

2. The Article 86(2) test set out in the Broadcasting Communication does not properly reflect the fourth condition under the Altmark test

⇒ *These comments relate primarily to Sections 1.1. and 2.1. of the Questionnaire*

2.1 Introduction

At the time of the adoption of the 2001 Broadcasting Communication, the latest case law in the area of State aid and public service compensation followed from cases T-106/95, FFSA and Others v Commission and T-46/97, SIC v Commission. In those cases, the Court of First Instance essentially ruled that all measures of State compensation constitute State aid which must always be ascertained in the light of Article 86(2) EC. Accordingly, the 2001 Broadcasting Communication relies on this case-law (see in particular footnote 19).

However, the case law has developed considerably since 2001. Most importantly, the European Court of Justice has rendered its ruling in the seminal Altmark case, setting out four conditions that must be observed in order for a public service compensation to escape classification as State aid.

The first Altmark condition is concerned with the definition of the public service, and the third Altmark condition makes it clear that a public service provider must not be overcompensated. The first and third conditions thus, essentially, overlap with the Article 86(2) test set out in the Broadcasting Communication.

The novelty in Altmark lies with the second and fourth Altmark conditions which state

- that the parameters for calculating the compensation must be established in advance in a clear and transparent manner, and
- that, in the absence of a public procurement procedure, the compensation received by the public service provider must not exceed the costs of a well-run company.

It is Viasat's submission that the second and fourth Altmark conditions are not only relevant for the State aid test under Article 87 EC as they must also be taken into account for the purpose of applying Article 86(2) EC.

As regards the requirement of transparency contained in the second Altmark condition, this aspect is considered below, in Chapter 3.

This Chapter primarily focuses on the fourth Altmark condition and its impact on the Article 86(2) test.

As regards the relevance of the “Article 86(2) package” of 28 November 2005¹, it is noted that the said package does not in any way reflect the requirements contained in the fourth Altmark condition.

Indeed in its Article 86(2) package, the Commission does not require Member States to examine whether the public service operator in receipt of State funding is cost-efficient. Nor does the Commission require Member States to appoint the public service provider pursuant to a public tender procedure, allowing for the selection of an operator that generates the least cost to society. Thus, Member States are allowed to compensate the actual costs of the public service broadcasters (“pubcasters”), without considering whether other broadcasters could have carried out the same public service mission at lower costs.

It is submitted that such approach is incompatible with the Commission's own statements in its White Paper on Services of General Economic Interest from 2004.

Moreover, it disregards central parts of the Article 86(2) test, just as it undermines the *effet utile* of the Altmark judgment.

The Commission is therefore urged not to rely uncritically on the Article 86(2) package when revising the Broadcasting Communication.

Rather, the revised Broadcasting should state that the Member States, for the purpose of compensating the costs of a public service operator, must either select the latter under a public tender procedure or limit the compensation to that of a well-run undertaking. Only in exceptional circumstances should Member States be allowed to derogate from those requirements. Importantly and moreover, the burden of proof would be on the Member States when the exemptions under Article 86(2) EC are invoked by the Member States.

These aspects shall be further developed below.

2.2 The 2004 White Paper on Services of General Economic Interest

It is recalled that, in its 2004 White Paper on Services of general interest², the Commission states as follows:

“3.2. Achieving public service objectives within competitive open markets

¹ Commission Decision of 28 November 2005 on the application of Article 86(2) 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) and Community Framework for State aid in the form of public service compensation (OJ 2005 C 297).

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committees of Regions - White Paper on services of general economic interest (COM/2004/374 final, Brussels 12.5.2004)

On the basis of the consultation, the Commission remains of the view that the objectives of an open and competitive internal market and of developing high-quality, accessible and affordable services of general interest are compatible. Indeed, the creation of an internal market has significantly contributed to improvement in efficiency, making a number of services of general economic interest more affordable [...]

