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an der Universität zu Köln

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Public Service Broadcasting
and the Contradictions
of European Competition Policy

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Vincent Porter

Public Service Broadcasting and the Contradictions of European Competition Policy*

1. Introduction

This morning, I should like to consider three aspects of European competition policy in the field of licence fee funded broadcasting, which will particularly affect the future of the broadcasting licence fee in Europe. They are the contradictions between:

- the promotion of the General Economic Interest and the restrictions on the allocation of State aid,
- the delivery of a Universal Service in broadcast programmes and a free market in electronic communications networks, and
- the use of State aid to push the transport of electronic signals over the airwaves, and the need for the consumer to pay for access to on-demand signals financed by State aid.

2. The General Economic Interest and the Prohibitions on State Aid

In 1999, the Amsterdam Treaty introduced two changes to European law, which modified the previous dogma that free market competition was the best way of achieving economic and social progress. They were the introduction by Article 16 of the Treaty of the new concept of a Service of General Economic Interest – or SGEI. The second was the agreement, in a Protocol to the Treaty – colloquially known as the Amsterdam Protocol – that because of the direct relationship between public service broadcasting and the democratic, social and cultural needs of each society, and of the need to preserve media pluralism – the provisions of the Treaty should not prejudice the freedom of Member States to allocate State aid to public service broadcasters. Although these two provisions are related, distinct and separate regulatory requirements derive from them. The contradiction between the two approaches emerges from an analysis of the Commission's latest Communication on the application of State aid rules to public service broadcasting.¹

* This article is based on a presentation given by Professor Vincent Porter during an international conference concerning "The Future of the Broadcasting Licence Fee in Times of Media Convergence" in Bonn on May 6, 2010. Professor Porter is Emeritus Professor of Mass Communications at the University of Westminster, where he was Director of Research in Media, Art and Design from 2001 to 2004.

¹ Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01), Official Journal C 257/1, 27. 10. 2009.



An SGEI must fulfil four conditions in order to benefit from the provisions of article 86(2) of the Treaty. These are:

- (a) The service in question must be an SGEI, and clearly defined as such by the Member State concerned.
- (b) The beneficiary must be explicitly entrusted with the provision of that service by the Member State.
- (c) The ban on State aid must obstruct the performance of the particular task assigned to the beneficiary, and
- (d) the exemption from such rules must not affect the developments of trade to an extent contrary to the interests of the Community.

The point to note about these requirements is that they are relatively simple to fulfil. Once the Member State has defined the service of general economic interest which the undertaking is expected to deliver, and has assigned that task to it, the only other legal requirements are that the Member State has to show that the task cannot be completed without State aid, and that it will not affect the development of trade to such an extent that is contrary to the interests of the Community.

The State aid rules, on the other hand, which derive from article 87 (1) of the Treaty, approach matters from the opposite end of the regulatory spectrum. In any assessment of a proposal to allocate State aid, it is the *effect* of allocating State aid, not just its purpose, which is decisive. In particular, any State aid which is allocated must satisfy three negative criteria. It must:

- (a) not be liable to affect trade between Member States,
- (b) not confer an advantage on the beneficiary,
- (c) not distort, or threaten to distort, competition.

The European Court of Justice has already ruled that public service broadcasters are caught by the prohibitions on State aid, for they may use their aid to affect both the acquisition and sale of programme rights at an international level, and the cross-border sale of advertising time, especially in trans-national homogeneous linguistic areas. Moreover, whereas public service broadcasters are – almost by definition - based in a single Member State, commercial broadcasters may be jointly owned by undertakings in more than one Member State.²

In 2003, in an attempt to resolve these two opposing regulatory approaches, the European Court of Justice laid down four *cumulative* conditions which an SGEI must also meet if any public subsidy which it receives is not to fall under the State aid rules.³ These were that

² Ibid, paragraph 22.

³ Case C-280/2000 Altmark Trans GmbH and Regierungspraesidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH (Altmark) (2003) European Court Reports 1-7747.



