Comments on the Communication from the Commission on the application of State aid rules to public service broadcasting (2001/C 320/04)¹

Note: These comments were reviewed by the EBU Legal Committee (April 2002) but do not constitute an official EBU position paper.

General aspects

- Recognition of the particular nature of public service broadcasting

"Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector." (Point 6 of the Communication)

In adopting a special Communication on public service broadcasting, only one year after its horizontal Communication on services of general interest², the Commission has clearly recognized the specificity of public service broadcasting compared to services of general interest in areas such as transport, telecommunications, energy, etc. This is a key point, advocated by the EBU for many years, which is related to the content dimension of the remit and is also one of the raisons d'être of the Amsterdam Protocol.

¹ Published in the Official Journal of the European Communities C 320/5 of 15 November 2001.
- **Wide interpretation of "State aid"**

"State financing of public service broadcasters is normally to be regarded as State aid, inasmuch as it meets the above criteria. (...) Naturally, the existence of State aid will have to be assessed on a case by case basis, and depends also on the specific nature of the funding." (Point 17)

Whereas in earlier internal documents (including the Discussion Paper of 1998) and in individual decisions the Commission simply assumed the state aid character of public funding without further reasoning (even where it was derived from broadcasting licence fees), now it at least acknowledges that the presence of state aid has to be assessed on a case-by-case basis, taking into account the specific nature of the funding. However, it may be regretted that the Commission still gives the impression that public funding "normally" constitutes state aid (in particular in referring to two decisions of the Court of First Instance), and that it has not drawn conclusions from recent case law of the European Court of Justice (notably the decisions C-379/98 Preussen Elektra and C-53/00 Ferring/ACOSS).

In the *Preussen Elektra* decision of 13 March 2001, the European Court of Justice held that "only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 92(1) [of the EC Treaty]"; consequently, the broadcasting fee paid by viewers and listeners should not simply be qualified as state aid where public broadcasters are the creditors of the fee. In the *Ferring* decision of 22 November 2001, the European Court of Justice held that "only advantages which exceed the necessary cost for ensuring the public service obligation constitute State aid"; thus, the funding necessary for the fulfilment of the public service remit of a broadcaster should not be qualified as State aid. In view of these decisions, the European Commission will probably have to reconsider its position.

- **Wide interpretation of Community dimension**

"State financing of public service broadcasters can generally be considered to affect trade between Member States." (Point 18)

According to Article 87 (1) of the EC Treaty, State aid, to be considered incompatible with the common market, must affect trade between Member States. This condition, which may be seen as a specific form of the subsidiarity principle, could become meaningless through an interpretation that regards as sufficient any possible international dimension (which can always be found in a liberalized economy, e.g. the fact that the ownership structure of competitors may extend to more than one Member State – one of the examples given under Point 18).

---

3 Commission DG IV Discussion Paper on the application of Article 90(2), 92 and 93 of the EC Treaty in the broadcasting sector, sent to Member States in September 1998. The earlier (1995) Commission DG IV Working Document on "Guidelines on state aid for the arts and culture, with particular reference to the audiovisual sector" had assumed that public funding was state aid only if it did more than "compensate for the additional costs incurred by the broadcaster in the fulfilment of public service obligations (including restrictions on advertising)".

4 Commission decisions in cases NN 70/98 (*Kinderkanal/Phoenix*) and NN 88/98 (*BBC News 24*).

5 Cases T-106/95 (*FFSA/La Poste*) and T-46/97 (*SIC/RTP*).
Application of State aid rules

- **Narrow interpretation of "culture"

"It should be recalled that the provisions granting exemption from the prohibition of State aid have to be applied strictly. Therefore, the notion of 'culture' within the meaning of Article 87(3)(d) must be interpreted restrictively. As stated by the Commission in its Kinderkanal and Phoenix decision, the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture. In this respect, it should be noted that the Protocol distinguishes between the cultural, the social and the democratic needs of each society. Education may, of course, have a cultural aspect." (Point 26)

This narrow interpretation of the notion of "aid to promote culture" is not convincing. Cultural, democratic and social needs of society are closely interrelated, and the usual meaning of "culture" includes public service broadcasting. In mentioning the cultural, democratic and social needs of society, the Amsterdam Protocol makes reference to the broad, dynamic character of the public service remit but in no way requires the three aspects of the remit to be separated.

- **Interpretation of public service broadcasting as "service of general economic interest"

"The term 'public service' as of the Protocol on the system of public broadcasting in the Member States has to be intended as referring to the term 'service of general economic interest' used in Article 86(2)." (Footnote to Point 9)

In combination, the wide interpretation of state aid (which in many cases also covers the public funding of public service broadcasting) and the narrow interpretation of "culture" (which excludes a justification of such funding through Article 87(3)(d) of the EC Treaty) leaves, in the European Commission's logic, only Article 86 to justify this type of funding under European state aid rules. This justification requires "public service broadcasting" to be considered a "service of general economic interest".

