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The Public Service Remit and the New Media

by Meike Ridinger, LL.M. (Eur.)

EDITORIAL

On 28 and 29 May 2009, the Council of Europe organised together with their Icelandic hosts the first Conference of Ministers responsible for Media and New Communication Services. The conference theme was "A New Notion of Media?". Anyone who, like the conference participants, sets off on a Faustian search for the "core" of the media will inevitably also reflect upon the function of the public service remit in the new media. Here, the particular question that arises is what role public service broadcasters should – or, more precisely, are allowed to – assume in the media world that is going to be reorganised. As expected, the ministers once again reaffirmed in their resolution their "support for technology-neutral public service media, including public service broadcasting, which enjoy genuine editorial independence and institutional autonomy".

Paragraph 7 of the action plan adopted together with the resolution contains a call for the further development of the notion of the public service value of the Internet. It expressly mentions the possibility of state intervention to redress market failure and specifically draws attention to cases "where market forces are unable to satisfy all legitimate needs or aspirations, both in terms of infrastructure and the range and quality of available content and services". Paragraph 7 of the action plan thus brings us to an issue of EC law that is a regular subject of decision by the Commission and the Court. Looking back, the question has up to now been what requirements the notion of a public service broadcaster has to meet with regard to its involvement in the new media in order to satisfy the competition and state aid provisions of EC law.

Topical as ever, this question fits into the general effort to strike a balance between the interests of public and private broadcasters in the changed media landscape. This IRIS *plus* accordingly discusses the involvement of public service broadcasting in the new media. The author examines to what extent and under what conditions the public service remit covers such an involvement and where the limits to legitimate state funding currently lie. She therefore goes in some detail into EC law and mentions numerous examples of national provisions in various countries.

It seems certain that the public service remit will have to be adapted to the context of the new media and that this adaptation will have to take place by taking into account the interests of the private and public media service providers. Whatever the outcome of this balancing act, at the end of this discussion we will be declaring "The King is dead. Long live the King!"

Strasbourg, June 2009

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IRIS *plus* is a supplement to **IRIS,** *Legal Observations of the European Audiovisual Observatory,* **Issue 2009-6**

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The Public Service Remit and the New Media

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I. Introduction

The electronic media are continually changing, and public service broadcasters want, and should (be able to), keep pace. They use existing services and develop new ones in order to reach their users "on the Internet". This contribution discusses the question of whether and, if so, which requirements of Community law need to be observed when member states permit the public service media to engage in these activities.

1. The Legal Situation

Since the 1970s, the Community institutions have emphasised the importance of public service broadcasting on several occasions. As early as 1974, the Court of Justice of the European Communities (ECJ) stressed that the member states were entitled to define a broadcast service in the form of a general programme as a service of general economic interest.[1] The court also recognised that the provision of television services with a pluralist and non-commercial content can be the aim of a national broadcasting policy and justify restrictions on the free movement of services.

In the protocol to the Treaty of Amsterdam of 17 June 1997,[2] the member states' competence to provide for the funding of public service broadcasting was underscored, as was the function of broadcasting in safeguarding democratic, social and cultural values and preserving pluralism. The Council also stressed this in its resolution of 25 January 1999 and added that "the fulfilment of the public service broadcasting's mission must continue to benefit from technological progress".[3] The Amsterdam Protocol attaches two conditions to the special treatment of public service media when applying the competition and subsidy rules in the EC Treaty (ECT): firstly, the funding of the broadcasters must serve the public service remit "as conferred, defined and organised by each Member State"; secondly, however, "such funding [must] 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".

The European Parliament has also on several occasions reaffirmed the important role of public service media, not least in the context of safeguarding media diversity.[4]

At the Lille Conference on 19/20 July 2000, the European Commission emphasised the importance of public service broadcasting in the online and digital television sectors, stating that it was important to provide public service broadcasters with an opportunity to make full use of all the possibilities offered by the new information technologies.[5] The Commission once again accepted this in principle in its communication of 2001 on the application of state aid rules to public service broadcasting.[6]

Irrespective of these general statements, however, technical developments always lead to new problems concerning the legitimacy of funding public service media offerings. In particular, the broadcasting remit, which is understood as something dynamic and is supposed to be very flexible towards new developments, is being questioned. At any rate, the Commission regards the current arrangements as providing insufficient grounds for it to be able to carry out an assessment, in the context of state aid rules, of the funding of new media services, which do not constitute programmes in the traditional sense. Having taken numerous decisions in individual cases in the last few years, the Commission has been working on a revised Broadcasting Communication since 2008.

The definition of the public service remit is highly relevant for drawing the dividing line between culture and democracy on the one hand and the market and commerce on the other. It also has an impact on the tension between constitutional and European law, because the specific features of individual states, rooted in the history of their democracy and culture, often conflict with European competition law, especially the rules on state aid. The key question today is: does Community law allow the remit of public service media to be shaped in such a way that it takes sufficient account of the current importance of certain (new) public communication services?

2. Challenges Raised by Media Development

2.1. The Increasing Importance of the New Media

The Internet is the future – or it will at least increasingly constitute a large proportion of future media use. The number of Internet users in Europe has risen at the same pace as the development of the web from a purely text-based information system into a multimedia platform for text, audio and video offerings.[7] According to a study produced in 2007, 45% of European broadband users regularly watch television online because of the greater flexibility that it provides in terms of time.[8] A large number of video and audio services offered both by established broadcasters and newcomers are now available on

the Internet. Programmes broadcast using the traditional means of transmission (terrestrial, cable, satellite) are also distributed on the web ("live streaming"). There are also providers that only distribute linear audiovisual services via the Internet ("webcasting"). A large amount of on-demand video and audio content is also available.

Compared to the traditional (electronic) media, the digital media market has a different competition and service structure. On the one hand, there are many more (and, at the same time, diversified) services; on the other hand, the usage habits are becoming more individual and, as a result, more diverse.

2.2. Discussion of the Remit of the Public Service Media

The public service media are increasingly dependent on new types of offering if they want to continue to fulfil their remit. For some time now, they have therefore been developing, expanding and honing their own online services. In their estimation, the online audience cannot be won over by simply distributing existing television or radio content on the web, so they have tried to exploit the specific advantages of the Internet for the new offerings they have created. However, the public service media's online activities that go beyond simulcasting (the simultaneous distribution of a complete item on traditional networks and via the Internet) often lead to a debate with private media providers on the legal possibilities of, and limits to, public service offerings in the new media. The private broadcasters are concerned about distortion of competition and about content funded by licence fees the demand for which could also be met by the commercial providers. The press complains in particular about the competition from the "press-like" texts offered and calls for such services to be allowed at most if they accompany programmes. The public service broadcasters refer to the media neutrality of their public service remit, which, they say, must also be discharged on the Internet.

