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Abstract

In 2009 the Commission adopted a new Communication on the application of State aid rules to public service broadcasting. The new Broadcasting Communication includes fresh measures and reveals a trend giving Member States a greater role with regard to the compatibility of State aid granted for SGEI with the EC Treaty. The introduction of a prior evaluation test which would assess the public value and the impact on the market for significant new activities is a novelty in this area. The revision of the Broadcasting Communication gave rise to several issues which are also of general interest for other SGEIs, and these are discussed in the present contribution.

En 2009, la Commission a adopté une nouvelle communication concernant l'application aux services publics de radiodiffusion des règles relatives aux aides d'État. Cette Communication introduit des nouvelles mesures et témoigne une tendance à octroyer aux Etats Membres un rôle grandissant concernant le supervision de la compatibilité des aides octroyées pour des SIEG. L'évaluation préalable des nouveaux services importants, qui aurait pour objectif d'examiner la valeur publique et l'impact desdits services sur le marché, est une nouveauté. En outre, la révision de la Communication sur la radiodiffusion soulève certaines questions d'intérêt pour d'autres SIEG; elles seront discutées dans cette contribution.

1. In July 2009, the European Commission adopted a new Communication on the application of State aid rules to public service broadcasting.[1] The communication lays down general principles on how the Commission applies State aid rules, in particular, Article 106 (2) TFEU (ex Article 86 (2) EC), to the funding of public service broadcasters. Public service broadcasting is a service of general economic interest (SGEI). The revision of the Broadcasting Communication raised several issues which are also of general interest for other SGEIs. This contribution presents the new provisions of the revised Broadcasting Communication.

2. The new Broadcasting Communication includes new measures and features a new trend of placing a greater burden on Member States with regard to services of general economic interest. Member States should play a more extensive role in defining and evaluating whether the conditions of the compatibility of the aid with the EC Treaty are fulfilled. The introduction of a prior evaluation test which would assess the public value and the impact on the market for significant new activities is a novelty in this area. Another trend in this review is the reinforcement of control mechanisms to avoid over-compensation and the introduction of more details in relation to what would be considered a behaviour in conformity with the market. These measures confirm the decision-making practice of the Commission and aim to increase the level of transparency for the use of public funds. Some are (highly) regulatory in nature and raise a number of issues as to whether they are proportional to the objective of ensuring that aid is compatible with EC law.

I. Public service broadcasting as a service of general economic interest

3. The European broadcasting landscape is characterized by a dual system whereby public service and commercial broadcasters coexist. The coexistence of strong public service broadcasting and a diverse range of commercial broadcasters brings about and guarantees a high level of pluralism in the media and more competition in the market. Public funding (through direct funding, licence fees or other means) is a crucial component of the functioning of this dual system, and guarantees sufficient, secured funding for delivering public service programmes of high quality to European citizens. It guarantees independent public service media free from the influence of individual economic interests.

4. Public service broadcasting constitutes a service of general economic interest within the meaning of Community law. In accordance with consistent case-law, Member States have broad discretionary powers to define what they regard as services of general economic interest, and the definition of these services by a Member

* The views expressed herein are the author's and do not reflect those of the European Broadcasting Union.

1 *Communication from the Commission on the application of State aid to public service broadcasting*, OJ 2009 C 257, p. 1 (hereafter referred to as "Broadcasting Communication"). It replaces the Communication from the Commission on the application of State aid rules to public service broadcasting, OJ 2001 C 320, p. 5 (referred to as the "2001 Broadcasting Communication").

State cannot be called into question by the Commission except in case of a manifest error.[2] In the BUPA case, the Court of First Instance (CFI) reaffirmed the Member States' competence, whilst specifying: "*that prerogative of the Member State concerning the definition of services of general economic interest is confirmed by the absence of any competence specially attributed to the Commission and by the absence of a precise and complete definition of the concept of services of general economic interest in Community law.*"[3]

5. The Amsterdam Protocol[4] stressed the particular nature of public service broadcasting, as well as its important role in ensuring democracy, pluralism, social cohesion, and cultural and linguistic diversity. In accordance with both the letter and the spirit of the Amsterdam Protocol, it is the Member States that define, confer and organize the public service broadcasting remit. In its Resolution of 25 January 1999[5] the Council of the European Union affirmed the Member States' competence with respect to the remit and funding of public service broadcasting. It thereby recognized that from one State to another public service broadcasting can be conferred and defined differently.

