

MAASTRICHT UNIVERSITY, FACULTY OF LAW

State Aid and Public Service Broadcasting

Zsófia Halmágyi (I6038320) , Sabrina Fetea (I6037974)

Abstract

The Television without Frontiers Directive liberalized the European broadcasting system and led to the introduction of the dual system, with both public and private operators providing services. As a consequence, State financing of public service broadcasting became a highly contested issue. A balance needs to be struck between financing public service broadcasting to ensure media pluralism and the functioning of the internal market.

The Commission in the 2009 Broadcasting Communication laid down some general rules which recognise the special nature of PSB and provide for safeguards against market distortions.

The Commission has made considerable efforts to balance competition and public service broadcasting by codifying solutions to concerns raised by the diversification of public broadcasting services.

This paper analyzes the conditions a measure taken by a Member State is to meet in order to be considered compatible with the internal market, as laid down by the 2009 Broadcasting Communication.

1. Introduction

The Television without Frontiers Directive¹ liberalized the European broadcasting system and led to the introduction of the dual system, with both public and private operators providing services. As a consequence, State financing of public service broadcasting became a highly contested issue. On one hand, it is argued that State financing of public operators is welcomed since it contributes to the provision of impartial information, cultural diversity, freedom of expression, and the preservation of a pluralistic media landscape across the European Union.² On the other hand, State financing of public operators is considered to affect competition and

¹Directive 89/552/EEC of the Council of 3 October 1989 on the Coordination of Certain Provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of Television Broadcasting Activities OJ L 298/23-30, as amended by Directive 97/36/EC OJ L 202/60- 70

²European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system, [2010/2028 (INI)], para. 2.

consumer welfare as it creates difficulties for new operators wanting to enter the market as well as for private operator already on the market.³

As a consequence, a balance needs to be struck between financing public service broadcasting to ensure media pluralism and the functioning of the internal market. Public service broadcasting policy is considered to fall within the competence of the Member States since forms part of the cultural policy. Thus, the Commission's role is limited to ensuring that the measures taken in this field will not create distortions of competition in the market. It has been argued however that the Commission engaged more actively in the area of public service broadcasting, not only because of the character of its decisions in this field, but also because of the adoption of a soft law instrument, the Broadcasting Communication, which contains guidelines on the application of State Aid rules to public service broadcasting.

This paper is structured into five parts. The first part provides a general overview of the legal framework of State aid in the area of public service broadcasting. The following three parts analyze the conditions laid down in the 2009 Broadcasting Communication that a measure taken by a Member State has to meet in order to be considered compatible with the internal market. The paper also comprises a part dedicated to the 'Ex-ante assessment' conducted in the field of public service broadcasting, and finally some conclusions are drawn.

2. Legal Framework

Article 106 (2) TFEU and the Amsterdam Protocol

The Commission has in general treated State financing of broadcasting activities as State Aid within the meaning of 107 (1) TFEU, and as a result, assesses the compatibility of the measures under scrutiny with the exceptions of the Treaty.

Public broadcasting services have been qualified as services of general economic interest, which led to the application of article 106 (2) TFEU. Article 106 (2) TFEU provides for a derogation from the Treaty provisions, in particular to the rules on competition, if the application of such rules would "obstruct the performance, in law or in fact, of the particular tasks assigned to them." However, the application of this exemption must not affect the development of trade to

³Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 3

such an extent as it would be contrary to the interest of the Union. For this reason, the wording of the provision is considered ambiguous and the Commission has a difficult task in deciding whether a measure supporting public service broadcasting can benefit from the exception provided in 106 (2) TFEU.

Article 106 (2) tries to strike a balance between two conflicting interests: the national interest of the Member States and the interest of the Union. The Treaty does not say how this balance is to be achieved, but paragraph 3 of Article 106 states that the Commission shall ensure the application of the provisions of article 106.

The same issue is considered by the Protocol on the System of Public Broadcasting in the Member States introduced by the Treaty of Amsterdam. The Protocol recognizes the importance of public service broadcasting in attaining the democratic, social and cultural needs of each society and in preserving media pluralism. It also acknowledges the fact that Member States have competence in providing for the funding of public service broadcasting, and when such a system is introduced, to organize and define the provisions related to the public broadcasting services. However, the Protocol also draws attention to the fact that State funding of public service broadcasting may not affect trading conditions and competition in the Union. Thus, the Protocol, while recognizing the significance of public service broadcasting, does not clarify the matter as it does not provide for a full exemption from the provisions of the Treaty. Moreover, the Protocol has an interpretative character.

Commission 2009 Broadcasting Communication

The Commission follows a case-by-case approach in the assessment of the compatibility of State Aid to public service broadcasters under Article 106 (2) TFEU and the Amsterdam Protocol due to the unclear wording of these provisions and to the differences existing between the national systems of the Member States. This led to the development of a body of common principles that are followed by the Commission: the Broadcasting Communication.⁴

The Broadcasting Communication is of great importance even if it is binding only to the Commission⁵ because it may give guidance to the Member States and to the private sector as to

⁴Ibid.

