

## PART IV: SECTOR SPECIFIC RULES

### Application of state aid rules to public service broadcasting<sup>1</sup>

#### 1. INTRODUCTION AND SCOPE

- (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 the EFTA States to allow other operators to broadcast. EFTA 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, EFTA 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.
- (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 Authority's attention by private operators. The complaints allege infringements of Articles 59 and 61 of the EEA Agreement in relation to public funding of public service broadcasters.
- (4) The previous Chapter on the application of state aid rules to public service broadcasting of the State Aid Guidelines<sup>2</sup> has first set out the framework governing state funding of public service broadcasting. It has served as a good basis for the Authority to handle cases in the field of 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 online 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

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<sup>1</sup> This Chapter corresponds to the Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 257, 27.10.2009, p. 1.

<sup>2</sup> Adopted by Decision No 90/04/COL of 23 April 2004 amending for the forty-sixth time the procedural and substantive rules in the field of State aid by introducing a new Chapter 24C: The application of the State aid rules to public service broadcasting, OJ L 327, 13.12.2007, p. 21 and EEA Supplement No 59, 13.12.2007, p. 1.

variety of options for consumers to access media content has 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) In the 2003 *Altmark* judgment<sup>3</sup>, the Court of Justice of the European Union (hereinafter referred to as the Court of Justice) defined the conditions under which public service compensation does not constitute state aid. In 2005, the Authority adopted a new Chapter on state aid in the form of public service compensation<sup>4</sup> and included it into its State Aid Guidelines. Moreover, in 2006, the Commission Decision 2005/842/EC 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<sup>5</sup> was incorporated into the EEA Agreement as Act referred to at point 1h of Annex XV to the EEA Agreement, as adapted by Protocol 1 thereto (hereinafter referred to as Decision 2005/842/EC).<sup>6</sup> The EFTA States are currently in the process of incorporation of Directive 2007/65/EC (Audiovisual Media Services Directive)<sup>7</sup>, extending the scope of the EEA wide audiovisual regulation to emerging media services.
- (7) These changes in the market and in the legal environment have called for an update to the Chapter on the application of state aid rules to public service broadcasting. The 2005 State Aid Action Plan<sup>8</sup> announced that the European Commission (hereinafter referred to as 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 Authority and the EFTA States took part in the Commission's public consultations on the review of the 2001 Communication on the application of State aid rules to public service broadcasting.<sup>9</sup> The present Chapter consolidates the Commission's and the Authority'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 Authority in the application of Articles 61 and 59(2) of the EEA Agreement to the public funding of audiovisual

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<sup>3</sup> Case C-280/2000 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (Altmark)* (2003) ECR I-7747.

<sup>4</sup> OJ L 109, 26.4.2007, p. 44 and EEA Supplement No 20, 26.4.2007, p. 1, also available on the Authority's website <http://www.eftasurv.int/?1=1&showLinkID=16997&1=1>.

<sup>5</sup> OJ L 312, 29.11.2005, p. 67.

<sup>6</sup> Joint Committee Decision No 91/2006, OJ L 289, 19.10.2006, p. 31 and EEA Supplement No 52, 19.10.2006, p. 24, entry into force on 8.7.2006.

<sup>7</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11.12.2007 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, 18.12.2007, p. 27.

<sup>8</sup> COM(2005) 107 final.

<sup>9</sup> OJ C 320, 15.11.2001, p. 5. This Communication corresponds to the previous Chapter on the application of state aid rules to public service broadcasting adopted by the Authority on 23 April 2004, see footnote 2 above.

services in the broadcasting sector<sup>10</sup>, taking into account recent market and legal developments. The present Chapter 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 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the Court of Justice<sup>11</sup>.
- (11) The role of the public service<sup>12</sup> in general is recognised by the EEA Agreement, in particular in Article 59(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 Agreement, 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 Contracting Parties.”*
- (12) The importance of public service broadcasting for social, democratic and cultural life was reaffirmed in the Act referred to at point 33 of Annex XI to the EEA Agreement (*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*)<sup>13</sup>, as adapted by Protocol 1 thereto (hereinafter referred to as the Resolution concerning public service broadcasting)<sup>14</sup>. As underlined by the Resolution concerning public service broadcasting *"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"*,

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<sup>10</sup> For the purpose of the present Chapter, 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 online text-based information services. This notion of *"audiovisual service(s)"* must be distinguished from the narrower concept of *"audiovisual media service(s)"*, as defined in Article 1(a) of Directive 2007/65/EC (Audiovisual Media Services Directive).

