.
47. At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2).<sup>39</sup> Such a definition is generally considered consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity. As expressed by the Court of First Instance, the legitimacy of such a widely defined public service remit rests upon the qualitative requirements for the services offered by a public service broadcaster.<sup>40</sup> The definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms.
48. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet - in the wording of the Amsterdam Protocol - the "democratic, social and cultural needs of each society". That would normally be the position in the case of advertising, e-commerce,

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<sup>39</sup> Judgement in the case T-442/03, SIC v. Commission, [2008], paragraph 201, Judgement in joined cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2/Danmark v. Commission [2008] at 122 to 124

<sup>40</sup> These qualitative criteria are according to the Court of First Instance "the justification for the existence of broadcasting SGEIs in the national audiovisual sector". There is "no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator", T-442/03, SIC v. Commission, paragraph 211.

teleshopping, the use of premium rate numbers in prize games,<sup>41</sup> sponsoring or merchandising, for example. Moreover, a manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.

49. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot be viewed as part of the public service remit.<sup>42</sup>

## 6.2. Entrustment and supervision

50. In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of official act (for example, by legislation, contract or binding terms of reference).
51. The entrustment act(s) shall specify the precise nature of the public service obligations in line with section 6.1 above, and shall set out the conditions for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.
52. Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment act(s) should be modified accordingly, within the limits of Article 86(2). In the interest of allowing public service broadcasters to react swiftly to new technological developments, Member States may also foresee that the entrustment with a new service is provided following the assessment outlined in part 6.7 below, before the original entrustment act is formally consolidated.
53. It is not sufficient, however, that the public service broadcaster be formally entrusted with the provision of a well-defined public service. It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. In accordance with the Commission communication on the principles and guidelines for the Community's audiovisual policy in the digital era,<sup>43</sup> it is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit.<sup>44</sup>

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<sup>41</sup> Regarding the qualification, under the Audiovisual Media Services Directive, of prize games including the dialling of a premium rate number as teleshopping or advertising, see the judgement of the Court in Case C-195/06 *KommAustria v. ORF* of 18 October 2007.

<sup>42</sup> See Judgement in joined cases T-309/04, T-317/04, T 329/04 and T-336/04 *TV2* [2008] at 107-108.

<sup>43</sup> COM(1999) 657 final, section 3(6).

<sup>44</sup> See Judgement in the case T-442/03 *SIC/Commission* [2008] at 212.

54. In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by 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.
55. In the absence of sufficient and reliable indications that the public service is actually supplied as mandated, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

### **6.3. Choice of funding of public service broadcasting**

56. Public service duties may be either quantitative or qualitative or both. Whatever their form, they could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred.
57. Funding schemes can be divided into two broad categories: "single-funding" and "dual-funding". The "single-funding" category comprises those systems in which public service broadcasting is financed only through public funds, in whatever form. "Dual-funding" systems comprise a wide range of schemes, where public service broadcasting is financed by different combinations of State funds and revenues from commercial or public service activities, such as the sale of advertising space or programmes and the offering of services against payment.
58. As stated by the Amsterdam Protocol: "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting (...)". The Commission has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.
59. While Member States are free to choose the means of financing public service broadcasting, the Commission has to verify, under Article 86(2), that the State funding does not affect competition in the common market in a disproportionate manner, as referred to in paragraph 38 above.

### **6.4. Transparency requirements for the State aid assessment**

60. The State aid assessment by the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities including a clear separation of accounts.
61. Separation of accounts between public service activities and non-public service activities is normally already required at national level as it is essential to ensure transparency and accountability when using public funds. A separation of accounts provides a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing

is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Amsterdam Protocol.