⁵Ibid., para.8.

what measures may be declared in accordance with the Treaty. The Communication makes reference to four criteria which must be met cumulatively for the measure to be compatible with the internal market: the public service remit must be defined in a clear and precise manner, the undertaking in question must be explicitly entrusted by the Member State with the provision of that service, and there must be an effective monitoring mechanism in place to ensure that the public service obligations are complied with, and State financing must not exceed the costs of the public service mission.

3. Definition of the public service remit

In what the criteria of a clear and precise definition is concerned, the 2009 Communication, reflecting the case-law provides that “As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission to decide which programmes are to be provided and financed as a service of general economic interest, nor to question the nature or the quality of a certain product.”⁶ This approach is also in line with the Amsterdam Protocol which recognizes the freedom of the Member States to organize and define the public service remit.

Even if the Commission’s role is restricted, several controversies arise when assessing whether the clear and precise definition condition is met due to the fact that in most situations it is not easy to distinguish between services which fulfill a public interest and commercial services. Recently, the introduction of new activities next to the traditional broadcasting activities makes the distinction between public and commercial services even more difficult.⁷

Court of First Instance- TV2 case

The case-law of the CFI, which has been codified in the 2009 Communication and the Commission’s decisions in the field of broadcasting address a number of issues which arise in relation to the definition of the public service remit.

The CFI restated the principle that the Commission is entitled to check only for manifest error in the TV2 and SIC cases.

⁶Ibid., para .48.

⁷ Bania, ‘State aid in the broadcasting sector: Has the right balance been struck between competition and public service broadcasting?’, European University Institute (EUI), Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf> , p. 18

In the TV2 case, the Court annulled the Commission's decision⁸ which held that the aid granted to TV2 by Denmark was compatible with the internal market with the exception of a part of the money granted. The Commission's Decision was appealed by all the concerned parties: Denmark and TV2 brought an action for the annulment of the decision and SBS and Viasat, private operators, requested the annulment of the part of the decision which found that the aid was compatible with the common market.

The Court found that the Commission infringed essential procedural requirements by failing to examine seriously during the formal investigation procedure the conditions under which Denmark provided funding to TV2, and that the Commission's claim that Danish authorities failed to check regularly the level of accumulated reserves is unsubstantiated. Therefore, the CFI annulled the decision and found that the Commission erred in making a finding of State Aid.

What is of importance for the present topic is that in its judgment, the Court states: "Member States enjoy a broad discretion for defining what they regard as services of general economic interest. Accordingly, the definition of such services by a Member State can be queried by the Commission only in the event of manifest error."

Further, the Court held that "to make the definition of the broadcasting SGEI dependent-through a comparative analysis of programming-on the range of programming offered by the commercial broadcaster would have the effect of depriving the Member States of their power to define the public service. In fact, the definition of the SGEI would depend, in the final analysis, on the commercial operators and their decision as to whether or not to broadcast certain programmes."⁹

Moreover, the Court concluded that "when the Member States define the remit of public service broadcasting, they cannot be constrained by the activities of the commercial television channels"¹⁰

It has been argued that Member State's freedom to define PSB derives from the PSB's special nature.

⁸ Decision 2006/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark [2006] OJ L 85, p. 1; corrigendum in [2006] OJ L 368, p. 112.

⁹Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, TV2/Danmark A/S, Danemark, Viasat Broadcasting UK Ltd, SBS TV A/S and SBS Danish Television Ltd v Commission, Judgment of the Court of First Instance of 22 October 2008, para. 123

¹⁰Ibid.

Public Service Broadcasting (PSB) is traditionally considered a service of general economic interest (SGEI), however it has a special nature in comparison to other SGEI. The special place of PSB is mentioned and recognized in several legal instruments, such as the Amsterdam Protocol, Communication on Services of General Interest in Europe Of 2000, the 2001 Communication, as well as case-law of the CFI.¹¹ The 2009 Communication builds on the 2001 Communication and the CFI jurisprudence.

The Amsterdam Protocol stipulates that 'the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism'.¹²

The 2001 Communication further states that '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'¹³

The CFI confirms the concept of speciality of PSB in even stronger terms by suggesting that PSB is almost a non-economic activity.¹⁴ The CFI explains the classification of the PSB as an SGEI 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. «¹⁵

The special nature of PSB has the following consequences: a Member State is not required to have recourse to competitive tendering for the award of such an SGEI and in principle Member States have a greater margin of manoeuvre in the definition of the PSB remit and its means of financing than in any other SGEI sector. Thus, the Commission's scrutiny regarding the definition and financing mechanism set up by the Member States is even more restricted than in case of any other SGEI.¹⁶

¹¹Grespan, 'A Busy Year for State Aid Control in the Field of Public Service Broadcasting', *European State Aid Law Quarterly* 1 (2010), p. 79.

¹²The Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam ('Amsterdam Protocol') [1997] OJ C340.

¹³2001 Broadcasting Communication, point 6

¹⁴Grespan, *European State Aid Law Quarterly* 1 (2010), p. 80.

