State aid and broadcasting: state of play

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As part of the reorganisation of DG Competition in 2003, a special focus was placed on the services sectors in the State aid area. This reflects the relative growth of the services industry and the increased codification of State aid in the manufacturing industry, which allowed shifting some focus and resources from the industry area to the services area. In practice, DG Competition has set up two separate units in charge of the services area.

Recently liberalised service sectors, such as the telecommunications, postal, and broadcasting industries, often raise specific State aid issues because their operations may have a dimension of public service obligation, imposed on one company or on parts of the sector and often compensated through State funding.

As regards the broadcasting area, DG Competition has made a significant leap forward in its assessment of the financing of public service broadcasters in Europe over the last year. This results from a policy consisting in systematically tackling the cases which have been brought to its attention in this area.

I. The ad-hoc funding measures

A first batch of three cases has been closed in 2003. These cases relate to ad-hoc State funding measures granted to the public service broadcasters during the 90’s. These ad-hoc funding comprised a series of different measures, e.g., capital injections, debt re-scheduling, operating aids, tax exemptions and subordinate loans. These measures are distinct from the recurrent funding mechanism that the Member States concerned have established long ago, generally under the form of a licence fee charged to the owners of radio and television sets or annual compensation from the State budget. The recurrent funding mechanisms were established before the entry into force of the EC Treaty in the Member States concerned. They are to be considered as existing aids and must be dealt with according to the existing State aid procedure set forth by the procedural regulation (1) (see Section II below).

The three cases closed in 2003 relate to the Portuguese (RTP), Italian (RAI), and French (France 2 and France 3) public broadcasters. All of these cases started with complaints filed by private competitors of the public broadcasters. In all of these cases, the Commission opened the procedure and closed it with decisions finding that the measures concerned constituted State aids but were compatible with the common market (2).

The Commission examined these cases in light of the recent judgment of the Court of Justice in the Altmark case (3) and also applied the principles set forth in its Broadcasting Communication (4).

Article 87(1) EC and the Altmark test. Without entering into the details of each case, the Commission’s assessment in these cases followed identical patterns. The Commission found that the conditions provided by Article 87(1) were met and, therefore, that the measures at stake constituted State aid. As regards more specifically the condition that the State measure must confer an advantage on the beneficiary to be found State aid, the Commission applied the Altmark test. Of particular interest is the fact that all three cases failed to meet the second criterion listed in the Altmark judgment, i.e., the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner (5). This shows how difficult it is, in the broadcasting area, for ad-hoc State financing measures to pass the Altmark test and thus escape the qualification as State aid.

The derogation of Article 86(2) EC. Once the aid was characterised, the Commission went on to assess whether the funding measures could qualify for the derogation set forth by Article 86(2) EC.

(3) Judgment of 24 July 2003, Case C-280/00, Altmark Trans, not published yet.
(5) Para. 95.
According to settled case law (1), three conditions have to be met to fall under this exception, namely (i) public service obligations must be clearly defined, (ii) the Member State must have explicitly entrusted the beneficiary with the public service tasks, and (iii) applying competition rules must obstruct the performance of these public service tasks. In addition, the Broadcasting Communication explains how the Commission contemplates to apply these principles. In particular, the Commission examined whether the funding measures concerned had overcompensated the costs generated by the public service tasks and no unnecessary market distortions occurred. The three most salient aspects of the application of Article 86(2) to the Portuguese, Italian, and French cases are briefly discussed below.

**Public service remit in the broadcasting area.** As to the scope of the public service, the broadcasting area presents some specificities compared to any other business areas. Indeed, the so-called Amsterdam Protocol on Public Service Broadcasting annexed to the EU Treaty allows the Member States substantial latitude in defining the scope of public service broadcasting. The Commission’s task in this respect is limited to the manifest error of appreciation test. In these cases, this test did not raise any particular issues.

**Absence of over-compensation.** In all three cases, identification of the public service costs did not raise any serious issues. Indeed, in line with the Broadcasting Communication, all three broadcasters hold separate accounts for commercial and public service activities, which allowed the Commission to identify the eligible public service costs. As is common practice in the broadcasting area, the Commission deducted from these costs the net profit directly and indirectly derived from the public service mission (essentially the net profit on advertising). It goes without saying that the monies granted to the public broadcasters through the annual licence fee were discounted from the public costs for purposes of the over-compensation assessment. In none of the above-mentioned cases did the Commission find that there was over-compensation of public service costs.

**No Side-effects in competitive markets.** In the Italian and French cases, the Commission assessed whether the public broadcasters had used the State ad-hoc funding to undercut their competitors’ prices in the commercial markets where they operate, i.e., essentially the advertising market (2). The Commission compared the selling prices for advertising space of all television stations weighted against audience share and composition. In this respect, the Italian case did not raise serious difficulties. In the French case however, in line with the Commission’s policy requirement towards more economics in all areas of competition law, this particular point was dealt with in cooperation with the Chief Economist team. This is because the market shares of the two public service channels were not in the same range as those of the private channels and, consequently, their advertising prices could not simply be compared with those of their private competitors. Indeed, the Commission had to take into account the ‘power of screen’ effect, according to which the bigger the audience of television stations, the more money per viewer’s hit buyers of advertising space agree to spend on advertising time. Finally, the Commission’s conclusion was that, despite differences in the broadcasters’ advertising prices, the French public broadcasters had not undercut their competitors’ prices. In summary, in none of the three cases did the Commission find any anticompetitive practices by the public broadcasters in the advertising market.

**II. The recurrent funding mechanisms**

The public broadcasters of Portugal, Spain, Italy, and France rely heavily on recurrent public funding. As mentioned above, these funding mechanisms were outside the scope of the Portuguese, Italian, and French decisions because they were found to be existing aid within the meaning of the procedural regulation. Accordingly, they have been dealt with under the existing aid regime established by Article 88(1) EC and the procedural regulation. This regime comprises an initial phase of bilateral cooperation between DG Competition and the Member States. If the issues are not solved during that phase, the Commission proposes appropriate measures to the Member States. If the Member States and the Commission do not reach a satisfactory agreement on these measures, the Commission then opens a procedure on the basis of Article 88(2) EC which will result in a formal Commission decision.

DG Competition’s services in charge of state aids have already sent letters to the four Member States explaining what principles, in the view of DG Competition’s services, should be implemented in the Member States’ legislations to safeguard future compliance with State aid rules. In the four cases,

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(2) Such conduct was not raised in the Portuguese case.
the main features of these safeguards cover, in very broad terms, (i) the introduction of mechanisms to avoid over-compensation of public service costs, (ii) market prices for the commercial activities of public service broadcasters, and (iii) the arm's length relationship between the public service broadcaster and their commercial subsidiaries. In addition, DG Competition's services invited the Spanish authorities to implement the separation of accounts requirement, in accordance with the Transparency Directive.

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With this set of decisions on ad-hoc financing measures, the practical application of the State aid rules to public service broadcasters has been clarified to a great extent. In addition, the existing aid proceedings on the recurrent funding mechanisms pave the way towards increased legal certainty for both public and private broadcasters as to the legality of State financing in the broadcasting area.