However, in certain situations, the achievement of a national public policy objective may need to be coordinated with certain Community objectives. At the level of the Treaty, these situations are addressed by Article 86(2), which provides that services of general economic interest are not subject to the application of Treaty rules to the extent that it is necessary to allow them to fulfil their general interest mission. This means that, under the EC Treaty and subject to the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules. Thus, missions are protected rather than the way they are fulfilled. The Treaty provision therefore allows the reconciliation of the pursuit and achievement of public policy objectives with the competitive objectives of the European Union as a whole, in particular the need to ensure a level playing field for all providers and the best use of public money."³

The same ideas are reflected in the 2001 Broadcasting Communication, at footnote 20, where the Commission points to the dangers of State aid allowing inefficient public service operators to stay in the market:

"This does not mean that State aid can be justified as a tool, which increases supply and demand and competition in the market. State aid which allows an operator to stay in the market in spite of its recurrent losses causes a major distortion of competition, as it leads in the long run to higher inefficiency, smaller supply and higher prices for consumers [...]"

Moreover, it is clear from a number of Commission documents that the aim of Community policy on services of general interest is to pursue the interest of citizens, and that the needs of the users lie at the heart of Community policy in this area:

"8. At the heart of Community policy on services of general interest lies the interest of citizens. Services of general interest make an important contribution to the overall competitiveness of European industry and to economic, social and territorial cohesion. As users of these services, European citizens have come to expect high quality services at affordable prices. It is thus users and their requirements

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Section 3.2., underlining added

that are the main focus of public action in this domain. The Community protects the objectives of general interest and the mission of serving the public."⁴

In addition, the Court has repeatedly held that "in allowing derogations to be made from the general rules of the Treaty in certain circumstances, Article [86](2) seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market"⁵.

The main aim of Article 86(2) EC is therefore to safeguard the interest of Member States to pursue certain socioeconomic aims in order to satisfy the needs of the citizens and the users of public services, while ensuring that the rules on competition are respected to the largest extent possible. The aim of Article 86(2) EC is clearly not to protect certain undertakings from being exposed to the rules of competition, including the rules of State aid.

The same view is reflected in the Broadcasting Communication in which the Commission itself refers to the "need to perform the public service" and "provide for its funding"⁶.

In view of the above, the following conclusions can be made:

- Under Article 86 (2), missions are protected rather than the way they are fulfilled.
- The main aim of Article 86(2) EC is to safeguard the interest of Member States to pursue certain socioeconomic aims in order to satisfy the needs of the citizens and the users of public services, while ensuring that the rules on competition are respected to the largest extent possible.

2.3 The obstruction test and the proportionality test in Article 86(2) EC must be applied in the light of the State aid rules (*in concreto* the Altmark judgment)

It is recalled that Article 86(2) EC will only allow derogation from the EC Treaty rules (and in particular the rules of competition) in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular public service mission.

⁴ Communication from the Commission - Services of general interest in Europe (OJ 2001 C 17/4), para 8 (underlining added).

⁵ See case C-157/94, Commission v Netherlands, ECR -5699, para 39, and case C-67/96, Albany International, ECR 1999 I-5751, paras 103-104 (underlining added). See also opinion of Jacobs AG in case C-475/99, Firma Ambulanz Glöckner, ECR 2001 I-8089, para 18.

⁶ See para 59 of the Broadcasting Communication : "Accordingly, in carrying out the proportionality test, the Commission will consider whether or not any distortion of competition arising from the aid can be justified in terms of the need to perform the public service as defined by the Member State and to provide for its funding. [...]".

Moreover, the last sentence of Article 86(2) contains a general proportionality test, which provides that “the development of trade must not be affected to such an extent as would be contrary to the interests of the Community”.

It follows logically both from the said “obstruction test” and the general test of proportionality under Article 86(2) that the Commission must always, when examining the applicability of that provision, carry out its assessment in the light of the specific Treaty provision that Article 86(2) is supposed to derogate from.

In the field of State aid, it must therefore always be assessed (1) whether application of the State aid rules (Article 87 EC) would obstruct the performance of the particular public service mission and (2) whether derogation from the State aid rules in a given case is contrary to the interests of the Community.

As stated above, the relevant State aid test in relation to public service compensation was given in the Altmark judgment, setting out four cumulative conditions that must be complied with in order to rule out the existence of an advantage being conferred on the recipient.

This Chapter is concerned with the fourth Altmark condition, which provides as follows:

“Where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means [...] so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations”.

Thus, under the fourth Altmark condition, a Member State has two possibilities of avoiding a finding of overcompensation:

- Either the State organises a proper public tender procedure (allowing for the selection of the most cost-efficient tenderer)
- Or the State conducts itself an analysis of the cost efficiency of the public service provider and limits its compensation to the level of a well-run operator.

This aspect of the State aid test must also be considered under the obstruction test and the proportionality test under Article 86(2).