- (a) The recipient undertaking must actually have clearly defined public service obligations to discharge.
- (b) The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner.
- (c) The compensation cannot exceed what is needed to cover the costs incurred in the discharge of public service obligations, taking into account relevant receipts and a reasonable profit.
- (d) Where an undertaking is not chosen, pursuant to a public procurement procedure, which would allow for the selection of a bidder providing those services at least cost to the community, the level of compensation must be determined on the basis of costs which a typical undertaking would have incurred in discharging those obligations.

Accordingly, in 2005, the European Commission adopted a new decision and framework on State aid, which sought to reconcile the two approaches.⁴ In this Decision, the Commission adopted a number of criteria, *any one of which* would automatically exempt certain SGEIs from State aid rules. I shall return to the details of this Decision and Framework later, but at the moment we only need to note that the Commission's Decision meant that public service broadcasters would not automatically be exempted from Europe's more stringent rules on State aid.

In its 2009 Communication on the application of State aid rules to public service broadcasting, the Commission therefore sought to develop an approach which resolved the contradictions between the EU's relatively relaxed approach towards SGEIs, which derived from article 86 (2) of the Treaty, as amplified by the European Court of Justice in its *Altmark* judgement, with the more stringent approach required by the application of State aid rules arising from article 87 (1) of the Treaty. After extensive consultation, the Commission concluded that in order for a public service broadcaster to receive State aid, there must be:

- an official definition of the broadcaster's public service remit,
- an entrustment, by an official act, of the responsibility of the broadcaster to fulfil the requisite public service obligations, accompanied by adequate arrangements for supervision,
- explicit arrangements for public funding, and
- transparent arrangements for the assessment and financial control of State aid.

Finally, the Commission also recognised that public broadcasting services should be allowed to diversify on to different digital platforms on a technology neutral basis, and that public service broadcasters could use State aid to provide audiovisual services over new digital platforms, provided they were addressing the same de-

⁴ Commission Decision of 23 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 (Official Journal, L 312, 29.11.2005, p. 67).



mocratic, social and cultural needs of the society, and did not entail disproportionate effects on the market, which were not necessary for the public service remit.

At the end of its 2009 Communication on Public Service Broadcasting, therefore, the Commission tentatively recognised that the regulation of public service broadcasting must also take account of the regulation of the medium which carries the broadcast programmes, as well as the democratic, social and cultural importance of the programmes themselves.

3. The Provision of a Universal Service and the Free Market in Electronic Communications Networks

Public service broadcasters have traditionally deployed their State aid to provide a universal service to all households within that country. But this is often expensive. When the BBC established the transmitter infrastructure for its UHF services in 1970, the average cost per household for delivering its broadcasts to the last 20% of rural households, was nearly ten times that for delivering them to the initial 80% who lived in the towns and cities.⁵ Broadcasters in some other Member States have achieved universal coverage by allowing their signals to be relayed via cable networks. In 2002, however, the EU passed a series of Directives which regulated Electronic Communications Networks – a term which covered electronic communication, whether by wire or over the air.

The principal directives were the Framework Directive – which established a common regulatory framework for electronic communications networks and services;⁶ the Authorisation Directive, – which regulated the authorisation of electronic communications networks and services;⁷ and the Access Directive, which regulated the access to, and interconnection of, electronic communication networks and associated facilities.⁸ But the EU also introduced a Universal and Users' Rights Directive, which defined a minimum set of services of specified quality to which all end users must have access at an affordable price.⁹ This last Directive allowed providers of electronic communication networks to receive State aid in order to provide a universal service.

Initially, these changes worked well for some public service broadcasters, as they were operating in a seller's market. They were able to sell off their transmitters to the private sector, and to include in any subsequent contracts with the new owners a requirement for the delivery of a universal service, for which they were able to pay with their broadcasting fee revenues. But their relationship with the telecommunication networks became more complex for three reasons. First,

⁵ C F Pratten, *The Economic of Television, Political and Economic Planning*, Broadsheet 520, September 1970., Table 5.4.