The new services involved in the discussion between the private and public service broadcasters can be roughly divided into three categories,[9] each of which has to be assessed differently, not least because several member states are in the process of enacting laws or are applying new legal rules for the first time.

New Digital Media as a (an Additional) Distribution Channel

The first group consists of services that use the new media as an additional distribution channel for public service broadcasting. It is basically recognised that the public service broadcasters are also entitled to exploit the existing (television and radio) programmes using the new digital distribution channels, such as simulcasting or via mobile reception networks (in the DMB or DVB-H-standard). This also includes the use, subject to additional conditions, of third-party platforms (Zatoo, Joost, YouTube, etc.).

Excluded Commercial Offerings

The second group comprises so-called "purely commercial activities". These include – according to the Commission's decision of April 2007 relating to Germany[10] – the following services: e-business, advertising/sponsorship, local reporting, links to direct commercial offers, paid for games and "other downloads", licence agreements with mobile operators, Internet chat-rooms, programmes that enable insurance premiums to be calculated and the offers of various insurance companies to be compared.

Particularly Controversial Offerings

The offerings and forms of usage available on the Internet that are the main focus of attention are those that permit programmes to be watched at any time independently of the traditional linear services. They form the third group of controversial services and involve two fundamental questions: can the traditional content of the public service media also be made available by so-called on-demand services (with no content/time limitations), and should the public service remit also cover the development and distribution of services specifically tailored to the new media and the way they are used?

- Examples of the first of the problems mentioned are the so-called media libraries, for example in the form of archives or catch-up services, which enable content that is available (in digital form) and has already been broadcast to be offered independently of a programme transmission time. For the user, this may be an additional factor that takes into account the democratic, social and cultural needs of society. For example, by watching various past current affairs programmes a user can gain a picture of how the discussion of a particular issue has developed over a specific period. However, the legitimacy of these on-demand services is not recognised by everyone concerned. For instance, a discussion is taking place on how long these offerings can be kept available and with what additional information their content may be provided, as well as under what conditions any involvement of third-party platforms is permissible. This makes it difficult to draw a clear dividing line between the public service remit and e-business, which is not allowed under that remit. For example, what should be the characterisation of archives which, after the expiry of the original access period, are only made available against payment, for example as pay-per-view? Or: would the public service remit also cover priority access given to specific user groups, for example for educational or vocational training purposes?

- With regard to the second set of issues, a discussion is underway concerning the offers and types of offer that the public service media can develop or exploit in order to take into account the specifics of the Internet. Should the proportion of text, pictures, audio or video used by the public service media be laid down? Should conditions perhaps be laid down

for linking an offer to a specific programme distributed via the traditional broadcasting system?

Many of the questions raised here cannot be answered in the abstract, nor is it possible to provide a single answer that covers a large number of member states.

II. Outline Provisions for the Public Service Remit

Both the Council of Europe[11] and the European Community institutions have repeatedly turned their attention to the public service remit. In the following, the Community's legal framework will be described and the problems that arise with regard to defining the remit will be discussed.

1. Conditions for "Shared Responsibility"

Other than in the case of the Council of Europe, the question frequently arises in the context of EU law as to what extent the various definitions of the public service media remit in the member states are subject to supranational supervision. This problem is the constant thread that runs through the observations below.

1.1 The Basis of the Competence of the EC

According to the principle of conferral (Art. 5(1) ECT), the Community may only act in the cases specifically mentioned in the ECT. Neither the Community nor the member states have exclusive competence for the regulation of broadcasting.

Art. 151 ECT is often considered a relevant basis for the conferral of powers in this field. However, it only confers subsidiary competence on the Community in the field of culture, and therefore the broadcasting sector.[12] Under this provision, the Community can enact measures for promoting culture but not rules on harmonising national laws and regulations (para. 5). According to Art. 151(4) ECT, the Community "shall take cultural aspects into account in its action [...] in particular in order to respect and to promote the diversity of its cultures".

The EC organs are entrusted with the task of setting up a common market. Accordingly, the Community's competence can, in principle, extend to cultural activities if these are at the same time economically relevant. As broadcasting has been classified as a service by the ECJ, Arts. 49 ff. ECT (especially Art. 55 in conjunction with Art. 47(2) ECT) can be considered as a possible basis for the conferral of powers in these cases.[13]

Through the ECT, the Commission is also given both the right and the duty to protect competition in the internal market from distortion resulting from unfair practices. The law relating to state aid is part of a system that serves this objective (Art. 3(1)(g) ECT). The EC institutions can check by reference to Arts. 87(1) and 86(2) ECT whether the public service remit formulated by the member states complies with the law relating to state aid.

Accordingly, in view of the dual nature of broadcasting as an economic and cultural activity the EC also possesses regulatory powers. However, a simple glance at Arts. 86(2) and 87(2) and (3) ECT shows that the relevant rules also leave scope for the pursuit of non-economic objectives, for example in the case of aid for cultural purposes (Art. 87(3)(d) ECT).

1.2. The Supervision of State Aid by the Commission and the Discussion of the Public Service Remit

The legality of the funding of public service broadcasters under the law relating to state aid depends on the extent to which the public service remit constitutes justification under Art. 86(2) ECT.

The ECJ,[14] the European Court of First Instance (ECFI)[15] and the Commission[16] have acknowledged that the activities of the public service broadcasters are services of general economic interest within the meaning of Art. 86(2) ECT. This rule enables the competition rules enshrined in EC law (in this case, the ban on state aid) to be limited if they would obstruct the performance of a public remit. In this connection, attention should also be drawn to Art. 16 ECT, according to which "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 (of general economic interest) operate on the basis of principles and conditions which enable them to fulfil their missions". Art. 36 of the European Union's Charter of Fundamental Rights (ChFR) also underlines the importance of these services.

According to the ECJ's case law, Art. 86(2) ECT should be referred to in order to bring the member states' interest in employing public-sector undertakings as an instrument of economic policy into harmony with the Community's interest in the observance of the competition rules. This presupposes that the member states have the relevant legislative powers. As part of this competence, the member states lay down what is to be understood by "services of general economic interest".

