

Internet

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Public Service Broadcasting,
State aid, and the Internet:
Emerging EU Law

Will public service broadcasting in Europe be marginalised with digitalisation of communications networks and media convergence? Or will its democratic, social and cultural functions and tasks remain relevant and legitimate in the information society? This is the fundamental question that the European Commission is presently analysing. The Commission must decide on several State aid complaints that have been brought to the attention of the Directorate General for Competition in Brussels by private media companies that are opposing various activities of public service broadcasters in Europe, including their financing systems. One of these complaints stemmed from the Association of German Broadcasting and Telecommunications Organizations, VPRT, and is directed, among other issues, against the online services of the German public broadcasting organizations ARD and ZDF.

In 1997, Member States unanimously supplemented the EC-Treaty with Protocol No. 23 to the Treaty of Amsterdam. The Protocol is an interpretative provision of EC-Treaty Article 86 (2), which recognizes the right of Member States to provide for services of general economic interest. On the one hand, the Protocol states that the provisions of the EC-Treaty “shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organizations for the fulfilment of the public service remit as conferred, defined and organised by each Member State.” On the other hand, the Protocol provides that it is the competence of the Commission to ensure that “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.” Put simply, the

Amsterdam Protocol establishes a clear and unmistakable division of responsibility. Member States have the responsibility to define the mission of public service broadcasters and decide their funding; the Commission has the responsibility to determine whether, in an individual case, the Member State’s decisions may be contrary to the common interest because of the extent of their effect on trade and competition.

In previous State aid cases involving public service broadcasters, the Commission interpreted the Amsterdam Protocol broadly. The Commission conceded that, given the role of public service broadcasting in promoting democracy, social cohesion, cultural diversity and media pluralism, Member States have wide discretion in determining the contours of the public service mission. When scrutinising State aid under Article 86 (2) for services of general economic interest (which include public service broadcasting), the Commission limited itself to examining whether or not a Member State had committed a “manifest error” in defining the mission.

Recent commentary

At the moment, however, some civil servants in the Competition Directorate General are publicly expressing concern that a broad definition of the remit – particularly in cases where there is room for interpretation – could create so-called “mission creep”; this is described as the gradual expansion of the goals and methods of the remit, which could in turn lead to an explosion of the costs of public service broadcasting (Stefaan Depypere, Nynke Tigchelaar, *The Commission’s State aid policy on activities of public service broadcasters in neighbouring markets*, *Competition Policy Newsletter*, No. 2, summer 2004, pages 19-22). In this connection, the officials consider the Internet as a neighbouring market to radio and television, and they argue

that, in the event of a broad definition of the remit, public service broadcasters will be tempted to move into such neighbouring markets, not least because digital technology allows them to do so in a cost-efficient manner. They cite public service broadcasters who take the position that public service activities do not lose their character when they are offered on the Internet. The deciding factor is the nature of the service and its role in supporting democracy and cultural diversity consistent with the remit, and not the identity of the neighbouring market.

The Commission officials, however, argue that even though television programmes and Internet services often share the same content, the nature of the services differs according to the markets in which they are offered. They argue that Member States must therefore be required to assess critically whether the justification for the role of public service broadcasting in the analogue world can be transposed (via the definition of the remit) to digital services on the Internet. To support this argument, they cite an example outside the Internet context. According to Depypere and Tigchelaar, a number of traditional justifications for public service broadcasting (for example, that public service channels need to show popular football games to entice viewers to watch subsequent cultural programmes) are no longer relevant in cases where a public service special interest football channel shows no other subsequent programmes, and no specific editorial input can be detected.

In this respect, the reasoning of the two officials is somewhat obscure. The Commission has repeatedly recognized the legitimacy of public service broadcasters that offer special interest channels in the context of digital bouquets. Inasmuch as the Internet is concerned, the offering of sports content on a website to attract

large numbers of users, who are then exposed to cultural content on the same website, is perfectly consistent with the rationale for justifications for public service broadcasting that the two Commission officials appear to accept. In any event, these officials, who are responsible for the pending State aid complaints involving public service broadcasting, conclude with a warning that the Commission must ensure that market rules are followed every time a public service broadcaster engages in a “commercial activity” in a neighbouring market and in particular no cross-subsidisation with public funds may take place. Of course, this reasoning is essentially circular: the whole issue is whether the fact the service is offered by a public service broadcaster on the Internet makes it “commercial”, even though the same content delivered by a broadcasting signal is considered to be part of the public service remit and hence non-commercial.

This recently published article in the Commission’s *Competition Policy Newsletter* is clearly marked as a piece giving the opinion of the two civil servants, and, as could be expected, does not go as far as predicting the outcome of the Commission’s consideration of the online activities of ARD and ZDF. Instead, the authors comment on some of the more recent pertinent decisions of the Commission, without stating clearly how the Commission intends to develop its emerging case law further. This question is the centrepiece of the analysis that follows.

