



ACT RESPONSE TO CONSULTATION on STATE AID COMMUNICATION: EXECUTIVE SUMMARY

1. GENERAL

The State Aid Communication of 2001 has played a helpful role in allowing the European Commission to scrutinise state aid to public broadcasters. But today's changed media environment poses a challenge to all stakeholders (including regulators and competitors, as well as pubcasters) of redefining the scale and purpose of public intervention in broadcasting and media markets. The Communication should therefore be updated to reflect these changes and to avoid the risk that structural problems in broadcasting regulation may persist into the online world. There is also the need to review the Communication in the light of the Altmark judgment of the European Court, and the Commission Decision of 28 November 2005.

The Commission asks a specific question about market data. We note that, following the decision of DG Competition, post-Altmark, to remove aid granted to “services of general economic interest” from the State Aid Scorecard there is no longer any transparent, independently verifiable data on this point. Nor is such information readily available elsewhere. Given the scale of state aid in the broadcasting sector, which we estimate as the third-largest recipient of state aid in the European economy, it is unsatisfactory for it to be left to competitors to make estimates as to the exact amount of public money involved. We assume that, in the interests of transparency, the EU will request accurate and complete data on this point from publicly-financed operators.

In terms of financing, public broadcasters are generally better-resourced than their immediate competitors. This – coupled with vague remits – has underpinned the extraordinary dominance which the public sector has achieved for example in sports rights in many Member States, causing major market distortions because of pubcasters presenting bids that private broadcasters can not match. The financing issue is particularly stark in the many markets where there are non-transparent sources of finance, or where dual financing is practiced.

2. COMPATIBILITY ASSESSMENT UNDER ARTICLE 86 (2) EC TREATY, IN COMBINATION WITH THE BROADCASTING COMMUNICATION

State Aid must comply with the Principles of the ongoing State Aid Reform, namely by becoming less and better targeted, having a refined economic approach, more effective procedures, better enforcement (namely in case of recovery decisions), higher predictability and enhanced transparency. Evaluation of compatibility of aid must rely on

more precisely defined concepts such as “market economy investor principle”, “advantage”, and more rigour in applying criteria such as the “effect of trade” and the “distortion of competition”, which have been identified as sources of legal uncertainty.

We recognise of course that the powers of DG COMP in the area of public service remit are not unlimited. However, the prevalence of vague, unquantifiable and ill-defined remits around Europe lies at the core of many of the competitive distortions in our media markets. Much of the peak time output of the public broadcaster is hard to justify in terms of their familiar rhetoric about quality, public or social value.

We would like to make a specific suggestion to DG COMP on the problem of the “circular” remit. By this, we mean a purported public service mission which actually does not help consumers, competitors or regulators in determining what public service is actually being delivered. The revision of the Communication is an opportunity for the Commission to clarify that the circular remit is unacceptable, and that state aid granted in fulfilment of such a “remit” will not pass the scrutiny of DG COMP.

Additionally, it is surprising that DG COMP is obliged to ask for information on the national public service remits used to justify state aid in the broadcasting sector. As a minimum outcome of this consultation, we would expect to see the publication of a scorecard of state aid for broadcasting together with a compendium of public service remits. This basic level of transparency appears to be missing from the debate on European state aid to broadcasting.

A general focus on information, culture and education is no longer sufficient because it is too broad; abstract principles such as pluralism, quality, exemption, minority promotion or accessibility must be sufficiently detailed and contractually regulated in order to allow for external monitoring and to comply with para 37 of the 2001 Communication. Instead, we would call for Member States to introduce clear and precise definitions of specific programme concepts, possibly including the maximum amount of time devoted to certain entertainment genres (soap-operas, quiz-shows, etc) and a minimum percentage of science, cultural, education, high-quality entertainment, children’s programming etc. It is also important that these remits are respected not only in the so called «minority channels» but in all pubcaster programming services. We do not believe that the public service remit in television – with its exceptionally broad definitions - is sufficient in clarifying the scope of state-financed intervention in new media.

We support the introduction of some form of EU level obligation for ex ante evaluation in a new Communication. As the Commission is aware, the recent introduction of a Public Value Test in the UK for new BBC services has provided operators with some early experiences of the strengths and weaknesses of such ex ante regulation. The revised Communication offers an opportunity to introduce new, best practice standards in this area. The revised Communication should indeed clarify Member States’ obligations to carry out ex ante evaluation of proposed expansion by pubcasters into new areas of business. If the revised Communication also includes meaningful rules on procedural,

institutional and substantive aspects, then this would be a significant step forward in introducing an element of transparency into the system.

Key issues include:

What analysis should be carried out?

By whom?

Against which criteria?

On which services?