There can, according to Art. 86(2) ECT, be no objections under the state aid rules to systems of funding public service broadcasting when:

- there is a clear and precise definition of the public service broadcasting remit at the national level (definition of the remit);
- one or more undertakings are formally assigned, by means of an official legal act, the task of carrying out the public serv-

ice remit and its actual execution is monitored by a body that is independent of that/those undertaking(s) (assignment and monitoring); and

- the public funding is limited to the extent necessary to fulfil the public service remit (proportionality test).

It should be pointed out that the Commission is entitled to supervise the funding of public service broadcasters in a member state under the powers it has under Arts. 87 ff. ECT to review state aid. Art. 86(2) ECT can, exceptionally, justify the funding of public service media contrary to the ban on state aid, and this can result in this being compatible with the common market. If this rule is applied, the focus is on the public service remit defined by the member states, and an examination needs to be carried out to establish whether the member state concerned has provided a sufficiently clear definition.

1.3. Establishing the Respective Fields of Action of the Community and the Member States

The 1997 Amsterdam Protocol, which, according to Art. 311 ECT, has the rank of primary Community law, confirms that it is the member states' responsibility to determine and shape the public service remit and fund the public service broadcasters accordingly. In some cases, it has been concluded from this that the member states must clearly specify the public service remit and, in particular, that concrete obligations relating to programming and associated tasks have to be clearly laid down in order to enable an assessment to be carried out of whether unlawful funding is being provided.[17] This conclusion is neither supported by the wording of the Protocol ("the public service remit as conferred, defined and organised by each Member State") nor by the Council Resolution of 25 January 1999, which makes the Amsterdam Protocol more precise with regard to the new services. According to the Resolution, public service broadcasting is given the possibility of benefiting from technological progress and "bringing to the public the benefits of the new audiovisual services" through new technologies. The public service remit should be organised in an open, dynamic and forward-looking way.

It is therefore difficult to draw a clear dividing line between the powers of member states and the Commission. The definition of the remit is a matter for the member states, which to a certain degree limits the extent and depth of the assessment, but the Commission believes that it legally must be able to examine whether too much compensation is being paid and says that a precondition for this is that it has precise knowledge of what the remit in an individual case comprises.

Limits to the Commission's Powers in Constitutional Law or Legislation Relating to Fundamental Rights

According to Art. 6(2) of the Treaty on European Union (TEU), the European Union is obliged to respect both the fundamental rights guaranteed in the European Convention on Human Rights (ECHR) and those resulting from the constitutional traditions that are common to the member states as general principles of Community law.[18] In addition, according to Art. 6(3) TEU the Union has an obligation to respect its member states' national identities. As the following observations will show, the guarantees of fundamental rights at both the national and European levels also provide strong indications that the member states have broad discretion with regard to defining the remit. The Commission must take into account both this and the fact that a broad and dynamic remit for public service media pays due regard to the national identity of the member state concerned.

In all member states of the European Union, broadcasting is considered to have a fundamental democratic, cultural and socio-political function. Its tasks are:

- to guarantee the free and comprehensive formation of individual and public opinion;
- to represent the economic, cultural or ideological interests of society;
- to report objectively and impartially;
- to preserve media plurality;
- to allow regional opinions and interests to be voiced so as to provide information on and strengthen the identity of individual regions;
- to supply the citizens with information, cultural and educational content and entertainment through a comprehensive and balanced programme offer; and
- to guarantee high programme quality.[19]

Accordingly, it is, at least theoretically, possible to speak of a common European *public service* function that entitles, and even obliges, the legislators to take measures to safeguard diversity of opinion and pluralism.[20] In a large number of member states, this function is inferred from the provisions of constitutional law and often justifies the fact that public interest in obtaining information takes priority over the interests of the broadcasters. It thus, to a certain extent, legitimises the development of, and limits to, the broadcasters' freedom. Freedom of opinion or freedom of the media thus leads to a constitutional postulate that empowers or even obliges the national legislature to enact measures to safeguard pluralism.[21] The public service remit is principally regarded as having to be entrusted to the public service media (funded by licence fees).

This view is also supported by Art. 10 ECHR and its interpretation by (in particular) the European Court of Human Rights (ECtHR). All EU member states have signed the ECHR.[22]

To Put It Bluntly: Freedom of Broadcasting and Independence from the State Versus a Precise Definition of the Remit

The Commission's assessment of the definition of the remit under the EU's state aid rules may seriously clash with the protection of the public service media guaranteed by national and European fundamental rights provisions:

According to the opinion expressed by the Commission in the Broadcasting Communication, the public service remit must have been entrusted to an undertaking by means of an official act.[23] On the one hand, the remit must be clearly and precisely defined by the member state; on the other hand, member states must generally protect the independence of broadcasting from the state and specifically safeguard the elementary programming autonomy that can be inferred from that independence. The two objectives can quite easily clash with one another. The more concrete the terms of the remit specified by the state are, the more there is a danger that the resulting conditions relating to the organisation of the service or the programmes will unlawfully interfere with the editorial freedom of the public service media, for the latter should be able to take their decisions on the basis of journalistic considerations under a remit defined in general terms.

It is thus necessary for the member states to have a great deal of scope so that conflicts can be resolved. The Commission accordingly has a duty to exercise restraint when examining the definition of the remit. Only in this way will due account be taken of the requirement set out in Arts. 6(2) and (3) TEU that both fundamental rights and the national identity be respected. This will ultimately result in the discharge of the duty of sincere co-operation stemming from Art. 10 ECT.[24]

1.4. The Commission's Broadcasting Communication

In its aforementioned Communication of 2001, the Commission made it clear on what principles it would be basing its application of Arts. 87 and 86(2) ECT to state aid for public service broadcasting. First of all, it recognised that the definition of the public service remit is the responsibility of the member states and that, given the specific nature of the broadcasting sector and the interpretative provisions of the Amsterdam Protocol, a "wide definition" of the public service remit is "legitimate under Article 86(2)". In the Commission's opinion, even services that are not "programmes" in the traditional sense, such as online information services, might be included in the public service remit if they address "the same democratic, social and cultural needs of the society in question". However, the Broadcasting Communication states that the definition of the public service remit should be as precise as possible.