Prior decisions

To date, two Commission State aid decisions (State Aid N37/2003 *BBC Digital Curriculum*, OJ 2003 C 271 of 01.10.2003; State Aid C 2/03 (ex NN 22/02) *TV2 Denmark* of 19.04.2004) and one formal opening of State aid procedures (NOS/NOB of 10.03.2004) have dealt directly with online activities of public service broadcasters. According to the

Commission, all forms of financing of public service broadcasting constitute State aid, even though certain legal elements relevant to the threshold test for determining State aid are still subject to legal controversy between the Government of Germany and the Commission over the issue of financing ARD and ZDF. These legal issues are not relevant to the main topic of this paper and will be set aside.

The emerging case law of the Commission, which began in 2003, strongly suggests that the Commission intends to restrict severely Member States’ competence to define the online remit of public service broadcasters in contrast with their competence to define the programme remit for radio and television. As it will be shown, this recent case law not only contradicts European State aid law as developed by the European Court of Justice, but it also contradicts the previous interpretation of State aid law by the Commission itself, as laid down in the Commission Communication of 2001 concerning the application of State aid law to public service broadcasting (OJ 2001 C 320/04). Also, the emerging law is at odds with earlier Commission decisions in the broadcasting sector.

Amsterdam Protocol

The approach until 2002

As mentioned above, in State aid cases on public service broadcasting the Commission has regularly acknowledged that, given the special role of public service broadcasting in supporting democracy, social cohesion, cultural diversity and media pluralism as recognized in the preamble of the Amsterdam Protocol, Member States have particularly wide discretion to define the public service mission. Such discretion goes beyond their competency under Article 86 (2) EC to define and finance services of general economic interest. Thus, the Commission states in its 2001 Communication (paragraph 33):

“The definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level. Generally speaking, in exercising that competence, account must be taken of the Community concept of ‘services of general economic interest’. However, given the specific nature of the broadcasting sector, a ‘wide’ definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism,

including cultural and linguistic diversity.”

In the same Communication, the Commission explicitly recognized that the Amsterdam Protocol is applicable to Member States’ broad competence to include online services within the public service remit insofar as they fulfil the same needs of society as traditional broadcasting services (paragraph 34):

“Similarly, the public service remit might include certain services that are not ‘programmes’ in the traditional sense, such as online information services, to the extent that while taking into account the development and diversification of activities in the digital age, they are addressing the same democratic, social and cultural needs of the society in question.”

There can be only one reading of these assertions. The Commission, citing the Amsterdam Protocol, affirms a dynamic, technologically neutral definition of the remit which is open to new developments and is based on the functional effect of public service content (functional understanding of the broadcasting remit). Of course, the Commission explicitly recognizes the primacy of Member States in construing this dynamic, technologically neutral definition.

In its decision on the BBC 24 hour news channel (NN 88/98 BBC News 24, OJ 2000 C 78 of 18.03.2000) the Commission also recognized these special attributes of the remit of public service broadcasting:

“The public service nature of a service cannot be judged on the basis of the



distribution platform. Once the UK Government has defined a certain service as being a public service (thereby referring to the service of general economic interest of Article 86(2)), such service remains a public service regardless of the delivery platform.”

Three years later, the Commission once again affirmed the functional understanding of the remit. In its decision of May 22, 2002 dealing with the nine new digital channels for BBC radio and television, the Commission stated that “public service broadcasters can develop and diversify their activities in the digital age, as long as they are addressing the same democratic, social and cultural needs of the society.” (N 631/2001 *BBC Licence Fee*, OJ 2003 C 23 of 30.01.2003). To justify this legal understanding, the Commission cited the 1999 Resolution of the Council and European Cultural Ministers, which stated that “public service broadcasters need to undertake the development and diversification of activities in the digital age.”

The two Commission officials, referred to at the beginning of this paper, acknowledge that in the past the Commission has been pursuing a technologically neutral approach when applying State aid law to public service broadcasting. However, they do not acknowledge that these decisions also recognized a functional understanding of the remit, particularly the flexibility of the remit as construed by the Member States for promoting democratic, social, and cultural needs by means of services on new delivery platforms and technologies, as these may evolve. Instead, they look at the nominal identity of the services which they interpret as being inherently different in the case of the Internet versus television, and then treat this difference as being legally decisive for State aid purposes. This arbitrary and rather artificial premise – that a service changes character when it is

moved from one delivery platform to another – is the very antithesis of technology neutrality. It is also essential to reach the ultimate conclusion its proponents seek – that the public service remit cannot be transposed from one delivery platform such as point-to-multipoint (conventional broadcasting) to another, such as point-to-point (the Internet).