62. Member States are required by Directive 2006/111/EC to take transparency measures in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving public service compensation in any form whatsoever in relation to such service and which carries out other activities, that is to say, non-public service activities. These transparency requirements are: (a) the internal accounts corresponding to different activities, i. e. public service and non-public service activities must be separate; (b) all costs and revenues must be correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles; and (c) the cost-accounting principles according to which separate accounts are maintained must be clearly established.<sup>45</sup>
63. These general transparency requirements apply also to broadcasters, in so far as they are entrusted with the operation of a service of general economic interest, receive public compensation in relation to such service, and also carry out other, non-public-service activities.
64. In the broadcasting sector, separation of accounts poses no particular problem on the revenue side. For this reason, the Commission considers that, on the revenue side, broadcasting operators should give detailed account of the sources and amount of all income accruing from the performance of public and non-public service activities.
65. On the cost side, all the expenses incurred in the operation of the public service may be taken into consideration. Where the undertaking carries out activities falling outside the scope of the public service, only the costs associated with the public service may be taken into consideration. The Commission recognises that, in the public broadcasting sector, separation of accounts may be more difficult on the cost side. This is because, in particular in the field of traditional broadcasting, Member States may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, public service and non-public service activities may share the same inputs to a large extent and the costs may not always be severable in a proportionate manner.
66. Costs specific to non-public service activities (e.g.: the marketing cost of advertising) should always be clearly identified and separately accounted. In addition, input costs which are intended to serve the development of activities in the field of public and non-public services simultaneously should be allocated proportionately to public service and non-public service activities respectively, whenever it is possible in a meaningful way.
67. In other cases, whenever the same resources are used to perform public service and non-public service tasks, the common input costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities.<sup>46</sup>

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<sup>45</sup> Article 4 of Directive 2006/111/EC.

<sup>46</sup> This implies reference to the hypothetical situation in which the non-public service activities were to be discontinued: the costs that would be so avoided represent the amount of common costs to be allocated to non-public service activities.

In such cases, costs that are entirely attributable to public service activities, while benefiting also non-public service activities, need not be apportioned between the two and can be entirely allocated to the public service activity. This difference to the approach generally followed in other utilities sectors is explained by the specificities of the public broadcasting sector. In the field of public broadcasting, the net benefits of commercial activities related to the public service activities have to be taken into account for the purpose of calculating the net public service costs and therefore to reduce the public service compensation level. This reduces the risk of cross-subsidisation by means of accounting common costs to public service activities.

68. The main example for the situation described in the preceding paragraph would be the cost of producing programmes in the framework of the public service mission of the broadcaster. These programmes serve both to fulfil the public service remit and to generate audience for selling advertising space. However, it is virtually impossible to quantify with a sufficient degree of precision how much of the program viewing fulfils the public service remit and how much generates advertising revenue. For this reason, the distribution of the cost of programming between the two activities risks being arbitrary and not meaningful.
69. The Commission considers that financial transparency can be further enhanced by an adequate separation between public service and non-public service activities at the level of the organisation of the public service broadcaster. Functional or structural separation normally makes it easier to avoid cross-subsidisation of commercial activities from the outset and to ensure transfer pricing and the respect of the arm's length principle. Therefore, the Commission invites Member States to consider functional or structural separation of significant and severable commercial activities, as a form of best practice.

#### **6.5. Net cost principle and overcompensation**

70. As a matter of principle, since over-compensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible State aid that must be repaid to the State subject to the clarifications provided in the present chapter with regard to public service broadcasting.
71. The Commission starts from the consideration that the State funding is normally necessary for the undertaking to carry out its public service tasks. However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs.
72. Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable

to include a profit element in the amount of compensation for the fulfilment of the public service mission.<sup>47</sup> However, in other cases, for example where specific public service obligations are entrusted to commercially run undertakings which need to remunerate the capital invested in them, a profit element which represents the fair remuneration of capital taking into account risk may be considered reasonable, if duly justified and provided that it is necessary for the fulfilment of the public service obligations.

73. Public service broadcasters may retain yearly overcompensation above the net costs of the public service (as "public service reserves") to the extent that this is necessary for securing the financing of their public service obligations. In general, the Commission considers that an amount of up to 10% of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations. As a rule, overcompensation above this limit must be recovered without undue delay.
74. By way of exception, public service broadcasters may be allowed to keep an amount in excess of 10% of the annual budgeted expenses of their public service mission in duly justified cases. This is only acceptable provided that this overcompensation is specifically earmarked in advance of and in a binding way for the purpose of a non-recurring, major expense necessary for the fulfilment of the public service mission.<sup>48</sup> The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication.
75. In order to allow the Commission to exercise its duties, Member States shall lay down the conditions under which the above overcompensation may be used by the public service broadcasters.
76. The overcompensation mentioned above shall be used for the purpose of financing public service activities, only. Cross-subsidisation of commercial activities is not justified and constitutes incompatible State aid.