⁶ Directive 2002/21/EC, Official Journal, L 108; 24. 4.2002, p. 33.

⁷ Directive 2002/20/EC, Official Journal, L 108, 24. 4.2002, p. 21.

⁸ Directive 2002/19/EC, Official Journal, L 108, 24. 4.2002, p. 7.

⁹ Directive 2002/22/EC, Official Journal, L 108, 24. 4.2002, p. 51.



the electronic communications networks were normally much larger organisations than the broadcasting organisations. Second, the broadcasters' signals were only one of several categories of signal carried by the broadband networks of the electronic communications companies. And thirdly, the Commission's guidelines for the allocation of any State aid to broadband and the so-called "next generation access" – or NGA – networks are different from that for public service broadcasters. Moreover, the Commission has already established this framework to authorise a large number of applications for State aid to broadband networks.¹⁰ As a result of these changes, the market between the broadcasters and the electronic communications networks is slowly turning into a buyers' market, in which the networks are becoming the dominant players.

The guidelines which the Commission has adopted in response to the applications for the rapid deployment of State aid for broadband and NGA networks clarify the balancing act which the Commission has to employ in order to resolve the contradictions between a free market approach to the regulation of electronic communications networks and the need for State aid in order to roll out a universal service.¹¹ In every case, the Commission has to balance the positive impact of State aid in reaching an objective of common interest against its potentially negative side effects, such as the distortion of trade and competition between electronic communication networks.¹²

When it seeks to resolve these contradictions, the Commission asks three key questions. They are:

- Is the aid aimed at a well-defined objective of common interest – i.e. does it address market failure or another objective?
- Is the aid well-designed to deliver the objective of common interest? More specifically:
 - Are there other better-placed instruments?
 - Will the proposed measure provide an incentive for undertakings to change their behaviour?
 - Could the same change in behaviour be obtained with less aid?
- Are the distortions of competition and the effect on trade limited, so that the overall balance will be positive?

Although the Commission has already approved a number of applications to allow State aid for broadband networks, the implementation of those criteria normally requires the Commission to enquire ever more closely into the individ-

¹⁰ For a full list, see http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf.

¹¹ Communication from the Commission, Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks, (2009/C 235/04) Official Journal C 235/7, 30.09.2009.

¹² Ibid, paragraph 34.

ual competitive situation affecting any broadband, or NGA, network which would be a beneficiary of any State aid.

A key illustration of this is the analytical methodology used by the Commission. It divides broadband Europe into three areas. Its criteria are economic and competitive, not democratic, social or cultural.

The Commission's three categories for its map of broadband Europe are :

- *White areas*, which are rural and underserved areas. Since the Commission considers that State aid will promote territorial, social and economic cohesion and address market failures, it generally grants applications for the award of State-aid in all these areas.
- *Black areas*, which are those areas where at least two broadband network providers are present, and are provided under competitive conditions (facilities-based competition). In general, the Commission has refused applications for the award of State-aid in all such areas, unless market failure has clearly occurred, for in the Commission's view, State-aid could lead to an unacceptable distortion of competition. It is unclear, however, whether this specifically includes market failure in the delivery of broadcasts.
- *Grey areas* are those areas where a monopoly operator may exist. This may, or may not, affect the quality of service, or the price at which services are offered to citizens. On the other hand, State aid for the development of a rival broadband network could, the Commission alleges, distort market dynamics.

In order to resolve the contradictions on applications for State aid in grey areas, the Commission intends to probe more deeply into local competitive and regulatory frameworks. The Commission will assess:

- the level of broadband prices, and the type of services offered, in order to decide whether the market conditions are adequate,
- whether network access conditions, which are available to third parties, are conducive to effective competition,
- the potential of entry barriers to preclude access by other electronic communication operators,
- the success, or failure, of national regulatory, or competition authorities to overcome such problems.