One of the first questions to consider under Article 86(2) is therefore as follows:

- Does the Altmark test (and in particular the duties to organise a public tender or to limit the compensation to the costs of a well-run undertaking) *obstruct* the performance of the public service mission?

Just as under Article 86(2) EC (see above), the relevant State aid test under Altmark is not concerned with whether *a particular undertaking* is prevented from carrying out the public service obligation defined by the Member State. Rather, the relevant test is whether the public service mission, as defined by the Member States, can be fulfilled at the least cost to society (involving the “best use of public money”).

As under Article 86(2), the “*mission is protected rather than the way it is fulfilled*”.

Given the clear overlaps in the two tests, it is difficult to see in which situations an application of the State aid test (and in particular the fourth Altmark condition) will obstruct the performance of the public service mission in question, if it can be shown that other (well run) operators are able to carry out the public service mission.

If the public service mission in question can actually be carried out by a well-run undertaking, the application of the fourth Altmark condition will not jeopardize the fulfilment of the mission. Indeed, if the public service compensation offered by the State does not allow the existing (‘incumbent’) public service operator to carry out the public service mission without incurring losses, the obvious alternative for the Member State is to appoint a well-run undertaking that can.

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In a number of decisions involving public service broadcasting adopted since the Altmark judgment, the Commission has found that neither the second nor the fourth Altmark conditions were met. For this reason, the Commission has concluded that it was in presence of State aid.⁷ However, when considering the applicability of Article 86(2) EC, the Commission has failed to apply the obstruction test and the proportionality test in the way described above. Instead, the Commission has uncritically followed the 3-step test prescribed in paragraph 29 of the 2001 Broadcasting Communication (definition – entrustment – proportionality).

The revision of the Broadcasting Communication provides an excellent opportunity for the Commission to review and modify this decisional practice.

Failure to do so would allow Member States to continue to appoint - on an entirely arbitrary basis - an inefficient (perhaps even State owned) operator and allow the latter to receive State funding to cover its actual costs, even if another operator could have provided the same services at lower costs. This is clearly contrary to the aim and purpose of Article 86(2), which is to ensure the efficient accomplishment of the public service mission and the best use of public money.

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See, *inter alia*, Commission decision 2005/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark (OJ L 85, 23.3.2006, p. 1), paragraph 71.

Lastly, it is observed that the inclusion of an efficiency test under Article 86(2) is not at odds with the case law of the Community courts and in particular paragraph 108 of the FFSA judgment (T-106/95).

It is recalled that, in paragraph 108 of the FFSA judgment, the Court of First Instance held as follows:

“108 [...] In the absence of Community rules governing the matter, the Commission is not entitled to rule on ... la Poste’s economic efficiency in the sector reserved to it [...]”

Indeed, it is clear from the judgment that the Commission should not ascertain the economic efficiency of an undertaking operating a monopoly in a reserved sector – for the simple reason that there is no risk of distortion of competition. It is recalled that the FFSA judgment concerned a very particular sector (namely the French postal sector) and involved the postal monopolist, La Poste, which, furthermore, held a unique postal infrastructure.⁸

Therefore, the above dictum of the Court of First Instance cannot be transferred to the present case involving an open and highly competitive sector such as the broadcasting sector.

The fact that the FFSA judgment should be limited to the facts of the case and not be applied to liberalised sectors is also clear from the judgment in case T-157/01, *Danske Busvognmænd* (paragraphs 91-92).

Secondly, the Court, in paragraph 108 of the FFSA judgment, was careful to state that its dictum only applied *"in the absence of Community rules governing the matter"*. Such Community rules now exist, namely in the fourth Altmark condition. This in itself makes paragraph 108 of the judgment redundant.

2.4 Applying the Article 86(2) test in practice: the burden of proof is on the Member States.

It may be objected that requiring the Commission to examine under Article 86(2) whether the compensation received by the pubcaster corresponds to that which would be received by a well-run undertaking is excessively difficult.

⁸ It is clear from joint cases C-83/01 et al, *Chronopost v Commission* (paragraphs 34-38), that the French postal sector represented such exceptional features that no meaningful analysis could be conducted with comparable operators. Para 108 of the FFSA-judgment is precisely evidence of our contention that in some exceptional situations, it may be excessively difficult if not impossible to conduct an efficiency analysis.