6. European case-law has recognized that public service broadcasting is not like other services of general economic interest, since it is directly related to the democratic, social and cultural needs of each society.[6] It is precisely its objective – the need to promote the democratic, social and cultural values of each Member State – and the need for editorial independence that distinguish public service broadcasting from other services of general economic interest. Consequently, any measure undertaken on the basis of State aid or other regulatory provisions, should respect public service broadcasters' specificity. For instance, regarding the requirement for a tender procedure under the Altmark provisions,[7] the CFI stressed, "*that specific status for public service broadcasting is, moreover, the basis for the freedom accorded by the Amsterdam Protocol to Member States in the award of broadcasting SGEIs*," which justified the fact that Member States cannot be required to have recourse to competitive tendering.[8]

7. In TV2/Danmark, the CFI stated that "*it is not unusual – quite the contrary – for a public service broadcaster to enjoy editorial independence from political authority in the choice of its actual programmes*."[9] In practical terms, public service broadcasting organizations should enjoy editorial independence, which requires an extended degree of autonomy also in financial terms and in terms of institutional organization. Guaranteeing editorial independence requires greater latitude with regard to the choice of programming and activities to be undertaken by public service organizations.

8. The latitude left to undertakings entrusted with the provision of services of general economic interest is recognized by European courts and is not specific only to public service broadcasting. The CFI stated that these operators should enjoy sufficient discretion in the market with respect to the *content* of services offered and the *means* made available for fulfilling the public service remit.[10] What is particular to public service broadcasting is the need for a greater degree of freedom and autonomy in carrying out its activities and the ways public service organizations fulfil their remit. In particular, the freedom to establish its own range of programmes and activities is closely linked to the principle of the editorial independence of public service organizations. The CFI approved the "*latitude left to TV2 by the Danish authorities as regards its actual programming choices*" by putting forward the need "*for a public service broadcaster to enjoy editorial independence from political authority in the choice of its actual programmes*".[11] The new Broadcasting Communication states clearly the need to safeguard the editorial independence of public service broadcasters.[12] It is in its application on a case-by-case basis, and particularly in the introduction of *ex ante* mechanisms, that the freedom and the discretion of public service organizations should be duly respected.

2 CFI, 12 February 2008, *BUPA*, Case T-289/03, pt 166; CFI, 15 June 2005, *Olsen*, Case T-17/02, pt 216.

3 CFI, 12 February 2008, *BUPA*, Case T-289/03, pt 167, where the Court added that "*The determination of the nature and scope of a service of general economic interest mission in specific spheres of action which either do not fall within the powers of the Community, within the meaning of the first paragraph of Article 5 EC, or are based on only limited or shared Community competence, within the meaning of the second paragraph of that article, remains, in principle, within the competence of the Member States*".

4 *Protocol on the system of public broadcasting in the Member States*, OJ 1997 C 340, p. 109: "*Considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretative provisions, which shall be annexed to the Treaty establishing the European Community: The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account*."

5 OJ 1999 C 30, p. 1.

6 CFI, 26 June 2008, *SIC v. Commission* (RTP), Case T-442/03, pt 153. The CFI held that "*although the public service of broadcasting is considered to be an SGEI and not a service of general non-economic interest, it must none the less be pointed out that that classification as an SGEI 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.*"

7 CJ, 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, Case C-280/00, ECR 2003 I-7747, pt 94.

8 CFI, 26 June 2008, *SIC v. Commission* (RTP), Case T-442/03, pt 154.

9 CFI, 22 October 2008, *TV2/Danmark*, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 118. It added, "*in this respect, [it is] right to stress the importance, for protecting freedom of expression, of the public service broadcaster's editorial independence from public authority – freedom of expression which, as defined in Article 11 of the Charter of Fundamental Rights of the European Union […] and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms […]*".

10 CFI, 12 February 2008, *BUPA*, Case T-289/03, pt 189.

11 CFI, 22 October 2008, *TV2/Danmark*, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 118.

12 Broadcasting Communication, para. 10.

9. Owing to its specificity,[13] the public service broadcasting sector is explicitly excluded from the scope of the Framework on public service compensation.[14] However, the Decision on State aid in the form of compensation granted to certain undertakings entrusted with the operation of services of general economic interest applies to public service broadcasters which fulfil its requirements.[15]

10. In this context, it is important to clarify the relation between (the definition of) services of general economic interest and market failure. In accordance with the new economic approach, the Commission assesses the compatibility of State aid with Article 107 TFEU (ex Article 87 EC) by applying economic principles – the most important being the concept of market failure. According to this principle, the selective granting of aid should be justified by the incapacity of the market to provide these services in the absence of State aid.[16]

