

## Communication from the Commission on the application of State aid rules to public service broadcasting

(2001/C 320/04)

(Text with EEA relevance)

### 1. INTRODUCTION AND SCOPE OF THE COMMUNICATION

1. Over the last two 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. 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 that private operators would not necessarily fulfil to the optimal extent.

3. The increased competition, together with the presence of State-funded operators, has also led to growing concerns for a level playing field, which have been brought to the Commission's attention by private operators. The vast majority of the complaints allege infringements of Article 87 of the EC Treaty in relation to the public funding schemes established in favour of public service broadcasters.

4. This Communication sets out the principles to be followed by the Commission in the application of Articles 87 and 86(2), of the EC Treaty to State funding of public service broadcasting. This will make the Commission's policy in this area as transparent as possible.

### 2. THE ROLE OF PUBLIC SERVICE BROADCASTING

5. As stated by the recent Commission communication on services of general interest in Europe: *'The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the broadcasting sector has, since its inception, been subject to specific regulation in the general interest. This regulation has been based on common values,*

*such as freedom of expression and the right of reply, pluralism, protection of copyright, promotion of cultural and linguistic diversity, protection of minors and of human dignity, consumer protection' (1).*

6. 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.

7. As stated by the high-level group on audiovisual policy chaired then by Commissioner Oreja, public service broadcasting *'has an important role to play in promoting cultural diversity in each country, in providing educational programming, in objectively informing public opinion, in guaranteeing pluralism and in supplying, democratically and free-of-charge, quality entertainment' (2).*

8. 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 ensures that all citizens participate to a fair degree in public life.

9. The role of the public service (3) in general is recognised by the Treaty. The key provision in this respect is Article 86(2), which reads as follows:

*'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.*

(1) COM(2000) 580 final, p. 35.

(2) 'The digital age European audiovisual policy. Report from the high-level group on audiovisual policy', 1998.

(3) 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).

10. This provision is confirmed by Article 16 of the EC Treaty, concerning services of general economic interest, which was introduced by the Amsterdam Treaty and entered into force on 1 May 1999 — Article 16 states:

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

11. The interpretation of these principles in the light of the particular nature of the broadcasting sector is outlined in the interpretative protocol on the system of public broadcasting in the Member States, annexed to the EC Treaty, (hereinafter referred to as 'the 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 also reaffirmed in the Resolution of the Council and of the Representatives of the Governments of the Member States, Meeting within the Council of 25 January 1999 concerning public service broadcasting, (hereinafter referred to as 'the Resolution'). As underlined by the Resolution: *'Broad public access, without discrimination and on the basis of equal opportunities, to various channels and services is a necessary precondition for fulfilling the special obligation of public service broadcasting'*. Moreover, public service broadcasting needs to *'benefit from technological progress'*, bring *'the public the benefits of the new audiovisual and information services and the new technologies'* and to undertake *'the development and diversification of activities in the digital age'*. Finally, *'public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole; in this context it is legitimate for public service broadcasting to seek to reach wide audiences'* <sup>(4)</sup>.

13. Given these characteristics, which are peculiar to the broadcasting sector, a public service mandate encompassing *'a wide range of programming in accordance*

*with its remit'*, as stated by the Resolution, can in principle be considered as legitimate, as aiming at a balanced and varied programming, capable of preserving a certain level of audience for public broadcasters and, thus, of ensuring the accomplishment of the mandate, i.e. the fulfilment of the democratic, social and cultural needs of the society and the guaranteeing of pluralism.

14. It should be noted that commercial broadcasters, of whom a number are subject to public service requirements, also play a role in achieving the objectives of the Protocol to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes.