It should be born in mind, however, that under Article 86(2) the burden of proof is on the party invoking the said provision.⁹ Moreover, as it contains a derogation to the general Treaty rules, Article 86(2) must be interpreted narrowly¹⁰

This implies that it is not for the Commission, but for the Member States to establish that application of the Altmark test obstructs the performance of the public service mission.

It is all the more appropriate to place the burden on the Member States in cases involving derogation from the fourth condition under the Altmark test since, otherwise, Member States are actually encouraged to violate (and rewarded for violating) the Altmark test.

It is recalled that, under the fourth Altmark condition, it is the Member States who must adduce evidence to the Commission that the test was complied with¹¹. It is the Member States that must either prove that the public service operator has been selected pursuant to a public tender procedure or adduce evidence that the compensation does not exceed that which is payable to a well-run undertaking.

If the burden of proof under Article 86(2) were suddenly to shift to the Commission in cases of Member States who have neither organised a public tender nor proven that the costs are kept at a strict minimum, this would clearly encourage Member States to never comply with the Altmark test.

This would be detrimental to the full effectiveness (*effect utile*) of the Altmark judgment. Moreover, it would be discriminatory to those Member States having actually complied with the Altmark judgment (or who have at least attempted to do so).

Moreover, it is recalled that a number of cases involve non-notified aid. In such circumstances, there is no doubt that the burden of proof should be placed on the Member States. To hold otherwise would ultimately favour those Member States granting State aid in breach of the duty to notify laid down in Article 88(3) EC to the detriment of those Member States that do notify at the planning stage¹².

⁹ See, inter alia, case 155/73, Sacchi (paragraph 15) and case T-260/94, Air Inter (paragraph 138). The French and Dutch electricity cases (C-157/94, Commission v Netherlands, and C159/94, Commission v France) are often invoked to support the opposite conclusion. However, it is important to note that those cases concerned infringements actions brought by the European Commission against the Member States, where the burden of proof more easily is placed on the European Commission.

¹⁰ See, inter alia, case 127/73, BRT, paragraph 19, and case T-106/95, FFSA, paragraphs 131 and 170).

¹¹ See e.g. Case E/2005 – State aid to public service broadcasters in Germany, letter dated 24.04.2007, paragraph 166 (“the German authorities have not submitted the relevant data ...”) and paragraph 168 (“Germany has also not provided the necessary information which would point to such impossibility”)

¹² Cf. the principles underpinning paragraph 33 of the Boussac judgment (case C-301/87, Commission v France).

Accordingly, the Commission should require that the Member States invoking Article 86(2) demonstrate that application of the Altmark test obstructs the fulfilment of the public service mission.¹³

As a final remark, it is observed that the possibility for a Member State to prove that the Altmark test would in fact obstruct the performance of the public service mission is not entirely theoretical.

Indeed, exceptional circumstances might exist where a Member State cannot possibly comply with the Altmark test and especially the fourth Altmark condition. This would be the case where no other undertakings can carry out the public service mission entrusted upon the existing public service operator and where it would be pointless to conduct a public tender. This situation has occurred in the postal sector, where the European Court of Justice acknowledged that the French postal monopoly, La Poste, could not be compared to any other operators in the market. For that reason, regard should be had to the *actual* costs of the public service operator (rather than the hypothetical costs of a well-run undertaking).¹⁴

In the broadcasting sector, one might point to BBC as a unique pubcaster which cannot be compared to any other operators in the market. Similar examples might exist across Europe.

However, in every case, it would be for the Member States – not the European Commission – to prove that exceptional circumstances did in fact prevent them from complying with the Altmark test. This is also clear from the Commission's decision in case E3/2005 – Financing of public service broadcasting in Germany¹⁵.

2.5 Conclusion

In the light of the above, it is recommended that the future Broadcasting Communication provides clear guidance on the implications of the fourth condition of the Altmark-test for the purpose of applying Article 86(2).

In particular, the Commission should place emphasis on the fact that Member States are, as a starting point, required to either appoint the public service operator under a

¹³ Moreover, even in such situation, the general proportionality principle contained in Article 86(2) must be complied with. It cannot be excluded that, even where the obstruction test is met, a State aid measure might create excessive harm to consumers and, on that basis, lead the Commission to refuse to grant an exemption under Article 86(2). This might be the case when there are strong indications that the public service provider (who operates in a reserved sector and thus presumably is a monopolist) is manifestly inefficient, for instance where it fails to meet consumer demand (see e.g. Case C-41/90, Höfner), or where it or otherwise commits a structural abuse (see e.g. Case C-18/88, RTT, paras 23-24, Case 260/89; Case C-179/90, Port of Genoa, Cases C-271, 281 and 289/90, Telecommunications Services Directive).