<sup>11</sup> Case C-260/89 *ERT* (1991) ECR I-2925.

<sup>12</sup> For the purpose of the present Chapter, the term *"public service"* has to be intended as referring to the term *"service of general economic interest"* used in Article 59(2) of the EEA Agreement.

<sup>13</sup> OJ C 30, 5.2.1999, p. 1.

<sup>14</sup> The Resolution concerning public service broadcasting was incorporated to the EEA Agreement as an act which the Contracting Parties shall take note of by Decision No 118/1999, OJ No L 325, 21.12.2000, p. 33 and EEA Supplement No 60, 21.12.2000, p. 423 (Icelandic) and p. 424 (Norwegian), entry into force on 1.10.1999.

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"*.

- (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<sup>15</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>16</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>17</sup>, and the remit of public service media in the information society<sup>18</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 the information society, respecting the public/private dual structure of the European electronic media landscape and paying attention to market and competition questions"*.
- (15) 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 Resolution concerning public service broadcasting 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 Directive 2007/65/EC (Audiovisual Media Services Directive), *"the coexistence 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**

- (16) 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 Article 61 of the EEA Agreement on state aid and Article 59(2) of the EEA Agreement on the application of the rules of the EEA Agreement and the competition rules, in particular,

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<sup>15</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was signed in Paris on 20.10.2005. It was then ratified by Norway and accepted by Iceland.

<sup>16</sup> Article 6(1) and 6(2)(h) of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

<sup>17</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 31.1.2007 at the 985th meeting of the Ministers' Deputies.

<sup>18</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 31.1.2007 at the 985th meeting of the Ministers' Deputies.

to services of general economic interest. Protocol 3 to the Agreement on the Establishment of a Surveillance Authority and of a Court of Justice (hereinafter referred to as Protocol 3) established the rules of procedure in state aid cases.

- (17) The EEA Agreement does not contain a provision similar to Article 167 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) (ex Article 151 of the EC Treaty) concerning culture or a “*cultural exemption*” for aid to promote culture similar to that contained in Article 107(3)(d) TFEU (ex Article 87(3)(d) of the EC Treaty). However, this does not mean that an exemption for such measures is excluded. As accepted by the Authority in previous cases, such support measures might be approved on cultural grounds on the basis of Article 61(3)(c) of the EEA Agreement<sup>19</sup>.
- (18) The regulatory framework concerning “*audiovisual media services*” is coordinated at European level by the Directive 2007/65/EC (Audiovisual Media Services Directive). The financial transparency requirements concerning public undertakings are regulated by the Act referred to at point 1a of Annex XV to the EEA Agreement (*Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings*)<sup>20</sup>, as adapted by Protocol 1 thereto (hereinafter referred to as Directive 2006/111/EC (Transparency Directive))<sup>21</sup>.
- (19) These rules are subject to interpretation by the EFTA Court within the “EFTA pillar” and by the Court of Justice within the “European Union pillar”. The Authority has also adopted several sets of guidelines on the application of the state aid rules which correspond to similar guidelines issued by the Commission. In particular, in 2005, the Authority adopted the Chapter on state aid in the form of public service compensation and in 2006, Decision 2005/842/EC was incorporated into the EEA Agreement, clarifying the requirements of Article 59(2) of the EEA Agreement. The latter is also applicable in the field of broadcasting, to the extent that the conditions provided in Article 2(1)(a) of Decision 2005/842/EC are met<sup>22</sup>.