Since 2003

The decision regarding the BBC

With its decision in the *BBC Digital Curriculum* case in October 2003, for the first time the Commission broke away from its earlier broad definition of the broadcasting remit. The issue was the lawfulness of using the licence fee to finance educational services offered by the BBC over the Internet. Initially, the Commission stated that online educational services do not have a close connection with the radio and television services of the BBC. It considered that these services were a totally new service, distinct from radio and TV services. In reaching this conclusion, the Commission explicitly rejected the argument that educational services had been part of the BBC’s core broadcasting remit for decades, and that Internet services simply constituted a logical evolution of these traditional educational services.

Instead, the Commission introduced a new criterion, thus far unknown in the jurisprudence of State aid cases involving broadcasting, namely the expectations of competitors in the Internet market for educational services. With publicly funded educational services, the Commission argued, the BBC had entered an already developed market in which commercial providers had previously faced little or no competition from the BBC. The BBC’s offering of Internet-based educational services had therefore led to a change in the status quo, the Commission reasoned.





As a first consequence, the Commission treated the licence fee used to pay for these services as a form of “new” State aid subject to notification and prior review and approval by the Commission under Article 88 (2) and (3) EC. In contrast to “existing” State aid under Article 88 (1) EC (i.e. aid that a Member State had already provided at the time of its accession to the European Union), “new” State aid is granted by a Member State for the first time after its accession. New State aid may be called back in its entirety, if it has not been notified to the Commission (as in the case of the BBC’s use of the license fee to offer educational services) and approved prior to its expenditure. In the case of existing aid, the Commission may only require the Member State to take appropriate measures going forward in order to adjust its State aid regime to the requirements of European law, and there is no obligation to notify this type of aid.

The Commission then looked at the lawfulness of the BBC’s offer of educational services under Article 86 (2) EC, which allows Member States under certain conditions to provide and finance services of general economic interest. Contrary to its earlier decisions, the Commission did not this time refer to the Amsterdam Protocol to determine the legitimacy of the educational remit of the BBC. Having first rejected the notion that the Internet service could be part of the broadcasting remit, the Commission inquired whether the service could be permissible as a service of general economic interest and then found that the public interest in education was a suitable justification. In this context, the Commission simply stated that a manifest error by the United Kingdom could not be detected in providing free educational services for schools and students.

At the same time, the Commission made it clear that it could only justify this educational remit of the BBC

because the British government had defined the remit very narrowly and in such a way as to ensure no harm to competitors. In this context, the Commission cited one of the government's key conditions for conferring the mission on the BBC, namely that the BBC offer had to be clearly distinguishable from the offers of commercial competitors and could only represent a complementary offer to the market. In addition, the Commission considered it relevant that the BBC was required to list in detail all activities it would offer for the entire five year period of the concession with a view to allowing competitors to adjust their market strategies with long advance warning. This also made it possible to sanction effectively any transgressions of the remit by the BBC.

Similarly, no reference to the Amsterdam Protocol in applying State aid law to the Internet services of public service broadcasters can be found in either the Commission's decision to open procedures in the Dutch case or in its decision in the Danish case regarding TV2. Instead, these decisions refer only to the 2001 Commission Communication and the market criteria first introduced in the BBC case, which the Dutch and Danish decisions further elaborate, as discussed below.

Analysis

In failing to apply the Amsterdam Protocol to the online services of public service broadcasters, the Commission violated primary European law. Pursuant to Article 311 EC, the Protocol forms an integral part of the Treaty and constitutes a binding interpretative provision. Moreover, nothing in the text of the Protocol supports the conclusion that the remit of public broadcasters should be confined to "conventional" delivery platforms. In fact, the Protocol does not refer to any specific delivery mechanisms. Instead, it speaks of the remit as

"conferred, defined and organised by each Member State", and it is noteworthy that this remit already comprised online services at the time the Amsterdam Protocol was adopted in 1997. Indeed, at that time numerous public service broadcasters already offered online services over the Internet.

Far from defining public broadcasting in a narrow, technical manner, the Amsterdam Protocol embraced a process orientation that empowered Member States to adapt the remit in the light of evolving technology developments and the functional mission of public service broadcasting to foster democracy, social cohesion, cultural diversity, and media pluralism. In this respect, the Protocol was faithful to longstanding practice and tradition. The Member States' interpretation of "broadcasting" in the context of the mission of public service broadcasters has always been, and still is, dynamic, flexible and adaptive to changing circumstances.

For example, according to the case law of the German Constitutional Court, the notion of 'broadcasting' cannot be defined in a particular way once and for all. According to the Court, public service broadcasters must be able to adapt to changing circumstances in order to continue to fulfil their democratic and opinion-forming functions. Given the accelerating pace of technological progress, the Constitutional Court held, as early as 1987, that communication services similar to broadcasting services might in future take over the functions of traditional broadcasting services (decision of 24.03.1987, Baden-Württemberg, BVerfGE 74, page 297 et seq. (353)).