¹⁵ Case T-442/03, *SIC v. Commission of the European Communities* Judgment of the Court of First Instance [2008] ECR II-01161 para. 153.

¹⁶Grespan, *European State Aid Law Quarterly* 1 (2010), p. 80.

In other cases, Member States cannot define SGEIs according to their own will, being generally required that the activity of general economic interest has special characteristics in comparison with the general economic interest of other activities.¹⁷

Since it is required that an SGEI should offer something extra compared to the services existing on the market, it is in general relevant to take into account the market offers for the SGEI definition. In its judgment, the CFI acknowledges the fact that PSB should distinguish itself from private broadcasting, but the definition of the PSB cannot depend only on the comparison of the programmes of private and public broadcasters.¹⁸

Since the Commission is entitled to check only for manifest error, it cannot give its opinion on whether the qualitative obligations which are imposed on PSB operators are complied with, or if they differ from the obligations imposed on private operators. Moreover, since the comparison between the programmes of public and private operators cannot include an analysis of the qualitative obligations, the Commission cannot decide in this way on the correctness of the PSB remit.¹⁹

The qualitative criteria for the services offered by public service broadcasters are according to the CFI “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”.²⁰

The 2009 Communication is in line with the CFI’s jurisprudence and gives further guideline with regard to the situations in which the Commission considers the definition of the PSB remit to be in manifest error: “The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet — in the wording of the Amsterdam Protocol — the ‘democratic, social and cultural needs of each society’. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising, for example. Moreover, a manifest error could occur where State aid is used to finance activities

¹⁷Ibid., p. 82

¹⁸Ibid.

¹⁹Ibid.

²⁰Case T-442/03, *SIC v. Commission of the European Communities*, para. 211.

which do not bring added value in terms of serving the social, democratic and cultural needs of society.”²¹

Editorial independence in the 2009 Communication

The 2009 Communication makes also reference to the need of safeguarding editorial independence of the public service broadcasters which has to be balanced with the requirement of a precisely defined public service mandate:”At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2)”.

Technology neutrality in the 2009 Communication

With regard to technology neutrality, the 2009 Communication provides that “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”²² which means that it may include also other services than activities like radio or TV broadcasting provided that the provisions of the Amsterdam Protocol are complied with.

Moreover, the 2009 Communication recognizes the fact that the technological developments led to the diversification of the publicly funded activities which in turn, led to a raise in the complaints made by other market players.²³ For example, newspaper publishers expressed their concern that if the concept of broadcasting will be interpreted too broadly, public broadcasters will expand the range of their services by publishing a kind of electronic press on the internet. The Commission gave assurance that the ex-ante test provides for enough procedural safeguards for public broadcasters expanding onto new platforms.²⁴

²¹Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 48.

²²Ibid., para. 47.

²³Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 5.

²⁴ L. Repa *et al.*, ‘The 2009 Broadcasting Communication’, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, p. 12.

Finally, the Commission takes the view 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” as long as this will not have a disproportionate effect on the market and aims at fulfilling the democratic, social and cultural needs of the society.²⁵

Commission Decisions on State aid rules to public service broadcasting

Universality-CFII

Another relevant decision is the Commission’s decision on Chaîne française d’information internationale²⁶ (CFII) in which the Commission approved the financing of the international news channel CFII. The Commission took the view that even though the financing of CFII constituted state aid, the project was compatible with the common market as it was a project financing a service of general economic interest.

In reaching this conclusion, the Commission analyzed whether the service constituted a SGEI, and whether it may qualify for an exemption from the general State Aid prohibition. One of the issues in the case was that the channel was not intended to be broadcast in the French territory being accessible only to “residents in France in possession of special equipment” or to “members of the French society residing in a foreign country”.²⁷

It was also questionable whether CFII’s mission that aimed at informing foreign audiences of “the French point of view on international news”²⁸ was sufficiently connected to the fulfillment of the democratic, social and cultural needs of the French society.²⁹

The Commission went on to conduct its analysis on the basis of ex-article 86 EC Treaty (article 106 TFEU) wanting to establish whether the service in question constituted a SGEI. The Commission considered that CFII was a public service organization of audiovisual communication being financed by the French government and as a consequence, being able to pursue the objective of promoting the French culture and language.³⁰ Further, the Commission

²⁵Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 81.

²⁶N 54/2005 – France - Chaîne française d’information internationale, Decision of the Commission, 07.06.2005

²⁷Ibid., para. 39

²⁸Commission Press Release IP/05/689

²⁹N 54/2005 – France - Chaîne française d’information internationale, Decision of the Commission, 07.06.2005

³⁰Ibid., para. 41

considered that CFII's obligations proved that the service was of a public nature.³¹ Finally, the Commission concluded that the French authorities had not committed a manifest error, and that the financing of CFII was compatible with the single market as a project financing a SGEI.³²

It has been argued in the literature that the decision is questionable for the reason that it lacks universality. In this case, State intervention was not aimed at fulfilling the needs of its citizens who reside in its territory. Moreover, case-law established that one of the key elements of a SGEI was its provision to the public as a whole throughout its national territory and at an equal and affordable price, while in the present case the Commission approved a measure that would burden the viewers without them being able to benefit from the service.³³

Financing

Several of the Commission's decisions are concerned with the lack of a clear distinction between public services and commercial activities. Although public broadcasting services have traditionally been free-to-air, the Commission considers that a direct remuneration element in such services — while having an impact on access by viewers— 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".³⁴

Financing public broadcasters in Germany

In its Decision on financing public broadcasters in Germany³⁵, the Commission's task was to assess the compatibility of the general funding regime supporting German public broadcasting organizations with the EU law.