¹⁴ See cases C-83/01 et al, Chronopost v Commission, at paragraph 38, referring to the "objective and verifiable elements" available. The unique position of Chronopost and its infrastructure is emphasized in paragraphs 34-37 of the said judgment.

¹⁵ Case E3/2005 – Financing of public service broadcasting in Germany, letter of 24.04.2007, paragraph 168.

public procurement procedure or limit the compensation to the amount payable to a well-run undertaking.

Member States who fail to honour those requirements should not benefit from an exemption under Article 86(2) EC, unless they were to demonstrate that *exceptional circumstances* had prevented them from complying with those requirements.

In this context, it is important that the revised Broadcasting Communication indicates in unambiguous terms that the burden of proof under Article 86(2) is on the Member States who seek to rely on that provision.

3. The Article 86(2) test set out in the Broadcasting Communication does not properly reflect the second condition under the Altmark test

⇒ *These comments relate primarily to Section 2.1. of the Questionnaire*

3.1 The transparency requirement contained in the second Altmark condition does not obstruct the performance of the public service mission and forms integral part of the proportionality test under Article 86(2) EC.

Following the second Altmark condition, "*the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings*"¹⁶.

Just as the fourth Altmark condition is not properly reflected in the Article 86(2) test set out in the 2001 Broadcasting Communication, also the second Altmark condition should form integral part of the Article 86(2) test to be described by the Commission in the revised Broadcasting Communication.

In particular, it should in all instances be considered whether compliance with the transparency requirement in the second Altmark condition may obstruct the performance of the public service mission and whether the general proportionality test would be upset in such cases.

Both the obligation on Member States to provide a clear and exact definition of the public services in question (cf. the first part of both the Altmark test and the Article 86(2) test set out in the Broadcasting Communication) and the obligation to establish in advance the parameters in an objective and transparent manner pursue the same objective: allowing the Commission to properly monitor compliance with Article 86(2) EC within the area of public service funding.

¹⁶ See para 90 of the Altmark judgment.

It is observed that the Broadcasting Communication recognises that the (formal) requirement of Member States having to provide a precise definition of the public service mandate must be observed in order for the Commission and the national competition authorities to carry out their tasks under Article 86(2) EC and in order for the national measure to benefit from an exemption under that provision:

"37. [...] Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 86(2) and, therefore, could not grant any exemption under that provision.

38. Clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities.

39. Finally, the terms of the public service remit should be precise, so that Member States' authorities can effectively monitor compliance, as described in the following chapter."

Similarly, the Broadcasting Communication requires that Member States, for accounting purposes, separate accounts relating to public service activities and non-public service activities, in order for the Commission to carry out its proportionality test and grant an exemption pursuant to Article 86(2) EC¹⁷.

If the requirements in respect of providing a precise definition of the public service mandate and separating accounts are necessary to satisfy the proportionality test contained in Article 86(2) EC and for the Commission to grant an exemption, it would seem illogical not to also require that the latter provision comprise a requirement that Member States must establish in advance, in an objective and transparent manner, the parameters for calculating the public service compensation.

Indeed, the second Altmark condition pursues the very same objective as the one pursued by the obligation to provide a clear and precise definition of the public service mandate (also comprised in the first Altmark condition), i.e. to provide an effective legal protection of all affected operators (which also enhances legal certainty on the part of the beneficiary undertaking) by allowing the competition authorities (both the Commission and the national authorities) and the judiciary (both at Community and national level) to properly monitor compliance with the State aid rules of the Treaty.

It appears from the *Community Framework for State Aid in the form of public service compensation* that the Commission only intends to grant an exemption under Article 86(2) EC if the Member State in advance (together with the notification of the aid) specifies the "*parameters for calculating, controlling and reviewing the compensation*"

¹⁷ As stated in the Communication, "[a] separation of accounts is necessary to allow the Commission to carry out its proportionality test. [...] Only on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus acceptable under Article 86(2) and the Protocol." (See para 49 of the Communication)

(paragraph 10), and that the "calculation of costs must follow the previously defined criteria [...] which must be brought to the attention of the Commission in the context of the notification in accordance with provisions of Article 88(3)" (paragraph 13).