2. The Commission's Practice

The Commission has in the meantime examined in several investigations the definition of the public service remit and the funding of online services offered by public service broadcasters.[25] The following observations focus on the insights gained with regard to the (permissible) subject of the remit. The proceedings that were consulted in each case in connection with defining the remit (more precisely) are also considered.

2.1. France

In the investigation concerning the funding of France 2 and France 3, the Commission first of all established that, as stated in the Broadcasting Communication, the definition of the public service remit falls within the competence of the member states. In this case, as in numerous other decisions, the Commission recognised both the member state's broad definition of the public service remit and the fact that its supervision is limited to the question of manifest errors.[26] The Commission considered that the schedules of tasks and obligations for France 2 and France 3 of 16 September 1994, which, *inter alia*, instruct the television broadcasters to discharge their cultural, educational and social role in the organisation of their programmes by offering a wide range of information, culture and entertainment, were sufficiently clearly defined and legitimate. The remit includes:

- an obligation to broadcast government communiqués, parliamentary debates or information on political organisations and parties, trade unions and professional associations and the main religious denominations represented in France,
- the transmission of drama, music, dance, variety shows, sporting events and
- the transmission of programmes for children and young people and fictional works.

The most recent amendments to the 1986 Freedom of Communication Act, which came into force in March 2009, like the draft of a new version of the schedule of obligations (*cahier des charges*) of France Télévisions, start from the assumption that the range of programmes will be extended and enriched in the context of the new services.[27]

2.2. United Kingdom

The Commission commented on the funding of the BBC's Digital Curriculum in October 2003 by stating that a digital entertainment channel is covered by the public service remit when the additional offering is supplementary in nature, differs from commercial offerings and is predictable for the commercial providers.[28] The Commission decided that no manifest error had been committed and justified its decision by making reference to the BBC's clearly defined remit and to the drawing up of a five-year plan in which specific criteria for the excluded areas have to be stated, thus ensuring clarity for commercial providers as to the subject-areas that will not be offered.

In the United Kingdom, a new legal framework came into force for the BBC in January 2007, and the regulation involved is being followed with great interest throughout Europe. One of the main changes in the BBC's Charter[29] was the creation of a new body, the BBC Trust. It is made up of twelve members proposed by the government and has replaced the board of governors. Institutionally, it is more clearly separated from the BBC management, which is now known as the BBC Executive Board, than the board of governors. Its function is expressly regulatory in nature, and one of its main instruments to supervise the corporation's performance is the conduct of a "public value test" (PVT) ("How does the programme benefit the public?").

The test consists of two parts: the BBC Trust first conducts a "Public Value Assessment", which measures the value of a planned new service for the consumer and society as a whole, and at the same time the Office of Communications (Ofcom) carries out a "Market Impact Assessment" (MIA), which measures the plan's short- and long-term impact on the markets concerned. The results of the two tests must as a rule be made available after three months and form the basis of the Trust's provisional decision. The Trust then publishes them for public discussion. It takes into account in its final decision the opinions it receives. The PVT procedure is terminated with the publication of the binding decision by the Trust.

Up to now, four PVTs have been conducted (online services, HDTV, a Gaelic digital service, and local video services), of which the first three produced positive results. On the other hand, on 23 February 2009 the BBC Trust turned down the application to allow new local video services.[30] Overall, it said, the negative market impact of the BBC's proposal was larger than the added value for the licence fee payers and society as a whole. The provisional decision of November 2008 had already established that the BBC portals were ousting private regional providers and publishers. According to the Chairman of the BBC Trust, regional newspapers and others can now invest in the Internet with the certainty that the BBC will not be entering this market.

2.3. Ireland

With regard to the funding of the Irish broadcasters RTÉ and TG4[31] the Commission reaffirmed in February 2008 that purely commercial activities are not covered by the public service remit. However, it can include, for example, the publication of books or audiovisual material when the public service benefit is established beforehand. This is done by means of a multi-year Broadcasting Charter, which is drawn up by the broadcaster and has to be approved by the minister responsible, and "annual statements of commitments". The scope of the public service remit is thus laid down in advance and implementation can subsequently be monitored by the relevant supervisory authority. In the Commission's opinion, the definition of the remit at any rate can include a proportion given over to sports reporting, which can comprise up to 10%. According to the Commission, the extent to which a new service meets society's democratic, social and cultural needs can be adequately determined by a procedure in which its benefit for society and any potential consequences for the market concerned are assessed. This, the Commission says, also applies to supplementary services.

In Ireland extensive changes in the broadcasting sector are planned with the Broadcasting Bill 2008, including for public service broadcasting (content and means of transmission) and its funding. The public service remit will be extended, especially with regard to the new media.[32]

2.4. Belgium – Flemish Community

The Commission's decision of February 2008 completed the examination of public service broadcasting in Belgium's Flemish Community (VRT). The Commission initially accepted existing outline arrangements for merchandising and other subsidiary activities that, as commercial activities, do not fall within the public service remit. An agreement was reached on concrete criteria and a suitable procedure to enable a preliminary assessment to be made of the public-interest nature of new media services.[33] The assessment is to be carried out by an independent advisory body. The potential impact on the market concerned must also be analysed, for which a consultation with interested parties could prove useful.

2.5. Denmark

The Commission stated in connection with the funding of TV2 Danmark that TV2's Internet pages which are limited to informing the user about its public service television programmes fall within its public service broadcasting task. In the Commission's opinion, however, a commercial website that makes available interactive products on individual demand, such as games or chat-rooms, that cannot be distinguished from commercial offerings, does not serve the democratic, social and cultural needs of society and therefore cannot be part of the public service remit.[34]

The Danish public service broadcaster's Internet activities, which, incidentally, are broadly defined, have thus in principle not been called into question. As far as can be determined, the legal rules applying at the time of the Commission's decision were the first in Europe to provide explicitly for the "new medium" to be regarded as a "third supply channel" and a "new type of service platform".