Nor is Germany alone. All Member States have shared and still share this dynamic understanding of the remit of public service broadcasters as one that is open to technological change.

This is evidenced by the Resolution on public service broadcasting that was unanimously adopted by Member States in 1999. It speaks unequivocally of the obligation of public service broadcasters to develop and diversify their activities in the digital age (OJ 1999 C 30/1).

Interim conclusions

At this point, it may be concluded that:

- (a) in recent decisions, the Commission has failed to apply the Amsterdam Protocol to Internet services of public service broadcasters;
- (b) this failure appears to have been motivated by the wish to limit the scope of the public service broadcasting remit and the competence of Member States to define that remit; and
- (c) this emerging trend constitutes a violation of EC primary law as well as a repudiation of the Commission's 2001 Communication and earlier Commission case law as applied to the broadcasting sector.

Market failure

Introduction of hitherto unknown legal criteria

The recent Commission decisions suggest that, apart from providing information online merely to inform viewers about conventional radio and television programme schedules, public service broadcasters should be allowed only to offer online services that are not otherwise being offered by the market. Of course, this condition would relegate public service broadcasters to the role of mere niche providers on the Internet. It would also render the Amsterdam Protocol meaningless. The legitimacy of public service broadcasting would no longer depend on whether it contributes to democracy, social cohesion, cultural diversity or media



pluralism, as determined by the Member States, but would instead hinge on whether or not the business expectations of competitors had been disturbed. This approach cannot be reconciled with the comprehensive notion of the public service broadcasting remit, which is explicitly not limited to minority programmes or niche offers, as this would lead to the demise of public service broadcasting in its present role and function.

As noted above, for the first time the Commission decision on the *BBC Digital Curriculum* case embraced market criteria as the basis for determining the legitimacy of public broadcasting services. More specifically, the Commission held that public service broadcasting offers on the Internet were permissible only if:

- (1) they were “clearly distinguishable” from commercial offers;
- (2) they were “complementary” to such commercial offers; and
- (3) competitors were informed well in advance so they had the opportunity to adjust their marketing strategies.

This final criterion is, of course, somewhat incoherent. If the first two

criteria are met, such that the public service offer would be only complementary to and not directly competitive with the commercial offers, it is unclear why commercial players would be in need of advance notice to “adjust their market strategies.”

Netherlands, Denmark

In the Dutch case, the Commission significantly elaborated these criteria and added to them. In effect, the Commission has completely reversed the burden of proof. It said that a Member State can only be said not to have committed a manifest error in including online services in the public service remit under Article 86 (2) EC, if the Member State can prove that:

- (1) there is a need for these services; and,
- (2) that they are of a special character (paragraph 85), i.e. that they are not also offered by commercial providers (paragraph 86).

In the Danish decision, the Commission treated this second criterion as self-evident and without need of explanation. The Commission simply declared that the interactive services of TV2, such as games and chat

rooms, must *per se* be regarded as purely commercial activities because they could not be distinguished from similar activities offered by commercial providers (paragraph 92). Based on this finding, the Commission found the services ineligible for the status of services of general economic interest under Article 86 (2) EC-Treaty.

Market failure

The criterion of market failure used by the Commission and clad in the language of “clearly distinguishable” and “complementary offer” cannot be reconciled with the EC-Treaty or the ECJ case law relating to services of general economic interest. This is evidenced, for example, by the Commission’s White Paper on services of general economic interest adopted on May 12, 2004 (COM (2004) 0374). Services of general economic interest are legally based in primary law, namely on Articles 16 and 86 of the EC. Article 16 recognizes the “place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion.” Article 86 (2) EC grants Member States the right to confer and define services of general economic interest. Competition law, including State aid law, is applicable to these services only to the extent its application would not render the fulfilment of their special task legally or practically impossible.

In this respect, the EC Treaty explicitly recognizes the European model of society, in which publicly funded services of general economic interest, due to their high social value, are offered side by side with commercial services. Implicit in these norms is the recognition that this model accepts that some measure of competition between services provided by the market and public services cannot be avoided. This is why the ECJ has never declared the legitimacy of public services to be