Two things are noticeable about the Commission's regulatory approach to broadband and NGA networks. The first is that it is unclear whether the Commission will insist that the carriage of public service broadcasts will be one of the categories of service to be carried by the broadband or NGA network. At the moment, the Commission merely assumes that if two broadband providers are present under competitive conditions, then this will be sufficient. There is no guarantee that any particular public broadcasting service, such as a high definition television service, will automatically be available to the individual consumer via a broadband or NGA service. And even if they are, there is no guarantee that the price which the consumer will have to pay for them will be competitive.



The other noticeable omission from the Commission's approach is that although the Electronic Communications Directives established a common regulatory framework for electronic signals, whether delivered by wire or over the air, the Commission's thinking has not yet addressed the economic relations between the carriage of licence fee-funded electronic signals and the carriage of conditional access services. It is to this third contradiction that I now want to turn.

4. Electronic Signals: State-aided Push or Consumer-driven Pull?

I mentioned earlier, that in 2005 the European Commission adopted a new Decision and Framework on State aid, which sought to reconcile the contradictory regulatory approaches required for an SGEI, and those for the approval of an application for State aid.¹³ In this Decision and Framework, the Commission adopted a number of criteria, *any one of which* would automatically exempt certain SGEIs from State aid rules. These were:

- when the average annual turnover of the undertaking is less than 100 million Euros, and the annual compensation less than 30 million Euros,
- all hospitals and social housing undertakings,
- air or maritime links to islands in which the average annual traffic does not exceed 300,000 passengers,
- airports and ports for which the annual traffic does not exceed 1,000,000 passengers for airports, or 300,000 for ports.

None of these automatic exclusions apply to land transport – nor indeed, to public service broadcasts.

The four exempt categories, which the Commission has exempted from its Decision and Framework, are based on three separate rationales. They are:

- the small size of the undertaking (100 million Euros) and the minimal proportion of State aid (30 per cent),
- SGEIs with a specific social function, namely hospital and social housing institutions,
- small public transport facilities by air and sea.

It is valuable to consider the differences between broadcast-fee funded broadcasters and those categories of undertaking which the Commission exempted in its 2005 Decision and Framework.

- Although the revenues of some small broadcast fee-funded broadcasters (e.g. *Radio Bremen* and *Saarländischer Rundfunk*) are less than 100 million Euros, their licence fee revenues are probably greater than the Commission's ceiling of 30 million Euros, although this will also depend on the size of their

¹³ Commission Decision of 23 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 (Official Journal, L 312, 29.11.2005, p. 67).

advertising revenues. They are unlikely, therefore, to be exempted on account of their small size.

- Although the official remit of a broadcast-fee funded broadcaster could ensure that it was a service of general economic interest, comparable to a hospital or a social housing organisation, the Commission's recent Communication already requires all Europe's public service broadcasters to observe both SGEI and State aid rules.
- The requirement for licence-fee funded broadcasters to provide a universal service by pushing their signal towards all households is also analogous to the exemptions which the Commission has already granted to small undertakings which provide marine and air transport.

Nevertheless, a profound change is under way in the manner in which broadcasters deliver their services. Whereas listeners and viewers have traditionally been able to use a personal audio or video recorder, to store these broadcast signals in order to catch up with the transmission at a later date,, more recently broadcasters have also introduced on-demand services, which require the viewer to pull the electronic signals towards their own TV-set or computer. These include web-sites and 'catch-up' broadcasting services, both of which have established a different relationship with the consumer.

By December 2008, the European Audiovisual Observatory and the Direction du développement des médias had identified 696 video-on-demand services in Europe, which are provided by 366 European companies. About a third of these were TV companies, which were offering a total of 241 catch-up TV services.¹⁴ In these services, it is the broadcaster, not the consumer, which stores the electronic information, and then requires the individual consumer to request the information to be delivered to her/his home. Thus these services are no longer public services, but information services which are available to the public.

In the traditional model, the broadcaster uses State aid to *push* the electronic signals toward the listener or viewer, who can then store it in their own personal audio or video recorder. In the new model, the broadcaster requires the consumer to download, or to *pull* the electronic signals towards them, by means of a broadband network.