For the period 2007-2010, a new contract for the provision of public services has been concluded between the public service broadcaster DR and the Danish Ministry of Education. It contains an agreement on possible content and on the procedure to be applied with regard to the examination of new services ("value test").[35]

2.6. Netherlands

According to the Commission's provisional assessment as part of the investigation concerning the Dutch public service broadcasting organisations, ancillary new media activities, for example in the form of SMS or i-mode services, are not part of the public service remit.[36] However, the decision of 22 June 2006 on the so-called *ad hoc* additional financing, which triggered the proceedings, "only" deals with the general aims of the remit and reporting on sports events, which are both accepted.[37]

In 2008, a new Media Act (*Mediawet* 2008) was passed, according to which public service broadcasting should, in order to fulfil its remit, also exploit all the opportunities made available by the new media and new channels of distribution.[38]

2.7. Germany

Public service broadcasting in Germany was the subject of an investigation that ended on 24 April 2007 in a much-reported agreement with the Commission ("state aid compromise"). Among other things, the Commission called for the competent authorities to provide a clear definition of the extent of the remit to provide a basic service.[39] They should also guarantee that the public service broadcasters' commercial activities are clearly separated and exercised according to economic principles. The procedure for monitoring the observance of the rules should be strengthened by establishing a supervisory body. The Commission imposed the following conditions:

- The remit of the public service broadcasters, especially for activities in the area of the new media, should be sufficiently defined.

- Lists should be drawn up of services that would normally be covered or not covered by the public service remit. This should guarantee transparency and predictability for other operators on the market and enable the relevant supervisory bodies to monitor effectively the legality of services.

- The interstate treaty should contain clear criteria to be met in particular by online services in order to fulfil the existing public service remit in a changing media environment. Such functions comprise, for example, allowing all citizens to participate in the information society, providing proper access to services for minorities, making citizens aware of the benefits of, and providing a trustworthy guide to, the new digital services, promoting media competence and monitoring television programmes in the light of changes in media use.

- The public service remit should be limited to journalistic-editorial services that reflect the editorial added value of the public service broadcasters.[40]

The German legislature had to perform a delicate balancing act with regard to defining the public service remit: it was necessary to balance the Commission's demand for as precise a definition of the public service remit as possible against the programming autonomy enshrined in the constitution and the need to guarantee opportunities for development in the field of the new media (as the Federal Constitutional Court reaffirmed on 11 September 2007 in its most recent judgment on this subject[41]).

With respect to the additional digital services, Germany declared that the future interstate broadcasting treaty would introduce programme categories by way of illustration in order to spell out the existing requirements of the general programming remit (which focuses on information, education and culture) in more concrete terms. For instance, with regard to the focus on "information", the interstate treaty could refer to such programme categories as news, political information and regional information, as well as sports. "Education" could comprise such categories as science and technology, children and young people, upbringing, history, religion, natural history, etc. The focus on "culture" could be broken down into such programme categories as theatre, music, architecture, philosophy, literature, the cinema, etc.

The 12th Interstate Treaty amending interstate broadcasting treaties, signed by the premiers of the German *Länder* on 18 December 2008, is intended to transpose the state aid compromise into German law. In this connection, the competition Commissioner stressed that the German "three-stage test" model see below for further details) "is an important example for the type of procedural safeguards needed to ensure effective control at the national level".[42]

Firstly, the interstate broadcasting treaty provides a direct remit for the organisation of television programmes by the public service broadcasters (in some cases on the basis of the plans drawn up by the broadcasters and incorporated into the interstate treaty). The interstate treaty declares that some of the Internet services classified in German law as "telemedia" also fall within the public service remit. Most of these services have to be described in more detail by the organisers in their telemedia plans. Attached to the interstate treaty is a list of types of service that are not permitted in telemedia.

Secondly, an examination procedure is introduced for new or modified telemedia services (the so-called "three-stage test"): the broadcaster must inform the relevant authority whether the service is part of the public service remit. It must also indicate to what extent it meets society's democratic, social and cultural needs, to what extent it will qualitatively enhance media competition, and what financial expenditure it requires. The description must also include statements on the quantity and quality of the existing, freely accessible services, the market impact of the project and its opinion-forming function in the light of the existing range of similar services. Third parties can comment on these criteria before the project is implemented and the relevant body must examine these com-

ments. That body has to consult independent experts on the impact on the market concerned and must state its reasons for deciding whether the project meets the criteria.[43] If the project passes the three-stage test, it is submitted to the body responsible for legal supervision. Only the subsequent publication of the details in the official gazettes of the *Länder* constitutes the "official entrustment" required by the Commission.

2.8. Result of the Commission's Decisions

The decision in the investigation relating to Germany makes the Commission's demands clear. The fundamental programme categories to which it refers – information, education, culture (as well as entertainment) – are to be found, despite some differences in the details, in the legal provisions of almost all member states. With regard to the definition of the public service remit in connection with additional digital channels, the Commission considers that the reference to these programme categories is in principle permissible but calls for it to be established to which category an individual additional channel belongs and for further details of the categories to be provided. On the one hand, this would make the scope and orientation of the additional channels sufficiently clear in comparison to the established channels available from the public service broadcasters; on the other hand, it would enable private broadcasters to plan their activities. Furthermore, the supervisory bodies responsible would be able to carry out the effective monitoring of the fulfilment of the commitments entered into by the public service broadcasters.

A few clear indications emerge from the decisions for the definition of the broadcasters' public service remit as far as the new media are concerned. In principle, a prerequisite for that remit is that services offered via the new media also meet social needs. Moreover, it is clear that the Commission attaches great importance to the establishment of procedures for examining this aspect and any potential impact on the market. Implementing these requirements would lead to a discussion at the national level on where (to use the term used in the United Kingdom) the "public value" in the new media service lies.

3. Relevant Aspects of the Case Law of the ECJ and the ECFI

The case law of the Community courts is relevant both for future decisions of the Commission in individual cases and for any revision of the Broadcasting Communication, so this will now be discussed in brief.

As we have seen, the ECFI dealt with broadcasting issues as far back as 1974 in its judgment on the *Sacchi* case. First of all, it established that broadcasting is a service; secondly, however, it stressed that the member states are entitled to define a service of general economic interest within the meaning of Art. 86(2) ECT. In the case concerned, it was thus legitimate to grant the public service broadcaster a remit to produce and broadcast a general programme.[44] The ECFI's current case law goes into this aspect in greater depth and breadth. A number of more recent judgments concern some of the aforementioned decisions taken by the Commission on the basis of its Broadcasting Communication.