Extent of third party involvement

In the absence of satisfactory guidelines in the Communication, there is a risk that ex-ante scrutiny becomes legitimisation, rather than regulation, of public broadcasters' activities. The analysis to be carried out under an ex ante evaluation needs to be rigorous, objective – and above all, devoid of the subjective, abstract concepts such as “quality” which have underpinned so many distortions of competition in the broadcasting market. It is essential that the ex ante scrutiny be carried out by an independent authority. The early operation of the PVT in the UK shows some of the weaknesses in a structure which is not adequately independent. The Communication should specify that ex-ante scrutiny is needed for any significant expansion of publicly-financed operators in existing or into new business areas, or for variations in their existing services. In terms of third party access, the PVT system, while imperfect, is certainly to be preferred to the system outlined in § 331 of the DG COMP German decision. Independent control is a necessary condition for any objective evaluation of the extent of the remit / justification of any new services.

2.3. Entrustment and Supervision

To describe fully the regulatory mechanisms in each European Member State would require a separate paper. So we will restrict ourselves to an overview. In too many European markets, supervision of the delivery of public service missions by publicly-financed broadcasters is neither systematic nor independent. Structures devised in the era of state monopoly broadcasting – when a part-time committee would monitor the broadcasters' output, and when competition issues by definition did not arise (as there were no competitors) – have in many Member States endured into the modern era, where public broadcasters' activities are much more complex and require a much more sophisticated analysis of their impact on competitors.

2.4. Dual Funding of public service broadcasters : Pay TV

Even if public broadcasters manage to justify to themselves and their governments how a move into pay-TV can be reconciled with their “obligation” to provide a universal service, the impact of such services can only be negative on competition. We can envisage no circumstances under which pay services can be justified against a public service remit.

2.5. Transparency requirements

Mere separation of accounts, while helpful, may, without published independent audits, become a smokescreen preventing third parties from understanding how the public body is run. Legal separation of the entities that carry on each field of activity, namely to always be able to establish a distinction between pubcaster and other undertakings, would clearly be in conformity with current management methods of business groups' "spin-off" strategies, and provide legal certainty to the market, avoiding any possibility of leveraging market power from the broadcasting sector to other sectors of the market. The most important clarification in a revised Communication would be to state that auditing accounts must be carried on by professional auditors on an annual basis, with proper cost allocation made according to consistently applied, objectively justifiable and clearly established cost-accounting principles. Further, a requirement to publish independent audit reports is a basic principle that could easily be taken on board in a new Communication and in line with our general support for increased transparency and for independent, objective regulation.

2.6. Proportionality test – Exclusion of overcompensation – financial stability of pubcasters

The majority of European pubcasters certainly appear to be financially sound. While public broadcasters often plead poverty, and while there may be some difficult restructuring in some markets, there are remarkably few examples of public broadcasters failing to find the money to bid for an attractive rights deal. On evaluation of public service net costs, the compensation should not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (negative test).

2.6.3. Under what circumstances could pubcasters keep a surplus?

Like many of the questions in this consultation, a 10% cap could be useful in some markets but other weaknesses in the system will allow distortions and abuses to continue. A 10% floating surplus at the pubcaster's free disposal would in practice always be used when bidding for the next attractive sports rights deal and thereby enhance the dominance of the pubcasters on the sports rights market . Allowing overcompensation to be carried forward to the next financial period invites pubcasters to create additional projects simply to absorb the surplus. Furthermore, there must be a management control mechanism that closely monitors the rising of programming costs, so that pubcasters achieve market efficiency, another requirement that the current State Aid review enhances, namely through a refined economic approach.

2.7. Proportionality test – exclusion of market distortions not necessary for the fulfilment of the public service mission

Dual funding and the inevitable consequence of price undercutting remains a serious problem in many European markets. As the ACT argued in our White Paper on Financing of Public Broadcasters in 2004, public broadcasters should benefit from public funding, and commercial operators should be left to compete for market resources. This is the optimum system. Dual funding can also be an issue even on markets where access to spot advertising is not permitted. However, it is not a problem merely in its own right, but is exacerbated by the lack of meaningful and effective regulation. By way of a possible solution, the Principle of Market Conform Behaviour has to be interpreted and applied in full, and not only in particular aspects such as dumping in the advertising market.

2.7.4. Do you consider that the Broadcasting Communication should contain clarifications as regards the public funding of premium sports rights?

We would like to place on record that the ACT does not accept the notion of a separate relevant market for “premium sports rights”. Regardless of how the relevant market is construed, there is evidence that the dominance of pubcasters in many European markets is now being pushed to a point where the market is emptied of meaningful content for competitors.