TRATADO DE AMSTERDAM
OM ÆNDRING AF TRAKTATEN OM DEN EUROPÆISKE UNION SAMT
TRAKTATERNE OM OPRETTELSE AF DE EUROPÆISKE FÆLLEDSKABETS
VERTRAG VON AMSTERDAM
ZUR ÄNDERUNG DES VERTRAGS ÜBER DIE EUROPÄISCHE GEMEINSCHAFT
ER VERTRÄGE ZUR GRÜNDUNG DER EUROPÄISCHEN KOINTEGRATION
SOWIE EINIGER DAMIT ZUSAMMENHÄNGENDER AKTEN
ΠΟΥ ΤΡΟΠΟΛΟΓΕΙ ΤΗ ΣΥΝΘΗΚΗ ΓΙΑ ΤΗΝ ΕΥΡΩΠΑΪΚΗ ΕΝΩΣΗ
ΚΑΙ ΟΡΙΣΜΕΝΕΣ ΣΥΝΑΦΕΙΣ ΠΡΑΞΕΙΣ
AMENDING TREATY OF AMSTERDAM
MODIFYING THE TREATY ON EUROPEAN UNION
AND CERTAIN RELATED ACTS
AMENDANT LE TRAITÉ D'AMSTERDAM
MODIFIANT LE TRAITÉ SUR L'UNION EUROPÉENNE
ET CERTAINS ACTES CONNEXES
LEASÚ AN CHONARTHA AR AN AONTAS EORPACH
CONARTHAÍ AG BUNÚ NA GCOMHPHOIBAL EORPACH
AGUS IONSTRAIMÍ GAOLMHARA AIRITHE
TRATTATO DI AMSTERDAM
MODIFICA IL TRATTATO SULL'UNIONE EUROPEA
TATI CHE ILLI CONNESSI
E ALCUNI ATTI CONNESSI
VERDRAG VAN AMSTERDAM
OPRICHTING VAN DE EUROPESE GEMEENSCHAP
EN SOMMIGE BIJBEHORENDE AKTEN
TRATADO DE AMSTERDAM
TERA O TRATADO DA UNIÃO EUROPEIA
QUE INSTITUEM AS COMUNIDADES EUROPEAS
ACTOS RELATIVOS A ESSES TRATADOS
AMSTERDAMIN SOPIMUS
N UNIONISTA TEHDYN SOPIMUKSEN
HTEISOJEN PERUSTAMISSOPIMUSTEN
TIETTYJEN ASIAKIRJOJEN MUUTTAMINEN
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Deutschland

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dependent on market failure. The acceptable competition between commercial services and public services only reaches its limits when the development of trade is compromised to an extent that is contrary to the common interest (EC Treaty Article 86 (2), second sentence). The role of services of general economic interest has also been recognized in Article II-36 of the draft Constitutional Treaty.

Distortion of competition

In its 1999 decision on the 24 hour BBC news channel, the Commission addressed, at great length, the issue of the limits of acceptable “distortion of competition” in the broadcasting sector. The effect of the arrival of the BBC news channel was that a number of commercial news channels, such as SkyNews, Euronews, and CNN, which had already been on the market for a substantial period of time, had been excluded from cable retransmission by cable operators wanting to make room for the BBC. In consequence, their audience reach had dropped, in some cases significantly, and SkyNews had even been forced to lower its prices for cable retransmission.

In its legal analysis, the Commission first examined the effects of BBC News 24 on trade between Member States. In this context, it started with the premise that it was not a matter for the Commission to decide whether a channel or a service was to be offered by the market or as a service of general economic interest, as long as no manifest error could be detected. A public service news channel served the democratic and social needs of society and was thus legitimate, the Commission held. Looking at the commercial competitors’ loss of market share, the Commission noted that the choice of news for British viewers had been enhanced. Also, the public service news offer had strengthened the pluralism

of media in accordance with the Amsterdam Protocol (paragraph 51).

Indeed, the Commission concluded, under these circumstances, competitors could have been made to accept even stronger distortions of competition to allow for the provision of services of general economic interest (paragraph 100). The Commission held that whenever a Member State decided to provide for a service of general economic interest, a certain degree of damage to competitors could be foreseen. The interpretation of Article 86 (2) EC hinged therefore on whether the development of trade was excessively distorted, not the impact on the *status quo ante*, i.e. the market conditions prevailing immediately before the entry into the market of the public service offer. Thus Article 86 (2) EC presupposes that some market distortion must be expected and tolerated.

The acceptable limit of such distortion is reached only where either:

- (1) a competing commercial activity is thereby rendered impossible; or
- (2) market entry of potential competitors is being prevented (paragraph 93).

Of course, this burden of proof is exactly the opposite of that applied by the Commission in the Dutch case. Moreover, the standard specified in Article 86 (2) EC can place no fewer restrictions on the Commission’s scope of review than the standard that the Commission is required to apply in exercising its review responsibility under the Amsterdam Protocol, which interprets Article 86 (2) EC. In fact, the Amsterdam Protocol standard is even more stringent because it requires the Commission, when construing the “common interest,” to ensure that “the realisation of the remit of that public service shall be taken into account.”