3.1. SIC v. Commission of the European Communities

The ECFI's judgment of 26 June 2008 in the *SIC v. Commission of the European Communities* case deals with issues relating to defining the remit, to the "official entrustment" and to supervision. It thus contains statements on the three assessment criteria, the fulfilment of which can justify the funding of public service broadcasting, which has to meet the state aid rules in accordance with Art. 86(2) ECT (see II.1. above). The court first of all follows the same line as the ECJ, which classifies public service broadcasting as a service of general economic interest (SGEI). This, the court says, "is explained more by the de facto impact of public service broadcasting on the otherwise competitive and commercial broadcasting sector, than by an alleged commercial dimension to broadcasting". It goes on to say that "as is clear from the Amsterdam Protocol, public service broadcasting 'is directly related to the democratic, social and cultural needs of each society'". Moreover, it points out, the insertion of Art. 16 into the ECT by the Treaty of Amsterdam underlined the importance of services of general economic interest for the European Union. According to the ECFI, "Community law in no way precludes a Member State from defining broadcasting SGEIs widely to include the broadcasting of full-spectrum programming". That is not called into question by the fact that the operator of the services is authorised to carry on commercial activities, such as the sale of advertising space. The decisive factor in determining whether a service is of general economic interest is "the general interest it is designed to satisfy and not […] the means which will ensure its provision".

The ECFI has emphasised the freedom that the Amsterdam Protocol gives the member states in the award of services of general economic interest in the broadcasting sector, concluding from this that there is no requirement for a member state to have recourse to competitive tendering when it intends to provide the service – in this case public service broadcasting – itself or through a public company.

On the question of whether the remit is fulfilled by public service broadcasting, the ECFI distinguishes between two stages of such an examination:

- Firstly, it is necessary to check whether the quality standards are met, since these requirements, especially at the national level, are the key feature of services of general economic interest in the broadcasting sector. There is, the court says, no reason for state funding to be continued if the public service broadcasters do not adhere to any particular quality

standards and thus operate on the market like any other providers, such as the commercial broadcasters. However, it makes it clear at the same time that verifying compliance with quality standards is a matter for the member states and that it must confine itself to establishing whether an independent monitoring mechanism exists and has in fact been used.

- A second question, according to the court, is whether the services commissioned have actually been provided in the way determined in advance and whether the costs corresponding to these services have not been exceeded. Here, the Commission is able to carry out checks: it can, for example, consult audits by external auditors if they contain information "relevant to the assessment of the costs for the purposes of its assessment of whether the aid is proportional within the context of Art. 86(2) ECT". Only then is it possible to conduct a systematic examination of the cost-performance ratio with respect to the remit.

3.2. TV2 Danmark and Others v. the Commission

In its *TV2 Danmark* decision of 22 October 2008, the ECFI recognised the broad scope given to the member states. It reiterated that the legitimacy of the definition of the remit did not depend on the nature of the funding (advertising, paid services, etc.). At the same time, it clearly rejected the argument that public service media could only act in the event of a failure of the market and that the extent of their activities was limited to services that differed from those of commercial broadcasters. The assessment of the definition of the remit was not determined by whether comparable services were available or by what impact the public service offering had on the market.[45]

3.3. Importance for Future Decisions

The most recent case law in particular emphasises the member states' comparatively broad scope for defining the public service remit, and therefore for determining the nature of the services of general economic interest. A difference from the Commission's decision-making policy seems to be emerging since the ECFI now evidently sees the importance of the impact of (new) services on the market very much in relative terms.

III. Revision of the Broadcasting Communication

The Commission is of the opinion that improvements need to be made to the definition of the broadcasters' public service remit in the new digital media environment, so it is currently revising the Broadcasting Communication of 2001.

The Commission's first step was to initiate a consultation.[46] It then introduced the first version of a draft amending the current Broadcasting Communication[47] and conducted a public hearing on this.[48] It recently published the revised draft Communication[49] and began a further consultation process. It is intended to adopt the amended Broadcasting Communication before the end of 2009. Among other things, the focus is on the principles for defining the public service remit, monitoring the public service activities in the member states and the question of the extent to which the scope of the public service broadcasters needs to be extended in the light of the challenges posed by the new media landscape. The new draft contains a number of changes to what has so far been the point of view of the Commission, which wants to reduce the depth of detail of some of the requirements.

The most important elements of the draft are:

- It is up to the member states to choose the most appropriate mechanism to ensure the compliance of audiovisual services with the material conditions of the Amsterdam Protocol, taking into account the specific features of their national broadcasting system and the need to safeguard the public service broadcasters' editorial independence.[50]

- As regards the definition of the remit, the Commission's role is limited to checking for manifest errors.[51] The remit should be defined as precisely as possible, but, in consideration of the ECFI's judgment in the *SIC v. Commission* case (see above), the Commission also considers entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer to be legitimate.[52]

- The first draft made the legitimacy of providing audiovisual media content in the form of linear services via new distribution platforms and the provision of special-interest programmes and media services that are not "programmes" in the traditional sense, such as on-line information services and nonlinear or on-demand services, subject to their "not entail(ing) disproportionate effects on the market, which are not necessary for the fulfilment of the public service remit".[53] The draft now states that "the simultaneous distribution of content already available on one distribution platform (e.g.: TV, radio) on new platforms (e.g.: Internet, mobile devices) is not considered to be a 'new' service". Services provided against payment could in an exceptional case fall within the public service remit if they clearly differed from commercial activities, but offering "premium content" on a pay-per-view basis would not be a legitimate part of the public service remit.[54]

- It is generally up to the member states to determine, after taking into account the characteristics and the development of the broadcasting market and the range of services already offered by the public broadcaster, what is to be understood by a "significantly new service". The "new" nature of a service may depend, among other things, on the content made available and on the way it is used.

- New services have to be assessed by the member states and provision must be made for stakeholders to be consulted and for the outcome of the consultation and the grounds for the decision to be made publicly available. According to the old draft, the assessment "would only seem effective if carried out by an external body independent from the public service broadcaster". Exceptionally, a body within the public service broadcaster itself may be charged with undertaking the assessment.[55] The wording of the new draft is more flexible with regard to the supervision requirements and thus renders them less stringent: instead of an external body, it provides for one "which is effectively independent from the management of the public broadcaster, also with regard to the appointment and removal of its members, and has sufficient capacity and resources to exercise its duties. Member States shall be able to design a procedure which is proportionate to the size of the market and the market position of the public service broadcaster".[56]

The draft Communication recognises that member states must be able to act flexibly in order to respond more effectively to the challenges of the modern Internet society faced by public service broadcasters (para. 52). An important new development is the requirement to carry out a public value test: new services must be assessed, with the consultation of third parties, to see whether they are part of the public service remit and do not distort competition or create barriers to entering the market.