#### 6.6. **Financial control mechanisms**

77. Member States shall provide for appropriate mechanisms to ensure that there is no over-compensation, subject to the provisions of par. 72 to 76. They shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of "public service reserves". It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit.

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<sup>47</sup> Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.

<sup>48</sup> Such special reserves may be justified for major technological investments (such as digitisation) which are foreseen to occur at a certain point in time and are necessary for the fulfilment of the public service remit; or for major restructuring measures necessary to maintain the continuous operation of a public service broadcaster within a well-defined time period.

78. Such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis. Member States shall make sure that effective measures can be put in place to recover overcompensation going beyond the provisions of the previous chapter 6.5 and cross-subsidisation.
79. The financial situation of the public service broadcasters should be subject to an in-depth review at the end of each financing period as provided for in the national broadcasting systems of the Member States, or in the absence thereof, a time period which normally should not exceed four years. Any "public service reserves" existing at the end of the financing period, or of an equivalent period as provided above, shall be taken into account for the calculation of the financial needs of the public service broadcaster for the next period. In case of "public service reserves" exceeding 10% of the annual public service costs on a recurring basis, Member States shall review whether the level of funding is adjusted to the public service broadcasters' actual financial needs.

#### **6.7. Diversification of public broadcasting services**

80. In recent years, audiovisual markets have undergone important changes, which have led to the ongoing development and diversification of the broadcasting offer. This has raised new questions concerning the application of the State aid rules to audiovisual services which go beyond broadcasting activities in the traditional sense.
81. In this respect, the Commission considers that public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society. In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests, provided that they are addressing the same democratic, social and cultural needs of the society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit.
82. In parallel with the rapid evolution of the broadcasting markets, the business models of broadcasters are also undergoing changes. In fulfilling their public service remit, broadcasters are increasingly turning to new sources of financing, such as online advertising or the provision of services against payment (so-called pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, paid online content downloads, etc.). The remuneration element in pay services can be related, for example, to the payment of network distribution fees or copyrights by broadcasters (for example if services over mobile platforms are provided against payment of a mobile distribution fee).
83. Although public broadcasting services have traditionally been free-to-air, the Commission considers that a direct remuneration element in such services – while

having an impact on access by viewers<sup>49</sup> - does not necessarily mean that these services are manifestly not part of the public service remit provided that the pay element does not compromise the distinctive character of the public service in terms of serving the social, democratic and cultural needs of citizens, which distinguishes public services from purely commercial activities.<sup>50</sup> The element of remuneration is one of the aspects to be taken into account when deciding on the inclusion of such services in the public service remit, as it may affect the universality and the overall design of the service provided as well as its impact on the market. Provided that the given service with a pay element satisfies specific social, democratic and cultural needs of society without leading to disproportionate effects on competition and cross-border trade, Member States may entrust public service broadcasters with such a service as part of their public service remit.

84. As set out above, State aid to public service broadcasters may be used for distributing audiovisual services on all platforms provided that the material requirements of the Amsterdam Protocol are met. To this end, Member States shall consider, by means of a prior evaluation procedure based on an open public consultation, whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society, while duly taking into account its potential effects on trading conditions and competition.
85. It is up to the Member States to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as “significant new service”. The “new” nature of an activity may depend among others on its content as well as on the modalities of consumption.<sup>51</sup> The “significance” of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.
86. It is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material

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<sup>49</sup> As the Council of Europe provided, in its Recommendation on the remit of public service media in the information society, “(...) member states may consider complementary funding solutions paying due attention to market and competition questions. In particular, in the case of new personalised services, member states may consider allowing public service media to collect remunerations (...). However, none of these solutions should endanger the principle of universality of public service media or lead to discrimination between different groups of society (...) When developing new funding systems, member states should pay due attention to the nature of the content provided in the interest of the public and in the common interest.”

<sup>50</sup> For example, the Commission considers that requiring direct payment from users for the provision of a specialised premium content offer would normally qualify as commercial activity. On the other hand, the Commission for example considers that the charging of pure transmission fees for broadcasting a balanced and varied programming over new platforms such as mobile devices would not transform the offer into a commercial activity.