11. However, the analysis regarding services of general economic interest is different. As stated above, Member States enjoy wide discretion to decide which services are to be considered of general interest, provided the definition is not manifestly erroneous. The only relevant factor is the general interest which a Member state is wishing to pursue, and the absence of any precise definition at the Community level confirms the prerogative of Member States.[17] Consequently, any economic concept that is inconsistent with Member States' prerogatives and would introduce criteria on how the general interest should be determined would be incompatible with the EC Treaty and the competence of Member States. Otherwise, the Commission would substitute its own criteria and thus determine to what extent Member States would be able to carry out services of general economic interest, basing its analysis on what the market is (or would be) able to provide. This could lead to a subjective "European" definition of the needs of society in each Member State, and how and to what extent these needs have to be fulfilled.

12. In the field of public service broadcasting, the CFI has recently clarified the relation between the competence of Member States to define the public service remit and the reference to the activities of commercial broadcasters: "*To accept that argument and thereby to make the definition of the broadcasting SGEI dependent […] on the range of programming offered by the commercial broadcasters would have the effect of* depriving the Member States of their power to define the public service. […] when the Member States define the remit of public service broadcasting, they cannot be constrained by the activities of the commercial television channels".[18] The CFI finds this unacceptable because "*the definition of the service of general economic interest would depend, in the final analysis, on commercial operators and their decisions as to whether or not to broadcast certain programmes*".[19] The Court clearly rejects the claim that the broadcasting service of general economic interest should be limited to the broadcasting of non-profitable programming.[20]

13. The new Broadcasting Communication is not based on the concept of market failure. This is in line with the principle of subsidiarity, which is particularly important for services of general economic interest in areas such as health, culture or education. Public service broadcasting relates, among others, to the democratic and social needs of society, to culture and education, and to media pluralism. In these areas, the European Union's action can only support that of the Member States, and cannot replace it.[21] The clarification of the CFI in the case of public service broadcasting is important in that it sets the boundaries of EC competition law and makes it clear that the central element of the analysis remains the general interest which a Member State wishes to attain, and not the existence of other commercial services or the impact that public service activities would have on the scope of activities of commercial operators. This is particularly important in view of the new prior evaluation procedure, which brings together elements from the definition of the remit and from the assessment of disproportionate distortions of competition.

II. Requirements under Article 106 TFEU (ex Article 86 EC)

1. Definition of the remit and entrustment of public service broadcasters

14. To benefit from the derogation under Article 106 TFEU (ex Article 86 EC), Member States should clearly define the public service remit in an entrustment act. In the field of public service broadcasting, the Court of First Instance has confirmed the possibility open to Member States to define broadcasting services of general economic interest broadly, so as to cover the broadcasting of full-spectrum programming.[22] Broad remit does not mean that it is imprecise or unclear; it simply means that Member States may entrust public service broadcasters with the provision of services that fulfil a wide range of objectives.

13 The new Broadcasting Communication acknowledges 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.*" (para. 9).

14 *Community framework for State aid in the form of public service compensation*, OJ 2005 C 297, p. 4.

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

16 State aid action plan – Less and better targeted state aid : a roadmap for state aid reform 2005-2009, SEC(2005) 795, COM/2005/0107 final, paras. 22 ff.

17 CFI, 12 February 2008, BUPA, Case T-289/03, pts 165 and 167.

18 CFI, 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 123 (emphasis added).

19 *Ibidem*.

20 CFI, 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 109.

21 CFI, 12 February 2008, BUPA, Case T-289/03, pt 167.

22 CFI, 26 June 2008, *SIC v. Commission* (RTP), Case T-442/03, pt 201; CFI, 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 107.