IV. Conclusion

The establishment for the public service media of a remit clearly located between culture and commerce is no easy task for any of the players involved. It is likely that even a revised Broadcasting Communication will not entirely eliminate the need for decisions in individual cases at the European level, especially owing to the experience gained following the numerous complaints made after the publication of the present Communication. Judgments of the European courts in pending proceedings or in new cases that might be brought in the future to challenge the Commission's decisions, will continue to rekindle the debate. It is already becoming apparent now that the discussion will be mainly about the extent to which the impact on private competitors of (new) offerings from the public service media should play a role in the definition of the remit and why an ex ante assessment is required for new services to enable them to be included in the remit.

1) Judgment of the Court of Justice, *Sacchi*, Case 155/73 (30 April 1974).
2) Protocol on public service broadcasting in the member states, OJ 1997 C340/109 of 10 November 1997.
3) Council resolution of 25 January 1999 concerning Public Service Broadcasting, OJ 1999 C 30/1 of 5 February 1999.
4) European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253 (INI), para. 37.
5) Conference report, available at: http://www.culture.gouv.fr/culture/europe/lille/ACTES-Lille.rtf . See also the statement by Neelie Kroes, *The way ahead for the Broadcasting Communication,* at the Strasbourg conference on 17/18 July 2008, available at: http://www.ebu.ch/CMS images/en/BRUDOC_INFO_EN_440_tcm6-61500.pdf
6) OJ 2001 C 320 of 15 November 2001, p. 5.
7) Cf., for example, as far as Germany is concerned the 2007 ARD/ZDF Online Study, summarised in Birgit van Eimeren/Beate Frees, "Bewegtbildnutzung im Internet", *Media Perspektiven 2007*, pp. 362 ff.
8) According to this study, which was produced by the Motorola Connected Home Solutions Division, France leads the field with 59%. A summary is available at: http://www.itnews.com.au/News/51423,europe-switches-on-to-internet-tv.aspx
9) See on this the paper by Alexander Rossnagel, "Die Definition des Auftrags der öffentlich-rechtlichen Medien" given at the "Public Service Media in the Digital Age" seminar, Strasbourg, 17/18 July 2008, available at: http://www.ddm.gouv.fr/IMG/pdf/Strasbourg_-_Alexander_Rossganel_-_VALL.pdf
10) Decision of the European Commission C (2007) 1761 FINAL, 24 April 2007 - State aid E 3/2005, paras. 362 ff.
11) Cf. the overview by Susanne Nikoltchev, "European Backing for Public Service Broadcasting – Council of Europe Rules and Standards", in *The Public Service Broadcasting Culture*, IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2007. Apart from the observations made in that publication, mention should be made of Committee of Ministers Recommendation CM/Rec(2007)16 on measures to promote the public service value of the internet and the Parliamentary Assembly Recommendation 1855 (2009). The former states that, in the context of emphasising cultural diversity, the development of a cultural dimension should be strengthened in the case of the production of digital content, including by the public service media. The second calls for a definition and explanation of the public service remit for audiovisual media services. The basic principles of public service broadcasting should also be preserved in a changing environment and extended to audiovisual media services as a whole.
12) The whole of public service broadcasting should fall under the concept of culture as used in Art. 151 ECT as, according to Claudia Roider (*Perspektiven einer europäischen Rundfunkordnung*, Berlin 2001, p. 267), it is not only a crucial factor for the mediation of culture but also directly linked to the cultural needs of society and is accordingly part of cultural life in the member states.
13) Even when Art. 151 ECT is taken into account, action to bring about harmonisation is not ruled out if the Community refers to other provisions of the Treaty, such as those concerning economic aspects. As the focus of the Community's competences is primarily on the creation of a common market, the dividing line cannot be based on a particular subject-area but must be goal-oriented. Cf. ECJ, *Gravier*, Case 293/83, 1985; *Germany v. European Parliament and Council of the European Union*, Case C-380/03, paras. 36 ff.; and *Ireland v. European Parliament and Council of the European Union* judgment of 10 February 2009, Case C-301/06, paras. 56 ff., available at: http://www.curia.europa.eu
14) ECJ, Case 155/73, *Sacchi*, op. cit.
15) See ECFI judgment of 26 June 2008, T-442/03, *SIC v. Commission of the European Communities*, available at: http://www.curia.europa.eu/
16) Commission Green Paper on services of general interest, of 21 March 2003, COM (2003) 270.
17) Anja Wichmann, "Inhalt und Bedeutung des Protokolls zum Amsterdamer Vertrag über den öffentlich-rechtlichen Rundfunk in den Mitgliedstaaten", Rostock 1999, p. 29.
18) The EU's Charter of Fundamental Rights is also considered by the Com-

munity courts and the Advocates-General at the ECJ. Cf. Thorsten Kingreen, in: Christian Calliess/Matthias Ruffert, *Kommentar des Vertrags über die Europäische Union und des Vertrags zur Gründung der Europäischen Gemeinschaft – EUV/EGV*, 2nd edit., Neuwied und Kriftel 2002, Article 6 TEU, paras. 20 ff.