The issues that concerned the definition aspect of the PSB referred also to the lack of a clear distinction between public services and commercial activities.³⁶ The Commission argued

³¹ *Ibid.*, para. 42

³² Commission Press Release IP/05/689

³³ K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 24

³⁴ Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 83.

³⁵ E 3/2005 – Germany - Financing of public service broadcasters in Germany, Decision of the Commission, 24.04.2007

that the lack of such a distinction may lead to distortions of competition which may affect intra-Union trade.³⁷

The Commission adopted an approach which is more in line with the Member State's freedom to define the remit by stating that the distinction between public and commercial activities should be made on the basis of the business model behind the service and not the type of technology.³⁸ However, the Commission's unwillingness to qualify pay services as falling within the PSB remit was considered problematic as it was not in accordance with the provision of the Amsterdam Protocol and the case-law which recognized the Member State's freedom to decide for the funding mechanism which they deem appropriate.³⁹

In recent cases, the Commission has accepted the possibility to qualify pay services as falling within the PSB remit when certain conditions are fulfilled.⁴⁰

State financing of Irish public broadcasters and State funding for Flemish public broadcaster

In these decisions, the Commission took a different approach with regard to the distinction between public and commercial activities in the case of financing regimes of the Irish and Flemish public broadcasters by focusing on the State's duty to promote clear legislation that ensures compliance with the public service obligations.⁴¹ The Commission considered that ambiguous provisions enable broadcasters to include commercial activities in the public mandate.⁴² As a consequence, both the Irish and the Flemish authorities took measures to increase transparency in relation to what kind of services fall under the public mandate. These measures are also for the benefit of private operators who would be able to plan their activities better.⁴³

The Commission's approach in these cases is more in accordance with the provisions of the Amsterdam Protocol. While the Commission takes into account the definitional freedom of

³⁶Ibid., p. 75

³⁷Ibid., p. 237

³⁸K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 26.

³⁹Ibid.

⁴⁰Grespan, *European State Aid Law Quarterly* 1 (2010), p. 85.

⁴¹K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 28.

⁴²E 4/2005 – Ireland – State aid financing of RTE and TNAG (TG4), Decision of the Commission, 27.02.2008, 89

⁴³K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 29.

the Member States, it also identifies problematic national statutory provisions which may lead to abuses and therefore to distortions of competition.⁴⁴

It has been argued that the Commission should follow this approach if it wishes to achieve the correct balance when assessing whether the Member States defined the public service mandate as precisely as possible.⁴⁵

In its decisions on financing public broadcasters in Germany, State financing of Irish public broadcasters and State funding for Flemish public broadcaster, the Commission also addressed the issue regarding lack of clarity of the provisions related to new media services. The Commission's approach in these cases is reasonable, even though it was argued that it may interfere with the freedom of the Member States, as it tries to avoid the expansion of public broadcasters to newly developed commercial activities and to ensure that public money are not used for commercial activities.⁴⁶

4. Entrustment and supervision

According to paragraph 50 of the 2009 Communication, the public service remit in order to benefit from the exemption under Article 86(2) (Article 106(2) TFEU), should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or binding terms of reference). Paragraph 51 stipulates that the entrustment act(s) shall specify the precise nature of the public service obligations, and shall set out the conditions for providing the compensation, as well as the arrangements for avoiding and repaying any overcompensation.

Paragraph 51 is new in comparison with the 2001 Communication and proves that the Commission takes account of the legal developments occurring in the field of SGEL.⁴⁷

The act of entrustment has a great significance in striking the balance between public service broadcasting and competition. By describing in a sufficiently clear and precise manner the public service obligations with which a specific organization is entrusted, the entrustment act precludes public service broadcasters from developing commercial activities under the

⁴⁴Ibid, p. 31.

⁴⁵Ibid.

⁴⁶Ibid, p. 26-30.

⁴⁷Grespan, *European State Aid Law Quarterly* 1 (2010), p. 83.

provisions of the Amsterdam Protocol and it facilitates control of the fulfillment of public service obligations and enables private operators to plan their business.⁴⁸

In the past, the fulfillment of the entrustment criterion did not really raise problems, because the State had a natural monopoly over the public service broadcasting, since the inception of the PSB sector. The provision of relevant services was assigned on an exclusive basis to specific undertakings by virtue of law, which has been considered by the Commission to be an adequate act of entrustment.