#### **4. APPLICABILITY OF ARTICLE 61(1) of the EEA Agreement**

##### **4.1. The state aid character of state financing of public service broadcasters**

- (20) In line with Article 61(1) of the EEA Agreement, the concept of state aid includes the following conditions: (a) there must be an intervention by the State or by means of State

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<sup>19</sup> For instance, EFTA Surveillance Authority Decision No 180/09/COL of 31.3.2009 on the aid schemes for audiovisual productions and development of screenplays and educational measures, OJ C 236, 1.10.2009, p. 5 and EEA Supplement No 51, 1.10.2009, p. 17. See also the Chapter on state aid to cinematographic and other audiovisual works of the Authority’s State Aid Guidelines, adopted by the EFTA Surveillance Authority Decision No 788/08/COL of 17.12.2008 amending, for the sixty-seventh time, the procedural and substantive rules in the field of state aid by amending the existing chapters on reference and discount rates and on state aid granted in the form of guarantees and by introducing a new chapter on recovery of unlawful and incompatible state aid, on state aid to cinematographic and other audiovisual works and state aid for railway undertakings, not published yet, available on the Authority’s website: <http://www.eftasurv.int/?l=1&showLinkId=15643&l=1>.

<sup>20</sup> OJ L 318, 17.11.2006, p.17.

<sup>21</sup> Joint Committee Decision No 55/2007, OJ No L 266, 11.10.2007, p. 15 and EEA Supplement No 48, 11.10.2007, p. 12, entry into force on 9.6.2007.

<sup>22</sup> According to Article 2(1)(a) of Decision 2005/842/EC, 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*”.

resources; (b) the intervention must be liable to affect trade between the Contracting Parties; (c) it must confer an advantage of the beneficiary; (d) 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 Court of Justice and the EFTA Court.

- (21) The effect of State intervention, not its purpose, is the decisive element in any assessment of its State aid content under Article 61(1) of the EEA Agreement. 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 the Contracting Parties. 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 EEA 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 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 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.

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<sup>23</sup> Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark v Commission (TV2)* (2008) ECR II-2935, paragraph 156.

<sup>24</sup> Regarding the qualification of licence fee funding as State resources, see *TV2* judgment, cited above,, paragraphs 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.

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

- (25) The funding schemes currently in place in most of the EFTA States were introduced a long time ago. As a first step, therefore, the Authority must determine whether these schemes may be regarded as "*existing aid*" within the meaning of Article 1(1) of Part I of Protocol 3. In line with this provision, "*the EFTA Surveillance Authority shall, in cooperation with the EFTA 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 EEA Agreement*".
- (26) Pursuant to Article 1(b)(i) of Part II of Protocol 3, existing aid includes "... *all aid which existed prior to the entry into force of the EEA Agreement in the respective EFTA 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 EEA Agreement*".
- (27) Pursuant to Article 1(b)(v) of Part II of Protocol 3, 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 European Economic Area and without having been altered by the EFTA State*".
- (28) In accordance with the case law of the Court of Justice<sup>26</sup>, the Authority must verify whether or not the legal framework under which the aid is granted has changed since its introduction. The Authority believes that a case by case approach is the most appropriate<sup>27</sup>, taking into account all the elements related to the broadcasting system of a given EFTA State.
- (29) According to the case law in *Gibraltar*<sup>28</sup>, not every alteration to existing aid should be regarded as changing the existing aid into new aid. According to the General Court, "*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.*"
- (30) In light of the above considerations, in its decision-making practice the Authority has generally examined: (a) whether the original financing regime for public service broadcasters is existing aid in line with the rules indicated in paragraphs 26 and 27 above; (b) 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 (c) in case subsequent modifications are substantial, whether they are severable from the original

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<sup>26</sup> C-44/93 *Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State* (1994) ECR I-3829.

<sup>27</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 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 10.12.2003 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 15.10.2003 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>28</sup> Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission (Gibraltar)* (2002) ECR II-2309.

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 61(3) OF THE EEA AGREEMENT**