15. One of the aims of the new Broadcasting Communication was to adapt the rules to the new broadcasting and audiovisual environment, by also applying the principle of technological neutrality.[23] Public funding may be used to finance activities of public service broadcasters that fulfil their remit, independently of the platform used or the consumption mode used by citizens. The Court of First Instance, in the TV2/Danmark case, confirmed the broad mandate of public service broadcasters in the new media environment.[24]

16. Commercial broadcasters and print media were concerned about the "expansion" of public broadcasters' online activities, including the provision of text-based and non-linear services. These activities were perceived to be in direct competition with print media, which were facing difficulties, and the issue was complicated owing to the development of online content providers and aggregators. The first case to reflect this tension was the Commission decision on public service broadcasting in Germany. The Commission expressed concern about the online services of ZDF and ARD. The main allegations by private broadcasters and print media were that such services were not covered by the remit and therefore should not benefit from public funding. To eliminate the doubts of the Commission, Germany accepted the appropriate measures suggested by the Commission, and undertook to introduce a three-step test for new or modified online or digital offers. The three-step test includes the following: the assessment of whether the new offer is covered by the remit; its contribution to editorial competition (here the analysis will take into account the scope and the quality of the existing offer freely available and the impact of the planned offer on the market); the financial impact for the public service broadcaster.[25] Before launching any significant online service, ARD/ZDF need to assess the public value and the impact that the new service would have on editorial competition. The objective would be twofold: on the one hand, the test helps clarify whether the service would be covered by the remit; on the other hand, the test allows for a certain assessment of the impact of the service on editorial competition.

17. The main question, however, remains to what extent such an *ex ante* test is necessary and justified if the remit is clearly defined and the services would be clearly covered by it. Does the EC law allow the Commission to impose a specific procedure (evaluation of new services *prior* to their introduction on the market) to make sure that services of general economic interest are covered by the remit or, alternatively, that they do not restrict competition, and their funding with public money is compatible with the EC Treaty? If the main concern is whether the services actually offered fall within the public service remit, why should there be an assessment of the impact on the market? Indeed, the only requirement under EC Treaty and Article 106 TFEU (ex Article 86 EC) is that the remit should be clearly defined in an entrustment act.[26] In addition, Member States should ensure that these services are actually provided by an *ex post* monitoring mechanism which could take different forms.[27] For instance, the CFI considered the RTP's monitoring mechanism (control by a Public Opinion Council accompanied by annual reports to Government) to be sufficient.

18. The question of the justification of a specific procedure in individual cases is relevant in that Member States enjoy wide latitude with regard to the choice of monitoring mechanisms, also in view of the principle of institutional and procedural autonomy. The competence and the discretion of Member States in these matters was also reflected in the SIC/RTP case. In discussing the monitoring mechanism pertaining to the fulfilment of the remit, the CFI emphasized the competence of Member States by stating 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*".[28] With regard to monitoring by an independent body, the CFI states that the Commission does not have the power to verify compliance with quality standards, and "*it can and generally must confine itself to finding that there is a mechanism for the monitoring by an independent body of compliance by the broadcaster with its public service remit*".[29] Most importantly, the CFI concludes that, during this exercise, the Commission should not "*replace the Member States in the specific assessment of compliance with the qualitative criteria*".[30]

19. The new Broadcasting Communication foresees two ways of resolving the tension between the risk of expansion of public broadcasters' activities beyond the remit. Firstly, the remit could be clearly defined, and the entrustment act should be modified to cover a wide range of services. Alternatively, if it is not clear whether the new activity would be covered by the remit, the public service broadcaster could launch an *ex ante* test which would evaluate the public value and the expected impact on the market.[31] This is the approach followed in the measures introduced in Belgium (VRT)[32] and Ireland (RTE)[33]: the test was designed to assess whether

23 Neelie Kroes, "The forthcoming Broadcasting Communication; measures to promote broadband", Education, Culture and Science Committee of the Dutch Parliament, The Hague, 19 March 2009 (SPEECH/09/130).

24 CFI, 22 October 2008, *TV2/Danmark*, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 115. In particular, it approved the definition in Danish law to provide as a public service "*through television, radio,* Internet *and the like, a wide range of programmes and services comprising news coverage, general information, education, art and entertainment*".

25 Commission Decision of 24 April 2009, State aid E 3/2005, Financing of public service broadcasters in Germany, paras. 327 ff.

26 CJ, 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, Case C-280/00, ECR 2003 I-7747, pt 94

27 CFI, 26 June 2008, *SIC v. Commission* (RTP), Case T-442/03.

28 CFI, 26 June 2008, *SIC v. Commission* (RTP), Case T-442/0, pt 212 (emphasis added).

29 Idem, pt 213.

30 Idem, pt 214.

31 Broadcasting Communication, para. 52.

32 The Flemish community undertook to introduce a public consultation when defining the remit in the *contrat de gestion*, i.e. every five years, combined with an *ex ante* test for new services not covered by the above-mentioned *contrat de gestion*. The *ex ante* test in this case is fundamentally different from the test proposed by the Commission in the Broadcasting Communication. VRT's test is limited to new services which are not covered by the remit as defined in the *contrat de gestion* and to the assessment of only the "public character" of the services, and not the impact on the market. In this respect, the only criteria related to the market are the evolution of the media environment and the existing offers on the market.