The BBC News 24 case is also legally significant because it makes clear at

what point in the legal analysis, and in accordance with what criteria, the Commission must determine whether a public service offer is permissible under State aid law. In the context of examining the possible abuse of a Member State in defining the remit, the Commission’s role is limited to determining whether the Member State has committed “manifest error”. It is expressly not the role of the Commission to place itself in the shoes of the Member State and to undertake what would, in effect, be its own *de novo* review. For this reason, it makes no sense for the Commission to develop detailed criteria, such as ‘closely associated’. The Member States may be found to have abused their power of broad discretion in defining the remit, only if they permit a public service broadcaster to engage in activities that do not serve the democratic, social, or cultural needs of society, including media pluralism (‘old’ and ‘new’ media). Once this determination has been made, it is still up to the Commission to determine whether the service under investigation runs counter to the common interest as distorting trade and competition to an unacceptable extent. This final step in the Commission’s review is explicitly foreseen both in Article 86 (2) EC and in the Amsterdam Protocol. It is in this context – and in this context alone – that a public service broadcaster serving the democratic needs of society may be deemed unlawful under State aid law in an individual case.

In its most recent decisions, the Commission has muddled up this test and seriously encroached upon the prerogatives of Member States. The Commission’s key error has been to introduce assessment of the effects on competition in reviewing the definition of the remit, and to apply the wrong standards for assessing those effects. These are fatal legal errors that cannot be reconciled with the EC Treaty for two essential reasons. First, they nullify Member

States' competence to define the public service remit, which stands in clear violation of the Amsterdam Protocol; and second, they lead to the wholesale exclusion of public service broadcasting from entire categories of new media delivery platforms, irrespective of the actual market effects of the participation of public service broadcasters on the Internet. In this connection, it cannot be seriously thought that such participation would normally drive commercial players out from the online world, or erect insurmountable barriers to the entry of new commercial players – the legal standard set out in Article 86 (2) EC.

Interim conclusions

At this point, the conclusion may be drawn that the Commission:

- (1) appears poised to limit public service broadcasters to niche online offers by using an inappropriate criterion of market failure;
- (2) has reached this result using a legal approach that cannot be reconciled with the European model of society as recognized in European primary law;
- (3) has misapplied the law by considering market effects of public service participation at the wrong place in the analysis, i.e. in reviewing the definition of the remit rather than the evaluation of the common interest;
- (4) has also applied the wrong legal standards in evaluating the market effects, which under the stringent criteria of Article 86 (2) EC require a determination whether or not commercial players are being driven from the online world or are being prevented from entering it, and
- (5) in committing these errors has granted to itself responsibilities

that are the sole prerogative of the Member States.

Criterion of “closeness” with broadcasting

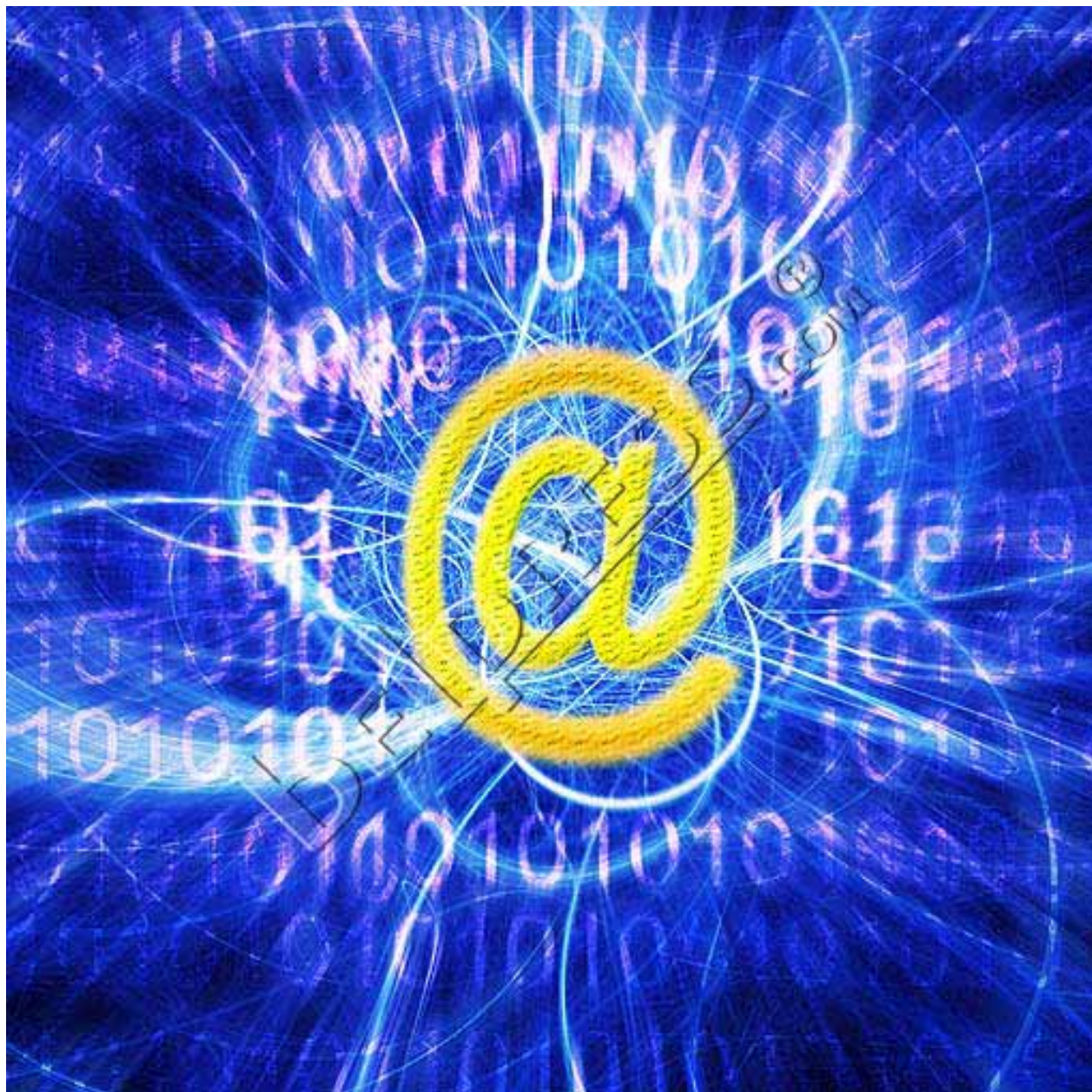
Permissible and non-permissible Internet activities.

