The Revision of the 'Broadcasting Communication' and its Implications for Public Service Television
NOTE

Abstract

This note provides an overview of the issues raised by the revision of the 'Broadcasting Communication' that took place in 2009. It identifies what is new in the Communication and describes the possible implications for the state aid granted to public service broadcasters in the EU.
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LIST OF ABBREVIATIONS

- **BBC**  British Broadcasting Corporation
- **BC**  Broadcasting Communication
- **CULT**  Committee on Culture and Education
- **EPP-ED**  Group of the European People's Party and European Democrats
- **PSBs**  Public Service Broadcasters
- **SGEI**  Services of General Economic Interest

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Table 1: Growth of the various branches of the audiovisual industry in the European Union (2002-2006) in EUR million
1. INTRODUCTION

The purpose of this note is to provide an overview of the issues raised by the 2009 revision of the 'Broadcasting Communication' for the benefit of Members of the European Parliament's Committee on Culture and Education (CULT).

On 2 July 2009, the European Commission adopted its Communication on the application of state aid rules to public service broadcasting (hereafter known as the 'Broadcasting Communication'). The document serves as a guide as to how the Commission intends to apply state aid rules to public service broadcasting, revising the previous communication on this subject, issued in 2001.

The Commission will of course continue to apply state aid decisions on a case-by-case basis to public service broadcasters. Between 2001 and 2008 it took 24 such decisions. At the same time, one can expect continued litigation in this sector. The Broadcasting Communication (BC), according to the Commission, aims to reduce the volume of litigation by setting out some principles with the aim of providing more legal certainty to all interested parties. This is important, since the technological changes that have taken place since 2001, especially the blurring of boundaries between the broadcasting sector (television) and the digital sector (the Internet) have added to the complexity of the situation. Conflicts between public and commercial television are hardly new, but they have been increasingly transferred to digital media where a number of other protagonists are also active (for instance the print media which are naturally transferring their focus to the digital environment).

The Commission first published a draft version of the new Broadcasting Communication in November 2008, which was followed by a period of public consultation, which ended on 15 January 2009. That public consultation was the third and last. The EPP-ED Group organized a hearing on the new BC on 8 January 2009; this was followed on 5 March by a Committee on Culture hearing with a broad focus on the role of public broadcasters.

The Broadcasting Communication will enter into force when published in the Official Journal. That is expected to happen before the end of November 2009.

2. LEGAL FRAMEWORK

Article 87(1) of the EC Treaty states that Member States must not grant public money to undertakings "in any form whatsoever which distorts or threatens to distort competition". As is well known, a number of exceptions are allowed to this general rule. In the cultural field, for instance, Article 87(3) (d) allows for "aid to promote culture and heritage conservation".

The relevant exception to the rule, in the case of public service broadcasters (PSBs), is laid in Article 86(2) of the Treaty, since they are considered services of general economic interest (SGEI). Article 86(2) states that SGEI shall be subject to competition rules, "in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". It also says that when state aid is allowed, it must

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1 See: State aid: Commission consults on revised rules for state funding of public service broadcasting - frequently asked questions.
not affect trade "to such an extent as would be contrary to the interests of the Community".

It is important to note that the EU approach to public service broadcasters considers that they are SGEI with a public service mandate. For article 86(2) to apply, the Member State must define the public service mandate carried out by a broadcaster, which should be done by means of an official act. In political debate, it is often assumed that PSBs are allowed to receive public funding because of their role in, for example, providing a varied cultural offer to viewers. However, it is slightly more accurate to state that public money is granted to PSBs in return for the public service mandate that they carry out. It goes without saying that providing a varied cultural offer to viewers can be (and often is) part of that public service mandate.

To complete the picture, one should mention that Article 16 of the EC Treaty acknowledges the place occupied by SGEI in the shared values of the Union and their role in promoting social and territorial cohesion. Furthermore, Article 36 of the Charter of Fundamental Rights requires the Union to recognise and respect access to SGEI in order to promote social and territorial cohesion.

Furthermore, the Lisbon Treaty contains a protocol on services of general interest which stresses the "wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users".

2.1. The 'Amsterdam Protocol'

The 'Amsterdam Protocol', annexed to the EC Treaty in 1997, adds further detail on how the Treaty principles should be applied to the system of public broadcasting in the Member States. It emphasizes that public broadcasting "is directly related to the democratic, social and cultural needs of each society", going on to state that:

"The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."