33 Ireland undertook to put in place an *ex ante* test which will cover public value assessment and a sectoral impact assessment. Nevertheless, only the following services will be subject to this test: alterations to the remit; introduction of significant services not expressly stipulated by legislation; the introduction of a new channel; the introduction of regional services; the introduction of non-linear, non-broadcast, audiovisual media services (unless it is the same content which is made available online or on mobile phones).

other services *not already covered* by the remit may be funded with public money since they fulfil the democratic, social and cultural needs of the society.

20. In the NRK case, the *ex ante* assessment is also regarded as an *entrustment procedure* by the EFTA Surveillance Authority.[34] The EFTA Surveillance Authority makes it clear that it is not necessary for each service automatically to trigger the entrustment procedure; the only services relevant are those which owing to their scope, are likely to have an impact on the market.[35]

21. These examples and the new test included in Broadcasting Communication show that from the Commission's standpoint there is a fine line between the entrustment act and the definition of the remit, on the one hand, and the proportionality test which assesses disproportionate distortions of competition on the other. The introduction of an element related to the restriction of competition – an area where the Commission enjoys broad competence – into the definition and the entrustment of the remit, risks broadening the Commission's scope of intervention into an area traditionally reserved for Member States. It also shows also a new trend whereby the Commission will not content itself with the control of the proportionality of the compensation, but would like to have a say in the scope of the public service remit, or at least in the way it is determined by Member States**22.** The interest of such a procedure is that third parties (commercial broadcasters and print media) would be able to express their views on the new service. In addition, the requirement that Member States themselves introduce such procedures takes the discussion to the national level, but on criteria largely determined at the European level. We shall discuss below how this requirement on prior evaluation procedures can be understood to maintain the balance between the powers of Member States, the Community interest in the protection of competition and the need for editorial independence of public service broadcasters.

2. Control of over-compensation and financial transparency

23. To fulfil the proportionality test, the compensation for the performance of public service tasks should not exceed the net public service cost, also taking into account the revenues derived from it. Compared to other services of general economic interest, public service broadcasting benefits from a partial derogation from cost allocation rules, but, in return, it is subject to more stringent provisions regarding reserves, and the actual calculation of the compensation.

24. In general, public service broadcasting organizations are required to ensure a complete separation of accounts.[36] As was the case in the 2001 Broadcasting Communication,[37] common costs which benefit both public service and commercial activities should be allocated on the basis of the *methodology of avoidable costs*. For calculating the proportion of costs to be allocated to commercial activities the question to be asked is what costs would not be incurred if commercial activities were to be suspended.[38] These costs (which can be avoided) must be allocated to commercial activities. From this methodology it follows that costs which cannot be avoided if commercial activities are stopped can be entirely allocated to public service activities and be eligible for calculation of the amount of compensation. The main example is the cost of producing programmes. The derogation from the complete separation of accounts in the broadcasting sector is justified since the net benefits of commercial activities related to the public service activities have to be deducted from the total public service costs for the purpose of calculating the net public service cost and therefore reduce the public service compensation level.

25. Public service duties justify compensation as long as they entail supplementary costs that broadcasters would normally not have incurred.[39] The concept of supplementary costs was clarified by the CFI as being capable of including "*all the costs incurred by a public service broadcaster entrusted with a public service mission*".[40]

26. Compensation in the public service field is the net public service cost, which is equal to the total cost of providing public service activities, also taking into account other direct or indirect revenue derived from the public service mission.[41] Thus, revenue from commercial activities related to public service activities has to be deducted from the total cost. One such example is the revenue from advertising activities or the marketing of programmes. In general, all revenue from public service activities which benefit from a derogation from cost allocation rules is to be deducted from the total cost to reduce the amount of compensation. Conversely, revenue from activities which are not related to public service activities is not deducted when the net public service cost is calculated.

27. Unlike the case for other SGEI, the compensation in the broadcasting sector does not include a "*profit margin*".[42] In this respect, considerations in the draft Broadcasting Communication disregard the Commission's past practice and recent case-law. The third *Altmark* criterion includes a reasonable margin of profit and would apply to determining whether State funding granted to any broadcaster, even if not profit-oriented or constrained, is State aid. Moreover, allowing for a reasonable profit margin would give public service organizations additional incentives to maximize their revenue from commercial activities and ensure that they adopt market conform behaviour.