### 3. THE LEGAL CONTEXT

15. The application of State aid rules to public service broadcasting has to take into account a wide number of different elements. The EC Treaty includes 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. Whereas the Treaty of Amsterdam introduced a specific provision (Article 16) on services of general economic interest and an interpretative protocol on the system of public service broadcasting, the Treaty of Maastricht had already introduced an article which defines the role of the Community in the field of culture (Article 151) and a possible compatibility clause for State aid aimed at promoting culture (Article 87(3)(d)). The European Parliament and the Council have adopted Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities <sup>(5)</sup>. The Commission has adopted Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings <sup>(6)</sup>. These rules are interpreted by the Court of Justice and the Court of First Instance. The Commission has also adopted the communication mentioned in point 5 and adopted several communications on the application of the State aid rules.

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

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

16. Article 87(1) states: *'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'*.

<sup>(5)</sup> OJ L 298, 17.10.1989, p. 23, as amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60).

<sup>(6)</sup> OJ L 195, 29.7.1980, p. 35, as last amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).

<sup>(4)</sup> OJ C 30, 5.2.1999, p. 1.

17. The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 87(1). State financing of public service broadcasters is normally to be regarded as State aid, inasmuch as it meets the above criteria. Public service broadcasters are normally financed out of the State budget or through a levy on TV-set holders. In certain specific circumstances, the State makes capital injections or debt cancellations in favour of public service broadcasters. These financial measures are normally attributable to the public authorities and involve the transfer of State resources. Moreover, and to the extent that such measures fail to satisfy the market economy investor test, in accordance with the 'Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings' <sup>(7)</sup> and the Commission communication to the Member States on the 'Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector' <sup>(8)</sup>, they favour in most cases only certain broadcasters and may thereby distort competition. Naturally, the existence of State aid will have to be assessed on a case by case basis, and depends also on the specific nature of the funding <sup>(9)</sup>.
18. 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>(10)</sup>. Thus, State financing of public service broadcasters can generally be considered to affect trade between Member States. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State.
19. According to the case-law of the Court <sup>(11)</sup>, any transfer of State resources to a certain undertaking — also when covering net costs of public service obligations — has to be regarded as State aid (provided that all the conditions for the application of Article 87(1) are fulfilled).

<sup>(7)</sup> Bulletin EC 9-1984.

<sup>(8)</sup> OJ C 307, 13.11.1993, p. 3.

<sup>(9)</sup> Aid NN 88/98, 'Financing of a 24-hour advertising-free news channel with licence fee by the BBC', OJ C 78, 18.3.2000, p. 6 and aid NN 70/98, 'State aid to public broadcasting channels 'Kinderkanal and Phoenix'' (OJ C 238, 21. 8.1999, p. 3).

<sup>(10)</sup> Cases 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>(11)</sup> Cases T-106/95, *FFSA and Others v Commission* [1997] ECR II-229; T-46/97, *SIC v Commission*, [2000] ECR II-2125 and C-332/98, *France v Commission*, [2000] ECR I-4833.

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

20. 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).
21. Existing aid is regulated by Article 88(1), which states that: 'The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market'.
22. Pursuant to Article 1(b)(i) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(12)</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'.
23. Pursuant to Article 1(b)(v), existing aid also includes 'aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State'.
24. In accordance with the case-law of the Court <sup>(13)</sup>, the Commission must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Commission must take into account all the legal and economic elements related to the broadcasting system of a given Member State. Although the legal and economic elements relevant for such an assessment present common features in all or most Member States, the Commission believes that a case by case approach is the most appropriate <sup>(14)</sup>.

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

25. State aid to public broadcasters must be examined by the Commission in order to determine whether or not it can be found compatible with the common market. The derogations listed in Article 87(2) and Article 87(3) can be applied.

<sup>(12)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(13)</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>(14)</sup> As concerns recent Commission practice in this field, see footnote 9.