The Amsterdam Protocol therefore repeats what is already stated in the EC Treaty but the emphasis placed on the democratic, social and cultural needs of each society and the fact that the need to fulfil the public service remit is mentioned twice can be interpreted as being a political message directed at the EU institutions in favour of an especially sensitive approach to PSBs under Community competition policy. The very existence of the Protocol is a testament to the fact that broadcasting is a sector like no other, since it shapes people's values and opinions and, in all countries, is still the main source of news.
3. THE 2009 BROADCASTING COMMUNICATION

The Commission's stated reason for revising the Broadcasting Communication is to consolidate its administrative practice of recent years in cases of state aid to PSBs. It is therefore important to identify what is completely new in the 2009 Communication.

3.1. The 'Amsterdam Test'

The main novelty, and by far the most polemical in political debates, is the Commission's idea of introducing a so-called 'Amsterdam Test' for "significant new services", in particular those that are not traditional media services. The 'Amsterdam Test' takes its name from the protocol mentioned above and it intended to assess whether such significant new services, on the one hand, meet the democratic, social and cultural needs of society, whilst, on the other hand, also assessing their distortive impact on existing commercial offers in the same market. The finality of the test is to make a judgement about how the democratic, social and cultural benefits of a particular initiative weigh up against the market distorting effects, which are almost always present.

The Broadcasting Communication (§ 62) states that such an assessment "would only seem effective if carried out by a body which is external and independent from the management of the public broadcaster". However, the text does leave the door open to a body inside the broadcaster carrying out the test, provided that certain safeguards are met to guarantee the independence of the persons involved making the decision.

3.2. Reserves and Pay Services

Two other new elements of the revised Communication deal with reserves and pay services respectively.

PSBs will be allowed to maintain 'reserves' of up to 10% of the "annual budgeted expenses" of their public service mission (§73), and even more in exceptional cases. These 10% 'reserves' are considered necessary to deal with ordinary cost and revenue fluctuations. Furthermore, the BC allows the keeping of reserves superior to 10% (§74), for major one-off investments that are necessary for carrying out the public service mission. Such reserves were not allowed under the 2001 Communication and the Commission has presented this change as necessary to allow PSBs greater financial flexibility in planning their activities. The new rule goes beyond the 2005 Framework applied to SGEI which allows utilities to keep reserves of up to 10% of their annual compensation (rather than of their budget, which is normally larger). Traditionally, PSBs and other SGEI had been subject to the 'strict net cost principle', implying that they would have to transfer back to the State any unspent part of their public subsidy.

Secondly, the BC makes it clear that paid services can sometimes be considered as SGEI under Article 86(2) of the Treaty, "provided that the services are clearly not commercial in their nature". The Commission therefore signals that the existence of paid services, in certain exceptional cases, is compatible with the public service remit. However, the wording

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2 See § 56 to § 64 of the Broadcasting Communication.
of the Broadcasting Communication makes it clear that PSBs should generally maintain their historical tradition of providing free services.

4. EVALUATION

The new 'Amsterdam Test' is the element in the revised Broadcasting Communication (BC) which has sparked off the greatest controversy. In particular, PSBs have heavily criticized the idea, but their criticisms are sometimes centred on the supposed intentions behind the BC or its potential future repercussions. Such criticisms are by their very nature difficult to analyse. However, some of the claims of the PSBs are clearly exaggerated. The Amsterdam Test is based on the spirit of the Protocol from which it takes its name.

It is worth examining some of the criticisms made by PSBs, which were aired at the two public hearings mentioned above:

- that the Amsterdam Test reduces the editorial autonomy of PSBs, in particular if governments are involved. This argument is not very convincing. Public broadcasters will still be able to propose any new services that they consider beneficial to the citizen in democratic, social and cultural terms. On the other hand, the text of the communication does not state that governments should be involved in the Amsterdam Test.

- that the new test will impose heavy administrative demands on PSBs, especially in smaller Member States. This line of reasoning is also unconvincing, because the BC does not set out in detail how the new tests are to be carried out or describe the entities that will execute them. It only devotes a handful of paragraphs to these subjects, leaving it up to each Member State to work out its own solutions. Furthermore, it states that the tests will only be applied to "significant new services", without defining these, therefore also allowing Member States flexibility in demarcating the border between existing and new services. Furthermore, it is clearly stated in the text that PSBs can try out new ideas, in the form of pilot projects, without these being considered significant new services.

Another reason for casting doubt on the above arguments is that some PSBs in the EU already carry out tests of this type, even in small Member States. The best known example is the 'public value test' created by the British Broadcasting Corporation (BBC) but Germany, Ireland and Belgium also have tests in place.