34 Decision of the EFTA Surveillance Authority of 8 July 2009 on the Norwegian Broadcasting Corporation (NRK), p. 41.

35 *Idibem*.

36 Broadcasting Communication, para. 60.

37 2001 Broadcasting Communication, para. 55.

38 Broadcasting Communication, para. 67.

39 Broadcasting Communication, para. 56.

40 CFI, 22 October 2008, *TV2/Danmark*, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 111.

41 Broadcasting Communication, para. 71.

42 Community Framework for State aid in the form of public service compensation, OJ 2005 C 297, p. 4, para. 15.

28. With regard to reserves, the new Broadcasting Communication codifies its decision-making practice and introduces a new rule, similar to the provisions of the Community Framework for State aid in the form of public service compensation.[43] Public service organizations may build up and keep a general reserve of up to 10% of the annual budgeted expenses from one year to another.[44] Unlike the general provisions for other SGEIs, the cap of 10% may be calculated on the basis of the *total budgeted expenses,* which include public service and commercial costs (or revenue), and not only on the basis of public funding.

29. Reserves above that threshold are still possible, but under certain stringent conditions:[45] the reserves must be *earmarked* in advance (in other words, the money should be specifically dedicated to a project), in a *binding way*; the reserves should remain exceptional and can be built up only for the purpose of non-recurring, major public service expenses. Reserves or money in excess of the 10% threshold are considered over-compensation and have to be recovered.

III. Specific provisions included in the revised Broadcasting Communication

1. Prior evaluation procedures

30. The new Broadcasting Communication introduces a "requirement" for a prior evaluation procedure for significant new services, the so-called "Amsterdam Test". Before its entry into force, the Commission required three Member States to introduce similar, but different, procedures, which shows the broad latitude left to Member States when putting in place such measures.[46] The *ex ante* assessment includes two features: firstly, the assessment of whether the new services meet the democratic, social and cultural needs of society (otherwise called the "public value"); secondly, the assessment of the impact of the service on the market.[47] The outcome of the assessment is the result of a balancing exercise of both components: the impact on the market with the value of the services in question for society.

31. An important question concerns the relation between the test on the public value and the test regarding the market impact. The assessment of the *public value* of a service is within the competence of Member States. The new Broadcasting Communication contains no restrictions in that regard. In assessing the *impact of the service on the market*, Member States have to take into account a number of criteria (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).

32. In relation to the market impact assessment and the balancing exercise, the new Broadcasting Communication states that "*in the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer*."[48] Consequently, the new Broadcasting Communication is liable to have an impact on the new activities if these services have little or unclear public value given what is already offered by the public service broadcaster, while having important negative effects on the market.

33. This balancing exercise can be construed in a way which is in line with the EC law on State aid and services of general economic interest. Indeed, the EC law should respect the competence of Member States, and the existence of SGEI as defined by them, while offering them a toolkit for the assessment of disproportionate market distortions. The element of market impact assessment would be in line with EC law on services of general economic interest if it does not endanger the existence and the development of public service broadcasting, while allowing reasonable control over the disproportionate market distortions resulting from this very existence. Bearing these considerations in mind, and taking into account the EC Treaty and the new Broadcasting Communication, the following remarks can be made:

→ the mere impact of the new service on the market, without a clear qualification of the negative effects on competition, cannot be considered relevant under the EC Treaty. A potential impact on the revenue of commercial operators would not be sufficient to qualify an impact on the market as "negative". Otherwise, the EC law would be used to object to the very existence of SGEI. Any such "Community" criteria would run the risk of encroaching on the competence of Member States;

→ the EC Treaty rules can have an impact on the functioning of services of general economic interest *only* when, firstly, these activities would result in disproportionate distortions of competition and, secondly, these activities are not necessary for fulfilling the public service mission (see, for example, paragraphs 40, 59, 81, 83, 92 of the new Broadcasting Communication). In addition, according to the wording of the Amsterdam Protocol, "*the realisation of the remit of that public service shall be taken into account*";

→ even when a significant new service is liable to have predominantly negative effects on the market, the launching of that service can be justified if the Member State considers that the public value of that service is high enough to justify that negative effect on the market (it has an added value compared to the existing overall public service offer);

43 Community Framework for State aid in the form of public service compensation, OJ 2005 C 297, p. 4, para. 21.

44 Broadcasting Communication, para. 73.

45 Broadcasting Communication, para. 74.

46 Commission Decision of 24 April 2009, E 3/2005, Financing of public service broadcasters in Germany; Commission Decisions of 27 February 2009, E8/2006, State funding for Flemish public broadcaster VRT, and E4/2005, State aid financing of RTE and TNAG (TG4).