However, recently the general wording of statutory national provisions laying down that public service broadcasters may provide any service, other than traditional broadcasting, without there being a specific act of entrustment for the provision of each new service sought to be provided has been contested by the Commission. This shift in the approach of the Commission can be explained by the development of new media markets and the pressure exercised by private undertakings. A separate entrustment for the provision of new media services may increase transparency in the sector and enable private undertakings operating in the wider context of the media market to design their business plan.⁴⁹

The 2009 Communication in paragraph 53 confirms, as its predecessor, the 2001 Communication did, the need for an appropriate authority or appointed body to supervise in a transparent and effective manner the provision of the public service in order to ensure its compliance with the formal agreement between the State and the entrusted undertaking. The choice of the mechanism used for this purpose is left to the Member State, however, paragraph 54 underlines that «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. »

Paragraph 55 stipulates the relevance of sufficient and reliable indications that the public service is actually supplied as mandated: they are a prerequisite for the Commission to carry out its tasks under Article 106(2) and to grant exemptions under that provision.

⁴⁸K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf> p. 31.

⁴⁹Ibid., p. 33.

The control required to be carried out by the Member States seems to include two types of control, i.e. a quantitative and a qualitative one. The quantitative control is an objective assessment which may be carried out also by the Commission itself and refers, *inter alia*, to aspects such as the actual provision of the PSB remit entrusted to the operator or the correspondence between those services and the costs declared.⁵⁰

In relation to the control which needs to be carried out the *SIC* case⁵¹ is a relevant one. In the *SIC* case the Court of First Instance noted that the Commission based its analysis on unreliable information, taking into consideration the absence of proof of systematic external verification of the public service reports.⁵² Therefore, CIF annulled the Commission decision on the ground that the Commission lacked sufficiently reliable information « to determine the public services actually supplied and the costs actually incurred in supplying them. In the absence of such information, the Commission was unable to proceed subsequently to a meaningful verification of whether the funding was proportionate to the public service costs and was unable to make a valid finding that there had been no overcompensation of the public service costs. «⁵³

A scope of the quantitative control according to para. 77 of the 2009 Communication is to prevent overcompensation. The mechanisms chosen by the Member States « 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’. «⁵⁴

The second type of control which needs to be carried out by the Member States is a qualitative one. In case of the qualitative control, contrary to the above-mentioned quantitative one, the Commission has no competence in carrying it out. The qualitative control is a subjective assessment concerning compliance of the program content with qualitative standards, such as promotion of pluralism, respect of democratic values, and appropriate representation of different opinions etc.

The relevant paragraphs of the *SIC* judgment referring to the qualitative control are para. 211, 212, 213 and 214. While para. 211 states that « public service broadcasting can have its State

⁵⁰ Grespan, *European State Aid Law Quarterly* 1 (2010), p. 83; Case T-442/03, *SIC v. Commission of the European Communities*, para. 210.

⁵¹ *Ibid.*

⁵² *Ibid.*, para. 250.

⁵³ *Ibid.*, para. 255.

⁵⁴ Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 77.

funding declared to be compliant with the provisions of the Treaty on State aid only inasmuch as the qualitative requirements set out in the public service remit are complied with », para. 212 clarifies that only the Member State is able to assess the public service broadcaster's compliance with the quality standards defined in the public service remit. Content regulation is considered to be a national issue because of its direct and close connection to the 'cultural, social and democratic needs of a particular society'. The Commission must be able to rely on appropriate monitoring by the Member States.⁵⁵ This aspect is codified in the 2009 Communication, in para. 53.

The SIC judgment states furthermore that the Commission generally must confine itself to finding that there is a monitoring mechanism of compliance, not having the power specifically to verify compliance with quality standards. Only in cases where serious doubts are raised regarding the use of the mechanism, the Commission can be required to examine whether it was actually used, whilst ensuring that it does not go beyond that examination and specifically that it does not interfere with the Member State's competence to assess compliance with the qualitative standards.⁵⁶

New media services/ Ex ante assessment

Section 6.7 of the revised Communication (from 2009) refers to the diversification of public broadcasting services. The changes and developments on the audiovisual markets have raised questions regarding the application of the State aid rules to audiovisual services which fall outside of the category of traditional broadcasting activities.⁵⁷

The Commission recognizes the necessity of enabling public service broadcasters to make use of State aid in the case of those new media services, which although cannot be considered broadcasting activities in the traditional sense, fulfill the material conditions of the Amsterdam Protocol. Thus, the Commission interprets broadly the concept 'broadcasting' used in the Amsterdam Protocol, provided that the new media services cater for the general public as well as for special interests and address « the same democratic, social and cultural needs of the

⁵⁵ Case T-442/03, *SIC v. Commission of the European Communities*, para. 212.

⁵⁶ *Ibid.*, p. 214.