19) Jörg Michael Voss, "Pluraler Rundfunk in Europa – ein duales System für Europa?", in: Dieter Dörr/Udo Fink (eds.), *Studien zum deutschen und europäischen Medienrecht*, Vol. 33, Frankfurt am Main, 2008, p. 170.
20) Peter Häberle, *Europäische Verfassungslehre*, Baden-Baden, 2004, pp. 377 ff.
21) Details in Nikolaus Petersen, *Rundfunkfreiheit und EG-Vertrag*, Baden-Baden, 1994, p. 189, pp. 191 ff.; Dieter Dörr, *Die Rolle des öffentlich-rechtlichen Rundfunks in Europa*, Baden-Baden, 1997, pp. 11 ff.; Wulf Meinel, *Grenzen europäischer Rundfunkrechtsetzung*, Frankfurt am Main, 1993, pp. 180 ff.; Alexander Rossnagel/Peter Strothmann, *Die duale Rundfunkordnung in Europa*, Vienna, 2004, pp. 200 ff., Jörg Michael Voss, op. cit., pp. 252 ff.
22) The EU intends to accede to the ECHR. This is likely to lead to an increase in the importance for the EU organs of the instruments developed by the Council of Europe in Strasbourg in the context of Article 10 ECHR.
23) This does not necessarily have to be done (entirely) by the legislature but can also take place as part of a multi-stage procedure involving legislative acts and decisions by an administrative authority. However, the state aid rules prevent the Commission from allowing undertakings to produce their own definition that is based on an imprecisely defined remit and enables them to determine themselves the degree to which they are bound by Community law (cf. Broadcasting Communication, para. 40, and Karl-Eberhard Hain, op. cit., pp. 7 ff., p. 36).
24) Thorsten Held/Wolfgang Schulz, *Europarechtliche Beurteilung von Online-Angeboten öffentlich-rechtlicher Rundfunkanstalten*, Berlin 2004, pp. 51 ff.
25) See also Thomas Kleist/Alexander Scheuer, "Public service broadcasting and the European Union: From 'Amsterdam' to 'Altmark' – The discussion on EU state aid regulation", in: Christian Nissen (Hrsg.), *Making a Difference – Public Service Broadcasting in the European Media Landscape*, 2006, pp. 170 ff.
26) C(2003) 4497, especially paras. 69 ff. This and other decisions mentioned here are available at: http://ec.europa.eu/comm/competition/state_aid/register/ii/#by_case_number
27) The Act defines not only the general public service remit of France Télévisions and the corresponding corporate units but also lays down the establishment of supplementary programme offerings in the context of new services (see section 43-11 of the Act of 30 September 1986 in the version of 5 March 2009, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020352071&dateTexte=). The Act also states that the tasks of each channel must be laid down in a "schedule of obligations". The proposal for a new schedule of obligations for France Télévisions contains rules on new services, especially in sections 19 and 23. According to these rules, under its public service remit France Télévisions may, in addition to television programmes transmitted in the traditional way, also offer content via on-demand services, such as catch-up TV or video on demand. The draft of 20 October 2008 is available at: http://www.culture.gouv.fr/culture/actualites/ccFranceTV.pdf
28) N 37/2003. The approach on which this assessment is based has, as the reader will be aware, made the Commission the target of considerable criticism.
29) The Royal Charter was granted to the BBC on 19 September 2006 and took effect on 1 January 2007. The text is available at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bbc_royal_charter.pdf
30) The decision is available at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/local_video/decision.pdf
31) E 4/2005 (ex NN 99/1999).
32) See in particular sections 101 ff. and 114 ff., available at: http://www.oireachtas.ie/documents/bills28/bills/2008/2908/b2908s.pdf . The Bill has not yet completed all legislative stages.
33) E 8/2006 (ex CP 110/2004).
34) C(2004) 1814. The Commission also accepted that the public service remit covers support for Danish film productions.
35) Available in English at: http://www.bibliotekogmedier.dk/fileadmin/user_upload/dokumenter/medier/radio_og_tv/landsdaekkende_regional/DR/public_service_dr/drspscontract_eng.pdf
36) Commission's press release of 3 February 2004, IP/04/146.
37) C 2/2004 (ex NN 170/2003).
38) Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008), Staatsblad 2008, 583.
39) Unless and until the balanced diversity of programming as a whole is guaranteed in a system involving competition between numerous (private) broadcasters, the public service broadcasters in Germany will be responsible for providing the citizens with the indispensable basic standard of service that meets their information, culture and entertainment needs and covers the necessary range of subjects and opinions. Basic standard should not be understood to mean minimum standard but, rather, the provision of the entire range of political information, cultural and entertainment programmes that characterise broadcasting at the present time. The legislature is obliged by the constitution to ensure that the technical, organisational, staffing and financial preconditions for the public service broadcasters to fulfil their remit to provide this basic standard of service are met (cf. Official Collection of Federal Constitutional Court Decisions [BverfGE] 89, 144, 152 ff.).
40) E 3/2005, loc. cit.
41) See also Georgios Gounalakis/Christoph Wege, "Öffentlich-rechtlicher Rundfunk hat seinen Preis – Das Karlsruher Gebührenurteil vom 11. September 2007", *NJW* 2008, pp. 800 ff.
42) The press release is available at: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/804&format=HTML&aged=0&language=EN&guiLanguage=en
43) See Thomas Kleist, "Die Umsetzung des EU-Kompromisses im 12. RundfunkänderungsStV", in: *promedia* 2/2008. In contrast to the public value test, in the case of the German three-stage test required by section 11f(4) of the Interstate Treaty in the version of the 12th Interstate Treaty amending interstate broadcasting treaties the final decision on the result of the examination is taken by bodies internal to the broadcasting organisation. Responsible for this are the Broadcasting Councils, on which different groups are represented (or the Television Council in the case of ZDF and the Radio Council in the case of Deutschlandradio).
44) The court said the member states were even entitled to prevent such services from being subject to competition. In its *SIC v. Commission* judgment (Case T-442/03), loc. cit., the ECFI adopted this view without further comment, for example against the background of the judgments delivered in the 1990s on Art. 10 ECHR by the European Court of Human Rights.
45) ECFI, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, available at: http://www.curia.europa.eu, paras. 102, 113 and 109 ff., 123; see also para. 96.
46) A summary of the contributions to the consultation is available at: http://ec.europa.eu/comm/competition/state_aid/reform/comments_broadcasting/summary.pdf
47) The Commission's draft of 4 November 2008 is available at: http://ec.europa.eu/competition/state_aid/reform/broadcasting_communication_de.pdf
48) The statements on the draft are available at: http://ec.europa.eu/competition/state_aid/reform/reform.html
49) The Commission's draft of 8 April 2009 is available at: http://ec.europa.eu/competition/consultations/2009_broadcasting_review/broadcasting_review_en.pdf
50) The principle of editorial independence has been inserted into the new draft, paras. 47 and 86.
51) See para. 47 of the first and para. 48 of the new draft: "That would normally be the position in the case of advertising, e-commerce, teleshopping, commercial prize-games, sponsoring or merchandising".
52) See para. 50 of the first and para. 47 of the new draft.
53) See para. 51 of the first draft. In the new draft (para. 85), this subject is dealt with in an amended form (further details below).
54) See para. 54 of the first and para. 83 of the new draft.
55) Paras. 69 and 99. On the other requirements, see in particular para. 62 of the draft.
56) Para. 89 of the new draft.