The Commission's additional demand that permissible Internet services of public service broadcasters must be “closely associated with broadcasting services” also leads to significant and unjustified limitations. An outside observer might consider that the English phrase “closely associated” is closely similar to the German term “programmbegleitend” (accompanying broadcasting programmes), as used in the 7th German State Broadcasting Treaty, which came into effect on 1 April 2004. In fact, however, the Commission has a much narrower understanding of the term “closely associated” than what Germany considers “programmbegleitend.”

In the Danish case, the Commission first noted that the Danish government had defined the public service remit of TV2 in such a way as to include Internet and similar services offering news, general information, education, art and entertainment (paragraph 88). The Commission then stated that Internet pages of TV2 were acceptable only to the extent they provided viewers with information about the schedules of TV2's regular television programmes. In connection with these services, the Commission found that the Danish government had not committed any manifest error under Article 86 (2) EC in defining the remit. A glance at the relevant TV2 web pages reveals that these offers are little more than an electronic ‘TV Guide’ of programme times and titles – effectively they contain no substantive information that would deepen viewers' understanding and knowledge about the topics treated in these programmes.

With the exception of games and chat rooms, the Danish decision is silent on the legitimacy of other online services offered by TV2. Thus, it remains open how the Commission evaluates the news and entertainment services of TV2 on the Internet, or its web content regarding general information, art and education. Commission officials have given informal explanation that these issues had been left undecided because there had been no complaints from competitors about these offers in this particular case. However, in the Dutch case, the Commission has already declared that text message (SMS) and i-mode services, offered on demand against individual payment, do not properly belong within the public service remit. The decision left open whether NOS/NOB had actually sold its SMS and i-mode services to end-users, or whether the ‘payment’ had only been the result of users paying the general connection fee to the mobile phone operator. As mentioned above, in its Danish decision, the Commission flatly considered all games and chat rooms of TV2 on the Internet as being “purely commercial activities” which did not serve the democratic, social and cultural needs of society and thus could not be considered as services of general economic interest under Article 86 (2) EC. The decision draws this conclusion peremptorily, without any discussion of the character of the actual content in question.

The Commission's deliberations in this context are confusing, because the Commission notes that the Danish government has itself considered these services as being outside the public service remit. As a result, any examination of these services under Article 86 (2) EC was simply unnecessary. If a Member State itself does not claim that it has defined a service as being one of general economic interest, there is no need for the Commission to examine whether the government committed a manifest error in choosing that



definition. The fact that the Commission nonetheless examined the question suggests that it was determined to make general observations about “commercial Internet activities” with a view to consider other pending State aid cases.

