

**REVIEW OF THE COMMUNICATION FROM THE COMMISSION ON THE
APPLICATION OF STATE AID RULES TO PUBLIC
SERVICE BROADCASTING (2001/C 320/04)**

Comments by MEDIASET S.p.A.

Introduction

Mediaset S.p.A. welcomes the opportunity to participate to the public consultation on the revision of the European Commission's *Communication on the application of State aid rules to public service broadcasting*, a most sensitive and strategic policy issue for the future growth of a healthy and pro-competitive media services industry in the Internal Market. Mediaset fully subscribes to the detailed submission of the Association of Commercial Televisions in Europe (ACT) and intends to provide only a brief statement to complement its views, with specific reference to the Italian market.

In line with the response submitted by ACT, Mediaset acknowledges that the State Aid Communication of 2001 established a landmark watershed from the stalemate of the 1990s. Indeed, updating the Communication – in order to address technology, market and regulatory developments in the Member States – is a timely initiative that requires thoughtful co-operation amongst all stakeholders, from both private operators and public bodies.

Against this background, the Commission Decision of 28 November 2005 (*Decision 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*) and other relevant EU legislation, while not specific to the broadcasting sector, seem to require more in-depth economic analysis instruments than those provided in the Communication of 2001, with particular reference to transparency and proportionality, but also in application of *the private investor test in a market economy* referred to in the European Court of Justice's Altmark judgment (Case C-280-00, Judgment of 24 July 2003).

The recently adopted "Audio-visual media services directive" (2007/65/EC) confirms the central role entrusted onto public service broadcasters and, on the other hand, considers the complexity of a multi-platform environment for the provision of an increasing number of services in competition with one another.

Market resources in a multi-platform environment

As for the Italian market, it is worth referring to the data provided by the National Regulatory Authority AGCom which indicate a significant increase of competition among free-to-air (both public-owned and commercial television) and pay-tv operators. In 2006, the overall market proceeds (licence fee, advertising and subscription) accounted for the following shares: RAI 34.1%, Mediaset 29.4%, Sky 28.1% (cfr. AGCom Annual Report, July 2007: http://www.agcom.it/rel_07/07_Relaz_part01.pdf). In terms of audience share, AGCom reports that the increasing penetration of subscription services determines an incremental decrease in the audience shares performed by traditional free-to-air players (by five percentage points in the last five years). The state-owned broadcaster RAI continues to rely on a dual financing system, comprising both licence fee and advertising, but it is also entitled to a compensation amounting to around €70 million on a yearly basis for special services (e.g.: overseas activities) and to honour other conventions with the State.

From a purely market perspective, the media services sector in the EU is undergoing a major structural evolution. Digitisation – which triggers the coming of age of a rich and varied content offer across competing delivery platforms - is indeed a major driver towards modernisation, enabling the proliferation of an increasing number of themed offers catered to both niche markets and larger audiences, in addition to traditional free-to-air, linear broadcasting. In recent years, increasing competition confronts the market with rising rights-acquisition costs - namely for events of general public interest such as national and international soccer – and, accordingly, with soaring production costs. In turn, this process generated, amongst other things, a more pervasive pay-tv offer – both subscription and pay-per-view. Italy, historically characterised by a wide free television offer, both at national and local level, is well into the process of providing viewers with new pay-tv services which complement and compete with traditional ones.

Scope for a regulatory update

The Protocol annexed to the 1997 Amsterdam Treaty (OJ 1997 C340/109) grants the Member States the right to define the public service remit conferred upon public service broadcasters. Moreover, the Protocol entitles the European Commission to verify the conformity of the definitions provided by the Member States, in order to safeguard general interest objectives and to prevent distortion of competition. Whilst Member States enjoy ample discretionary powers in this matter, a superficial control would confirm that the definition of public service remit in several Member States is rather vague

Definition of the public service remit

In the case of Italy, art. 45 of *Decreto Legislativo* No. 177/05 of 31 July 2005 states that the definition of the public service remit is to be drawn by the state-owned broadcaster RAI (art. 49 of the same Decree entrusted the public service licence to Rai for a ten-year period expiring on 6 May 2016) within the contract – *Contratto di servizio* - it is required to renew with the Ministry of Communications every three years. Art. 45.2 merely lists a few characteristics of the public service remit, mostly related to national coverage obligations and transmission time. The current *Contratto di servizio* (2007-2009) defines the public service remit in art .1, with a reference to relevant regulatory provisions indicating a series of “objectives, operational indications, quality standards

and programming genres, whose implementation is entrusted to the autonomous editorial capacity of the public service licensee in compliance with relevant principles and the regulatory framework.”

It is worth considering that the 2001 European Commission’s Communication provides that the public service remit should be as accurate as possible and that if the remit included activities which do not pertain to – in the sense suggested by the Protocol – “democratic, social and cultural needs of every society,” as it is the case, according to the Communication, for electronic commerce, such a manifest error would result in a flawed public service remit definition.

In order to prevent loose public service remit definitions, an update of the 2001 Communication could perhaps make it mandatory to indicate by means of a positive list the level of specification required – as provided in art. 4 of the 28/11/05 Decision – for instance: Member States must indicate the type of programming which is reckoned to fulfil public service obligations. A negative list could also be drawn for programmes which, by their very nature, could not be considered public service. The 2001 Communication currently excludes advertising sales from the activities deemed to provide a general economic interest service to the public. Likewise, the Commission may want to consider that a similar exclusion should apply to pay-tv offers for which public financing could entail serious distortion of competition, in absence of any justification, such as those indicated in the Protocol to the Amsterdam Treaty, for the promotion of democracy, social development and cultural objectives.