However, some argue that the Amsterdam Test is unnecessary, from a legal point of view. After all, the rules are already clear as laid down in Article 86(2) and in the Amsterdam Protocol. Speaking at the public hearing organized by the PPE-ED on 8 January, Mrs Doris Hildebrand, a lawyer and consultant, considered that the Commission's proposal to create a new test "was outside the common reform of state aid provisions". In other words, she raised doubts about the need to create a new test for PSBs, arguing that there was no need for "further sector specific guidance" with respect to Article 86(2). The Commission disagrees, pointing out that in other SGEI sectors state aid cannot actually be paid out if the private sector is offering a similar service. State aid in these sectors is subject to a 'market failure test'. The Commission therefore argues that public service broadcasting receives more lenient treatment than other SGEI sectors, for reasons of political sensitivity and due to the Amsterdam Protocol.

PSBs, naturally suspicious of an innovation which they see as unnecessary, have argued that the Amsterdam Test has an in-built tendency to limit their role in so-called "new
media’, since by definition their investments in this sector will cause market distortion. Such a suspicion cannot be fully refuted. As already stated however, EU law, the Amsterdam Protocol and the test make it clear that PSBs are allowed to introduce new significant services (which are expected to be mostly in 'new media') but only after the weighing up of the public interest benefit versus the distortion caused to the market.

The remarks made above show that the arguments for and against the Amsterdam Test are somewhat circular. One side argues that the tests are unnecessary, since EU law already imposes similar principles; the other considers that there is nothing wrong with creating a new test which is in the spirit of EU law and adds a new procedure, which is intended to diminish litigation and complaints at a later stage.

4.1. Further Considerations

The debate on the revision of the BC sometimes raises wider questions for which the EU institutions, notably the Commission, are not fully competent to provide answers. One of the reasons why the debate is a difficult one is because the EU's competences in this field are inherently unbalanced. On the one hand, the Commission and the European Court of Justice (ECJ) have strong powers over competition policy. On the other, it is not up to them to take decisions on each country's public broadcasting model. That is left up to each Member State, as the Amsterdam Protocol makes clear.

The Broadcasting Communication states that when the Commission examines the public service remit defined in a particular country, its role is limited to checking for "manifest error" (§ 48). That means that the Commission considers that certain types of programming can never be considered part of the public service remit. It provides a few examples: e-commerce, advertising, teleshopping, the use of premium rate numbers in prize games etc. These are just examples. "Manifest error", according to the BC, means using public money to finance any activity which does not contribute to serving the democratic, social and cultural needs of society.

The Commission considers that its role in evaluating the public service remit defined in any particular Member State starts and ends with a check for "manifest error". Beyond that, matters are left at the national level. Furthermore, the Broadcasting Communication underlines that the public service remit can be defined broadly to include "a wide range of programming and a balanced and varied broadcasting offer"(§ 47). At the same time, it states that the definition of the public service mandate "should be as precise as possible" (§ 45).

The Commission, according to European case law3 is responsible for making sure that the national bodies entrusted with checking how PSBs perform their public service remit carry out their tasks properly. In simple terms, the Commission's role is to make sure that national bodies actually do their job. That does not mean that the Commission actually carries out the supervision itself.

In the context of the debate on the BC, commercial operators often accuse PSBs of not carrying out their public service mission properly, in some cases because they feel that the mission is defined too broadly. But, as we have seen, the Commission is not responsible for checking how the remit is being performed 'on the ground'. Nor does it object to the public

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3 For instance, case T-442/03, SIC vs. the European Commission.
service remit being defined broadly, meaning that it encompasses a wide variety of programming, ranging from the cultural or educational to pure entertainment.

Therefore EU policy and law have little to say regarding the traditional dispute between PSBs and commercial rivals, which revolves around the issue of whether the public service mission should simply cater for tastes that are not provided for by commercial operators or whether it should cater for the needs of a broad segment of the population. That is a political debate which can only be held and decided on the national level. The same is true for the financing model for PSBs. It is up to Member States to decide on these (which is of course why they vary so considerably across the EU).

Issues such as the breadth of the public service mission or the financing model will no doubt continue to be debated at the EU level. But they are not under EU competence. The Broadcasting Communication in itself cannot provide answers to such questions. It is therefore misleading to establish a direct link between the revision of the BC and the broader socio-political issues discussed above, which will continue to be debated in coming years.

4.2. The Financing of Public Service Broadcasting

It is beyond the purpose of this note to describe the debate on what the mission of PSBs should be and how it should be financed, given the immense variety of situations across the EU. Nevertheless, it appears that in some countries PSBs offer very similar programming to commercial rivals and that this may partly be a result of their funding model, which is heavily reliant on advertising income.

The Broadcasting Communication restates some well established Commission requirements on state aid assessment which many participants in this debate consider almost impossible to implement in practice. PSBs are asked to separate their accounts in order to distinguish clearly between the public service mission and other activities. The Communication diplomatically states in §82 that "separation of accounts may be more difficult on the cost side" [than for revenues]. Many would go further and say that in practice PSBs cannot ever fully distinguish between investments in equipment and personnel that are used for carrying out both commercial activities and public service tasks.