26. 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. Accordingly, 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. 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. Therefore, the notion of 'culture' within the meaning of Article 87(3)(d) must be interpreted restrictively. As stated by the Commission in its *Kinderkanal and Phoenix* decision, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture<sup>(15)</sup>. In this respect, it should be noted that the Protocol distinguishes between the cultural, the social and the democratic needs of each society. Education may, of course, have a cultural aspect.
27. State aid to public service broadcasters often does not differentiate between those three needs. Consequently, unless a Member State provides for the separate definition and the separate funding of State aid to promote culture alone, such aid cannot generally be approved under Article 87(3)(d). It can normally be assessed, however, on the basis of Article 86(2) concerning services of general economic interest. In any event, whatever the legal base for assessing compatibility, the substantive analysis would be conducted by the Commission on the basis of the same criteria, namely those set out in this communication.
- 6. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 86(2)**
28. The role of services of general economic interest in attaining the fundamental objectives of the European Union has been fully acknowledged by the Commission in its communication on services of general interest in Europe, mentioned in point 5.
29. 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);
  - (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);
  - (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).
30. It is for the Commission, as guardian of the Treaty, to assess whether these criteria are satisfied.
31. In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Protocol, which refers to the '*public service remit as conferred, defined and organised by each Member State*' (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting '*in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit ... and ... does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*' (proportionality).
- 6.1. Definition of public service remit**
32. In order to meet the condition mentioned in point 29(i) for application of Article 86(2), it is necessary to establish an official definition of the public service mandate. Only then can the Commission assess with sufficient legal certainty whether the derogation under Article 86(2) is applicable.
33. Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level. Generally speaking, in exercising that competence, account must be taken of the Community concept of 'services of general economic interest'. However, given the specific nature of the broadcasting sector, a 'wide' definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.
34. Similarly, the public service remit might include certain services that are not 'programmes' in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.

<sup>(15)</sup> See footnote 9.

35. Whenever the scope of the public service remit is extended to cover new services the definition and entrustment act should be modified accordingly, within the limits of Article 86(2).

36. The Commission's task is to verify whether or not Member States respect the Treaty provisions<sup>(16)</sup>. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet — in the wording of the Protocol — the *'democratic, social and cultural needs of each society'*. That would normally be the position in the case of e-commerce, for example. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot normally be viewed as part of the public service remit.

37. The definition of the public service mandate 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.

38. 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.

39. Finally, the terms of the public service remit should be precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapter.

## 6.2. Entrustment and supervision

40. In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act

(for example, by legislation, contract or terms of reference).

41. 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 monitor its application. 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>(17)</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.

42. 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. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking.

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

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

### 6.3.1. The choice of funding

44. 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.

45. 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 activities, such as the sale of advertising space or programmes.

<sup>(16)</sup> See Case C-179/90, *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

<sup>(17)</sup> COM(1999) 657 final, section 3(6).

46. As stated by the 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 communication on services of general interest in Europe, mentioned in point 5, further clarifies that: *'The choice of the financing scheme falls within the competence of the Member State, and there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenues) rather than a single funding scheme (solely public funds) as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest'* <sup>(18)</sup>.
47. While Member States are free to choose the means of financing public service broadcasting, the Commission has to verify, under Article 86(2), that the derogation from the normal application of the competition rules for the performance of the service of general economic interest does not affect competition in the common market in a disproportionate manner. The test is of a 'negative' nature: it examines whether the measure adopted is not disproportionate. The aid should also not affect the development of trade to such an extent as would be contrary to the interests of the Community.
48. The Protocol confirms this approach also for public service broadcasting, stating that funding should not *'affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'*.
- 6.3.2. *Transparency requirements for the State aid assessment*
49. The above-described assessment by the Commission requires a clear and precise definition of the public service remit and a clear and appropriate separation between public service activities and non-public service activities. Separation of accounts between these two spheres is normally already required at national level to ensure transparency and accountability when using public funds. A separation of accounts is necessary to allow the Commission to carry out its proportionality test. It will provide the Commission with a tool for examining alleged cross-subsidisation and for defending justified compensation payments for general economic interest tasks. Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Protocol.
50. The transparency requirements in the financial relations between public authorities and public undertakings and within undertakings granted special or exclusive rights or entrusted with the operation of a service of general economic interest, are indicated in Directive 80/723/EEC.
51. The Member States have been required by Directive 80/723/EEC to take the measures necessary to ensure — 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 State aid in any form whatsoever and which carries out other activities, that is to say, non-public service activities — that: (a) the internal accounts corresponding to different activities, i. e. public service and non-public service activities, are separate; (b) all costs and revenues are 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 are clearly established.
52. The general transparency requirements apply also to broadcasters as indicated in the fifth recital of Directive 2000/52/EC. The new requirements apply to public service broadcasters, in so far as they are beneficiaries of State aid and they are entrusted with the operation of a service of general economic interest, for which the State aid was not fixed for an appropriate period following an open, transparent and non-discriminatory procedure. The obligation of separation of accounts does not apply to public service broadcasters whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of those services.
53. In the broadcasting sector, separation of accounts poses no particular problem on the revenue side, but may not be straightforward or, indeed, feasible on the cost side. This is due to the fact that, in the broadcasting sector, Member States may consider the whole programming of the broadcasters as covered by the public service remit, while at the same time allowing for its commercial exploitation. In other words, different activities share the same inputs to a large extent.
54. For these reasons, the Commission considers that, on the revenue side, broadcasting operators should give a detailed account of the sources and amount of all income accruing from the performance of non-public service activities.
55. On the expenditure side, costs specific to the non-public service activity should be clearly identified. In addition, whenever the same resources — personnel, equipment, fixed installation etc. — are used to perform public service and non-public service tasks, their costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities <sup>(19)</sup>.