<sup>51</sup> For example, the Commission considers that some forms of linear transmission, such as the simultaneous transmission of the evening TV news on other platforms (e.g. internet, mobile devices), may be qualified as not being “new” for the purposes of this Communication. Whether other forms of retransmission of public broadcasters' programs on other platforms qualify as significant new services, should be determined by Member States, taking into account the specificities and the features of the services in question.

conditions of the Amsterdam Protocol, taking into account the specificities of their national broadcasting systems, and the need to safeguard editorial independence of public service broadcasters.

87. In the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the consultation, its assessment as well as the grounds for the decision shall be made publicly available.
88. In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. This impact needs to be balanced with the value of the services in question for society. In the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society,<sup>52</sup> taking also into account the existing overall public service offer.
89. Such an assessment would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. Member States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster.
90. The considerations outlined above shall not prevent public service broadcasters from testing innovative new services (e.g. in the form of pilot projects) on a limited scale (e.g. in terms of time and audience) and for the purpose of gathering information on the feasibility of and the value added by the foreseen service, in so far as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service.
91. The Commission considers that the above assessment at the national level will contribute to ensuring compliance with the EC State aid rules. This is without prejudice to the competences of the Commission to verify that Member States respect the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative.

#### **6.8. Proportionality and market behaviour**

92. In accordance with the Amsterdam Protocol, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition

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<sup>52</sup> See also at footnote 40 on the justification of a broadcasting SGEI.

that are not necessary for fulfilling the public service mission. For example, the acquisition of premium content as part of the overall public service mission of public service broadcasters is generally considered legitimate. However, disproportionate market distortions would arise in the event that public service broadcasters were to maintain exclusive premium rights unused without offering to sublicense them in a transparent and timely manner. Therefore, the Commission invites Member States to ensure that public service broadcasters respect the principle of proportionality also with regard to the acquisition of premium rights, and to provide rules for the sub-licensing of unused exclusive premium rights by public service broadcasters.

93. When carrying out commercial activities, public service broadcasters shall be bound to respect market principles and, when they act through commercial subsidiaries, they shall keep arm's length relations with these subsidiaries. Member States shall ensure that public service broadcasters respect the arms' length principle, undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regard to their competitors, based on their public funding.
94. An example of anti-competitive practice may be price undercutting. A public service broadcaster might be tempted to depress the prices of advertising or other non-public service activities (such as commercial pay services) below what can reasonably be considered to be market-conform, so as to reduce the revenue of competitors, in so far as the resulting lower revenues are covered by the public compensation. Such conduct cannot be considered as intrinsic to the public service mission attributed to the broadcaster and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the Amsterdam Protocol.
95. In view of the differences between the market situations, the respect of the market principles by public service broadcasters, in particular the questions whether public service broadcasters are undercutting prices in their commercial offer, or whether they are respecting the principle of proportionality with regard to the acquisition of premium rights,<sup>53</sup> shall be assessed on a case-by-case basis, taking into account the specificities of the market and of the service concerned.
96. The Commission considers that it is in the first place up to the national authorities to ensure that public service broadcasters respect market principles. To this end, Member States shall have appropriate mechanisms in place which allow assessing any potential complaint in an effective way at the national level.
97. Notwithstanding the preceding paragraph, where necessary, the Commission may take action on the basis of Articles 81, 82, 86 and 87 of the EC Treaty.

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<sup>53</sup> For example, one of the relevant issues may be to consider whether public service broadcasters are consistently overbidding for premium programme rights in a way which goes beyond the needs of the public service mandate and results in disproportionate distortions on the marketplace.

## 7. TEMPORAL APPLICATION

98. This Communication will be applied from the first day following its publication in the *Official Journal of the European Union*. It will replace the 2001 Communication from the Commission on the application of State aid rules to public service broadcasting<sup>54</sup>.
99. The Commission will apply this Communication to all notified aid measures in respect of which it is called upon to take a decision after the Communication is published in the Official Journal, even where the projects were notified prior to that date.
100. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid<sup>55</sup>, the Commission will apply, in the case of non-notified aid,
- (a) this Communication, if the aid was granted after its publication;
  - (b) the 2001 Communication in all other cases.

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<sup>54</sup> OJ C 320 of 15.11.2001, p. 5-11.

<sup>55</sup> OJ C 119, 22.05.2002, p. 22.