Apart from the fact that the Commission lacks any competence to introduce such criteria as “closely associated to broadcasting” – because this would mean in effect that the Commission itself is assuming the

responsibility of defining the remit, rather than deferring to the Member States – the criterion is also deficient, as it would limit Member States’ competence to an unacceptable extent, even if it were interpreted as being commensurate with the German definition of ‘programmbeleitend’ (services accompanying radio and television programmes) for purposes of State aid law. This is because, in an age of convergence of digital technologies and of networks of electronic communication, the

capacity of public service broadcasting to fulfil its democratic, social and cultural role hinges on its right to distribute its content on all digital platforms relevant to public discourse. A State aid rule that would tie the legitimacy of public service content only to traditional broadcasting distribution technology of ‘point-to-multipoint’, would in effect deny online users of any alternative to commercial offers. In the medium term (i.e. in the next five to ten years at the latest), the disappearance of

public service online content would mean that public service broadcasting would no longer reach a large part of the population and that it could not offer its content in a way that responded adequately to the changing needs of users in terms of content presentation, formatting, and flexibility in times of access. This social marginalisation of public service broadcasting would soon become noticeable with the young generation, because, for young people, interactive services are increasingly becoming the primary media to participate in public discourse. Depending on the speed of uptake of interactive digital television, which also would be denied to public service broadcasters, this development would in due course spread to society as a whole.

The Commission's legal arguments

The opening of State aid procedures in the Dutch case provides further evidence of the Commission's current tendency towards legal arguments to interpret the broadcasting remit in a narrow rather than dynamic way. In opening the Dutch case, the Commission sought to justify its approach by referring to the distinction in secondary Community law between broadcasting services (in the 'Television without Frontiers' Directive) and information society services (in the e-Commerce Directive)(paragraph 84). The Danish decision also contains a comment that the 'nature' of information society services differs from that of broadcasting services (paragraph 89). In fact, these observations are wholly irrelevant to the standards for defining the remit and its limits set out in primary EU law.

Moreover, in its present form, the Television Directive does not define broadcasting services but only television programmes, and leaves radio services unregulated. In addition, the Commission has failed

to mention that, long after the 1998 adoption of the E-Commerce Directive, Community secondary law recognized the dynamic understanding of television services, in particular in the Commission Communications on *e-Europe 2002* and *e-Europe 2005*. They consider digital interactive television as a cornerstone of Community policy to guarantee all citizens access to the information society. Member States are called upon to provide a multitude of attractive publicly financed content on this interactive platform. Equally, the EU's so-called telecom package, which completely changed the regulation of infrastructures for electronic communication at the Community level, is based on explicit recognition of the technological convergence of networks, i.e. the legal irrelevance of any technical distinction between 'point-to-multipoint' (broadcasting) and 'point-to-point' (on demand) delivery.

Conclusions

The most recent Commission decisions recognize only one kind of online content – pure programme scheduling information – as being permissible within the public service broadcasting remit. This is a much narrower concept of the criterion of 'closely associated' than that denoted by the similar term used in German law for permissible online activities of public service broadcasters.

Moreover, even the broader German concept of 'closely associated', (which permits more information about the topics treated in radio and TV programmes to be offered online), would be highly problematic from the perspective of Member States' competence to define the remit, if made legally binding on the European level. While this interpretation could help convince the Commission of the legitimacy of online services offered by ARD and ZDF in the present State aid proceeding against Germany, adopting it as an EU-wide standard

would make the national definition of the remit chosen by Germany in 2003 binding for all Member States for the indefinite future. In practice, this would make it impossible for Germany or any other Member State government dynamically to adjust the public service remit in light of new technological developments. This would not only severely limit the competence of Member States to define the remit; it would also be incompatible with German constitutional law, which requires the public service broadcast remit to be defined in a dynamic way to ensure it continues to fulfil its mission in changing circumstances. Last but not least, the use of the term "closely associated" in this way would make the online remit (for example, that of the Flemish public service broadcaster VRT) as defined by the Flemish government and which is not limited by reference to traditional broadcasting services, illegal under today's European State aid law.

In summary, by introducing the term 'closely associated' as a necessary precondition for the legitimacy of public service online offers, the Commission has unjustifiably assigned to itself the competence to define the public service remit, a task which properly belongs to Member States. The Commission has achieved this end by declaring all definitions of the remit going beyond mere information about television and radio programme schedules as constituting a 'manifest error' on the part of the Member States. However, the only proper legal standard for examining a possible 'manifest error' is whether a Member State can demonstrate that the pertinent offer serves the democratic, social and cultural needs of society. Only if this standard has not been met, can a Member State be found to have committed a 'manifest error'.

The examination of possible distortion of competition must not take place in the context of analysing

the definition of the remit, but only later in balancing the common interest, as articulated explicitly in Article 86 (2) EC and in the Amsterdam Protocol. This is the only valid methodology which ensures that:

- (a) State aid law respects the competence of Member States to define the remit;
- (b) the examination of any distortion of trade and competition takes place on a case by case basis and not by a generalised *fait* that would deny European public service broadcasters any meaningful role in a vast array of interactive services; and
- (c) State aid law recognizes the model for services of general economic interest as enshrined in EU primary law, which presupposes a certain degree of distortion of competition as being both unavoidable and tolerable.