47 Broadcasting Communication, para. 88.

48 Broadcasting Communication, para. 88.

→ the reference to the *"added value"* cannot be understood as a basis for the application of any argument related to market failure; the CFI expressly rejected the application of the market failure to public service broadcasting in the TV2/Danmark case.

34. More recently, the Commission accepted commitments from Austria which included provisions on prior evaluation of significant new services.[49] It is the first Commission decision after the entry into force of the Broadcasting Communication. The definition of what is considered a significant new service, which also determines the scope of application of the *ex ante* test, is left to the Member State. The commitments offered by Austria in the framework of the assessment of an existing aid scheme give indications as to what will be regarded as a significant new service in Austria.[50] ORF has to publish the concept of the new offer on the Internet and invite third parties to comment. An advisory council will assess the public value and its potential impact on the cross-border trade and competitive market conditions. It is interesting to note that in the case of Austria this latter aspect will also be assessed by the Competition Authority. The decision specifically states that the mere fact that other providers actually or potentially offer a similar service does not prevent the approval of new services; the assessment is a balancing exercise which assesses whether the added value of the service, taking into account the overall public service offering, justifies an overall negative impact on competition.[51]

2. Market conform behaviour

35. New trends in the Broadcasting Communication indicate a greater emphasis on the market conform behaviour of undertakings receiving State aid. This is also not solely relegated to their relations with commercial subsidiaries. Market behaviour such as predatory pricing or overbidding is considered under certain conditions to be disproportionate and therefore incompatible with State aid law. The emphasis on these practices shows indirectly a greater burden on undertakings receiving State aid; it seems that the mere fact of receiving State aid places them under suspicion of cross-subsidization and gives them a greater incentive to engage in anti-competitive market behaviour,[52] such as predatory prices or overbidding.

36. The risk of cross-subsidization and anti-competitive practices is overestimated in State aid cases. While cross-subsidization should be prohibited and measures should be taken to limit the risks, other factors indicate that public service broadcasters operate under tight budgetary constraints. In addition, they do not have objectives pertaining to market share expansion with regard to commercial activities, which would justify the high risk of abusive behaviour.

37. In this context, the CFI emphasized in the TV2/Danmark case: "*It is necessary to reject – as a mere hypothesis – the claim that a broadcaster entrusted with a service of general economic interest defined in broad and qualitative terms and dual-funded will inevitably be led, through the practice of selling its advertising space at artificially low prices, to subsidise its commercial activity through the State funds received for the public service. At the very most, there is only a risk of such behaviour, which it is for the Member States to prevent and, where necessary, for the Commission to penalise*".[53]

38. To avoid the risk of cross-subsidization, public service broadcasters are subject to accounting separation and should allocate costs among public service and commercial activities. The new Broadcasting Communication includes a recommendation to put in place functional or structural separation.[54] Should public service broadcasters introduce such mechanisms and ensure that the business relations between commercial subsidiaries are conducted under behaviour in conformity with the market, there can be no risk of cross-subsidization, and therefore there are no grounds for an assumption of increased risk resulting from public funding. Consequently, there should be no burden on public service broadcasters to show that their behaviour is in conformity with the market.

39. The suspicion about the ability and incentive to cross-subsidize has an impact on the burden of proof and on the standard of proof. In general, a question which arises is whether the Commission, in applying State aid law, can lower the standard of finding abusive behaviour, overturn the burden of proof, or design specific regulatory rules for undertakings receiving State aid.

40. The 2001 Broadcasting Communication, while rightly stating that price undercutting is not necessary for the performance of public service tasks, also stressed that such conduct must be proven first.[55] This is in line with European competition law. Indeed, Article 106 TFEU (ex Article 86 EC) is a derogation from Articles 101 and 102 TFEU (ex Articles 81 and 82 EC): a restriction of competition in the sense of Article 101(1) or 102 TFEU (ex Article 81(1) or 82 EC) should be proved in the first place; if such violation is proved, the undertakings should provide evidence that their behaviour fulfils the conditions of Article 101(3) TFEU (ex Article 81(3) EC) or the conditions of the derogation contained in Article 106(2) TFEU (ex Article 86(2) EC). Furthermore, while it is incumbent on Member States which invoke Article 86(2) TFEU (ex Article 86(2) EC) to demonstrate that the conditions laid down by these provisions are met, it is incumbent on the Commission to show that the development of trade is affected to such an extent as would be contrary to

49 Commission decision of 28 October 2009, E 2/2008, Financing of ORF.

50 Commission decision of 28 October 2009, E 2/2008, Financing of ORF, paras 198 ff. A new offer exists if it differs significantly from existing offerings in their content, their technical usability or their access; if they address a significantly different target group; or if the new service will exceed 2% of the total budget.