- (31) Although compensation for public service broadcasting is typically assessed under Article 59(2) of the EEA Agreement, the derogations listed in Article 61(3) of the EEA Agreement may in principle also apply in the field of broadcasting, provided that the relevant conditions are met.
- (32) The EEA Agreement does not contain a provision corresponding to Article 167(4) TFEU, which obliges the Commission to take cultural aspects into account in its actions under other provisions of the Treaty on the Functioning of the European Union, in particular in order to respect and to promote the diversity of its cultures. Nor does it contain a cultural exemption similar to Article 107(3)(d) TFEU, which 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. This does not, however, mean that the application of the state aid rules does not leave any room for the consideration of cultural aspects. The EEA Agreement recognises the need for strengthening cultural cooperation in Article 13 of Protocol 31. In this respect, it should be recalled that the Authority established in a decision-making practice regarding state aid for film production and film related activities that measures in favour of cinematographic and audiovisual production might be approved on cultural grounds under the application of Article 61(3)(c) of the EEA Agreement, provided that this approach takes the criteria developed by the Commission sufficiently into account and that the approach does not deviate from the Commission's practice prior to the adoption of Article 107(3)(d) TFEU.<sup>29</sup>
- (33) It is for the Authority to decide on the actual application of any exemption provision in Article 61(3) of the EEA Agreement and how cultural aspects should be taken into account. It should be recalled that the provisions granting exemption from the prohibition of state aid have to be applied strictly. Accordingly, the Authority considers that the cultural derogation may be applied in those cases where the cultural product is clearly identified or identifiable<sup>30</sup>. Moreover, the Authority 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>31</sup>. Furthermore, the educational and democratic needs of an EFTA State have to be regarded as distinct from the promotion of culture<sup>32</sup>.
- (34) State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically

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<sup>29</sup> See, for instance, Decision No 32/02/COL of 20 February 2002, Decision No 169/02/COL of 18.9.2002, Decision No 186/03 of 29.10.2003, Decision No 179/05/COL of 15.7.2005 and Decision No 342/06/COL of 14.11.2006. See also the Chapter on state aid to cinematographic and other audiovisual works of the Authority's State Aid Guidelines.

<sup>30</sup> For example, Commission Decisions NN 88/98, *BBC 24-hours*, OJ C 78, 18.3.2000 and NN 70/98, *Kinderkanal and Phoenix*, cited above.

<sup>31</sup> For example, Commission Decision N 458/2004, *State aid to Espacio Editorial Andaluza Holding sl.*, OJ C 131, 28.5.2005, p. 12.

<sup>32</sup> NN 70/98, *Kinderkanal and Phoenix*, cited above.

aimed at promoting cultural objectives, such aid cannot in principle be approved under Article 61(3)(c) of the EEA Agreement as cultural aid. 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 59(2) of the EEA Agreement, on the basis of the criteria set out in the present Chapter.

## **6. ASSESSMENT OF THE COMPATIBILITY OF STATE AID UNDER ARTICLE 59(2) OF THE EEA AGREEMENT**

- (35) In accordance with Article 59(2) of the EEA Agreement, *"[u]ndertakings 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 Agreement, 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 Contracting Parties."*
- (36) The Court of Justice has consistently held that Article 106 TFEU (ex Article 86 of the EC Treaty), corresponding to Article 59 of the EEA Agreement, provides for a derogation and must therefore be interpreted restrictively. The Court of Justice 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>33</sup>;
  - (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment)<sup>34</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>35</sup>.
- (37) In the specific case of public broadcasting the above approach has to be adapted in the light of the Resolution concerning public service broadcasting, 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 *"insofar 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).
- (38) It is for the Authority to assess, on the basis of evidence provided by the EFTA States, whether these criteria are satisfied. As regards the definition of the public service remit, the role of the Authority is to check for manifest errors (see section 6.1). The Authority further verifies whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations (see section 6.2).

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<sup>33</sup> Case 172/80 *Zuechner* (1981) ECR 2021.

<sup>34</sup> Case C-242/95 *GT-Link* (1997) ECR 4449.

<sup>35</sup> Case C-159/94 *EDF and GDF* (1997) ECR I-5815.

- (39) In carrying out the proportionality test, the Authority 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 Authority assesses, in particular on the basis of the evidence that EFTA 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 section 6.3 and following).
- (40) The analysis of the compliance with the state aid requirements must be based on the specific characteristics of each national system. The Authority is aware of the differences in the national broadcasting systems and in the other characteristics of the EFTA States' media markets. Therefore, the assessment of the compatibility of state aid to public service broadcasters under Article 59(2) is made on a case-by-case basis, according to the Commission's and the Authority's practice<sup>36</sup>, in line with the basic principles set out in the following sections.
- (41) The Authority will also take into account the difficulty some EFTA States may have to collect the necessary funds, if costs per inhabitant of the public service are, *ceteris paribus*, higher<sup>37</sup> while equally considering potential concerns of other media in these EFTA States.
- (42) As the Commission's and the Authority's practice demonstrates, a measure which does not fulfil all of the *Altmark* criteria, will still have to be analysed according to Article 106(2) TFEU, respectively Article 59(2) of the EEA Agreement.<sup>38</sup>