⁵⁷ Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 80.

society in question, and do not entail disproportionate effects on the market, which are not necessary for the fulfillment of the public service remit ». ⁵⁸

The compliance of new media services to the above-mentioned values cannot be presumed, because at the moment of the introduction of the Amsterdam Protocol in the Treaty in 1997, public service broadcasting in Europe included traditional forms of broadcasting, i.e. TV and radio (free to air transmission of audiovisual programs to the general public). ⁵⁹

Therefore, the Commission requires Member States to carry out a prior evaluation procedure, also called the ‘Amsterdam test’, which ensures that the new media services meet the substantive conditions of the Amsterdam Protocol. This procedural solution had been already applied in cases concerning Germany, Ireland and Belgium, before the codification of this practice in the revised version of the Broadcasting Communication. ⁶⁰

The prior evaluation procedure (ex ante assessment), carried out at a national level, responds to the concern of the commercial media and has as a scope precluding the use of public money to offer new online services which are similar to traditional forms of broadcasting, but which do not add public value and which considerably distort competition. ⁶¹

The ex ante assessment procedure was inspired by the BBC’s Public Value Test (2007) and is governed by the 2009 Broadcasting Communication in paragraphs 84 – 91.

These paragraphs are applicable to ‘significant new services’. Thus, the Commission introduces a distinction between new media services: those not to be considered as significantly new’ and which can be provided as part of the existing PSB remit (e.g. some forms of linear transmission, such as the simultaneous transmission of the evening TIV news on other platforms like internet or mobile devices), and those that are significantly new for which a specific entrustment is required. ⁶²

The 2009 Communication does not include a definition of ‘significant new services’ ; thus Member States are granted, within the limits of the Amsterdam Protocol, flexibility in defining the benchmark which triggers the test. ⁶³

⁵⁸Ibid., para. 81; L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), p. 14.

⁵⁹Grespan, *European State Aid Law Quarterly* 1 (2010), p. 87.

⁶⁰Ibid., 14.

⁶¹Ibid., 15.

⁶²Ibid., p. 86.

⁶³L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, 15.

According to para. 85 of the 2009 Communication Member States decide what services should fall under the category of ‘significant new service’, taking into consideration the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster. Para 85 gives furthermore guidance regarding the determination of the ‘new’ and ‘significant’ nature of a service.

Under the prior evaluation procedure two aspects must be examined: the public value of the new service and its impact on the market.

The public value test refers to the consideration of whether the new service adds value for society in terms of satisfying the social, democratic or cultural needs of the population.⁶⁴

The Commission leaves the public value assessment of the new service entirely to the Member States, who are in a better position to do the assessment, based on the specificities of the national public broadcasting systems and the need to safeguard editorial independence of public service broadcasters.⁶⁵

The scope of the market impact assessment is 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.⁶⁶

The market impact of the new service should be assessed taking into consideration the outcome of the open consultation of the interested stakeholders, governed by para. 87 of the Broadcasting Communication. The Commission in para. 88 refers, in an exemplificative manner to factors which can be included when assessing the impact on the market, such as 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. The Commission requires the market impact to be balanced with the public value of the services. In case the effects on the market are predominantly negative, « 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, taking also into account the existing overall public service offer » - according to para. 88 of the 2009 Communication.

⁶⁴ Ibid.

⁶⁵ Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 86.

⁶⁶ Ibid., para. 88.

The prior evaluation procedure has been heavily debated, mainly because it involves competence issues in the sense that it is questionable whether the Commission has stayed within the limits of its competence to check for manifest errors or has acted *ultra vires* by interfering with the freedom of the Member States to define the PSB mandate.⁶⁷

Next to the competence issue, other concerns have been raised as well regarding market failure, editorial independence, administrative burden on public service broadcasters, differences that characterize the national media landscapes.

It has been argued that the prior evaluation of new services on a case-by-case basis may easily lead to a market failure approach in the public broadcasting project, which would eventually reduce programming diversity and lead to the marginalization of public broadcasting organizations.⁶⁸

Another concern was that the Amsterdam Test would reduce the editorial independence of public service broadcasters, in the sense that it would dictate the programming on offer by taking into account existing commercial offers upon considering the market impact of each new service.⁶⁹

The Amsterdam Test has also been criticized because it was argued that it would impose a heavy administrative burden on public service broadcasters, especially in smaller Member States.⁷⁰ Because of the lack of resources in smaller Member States, it is questionable whether the prior evaluation procedure can successfully be introduced to these Member States. Taking into consideration that the prior evaluation procedure has been inspired by the BBC's public value test, thus a test originally applied for a « specific organization, fulfilling the needs of a specific society and pertaining in a specific media environment », the success of introducing it to all Member States has been questioned.⁷¹

This uniform requirement has also been criticized on the basis that it does not take into account the differences between national public service broadcasting systems, resulting from the

⁶⁷K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 36.

⁶⁸Ibid.

⁶⁹Ibid.

⁷⁰L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, p. 15.

⁷¹K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 37.

diverse cultural, democratic and social needs and it introduces changes to systems where such changes might not be necessary.⁷²

Regarding the concerns raised in relation to the Amsterdam Test, some points need to be made. No governmental involvement is required by the Communication and the Communication itself emphasizes the need to safeguard the editorial independence of public service broadcasters. The Commission in para. 89 of the Communication only affirms the necessity that the assessment be carried out by a body which is effectively independent from the management of the public service broadcaster.