In the former model, the public service broadcaster was able to use State aid to ensure that the electronic communication network *pushed* the broadcasts towards the listener or the viewer, who could then store them in a personal audio or video recorder. But in the latter model, the public service broadcaster uses State aid to store the broadcasts in its own computer, but then requires the consumer to pay the broadband network to deliver the service into his own home. Thus for the consumer, the payment for the electronic transmission of the on-

¹⁴ European Audiovisual Observatory and the Direction du développement des médias (France) with the collaboration of NPA Conseil, Video on Demand and catch up television in Europe, European Audiovisual Observatory, October 2009), pp. 113, 116, and 220.



demand service has been removed from the (State-aided) broadcasting fee and charged instead to the rental fee for the broadband, or NGA, network.

Furthermore, it is also important to note, that there are four categories of on-demand service. They may be:

- freely available (even to non-payers of broadcasting fee),
- freely available, but funded by advertising or sponsorship,
- paid for on a subscription basis (e. g. a cable or satellite services), or
- paid for on a pay-per-view basis.

Europe's broadcast-fee funded broadcasters may be running various combinations of these on-demand systems in parallel, but in every case, *users will also have to pay for the carriage of the on-demand services into their home*. Today, most broadcasters are paying both to push their services towards their licence payers, but also offering on-demand services, for which their licensees have to pay the network an additional charge to access them. To confuse matters even further, in the UK, the BBC's Project Canvas, and British Sky Broadcasting's Anytime Plus are now offering set-top boxes which will allow viewers to access internet-delivered content on their TV sets. In a year or two, Europe's viewers will be offered a single television set, which can receive both broadcast and online signals, but for which they will have to pay an additional fee to a broadband network in order to watch the latter.

There may also be further differences, depending on where each individual consumer lives. In general, most consumers, who take advantage of these on-demand services, live in one of the European Commission's "black areas". Thus they will not enjoy any additional State aid to pay for the carriage of these on-demand services. On the other hand, those viewers who live in one of the Commission's "white areas" may also be able to enjoy additional State aid which will establish a suitable broadband or NGA network to deliver the electronic signals which the broadcaster has already produced and stored.

The regulatory situation governing State aid could be even more complicated in one of the Commission's grey areas, where there is no proper competition between network providers, and where the Commission has to balance monopoly provision against anti-competitive subsidy for a rival network.

There are three possible scenarios to finance the universal rollout of broadband networks. In the first, consumers living in the "black areas" will subsidise those living in the "white areas". In the second, the broadcasting fee could be used to subsidise the universal roll-out of broadband, or NGA, networks. And in the third possibility, is that the State aid comes from general taxation. In the UK, the Chancellor of the Exchequer of the new Conservative- Liberal Democrat Government recently announced that he would be taking £250 million from the BBC's digital switchover budget to roll out a universal broadband service, although as yet there are no further details. Nor is there any guarantee that the State aided parts of the network will have sufficient capacity to enable consumers to download television programmes.



5. Conclusion

In conclusion, therefore, I submit that there are three contradictions at the heart of Europe's policy towards public service broadcasting.

- It regulates public service broadcasting both as an SGEI and, more stringently, as a beneficiary of State aid.
- Although Europe's public service broadcasters have traditionally used their State aid to pay for the universal over-the-air delivery of their broadcast signals, they will increasingly have to compete with providers of other, non-broadcast, audiovisual services. Moreover, in many European countries, there is no guarantee that a universal broadband service will become available unless the Commission approves a second – but different - form of State aid in order to build, or to extend, a commercial broadband, or NGA, network, which can only take place either in a “white area” or in one of the Commission's “grey areas”.
- Finally, the decision by public service broadcasters to use their State aid funds in order to establish their own on-demand services, means that the additional costs, which a consumer has to pay to access those services via a broadband or NGA network, will be additional – the transmission costs for broadcasts which s/he has already paid to the broadcaster in their broadcasting licence fee. Thus State aids may often be used to encourage television viewers to pay further costs to commercial transmission networks, in order to access the already State-aided – or in some cases State-funded – on-demand services.

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