The justification via Article 86 is not an ideal solution (given the uncertainties linked to the application of the proportionality principle and given also the possible requirement of prior notification), and it is not the solution the authors of the Amsterdam Protocol obviously had in mind. It would clearly be preferable for the public funding of public service broadcasting either not to be qualified as state aid at all or to be qualified as aid to promote culture. However, the justification via Article 86 is also a solution, which should not be excluded a priori by contesting the qualification of public service broadcasting as a "service of general economic interest", despite its specificity recognized by the Amsterdam Protocol (see above).
Definition of public service broadcasting remit

- Competence of the Member States

"Definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level." (Point 33)

The exclusive competence of each Member State to define the remit of its public service broadcaster(s) already follows on clearly from the Amsterdam Protocol.

- Legitimacy of a broad remit (or "wide" definition)

"A public service mandate encompassing 'a wide range of programming in accordance with its remit' (…), can in principle be considered as legitimate, as aiming at a balanced and varied programming, capable of preserving a certain level of audience for public broadcasters and, thus, of ensuring the accomplishment of the mandate, i.e. the fulfilment of the democratic, social and cultural needs of the society and the guaranteeing of pluralism." (Point 13, see also Point 33)

"Public service duties may be either quantitative or qualitative or both." (Point 44)

The Commission thus gives up its earlier attempts to restrict the scope of the public service broadcasting remit. It is now made clear that the public service remit should not be limited to programmes and services which commercial operators are not providing. Moreover, it is not limited to specific programme categories but can cover the whole range of programming.

In the 1998 Discussion Paper the Commission services had still argued that the Commission had to ensure that the public service remit was coherent with the Community concept of services of general economic interest and that where public service broadcasting enjoyed dual funding schemes, as a general rule Member States would not be allowed to define all types of programmes broadcast by generalist channels as public service; essentially only those related to information, education and culture would qualify.6

---

6 See footnote 2. According to the Discussion Paper, sports events, when not defined as events of major importance to society, and entertainment shows should not qualify as public service programmes; fiction, serials and films should qualify only if there are specific obligations, beyond those required by the general legislation and involving specific costs for the broadcaster.
- **Inclusion of new services**

"The public service remit might include certain services that are not 'programmes' in the traditional sense, such as on-line 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." (Point 34)

The Commission thus recognizes that the public service remit may be extended beyond the traditional field of broadcasting. It no longer tries to use the wording of the Amsterdam Protocol, which merely mentions "broadcasting" (without any further definition), as a basis for an additional criterion, i.e. that the remit must be limited to broadcasting. This is only logical in view of the approach chosen by the Commission, where the Amsterdam Protocol solely interprets the general framework for services of general interest – which is also based on the principle that it is for the Member States to define the public service remit.  

- **European control limited to checks for manifest error**

"As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. (…) The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet - in the wording of the Protocol - the 'democratic, social and cultural needs of each society'. That would normally be the position in the case of e-commerce, for example." (Point 36)

The example given for a possible transgression of the margin of appreciation granted to the Member States must not be interpreted in the sense that public service broadcasters would not be allowed to use e-commerce as a means of funding new on-line services (see below).

- **Distinction between remit and means of funding**

"The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot normally be viewed as part of the public service remit." (Point 36)

This means that commercial activities in areas such as the sale of advertising do not need to be covered by the public service remit even if advertising spots are inserted into public service channels which they help to finance. The same would apply to other forms of commercial communication (sponsorship or e-commerce activities) in the context of public service programmes or services.

---

This clarification is of great importance, particularly in view of earlier attempts by the Commission to argue that programmes and services partly funded through commercial revenue could not be defined 100% as public service activities.

### Obligation on Member States to provide a clear definition

"The definition of the public service mandate should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not." (Point 37, see also 49)

The public service remit must be understood in a dynamic way (particularly regarding new interactive features and on-line services). In a rapidly evolving environment it is evident that it needs to be regularly adjusted to developments, including new technology, new services and new consumer behaviour and needs.

This means that it would be unrealistic to have a detailed definition of the remit in the broadcasting law itself, which cannot be kept under constant review. Rather, the law should state the **basic principles** of the remit and define the **procedure** for rendering the remit more concrete. Here again, differences in the legal and organizational traditions and structures of Member States mean that the procedure can only be determined by each Member State.

Often Member States have a two- or three-layer procedure, for example with

- **a)** the statutory law (or charter) laying down a basic definition,
- **b)** a regulatory or co-regulatory instrument (e.g. a *cahier des charges* or broadcasting agreement) defining more concrete obligations, and
- **c)** a self-regulatory or co-regulatory instrument (e.g. self-commitments or *contrats d'objectifs et de moyens*) defining objectives and/or activities for a given period of time.

### Entrustment of the remit and supervision of its fulfilment

- **Need for official act of entrustment by Member States**

  "The public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference)." (Point 40)

The Amsterdam Protocol makes it clear that the entrustment of the remit is a matter for the Member States. The official acts mentioned as examples are often the same as the ones through which the public service remit is defined and specified (see above). In fact, there is an inherent link between the definition and the entrustment, since any extension of the remit normally also means an additional entrustment.
- **Need for effective monitoring of compliance**

"It is not for the Commission to judge on the fulfilment of quality standards: it must be able to rely on appropriate supervision by the Member States." (Point 41)

"It is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations. The role of such a body would seem to be effective only if the authority is independent from the entrusted undertaking." (Point 42)

Member States have foreseen various systems to ensure that public service broadcasters actually fulfil their remit: sometimes the supervisory tasks are entrusted to a broadcasting authority or council which is in charge of regulating the broadcasting or communications sector as a whole ("external supervision"); sometimes – and this is a frequent solution – these are entrusted to a special body (e.g. council) of the public service broadcaster, i.e. a body forming part of the organizational structure of the public broadcasting institution ("internal supervision").