In relation to the concern regarding the administrative burden on public service broadcasters, it must be mentioned that the Communication lays down only minimal requirements, while leaving the details of the procedure and the institutional solution up to each Member State.⁷³

The Commission refers to only certain aspects of the procedure: the two substantive elements of the evaluation (leaving the conduct of the balancing exercise between the public value and the market impact to the Member State); the open consultation of interested stakeholders ; the need for an independent body to carry out the assessment.⁷⁴

According to para. 89 « 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 ». Moreover, the test is applied only to ‘significant new services’, whose definition is left to the Member States. Pilot projects which have the scope to try out new ideas do not need to go through the prior evaluation procedure.^{75/76}

The requirement of introducing a prior evaluation procedure may be justified by transparency, legal certainty and security as well as other practical reasons.

⁷²Ibid.

⁷³L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, p. 15.

⁷⁴K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/ilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 40; Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 87 and 89

⁷⁵Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 90.

⁷⁶L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, p. 15.

The ex ante assessment may increase transparency in the market since it requires each new service to be assessed individually. It can establish legal certainty not only for broadcasters but also for other interested stakeholders through the open consultation. The media market players will be able to deliver their opinions and express their concerns not only by contesting certain services through complaints, but also in a prior stage, during the consultation process concerning a proposed service. Taking into consideration the continuous developments in this sector, a prior evaluation procedure may reduce significantly the Commission's workload and improve the quality of the decisions in this field by facilitating a more efficient decision-making practice.⁷⁷ Due to the consultation process, complaints to the Commission are avoided. The Amsterdam test in practice works like a dispute settlement mechanism.⁷⁸

Another positive aspect of the ex ante assessment is the enhancement of legal security on the use of public money.⁷⁹ Due to the disappearance of a clear borderline between public and commercial services, the Commission's manifest error control concerning the use of public money does not seem to give enough protection to commercial operators and the taxpayers.⁸⁰

The application of the Amsterdam test has the effect of maximizing the public value of a new service while reducing the market impact to an acceptable level.⁸¹

The prior evaluation procedure being codified in the Broadcasting Communication 2009, it became soft law. Thus, « in the digital era the Commission has undoubtedly found its way to affect national public broadcasting policies ». ⁸²

The prior evaluation procedure will contribute to complying with the EU State aid rules. This is, however, without prejudice to the competences of the Commission to verify that Member States comply with the Treaty provisions, and to its right to act, whenever necessary, also on the basis of complaints or on its own initiative.⁸³ Thus, the Commission - when receiving a

⁷⁷K. Bania, European University Institute Florence (2011), p. 37.

⁷⁸L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, p. 16.

⁷⁹Ibid.

⁸⁰K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 41.

⁸¹L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, p. 16.

⁸²K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 41.

⁸³Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 91.

complaint - will take into account the prior evaluation carried out at the national level, but the prior assessment does not preclude the Commission from opening an investigation, if it considers that the test was unfair or ineffective.⁸⁴

In conclusion, it seems that the positive effects of the ex ante assessment outweigh the competence issues.

The Commission only requires Member States to consider best practices when accepting new media services as part of the PSB, leaving to them a wide margin of appreciation as to the content of those services.⁸⁵

5. Proportionality

The 2009 Commission Communication advises Member States to ensure that public service broadcasters respect the principle of proportionality meaning that they should not “engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission”.⁸⁶

What’s more, the 2009 Communication also gives a number of examples on how proportionality in the field of PSB is to be achieved: public service broadcasters should comply with the market economy investor principle when they act through subsidiaries and they should comply with the principle of proportionality when they acquire premium rights, the prices of advertising or other non-public service activities must be market-conform, and finally, when public service broadcasters purchase exclusive premium rights, these rights must be offered for sublicensing in a transparent and timely manner.⁸⁷

The guiding principle when assessing proportionality is that the amount of public compensation should not exceed the net costs of the public service mission. It should also be mentioned that “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”.⁸⁸

The Commission encountered problems in carrying out the proportionality test because of lack of transparency in the public service broadcaster’s accounts. The 2009 Communication

⁸⁴L. Repa *et al*, *Competition Policy Newsletter* 3 (2009), http://ec.europa.eu/competition/publications/cpn/cpn2009_3.pdf, p. 15.

⁸⁵Grespan, *European State Aid Law Quarterly* 1 (2010), p. 87.

⁸⁶Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 92.

⁸⁷*Ibid.*, para. 92-96.

⁸⁸*Ibid.*, para. 71.

codified the Commission's previous practice in relation to this issues providing for a clear separation between public service activities and non-public service activities including a clear separation of accounts⁸⁹, recognizing at the same time that in this particular case separation of accounts may be more difficult because Member States "may consider the whole programming of a broadcaster covered by the public service remit, while at the same time allowing for its commercial exploitation"⁹⁰. Moreover, the Communication states that the costs specific to non-public activities should be identified and accounted separately and that proportionality should also be taken into account when allocating costs which will serve the development of activities in the field of public and non-public services simultaneously.⁹¹