51 Commission Decision of 28 October 2009, E 2/2008, Financing of ORF, para. 205.

52 See Broadcasting Communication, para. 94, in relation to price undercutting.

53 CFI, 22 October 2008, *TV2/Danmark*, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, pt 109.

54 Broadcasting Communication, para. 69. The recommendation concerns only commercial activities which can be regarded as significant and severable, and not all commercial activities; these remedies are suitable only for significant commercial activities which can be managed and organized in separate business units.

55 2001 Broadcasting Communication, para. 58:"*Such conduct,* if demonstrated, *could not be considered as intrinsic to the public service mission attributed to the broadcaster.*"

the interests of the Community.[56] Consequently, any general obligation on the public service broadcaster to demonstrate behaviour in accordance with the market would overturn the burden of proof. In competition law, the conduct of undertakings operating in a competitive market is assumed to be in accordance with the market, and restrictions of competition have to be demonstrated on a case-by-case basis.

41. Another issue is whether State aid law allows the lowering of the standard of proof, for example to demonstrate price undercutting, simply because of the existence of public funding. The Broadcasting Communication states that price undercutting is anti-competitive and cannot be considered intrinsic to the public service mission. Price undercutting is indirectly defined as the temptation to "*depress prices of advertising or other non-public service activities below what can be reasonably be considered to be market-conform, so as to reduce revenue of competitors, insofar as the resulting lower revenues are covered by the public compensation*."[57] The EC law on predatory pricing avoids such subjective criteria by stating that the prices should be below cost in order to be considered as predatory and therefore anti-competitive. This standard of proof is designed to avoid over-intervention, which could result in stifling competition instead of fostering it. However, the Broadcasting Communication indicates that the existence of cross-subsidization would be a supplementary condition, which could mitigate the risk of over-intervention.

42. The Broadcasting Communication shows to what extent State aid law can be used to design a new set of rules. The introduction of "*consistent overbidding*" in the acquisition of premium rights is a striking example. The Commission states that one of the relevant issues to be considered is whether public service broadcasters are "*consistently overbidding for premium rights in a way which goes beyond the needs of the public service mandate and results in disproportionate distortions on the market place*."[58] There are few indications as to how such provisions will be applied in practice, but the latest decision in the ORF case gives some clarifications. First of all, the Commission states "*ORF may not […] purchase premium sports rights above the market price using its privileged financial position*".[59] As such, this requirement is quite surprising given that, in order to buy rights, public service broadcasters should normally pay more than their competitors, which also sets the market price. The question raised is how the "market price" can be determined in a bidding market? Nevertheless, the Commission also adds that ORF should not empty the market for sports rights, which is closer to the idea of "consistent overbidding".[60]

43. Another new provision is the principle that public service broadcasters should sub-license unused premium rights, without asking beforehand whether a public service broadcaster enjoys an important market position and/or whether it has an extremely large portfolio of exclusive (long-term) agreements on such premium rights that would risk excluding other broadcasters from the market. Such highly regulatory obligations on undertakings receiving public funding, independently of their market position and their ability to restrict competition, are regrettable in that they are a major departure from sound principles. These principles include the fact that there should be no intervention unless the effect of the behaviour of the undertakings entrusted with the provision of services of general economic interest is liable to distort competition to such an extent that public funding would be contrary to the common interest. ■

56 See the judgment of the Court of Justice of 23 October 1997, *Commission v. Kingdom of the Netherlands,* Case C-157/94, pts 69-71. This also implies that when the Commission opens a procedure following a complaint, the plaintiff must provide all the necessary information to support its complaint and must sufficiently substantiate the allegations put forward.

57 Broadcasting Communication, para. 94.

58 Broadcasting Communication, note 53.

59 Commission decision of 28 October 2009, E 2/2008, Financing of ORF, para. 222.

60 *Ibidem*.

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