The same view is reflected in a memorandum of 15 July 2005 (MEMO/05/258) concerning the publication of the above-mentioned Community Framework, which states that the Framework clarifies how the Commission intends to apply the state aid rules (Article 86(2) EC) when all four Altmark conditions are not satisfied (i.e. when the public service compensation constitutes State aid), and that a number of conditions are laid down "in the light of the first three Altmark conditions" (which must logically comprise the second Altmark condition):

"Is the Commission attempting to modify the criteria laid down in Altmark?"

No – [...] The measures the Commission has put in place address the situation where the Altmark criteria are not met in full and so the compensation is state aid. What we are doing is to clarify, in the light of the first three Altmark principles, how the Commission intends to apply the state aid rules to public service compensation which is state aid."¹⁸

The fact that Article 86(2) EC requires the presence of certain structural safeguards is also apparent from Case C-438/02, Hanner, in relation to Article 31 EC, in which the ECJ (Grand Chamber) held, *inter alia*, that the selection system operated by a sales monopoly must be based on criteria that are transparent by providing both for an obligation to state reasons for decisions and for an independent monitoring procedure (paragraph 39). Absent these structural safeguards (paragraph 43), the selection system could not be justified under Article 86(2) EC (paragraphs 47-48).¹⁹

The importance of the transparency requirement is also reflected in the case C-231/03, Coname as well as later cases, where the ECJ ruled that, in the absence of any transparency, the award of a contract by a Member State to an undertaking located in that Member State amounts to a difference in treatment to the detriment of the undertaking located in other Member States²⁰ The ruling shows that the transparency requirement is essential to safeguard the interests of third parties and prevent Member States from granting preferential treatment to certain national (perhaps even State owned) companies as they see fit.

¹⁸ See MEMO/05/258 of 15 July 2005 : "State aid : Commission provides greater legal certainty for financing services of general economic interest – frequently asked questions" (emphasis added). See also **A. Sinnavee**, State Financing of Public Services: The Court's Dilemma in the Altmark Case, *European State Aid Law Quarterly* 2003, s. 351-364, where the author states, *inter alia*, that "the aid cannot fall under Article 86(2) EC either, to the extent that the conditions for the application of Article 86(2) EC coincide with the first three conditions of Altmark" (s. 359, underlining added).

¹⁹ Judgment of 31 May 2005 in Case C-438/02, Hanner, not yet reported.

²⁰ Case C-231/03, Coname. See also cases C-507/03, Commission v Ireland, C-260/04, Commission v Italy, and C-382/05, Commission v Italy.

There is all the more need for transparency in cases where the public service provider is a public undertaking.

Indeed, the ECJ has recognised that it will, as a general rule, be very difficult for a third party, precisely because of the privileged relations existing between the State and a public undertaking, to obtain evidence that State aid had been granted²¹.

Furthermore, having regard to the fact that relations between the State and public undertakings are close, there is an actual risk that State aid may be granted in a non-transparent way and in breach of the rules on State aid laid down by the Treaty²².

This is also reflected in the Transparency Directive²³ and the Commission communication to the Member States on the application of Articles 87 and 88 EC and of Article 5 of the Commission Directive 80/723/EEC to public undertakings in the manufacturing sector²⁴.

3.2 Conclusion

In the light of the above, it is recommended that the future Broadcasting Communication provides clear guidance on the implications of the second condition of the Altmark test for the purpose of applying Article 86(2).

More in particular, the Commission should make it clear that the second Altmark condition forms integral part of the transparency requirement enshrined in Article 86(2), which must be complied with in all cases.

²¹ Case 482/99, *France v Commission* ("Stardust Marine"), para 53. See also Case T-49/93, *SIDE v Commission*, para 71, and Case T-155/98, *SIDE v Commission*, para 66, which illustrates the difficulties of third parties in presenting documentation relating to the grant of State aid.

²² *Ibid*, para 54.

²³ See e.g. the preamble of Commission Directive 80/723 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195/35).

²⁴ (OJ 1993 C 307/3). See in particular paras 4-8 and 22.