The Communication also acknowledges the fact that because of the specificity of the public broadcasting sector, where the net benefit of commercial activities related to the public service activities have to be taken into account when calculating the net public service costs, and whenever the same resources are used to perform public service and non-public service tasks, costs that are attributable to public service activities can be allocated only to public service activities even if at the same time they benefit non-public service activities. This is aimed at reducing the risk of cross-subsidization by means of accounting common costs to public service activities.⁹²

The obligation to have separate accounts between public and non-public services is also laid down in the provisions of the Transparency Directive with relevance to services of general economic interest. However, the Commission's task to assess the proportionality requirement was made difficult by the unwillingness of some Member States to transpose the relevant provisions of the Transparency Directive into national law, or due to the fact that the Directive was not implemented in an efficient manner.⁹³

The 2009 Communication contains also provisions on the financing of the public broadcasting services stating that quantitative or qualitative public service obligations could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred and that Member States are free to choose the means of financing

⁸⁹Ibid., para. 60.

⁹⁰Ibid., para. 65.

⁹¹Ibid., para. 66.

⁹²Ibid., para. 68.

⁹³K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 46

public service broadcasting while the Commission has to check under article 106 (2) whether the State funding affects competition in a disproportionate manner.⁹⁴In some cases it was especially difficult for the Commission to conduct the proportionality control due to the fact that some Member States designed complicated schemes to finance the public broadcasting services.⁹⁵

The 2009 Communication sets out that overcompensation is not necessary for the operation of the service of general economic interest, and as a consequence it will be considered incompatible State Aid. It is also acknowledged that state funding is necessary for the undertaking to carry out its public service tasks. The Communication states further: “However, in order to satisfy the proportionality test, it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit of all commercial activities related to the public service activity will be taken into account in determining the net public service costs”.⁹⁶

Undertakings that receive compensation for the performance of a public service task may enjoy a reasonable profit. However, the Commission considers that it would not be reasonable to include a profit element in the amount of compensation for the fulfillment of the public service mission in the case of 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. Public service broadcasters are entitled to earn profits from their commercial activities outside the public service remit. In other cases⁹⁷, a profit element may be considered reasonable if it is duly justified and necessary for the fulfillment of the public service obligations.⁹⁸

In the TV2 decision which was annulled by the Court of First Instance, the Commission recognized that under certain conditions, a limited level of overcompensation may be retained in

⁹⁴Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, section 6.3.

⁹⁵K. Bania, European University Institute Florence (2011), <http://www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/pdfs/events/20-21june2011/paper-Konstantina-Bania.pdf>, p. 47.

⁹⁶Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 71.

⁹⁷ 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 Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 72.

⁹⁸Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para.72.

the form of reserves in order to face the variability of the future SGEI costs and revenues.⁹⁹ It is argued that the use of reserves to finance the SGEI is relative since the State is allowed to compensate SGEI costs if it considers it to be appropriate.¹⁰⁰

The 2009 Communication provides for the situations and amount up to which public service broadcasters may retain yearly overcompensation.¹⁰¹ It is also mentioned that the overcompensation shall be used only for the financing of the public service activities and that cross-subsidisation of commercial activities is not justified and constitutes incompatible State aid.¹⁰²

The Commission interpreted paragraphs 73 and 74 from the 2009 Communication broadly in its decision on the financing of the Austrian public service operator stating that the percentages provided for by the Communication do not address the question of how much State aid is permissible if the performance of the public broadcasting service is threatened due to a drop of the broadcaster's equity capital, which seems to be linked with the financial crisis.¹⁰³ The provisions of the 2009 Communication referring to overcompensation and cross-subsidization reflect the Commission's practice in this field, aimed at preventing distortions of competition, allowing Member States at the same time to "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 fulfillment of the public service remit".¹⁰⁴

⁹⁹ In the TV2 case the Commission considered however the reserves of the public service operator incompatible aid, because what was accumulated was equity capital. The CFI was of the opinion that the proportionality criterion was met in the case.

¹⁰⁰ Grespan, *European State Aid Law Quarterly* 1 (2010), p. 92

¹⁰¹ Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 73-74.

¹⁰² Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 76.

¹⁰³ Grespan, *European State Aid Law Quarterly* 1 (2010), p. 93.

¹⁰⁴ Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01, para. 77.

6. Conclusion

The Commission in the 2009 Broadcasting Communication laid down some general rules which recognise the special nature of PSB and provide for safeguards against market distortions.¹⁰⁵

In comparison with its predecessor, the 2009 Communication contains significant clarifications and new requirements, which are based on the decisional practice of the Commission.

The clarifications deal with the diversification of public broadcasting services by setting out guidelines to be followed by the Member States, without interfering with their wide margin of discretion in defining the SGEI remit.

The new requirements follow from the extension to PSB of the regulations concerning technical financing aspects of SGEI.¹⁰⁶

The Commission has made considerable efforts to balance competition and public service broadcasting by codifying solutions to concerns raised by the diversification of public broadcasting services.

The Commission by this soft law instrument has found a way to affect national public broadcasting policies.

¹⁰⁵Grespan, *European State Aid Law Quarterly* 1 (2010), p. 97.

¹⁰⁶Grespan, *European State Aid Law Quarterly* 1 (2010), p. 98.