Turning to some potential remedies: sports rights as part of public broadcasting should be the subject of particularly careful attention in order to prevent pubcasters from any practice that distorts or threatens to distort the market for rights. Public intervention on the sports rights market must be limited to what is necessary for the fulfilment of the properly entrusted remit, if they are part of a balanced programming schedule. There are a number of ways in which this could be done, and one way which has been attempted recently but which will prove ineffective in practice:

- The financing regime of public broadcasters can not allow pubcasters to systematically outbid private competitors, because that would lead to a market distortion, as market prices for sport rights will raise to speculative level. Public sector intervention in sports rights should be also limited by global value, or by a mechanism referring to the price that commercial broadcasters can pay, based on a cost/benefit analysis - the maximum bid by commercial broadcasters shaping, in fact, the market value of those rights;
- Unused rights are not necessary for the fulfilment of the public service; State financing used for exclusive rights which the public service broadcaster cannot or does not intend to use would not, in principle, be justified under Article 86 (2) EC Treaty.
- The “remedy” put forward in the German case by DG COMP of regulation via a percentage of the schedule is entirely inadequate and should not be taken forward in the new Communication. A meaningful quantitative restriction could rather be on the proportion of a pubcaster’s budget which was spent on sport. While it may be marginal as to whether DG COMP has the power to enforce such

a restriction, it could certainly be included as a recommendation to Member States in the revised Communication.

3. FINAL REMARKS

As we mentioned earlier, the 2001 Communication has been a useful tool in introducing an element of certainty and stability to our sector. Subject to the issues we raise in our response, an update and an extension to cover new media activities of the publicly-funded sector could be helpful. Compliance costs and administrative burdens are a fact of life in the commercial sector, and we would argue are a reasonable price to pay also for our publicly-funded competitors in exchange for the enormous privilege and competitive advantage of state-guaranteed public financing.

Part II Legal Analysis

[1] According to §18 of the 2001 Communication on State Aid, the market of acquisition and sale of programme rights, which takes place at international level, is to be considered a market where trade may be affected by the exemption to the scope of competition rules that SGEI benefit from.

[2] The other obvious example is advertising, for those public undertakings that are allowed to exploit it. According to §36 of the 2001 Communication, the sale of advertising space in order to finance programming is not to be viewed as part of the public service remit.

[3] The Amsterdam Protocol also clarifies that there can be no objection (to Member State competence on the funding issue) *«as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest»*.

[4] The need to evaluate compensation in the light of Art. 86 (2) has always implied an investigation on possible failure to maximise commercial income but never led to a thorough analysis of public undertakings' behaviour in the market of programming acquisition, where private operators complain from practices that raise their own costs. This failure should be clearly addressed in the new guidelines.

[5] Under an Art 86 (2) analysis, the Commission is not required to scrutinise whether the costs incurred by the public undertakings are, in fact, reasonable, but only if they refer to the public service, i.e., if they relate to PSB remit. This is a flaw of the compatibility assessment, and must be rectified in the future.

[6] To put market efficiency back in the Art. 86 (2) analysis of compatibility is precisely the path that a new Commission Guideline must follow, in order to provide new instruments for eradication of market distortions. The Commission has not assessed nor established any economic criteria for assessing the structure and development of programming price mechanisms.

[7] So, what is clearly lacking, in the current compatibility procedure, is a refined economic analysis, that is able to demonstrate that the compensation which the public

undertaking is receiving on account of being an SGEI is, in fact corresponding to the effective additional costs that wouldn't exist if it wasn't for the public service mission.

[8] The EC State aid framework has, in fact, not been able to prevent these distortions of competition, clearly because the Commission has not assessed nor established any economic criteria for assessing the structure and development of programming price mechanisms.

[9] The fact that it may be very difficult to properly allocate costs, and therefore, to accept that all programming costs are to be allocated to public service mission, must not mean that all programming costs should be treated as SGEI given the exceptionality treatment that would prevent enacting of competition rules.

[10] The new Guidelines must incorporate a deep economic assessment of management efficiency, because there is absolutely no point in assuming that all costs incurred by the public broadcaster are connected with the public service remit, when it's clear to see that some programmes do not fulfil any particular public service characteristics, and are, in fact, also exhibited by commercial broadcasters.

[11] This analysis is fundamental even for the limited effects of Art 86 (2) because only by an evaluation of reasonableness of costs may one conclude on the issue of overcompensation. Therefore, it is also necessary to scrutinise the respect for «management efficiency», in order to determine «proportionality of compensation».

[12] At the end of each year, an independent controller or auditing company must verify in a transparent but effective manner, whether the reported costs are in line with market benchmarks, if such benchmarks do exist, at least at national level. If not, and after searches conducted at international level, maybe there is some room for wider discretion, probably motivated by the fact that there are no commercial broadcasters interested in that particular active. This would probably qualify it as being a genuine component of public service.

[13] These lines match some of the main principles of the on-going Reform of all State aid Communications, as stated in the Consultation document issued in 7th June.

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