4. A clear distinction should be made between public service costs and supplementary public service costs

⇒ *These comments relate primarily to Sections 2.6. and 2.7. of the Questionnaire*

In Viasat's submission, there is a need for a precise distinction between, on the one hand, public service costs and, on the other hand, supplementary public service costs.

Under the EC Treaty and in particular the Broadcasting Protocol, Member States retain a considerable margin of appreciation in defining the public service mission. The broad public service notion in the broadcasting sector implies that a public service mission might involve broadcasting programmes which would have been broadcasted even in the absence of the public service obligation. The latter programmes are in the following referred to as "commercial programmes" (although they form part of the public service mission).

However, the fact that the public service mission may be extended to cover commercial programmes entails a clear risk of market distortions, when the pubcaster is dually funded (thus generating parts of its income on the advertising markets in competition with the non-pubcasters).

It is submitted that in cases of dually funded pubcasters, Member States should be required to identify the supplementary public service costs. Such requirement is necessary to ensure both that the pubcaster is not overcompensated and that the pubcaster does not use the public service compensation to cross-subsidise its commercial activities within the public service field.²⁵

The need to identify the supplementary public service costs is also highlighted in paragraph 44 of the Broadcasting Communication, which states that "*public service duties [...] could justify compensation, as long as they entail supplementary costs that the broadcaster would normally not have incurred*".

In its decisional practice, however, the Commission does not seem to require that the supplementary public service costs be calculated. Instead, the Commission appears to accept that *all broadcasting costs* are eligible to State funding.

This is regrettable, since it allows Member States to circumvent the State aid rules by paying out de facto *operating aid* to inefficient broadcasters in the guise of public service compensation.

This is a very important point: Given the broad notion of public services, Member States may appoint a loss-making pubcaster and impose upon it a minor public service duty which would generate only minor additional costs (or none at all). Since the

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The question of cross-subsidisation is more specifically addressed below, at Chapter 5.

said undertaking would be regarded as a public service broadcaster, all of its costs would be eligible to State compensation, even if not all of its costs result from the public service obligation, but from commercial inefficiencies and/or a failure to maximise advertising revenue.

To illustrate this point by an example, let us assume that a commercial broadcaster, which generates all of its income through advertising, has a yearly deficit of 15 million EUR and that the said company is suddenly appointed public service provider by the State with a public service obligation generating an additional cost of 5 million EUR. Given its new status as public service broadcaster, the Member State is entitled to grant a compensation of 20 million EUR, which to a large extent constitutes de facto operating aid (but in the guise of public service compensation), without it ever being detected by the European Commission.

Instead of leaving the market, the previously loss-making undertaking is now allowed to stay in the market despite commercial inefficiencies and/or failure to maximise profit. This is clearly detrimental to other broadcasters which have not been appointed public service broadcasters and who therefore can only stay in the market if they are commercially well-run.

Allowing Member States to grant operating aid in the guise of public service compensation is clearly not in the interest of free and fair competition. It clearly does not create a level playing field in the market between broadcasters. It leads to an obvious risk of market distortion which cannot be compatible with Article 86(2) EC.

It is therefore paramount that the revised Broadcasting Communication addresses this important issue by requiring Member States to always identify the supplementary public service costs which the broadcaster would normally not have incurred.

5. The issue of cross-subsidisation

⇒ *This comment relates primarily to Section 2.7.3. of the Questionnaire*

Paragraph 58 of the Broadcasting Communication describes the problem of cross-subsidisation as follows (underlining added):

"There might be market distortions which are not necessary for the fulfilment of the public service mission. For example, a public service broadcaster, in so far as lower revenues are covered by the State aid, might be tempted to depress the prices of advertising or other non-public service activities on the market, so as to reduce the revenue of competitors. Such conduct, if demonstrated, could not be considered as intrinsic to the public service mission attributed to the broadcaster. Whenever a public service broadcaster undercuts prices in non-public service ac-

activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of overcompensation of public service obligations and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the Protocol."

It should be emphasised, firstly, that in Viasat's experience the problem of cross-subsidisation poses a serious threat to fair and free competition in the broadcasting sector.

Failure to deal adequately with this problem would allow (dually funded) public service operators to lower their prices in the advertising market, whilst receiving public service compensation to cover any losses that may result from failure to maximise profit and/or inefficiencies on part of the pubcaster.

It is therefore of the utmost importance that the issue of cross-subsidisation is thoroughly dealt with in the revised Broadcasting Communication.