### 6.1. Definition of public service remit

- (43) In order to meet the condition mentioned in point 36(i) above for application of Article 59(2) of the EEA Agreement, it is necessary to establish an official definition of the public service mandate. Only then can the Authority assess with sufficient legal certainty whether the derogation under Article 59(2) of the EEA Agreement is applicable.
- (44) Definition of the public service mandate falls within the competence of the EFTA 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 concept of "*services of general economic interest*" (hereinafter referred to as SGEI).
- (45) The definition of the public service mandate by the EFTA 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 EFTA State to be included in the public service remit or not. Without a clear and precise definition of the obligations imposed upon the

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<sup>36</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 and TNAG (TG4)*, OJ C 121, 17.5.2008, p. 5; E 3/05, *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 10/05, *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 service broadcasters*, OJ L 49, 22.2.2008, p. 1. See also EFTA Surveillance Authority Decision No 306/09/COL of 8 July 2009 on the Norwegian Broadcasting Corporation, available on the Authority's website <http://www.eftasurv.int/?1=1&showLinkID=16906&1=1>.

<sup>37</sup> Similar difficulties may also be encountered when public service broadcasting is addressed to linguistic minorities or to local needs.

<sup>38</sup> Commission Decision C 62/1999, RAI, paragraph 99 and C 85/2001, RTP, paragraph 158.

public service broadcaster, the Authority would not be able to carry out its tasks under Article 59(2) of the EEA Agreement 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 EFTA States' authorities can effectively monitor compliance, as described in the following section.
- (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 legitimate under Article 59(2) of the EEA Agreement<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 General Court, 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 Authority is limited to checking for manifest error. It is not for the Authority 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 the democratic, social and cultural needs of each society. That would normally be the position in the case of advertising, e-commerce, 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>.

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<sup>39</sup> Case T-442/03 *SIC v Commission* (2008) ECR II-1161, paragraph 201 and *TV2* judgement, cited above, paragraphs 122-124.

<sup>40</sup> These qualitative criteria are according to the General Court "*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*", see *SIC v Commission*, cited above, paragraph 211.

<sup>41</sup> Regarding the qualification of prize games, including the dialling of a premium rate number as teleshopping or advertising, under the Directive 2007/65/EC (Audiovisual Media Services Directive), see Case C-195/06 *Österreichischer Rundfunk (ORF)* (2007) ECR I-8817.

<sup>42</sup> See *TV2* judgment, cited above, paragraphs 107-108.

## **6.2. Entrustment and supervision**

- (50) In order to benefit from the exemption under Article 59(2) of the EEA Agreement, the public service remit should be entrusted to one or more undertakings by means of an 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 59(2) of the EEA Agreement. In the interest of allowing public service broadcasters to react swiftly to new technological developments, EFTA States may also foresee that the entrustment with a new service is provided following the assessment outlined in section 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. It is not for the Authority to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the EFTA States of compliance by the broadcaster with its public service remit including the qualitative standards set out in that remit<sup>43</sup>.
- (54) It is within the competence of the EFTA State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Authority to carry out its tasks under Article 59(2) of the EEA Agreement. 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 insofar 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 Authority would not be able to carry out its tasks under Article 59(2) of the EEA Agreement 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

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<sup>43</sup> See Case *SIC v Commission*, cited above, paragraph 212.

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 in the Resolution concerning public service broadcasting: "[T]he 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 Authority has therefore no objection in principle to the choice of a dual financing scheme rather than a single funding scheme.
- (59) While EFTA States are free to choose the means of financing public service broadcasting, the Authority has to verify, under Article 59(2) of the EEA Agreement, that the State funding does not affect competition in the EEA in a disproportionate manner, as referred to in paragraph 37 above.