The university professor Pere-Oriol Costa, speaking at the March 5 CULT hearing, himself a staunch defender of the need for public broadcasting, argued that PSBs needed to better define their identity in terms of programming. That involved reaching out to new causes, such as promoting media literacy or 'citizens' journalism', as well as investing in more traditional ones such as providing rigorous and analytical news coverage in a period when 'information' and 'entertainment' are increasingly mixed.

He argued that PSBs should also try to be more distinctive vis-à-vis commercial rivals in terms of their financing model. This could involve abandoning commercial advertising (the French model) or a variety of more nuanced approaches. The latter would include PSBs not showing advertising at certain times of day or with certain types of programming. An example would be PSBs only showing advertising when broadcasting entertainment programmes aimed at a broad audience. Recent press reports indicate that the Spanish
government is preparing a reform along the lines of the French one, with a reduction or a ban on commercial advertising in PSBs⁴.

### 4.3. Relevant Trends in Television

It is not an accident that the financial investments of PSBs, notably in digital media, are coming under closer financial scrutiny, notably in the 'Amsterdam Test'. The audiovisual industry, especially the commercial operators dependent on advertising, is facing difficult times. The 'golden age' where the audience was concentrated in a handful of channels, whether public or private, generating huge advertising income has come to an end. Since the 1980s there has been an explosion in the number and type of television channels available to viewers. More recently, the Internet has become a new mass medium and in the last few years it has become common to watch audiovisual content using a computer. The result of such trends is 'audience fragmentation'. Moreover, on all media, consumers are increasingly avoiding advertising. These well-known trends mean that broadcasters face new (financing) difficulties, which have of course been accentuated by the economic crisis which began in late 2008. The only medium where advertising income is thought to be still increasing is the Internet.

In table 1 (on the next page), based on data from the European Audiovisual Observatory, we can see that between 2002 and 2006 the revenue of PSBs in the EU grew at an annual average of 2.9%. Private television companies mostly financed by advertising saw slightly stronger revenue growth of 4.3%. But the strongest television growth came from thematic channels, home shopping companies and subscription/pay TV. The emergence of online gaming is also striking, with annual growth rates of more than 70%. Therefore the current reality of the audiovisual market is that all traditional 'generalist' broadcasters - whether public or private - are being outperformed either by broadcasters with different financing models (pay TV) or by operators belonging to the digital media environment. That is why investments by PSBs in 'new media' generate considerable debate. But PSBs, like others, are of course simply trying to adapt to new audiences and consumption habits. The steep fall in television viewing habits of 16-25 year olds, which has been widely reported, is expected to become the norm.

According to a follow-up study on television in Europe carried out by the Open Society Institute⁵, covering seven EU Members and two other countries⁶, PSBs lost about 4% of audience share between 2005 and 2008, while the commercial sector grew modestly. Its key findings in the nine mostly ex-communist countries studied were that public broadcasters are characterised by "over-extension, under-funding and self-doubt".

The study underlines that PSBs are under pressure since the license fee is difficult to justify in an age where content - even that of the PSBs - is available on the Internet, often for free. Like other observers, the Open Society Institute considers that digitisation is making the collectively-financed PSB model obsolete.

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⁶ It is important to note that the survey was heavily concentrated in former communist countries, covering: Albania, Bulgaria, the Czech Republic, Italy, Lithuania, Poland, the Former Yugoslav Republic of Macedonia, Romania and Slovakia.
4.4. Conclusions

The new Broadcasting Communication has little bearing on the two key questions faced by every country which are:
- What is the mission of public service broadcasting, in an environment where the media are undergoing rapid change?
- How is that mission to be financed?

What the Communication has in fact done is introduce a new mandatory 'Amsterdam Test' for major new services provided by PSBs, which are expected to be Internet or 'new media' services. The introduction of the test has been welcomed by commercial television broadcasters and other private sector companies across the EU and there is little doubt that it places PSBs under increased pressure to justify their investment decisions. That added pressure arrives in a period when the rationale for financing public service broadcasting is beginning to be called into question. Secondly, the new BC allows public broadcasters greater freedom in terms of keeping cash reserves.

It is also apparent that private broadcasters relying mostly on advertising income (rather than on a fixed subscription fee) are also under pressure, given the expected fall in advertising revenue since mid-2008, with the start of the current recession. The print media are facing similar or worse problems, since they have suffered falling revenues from advertising as a long-term trend, instead of mostly due to the economic crisis.
Table 1: Growth of the various branches of the audiovisual industry in the European Union (2002-2006) in EUR million

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<td>All broadcasters' net revenues</td>
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Source: Adapted from Audiovisual European Observatory Yearbook Online 2008
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