Viasat agrees with the general premise of paragraph 58, namely that the test of cross-subsidisation should be concerned with the stand-alone costs of the public service operator.

However, Viasat would disagree with paragraph 58 on two central points:

1. Firstly, paragraph 58 should not only refer to cross-subsidisation of non-public service activities.
2. Secondly, paragraph 58 should not refer to the stand-alone costs "of an efficient commercial operator" as a relevant bench mark.

These aspects are briefly elaborated below.

5.1 Reference should not only be made to cross-subsidisation of non-public service activities

This comment is closely linked to the observations made in Chapter 4.

As explained in Chapter 4, a clear distinction should be made between, on the one hand, those public service activities which generate additional public service costs and, on the other hand, the public service activities which would have been carried out in the absence of the public service obligation (the "commercial activities").

Regrettably this distinction features only in paragraph 44 of the Broadcasting Communication, but not in paragraph 58 which only refers to "non-public service activities".

It is recommended that the revised Broadcasting Communication rectifies this error and abandons the reference to non-public service activities.

5.2 The use of the stand-alone costs of "an efficient commercial operator" should be abandoned

It is submitted that the applicable test of cross-subsidisation should be designed to ensure that the public service operator is able to cover *its own* stand-alone costs (i.e. the costs that it would have incurred absent the public service obligation), *not the stand-alone costs of some fictive well-run operator*.

In fact, by using the costs of an efficient commercial operator as the relevant benchmark, the test set out in paragraph 58 allows the public service broadcaster to set its prices in the advertising market below its own stand-alone costs.

Moreover, the test implies that a public service broadcaster may lower its prices each time competing (non-public service) broadcasters increase their efficiency.

Accordingly, the test in paragraph 58 thus has the odd consequence of allowing the pubcaster to lower its prices each time its competitors increase their efficiency, without at any time considering the level of efficiency of the pubcaster.

Such test discourages both the public service broadcaster and competing broadcasters from increasing their efficiency. It is submitted that such test is incompatible with EC competition policy, which is designed to achieve an optimal allocation of resources and to result in increasingly better and cheaper products being made available to consumers.

Assessing the actual cost level of the pubcaster may, admittedly, require detailed investigations. Again, it should be kept in mind, however, that it is not for the Commission to carry out such investigations. Rather, it falls upon the Member States invoking Article 86(2) to demonstrate that the public service compensation is limited to the additional public service costs and that it does not de facto benefit the commercial stand-alone activities of the pubcaster. If Member States were to object that such proof may be difficult to adduce, it should be answered that it was the decision of the Member States not to select the public service broadcaster pursuant to a public tender procedure. It is recalled that, if a public tender had been organized, the compensation measure would in most instances escape Article 87(1) and not be classified as State aid. In such instance, it would not even be necessary to examine the cost level of the pubcaster.

The revised Broadcasting Communication may therefore be a golden opportunity for the Commission to influence the Member States' procedures for appointing public service broadcasters.

5.3 A price-maximisation test is wholly inappropriate

In its decision of 19 May 2004 concerning the financing of the Danish broadcaster, TV 2/DANMARK, the Commission applied an alternative test to the one set out in paragraph 58 of the Broadcasting Communication, namely a test consisting in examining whether TV 2 had maximised its revenue'.²⁶

However, whilst such test may be apt to assess whether the pubcaster's advertising revenues have been maximised in the commercial market, it is clearly inapt to assess whether those revenues are sufficient to cover the pubcaster's commercial stand-alone costs (i.e. the costs that would have been incurred in the absence of the public service obligation).

The price maximisation test therefore must be dismissed as irrelevant for the purpose of assessing whether the public service compensation serves de facto as operating aid, keeping an inefficient commercial broadcaster artificially alive.

5.4 Conclusion

In the light of the above, it is recommended that the revised Broadcasting Communication

- contain a thorough analysis of the issue of cross-subsidisation;
- state that cross-subsidisation may relate not only to non-public service activities, but also to the public service activities of the pubcaster, which the latter would have carried out in the absence of the public service obligation;
- state that the stand-alone test should concern the actual costs of the pubcaster instead of the fictive costs of an efficient commercial broadcaster.

²⁶

Commission decision 2005/217/EC of 19 May 2004 on measures implemented by Denmark for TV2/Danmark (OJ L 85, 23.3.2006, p. 1); see in particular paragraphs 140 et seq.