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

- (60) The state aid assessment by the Authority 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 59(2) of the EEA Agreement.
- (62) Member States are required by Directive 2006/111/EC (Transparency Directive) 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>44</sup>.
- (63) These general transparency requirements apply also to broadcasters, insofar 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 Authority 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

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<sup>44</sup> Article 4 of Directive 2006/111/EC (Transparency Directive).

scope of the public service, only the costs associated with the public service may be taken into consideration. The Authority 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, EFTA 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>45</sup>. 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 Authority 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 Authority invites EFTA 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 overcompensation is not necessary for the operation of the service of general economic interest, it constitutes incompatible state aid that must

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<sup>45</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.

be repaid to the State subject to the clarifications provided in the present section with regard to public service broadcasting.

- (71) The Authority 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, also taking 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 Authority 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>46</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 Authority 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>47</sup>. The use of such clearly earmarked overcompensation should also be limited in time depending on its dedication.
- (75) In order to allow the Authority to exercise its duties, EFTA 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.

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<sup>46</sup> Of course, this provision does not preclude public service broadcasters from earning profits with their commercial activities outside the public service remit.

<sup>47</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.

## **6.6. Financial control mechanisms**

- (77) EFTA States shall provide for appropriate mechanisms to ensure that there is no overcompensation, subject to the provisions of paragraphs 72 to 76 above. 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 EFTA 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.
- (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. EFTA States shall make sure that effective measures can be put in place to recover overcompensation going beyond the provisions of the previous section 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 EFTA 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, EFTA 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 Authority 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 Authority considers that a direct remuneration element in such services — while having an impact on access by viewers<sup>48</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>49</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, EFTA 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 Article 59(2) of the EEA Agreement are met. To this end, EFTA 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 Article 59(2) of the EEA Agreement, *i.e.* in the public service broadcasting context, 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 EFTA 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>50</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 EFTA States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material conditions of Article 59(2) of the EEA Agreement, taking into account the specificities

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<sup>48</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>49</sup> For example, the Authority 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 Authority, 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>50</sup> For example, the Authority 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 Chapter. Whether other forms of retransmission of public broadcasters' programs on other platforms qualify as significant new services, should be determined by EFTA States, taking into account the specificities and the features of the services in question.

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, EFTA 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>51</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. EFTA 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, insofar as such test phase does not amount to the introduction of a fully-fledged, significant new audiovisual service.
- (91) The Authority considers that the above assessment at the national level will contribute to ensuring compliance with the EEA state aid rules. This is without prejudice to the competences of the Authority and the Commission to verify that EFTA States respect the provisions of the EEA Agreement, and to their 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 Article 59(2) of the EEA Agreement, public service broadcasters shall not engage in activities which would result in disproportionate distortions of competition 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 Authority invites

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<sup>51</sup> See also footnote 40 above on the justification of a broadcasting SGEI.

EFTA 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. EFTA States shall ensure that public service broadcasters respect the arm's 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, insofar 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 European Economic Area to an extent which would be contrary to the common interest and thus infringe Article 59(2) of the EEA Agreement.
- (95) In view of the differences between the market situations, respect of market principles by public service broadcasters, in particular the questions as to whether public service broadcasters are undercutting prices in their commercial offering, and whether they are respecting the principle of proportionality with regard to the acquisition of premium rights<sup>52</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 Authority 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, EFTA 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 Authority may take action on the basis of Articles 53, 54, 59 and 61 of the EEA Agreement.

## **7. TEMPORAL APPLICATION**

- (98) This Chapter will be applied from the first day of its adoption by the Authority. It will replace the previous Chapter on the application of the state aid rules to public service broadcasting in the Authority's State Aid Guidelines.
- (99) In accordance with the Chapter on applicable rules for the assessment of unlawful State aid<sup>53</sup>, the Authority will apply, in the case of non-notified aid:
  - (a) this Chapter, if the aid was granted after its adoption;

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<sup>52</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.

<sup>53</sup> Adopted by Decision No 154/07/COL of 3.5.2007 to amend the State aid Guidelines for the sixty-third time, updating and incorporating a new chapter on the rules applicable to unlawful aid, not yet published, available on the Authority's website: <http://www.eftasurv.int/?1=1&showLinkID=15119&1=1>

(b) the previous Chapter on the application of the state aid rules to public service broadcasting, adopted on 23 April 2004, in all other cases.