Moreover, on the definition of the public service remit, the 2001 Communication suggests that a broad definition entrusting a public service broadcaster with the obligation to offer balanced and varied programming and allowing a certain level of audience share is in essence compatible with art. 86.2 of the Treaty. In Italy, the current *Service contract* between RAI and the State provides that RAI’s editorial offer should be well balanced in order “maintain a level of audience adequate to the fulfilment of its functions.” Whilst there is no apparent incompatibility between the level of audience share and the public service nature of a given programme, it seems appropriate to clarify that the pursuit of high audience reach cannot be considered in itself a service of general economic interest and, in any case, it does not represent a pre-requisite for a public service broadcaster to carry out its obligations. In other words, public financing should never be justified if the recipient’s primary objective consists merely in performing high audience results.

Cost Allocation

A more accurate and precise definition of the public service remit is necessary in order facilitate the implementation of the proportionality test, on the basis of a precise quantification of the net public service costs and of the *ex post* control of the compensation for the effective costs borne for public service obligations. This would prevent over-compensation, a practice that could affect fair competition in several EU Member States in the markets for rights acquisition, advertising and pay-tv offers.

Art 47, *Decreto Legislativo 177/05*, and relevant provisions for its implementation by the National Regulatory Authority AGCom introduced mandatory separate accounting provisions for RAI. It is worth noting that par. 1, in line with the 2001 Communication, requires to indicate the common costs incurred by both public service and other activities, “by including or excluding the public service activities.”

However, the 2001 Communication maintains that Member States could consider part of the public service remit the entire programming of the broadcasters which receive public funding and that the costs of programming aimed at creating contacts for advertising clients should, in principle, be accounted as costs pertaining to public service. With no clear criteria, any distinction results unfair. Art. 5.2 of the 28/11/1995 Decision could represent a good reference for the purpose of defining quantification methods to be applied to public service activities, should the new Communication contain specific rules – both positive and negative – on the definition of the public service mission.

The clear identification of the public service costs is a pre-requisite in order to apply the *proportionality test* and the *private investor test*, defined in the Altmark judgment: public broadcasting operators should be subject to obligations of efficient management even in public service delivery, in order to prevent poor management practices prompted by the certainty of public financing.

Separate accounting, however important, is but a minimal guarantee for implementing the pre-requisites of transparency and proportionality. In the case of public service operators that carry out almost exclusively commercial activities, such as pay-tv services, it would be advisable to envisage legal separate entities, not only to allow pricing quantification for goods and services to be transferred within the parent company, but also to ensure equitable treatment to third parties, in the case of entities with significant market power.

Compliance and Supervision

According to the 2001 Communication, the public service remit is a pre-requisite for public funding to be considered compatible with state aid rules in the EU, excluding any possible derogation from EC competition law, according to art. 86.2, when public service is effectively carried out in compliance of the remit conferred by the Member States. However, the Communication delegates controlling responsibilities to the very Member States that are entrusted with the remit.

In Italy, art. 49, *Decreto Legislativo* 177/05 confers upon the National Regulatory Authority AGCom the obligation to verify the implementation of the *Contratto di servizio* between RAI and the State, as well as the compliance with relevant regulatory provisions; in case of infringements, AGCom determines a deadline for redress and, when appropriate, it may administer fines up to 3% of total turnover, with further sanctions in case of relapse.

The effectiveness of ad-hoc controls on the implementation of the remit is a rather sensitive matter; more specifically, Member States may have inadequate/insufficient means to enforce statutory instruments and to apply effective fines to public-owned bodies, such as RAI.

Financial sanctions administered against such entities would end up weighing, indirectly, on the State's own accounting, which would in turn be affected by its own participation as the only shareholder to the public service broadcaster's capital.

The revised Communication, besides insisting on the need to enforce effective control mechanisms, should also indicate adequate evaluation criteria to assess the management responsibilities which top administrators in the state-owned companies could be held accountable for.

Public service and digitisation

The contribution of public service broadcasters to digitisation, both for infrastructure development and content creation, is absolutely crucial to enable a positive evolution in the European media industry.

In Italy, digitisation is subject to a detailed regulatory framework, which compares in its founding principles (i.e. *must carry* obligations) public service broadcasters to commercial broadcasters that hold licences for more than one analogue channel - such as R.T.I. – Reti Televisive Italiane S.p.A, - wholly controlled by Mediaset.

RAI benefited from ad-hoc public financing aimed at covering network digitisation costs, an obligation that had to be implemented according to the *Contratto di servizio* with the State.

Conclusion

Precise definition of the public service remit, proportionality of the financing granted for the purpose of implementing the remit, and adequate control mechanisms are ever more crucial during the transition towards the provision of fully digital services. It is advisable that Member States provide for specific obligations to be carried out by public service operators in this context, besides the offer made available by their commercial counterparts. A new Communication from the European Commission would be a decisive policy instrument to clarify that the transition towards digital switch-over should not justify arbitrary forms of public funding, in absence of precise obligations, adequate controls and specific provisions aimed at ensuring the system's accountability.

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Mediaset S.p.A., March 2008