<sup>(18)</sup> See footnote 1, p. 36.

<sup>(19)</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.

56. The above implies that, contrary to the approach generally adopted in other utilities sectors, costs that are entirely attributable to public service activities, while benefiting also commercial activities, need not be apportioned between the two and can be entirely allocated to public service. This could be the case, for example, with the production costs of a programme which is shown as part of the public service remit but is also sold to other broadcasters. The main example, however, would be that of audience, which is generated both to fulfil the public service remit and to sell advertising space. It is considered that a full distribution of these costs between the two activities risks being arbitrary and not meaningful. However, cost allocation from the point of view of transparency of accounts should not be confused with cost recovery in the definition of pricing policies. The latter issue is addressed in point 58.

### 6.3.3. Proportionality

57. In carrying out the proportionality test, 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 this test, it is necessary that the State aid 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 that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid.

58. On the other hand, there might be market distortions which are not necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors. Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster. Whenever a public service broadcaster undercuts prices in non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate

the presence of overcompensation of public service obligations 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 Protocol.

59. Accordingly, in carrying out the proportionality test, the Commission will consider whether or not any distortion of competition arising from the aid can be justified in terms of the need to perform the public service as defined by the Member State and to provide for its funding. When necessary the Commission will also take action in the light of other Treaty provisions.

60. The analysis of the effects of State aid on competition and development of trade will inevitably have to be based on the specific characteristics of each situation. The actual competitive structure and other characteristics of each of the markets cannot be described in the present communication, as they are generally quite different from each other. For the same reason, this Communication cannot *ex ante* define the conditions under which the prices of the public service broadcasters are in line with the principles explained in point 58. Therefore the assessment under Article 86(2) of the compatibility of State aid to public broadcasters can finally only be made on a case by case basis, according to Commission practice.

61. In its assessment, the Commission will take into account the fact that, to the extent that State aid is necessary to carry out the public service obligation, the system as a whole might also have the positive effect of maintaining an alternative source of supply in some relevant markets<sup>(20)</sup>. However, this effect has to be balanced against possible negative effects of the aid, such as preventing other operators from entering these markets, thereby allowing a more oligopolistic market structure, or leading to possible anti-competitive behaviour of public service operators in the relevant markets.

62. 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>(21)</sup>.

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<sup>(20)</sup> This does not mean that State aid can be justified as a tool, which increases supply and competition in a market. State aid which allows an operator to stay in the market in spite of its recurrent losses causes a major distortion of competition, as it leads in the long run to higher inefficiency, smaller supply and higher prices for consumers. Lifting legal and economic barriers to entry, ensuring an effective anti-trust policy and promoting pluralism are more effective instruments in this respect. Natural monopolies are normally subject to regulation.

<sup>(21)</sup> Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.