Whatever the model chosen, the independence of the supervisory bodies must be ensured in two directions: vis-à-vis the State and vis-à-vis the broadcasting operator. (See Council of Europe Recommendation No. R (1996)10 on the guarantee of independence of public service broadcasting and Recommendation No. R (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector.)

In view of the competence of the Member States to organize public service broadcasting and to choose appropriate supervisory mechanisms, the Communication can be understood only in the sense that Member States are not confined to any of the two models described above. In other words, "independent from the entrusted undertaking" must not be understood in the sense of requiring legal separation. What counts is the independence of the members of the supervisory body as a whole.

**Choice of funding scheme**

"The choice of the financing scheme falls within the competence of the Member State, and there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenues) …" (Point 46, see also 47)

While the competence of the Member States to choose the funding system is already clearly spelled out in the Amsterdam Protocol, the Commission here explicitly responds to the political will of the Member States to protect dual (or mixed) funding schemes for public service broadcasting from being called into question. Earlier internal Commission papers had given a clear preference to other funding models, considering mixed funding systems to be a distortion of the market *per se*. 
Financial transparency

- Separation between public service and non-public service activities

"The Commission requires (...) a clear and appropriate separation between public service activities and non-public service activities. Separation of accounts between these two spheres is normally already required at national level ..." (Point 49)

"The obligation of separation of accounts does not apply to public service broadcasters whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of those services." (Point 52)

These statements are line with the horizontal rules of the Financial Transparency Directive, which impose financial transparency requirements on public and private undertakings which, in addition to their public service activities, carry out commercial activities outside the public service remit.

- Separation of accounts on the revenue side

"On the revenue side, broadcasting operators should give a detailed account of the sources and amount of all income accruing from the performance of non-public service activities." (Point 54)

It is normal practice for the accounts of public service broadcasters to specify transparently revenue from advertising, sponsorship and other income derived from contractual transactions on the market.

- Separation of accounts on the expenditure side

"On the expenditure side, costs specific to the non-public service activity should be clearly identified. In addition, whenever the same resources - personnel, equipment, fixed installation etc. - are used to perform public service and non-public service tasks, their costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities." (Point 55)

"... contrary to the approach generally adopted in other utilities sectors, costs that are entirely attributable to public service activities, while benefiting also commercial activities, need not be apportioned between the two and can be entirely allocated to public service. This could be the case, for example, with the

---

8 Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings. Recital No. 7 explicitly clarifies that the obligation of separation of accounts does not apply to undertakings limited in their activities to the provision of services of general economic interest without operating activities outside of the scope of these services.
production costs of a programme which is shown as part of the public service remit but is also sold to other broadcasters. The main example, however, would be that of audience, which is generated both to fulfil the public service remit and to sell advertising space." (Point 56)

These are important sector-specific clarifications which are not to be found in the horizontal rules of the Financial Transparency Directive. They seem to be in line with the proposals made by the EBU in its comments on the draft of that Directive. To reconcile the horizontal transparency rules with the specificity of the audiovisual sector, the EBU had proposed a clarification that no separation of accounts for different categories of programmes or services is to be required, provided that such programmes and services fall within the public service remit defined by the Member State.

**Proportionality**

- **Negative proportionality test**

  "The test is of a 'negative' nature: it examines whether the measure adopted is not disproportionate." (Point 47)

Although the last part of the Communication dealing with the proportionality test contains useful elements – such as the description of the test as a "negative" one – it lacks clarity on the actual criteria to be applied (Points 57-62).

- **Compensation for net costs**

  "It is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid." (Point 57)

The Commission applies the proportionality test only to the amount of State aid provided; the definition of the remit is a matter for the Member States and is not subject to any further proportionality test. (As late as 1998, the Commission services' Discussion Paper argued that the Commission had a duty to assess the proportionality of the definition of the public service remit with regard to the objectives pursued.)

It is only natural for other revenue to be taken into account when it is derived from, for example, the sale of advertising space on public service channels, as it reduces the need for public funding for those channels.

---

"Whenever a public service broadcaster undercuts prices in non-public service activities below what is necessary to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover, such practice would indicate the presence of overcompensation of public service obligations …" (Point 58)

The term "stand-alone costs" is probably to be understood as meaning the total cost of providing the service or activity, including overheads and any other indirect or shared cost, without any subsidy or cross-subsidization; it does not include profits.

- **Weighing up distortion of competition and performance of public service**

  "The Commission will consider whether or not any distortion of competition arising from the aid can be justified in terms of the need to perform the public service as defined by the Member State and to provide for its funding." (Point 59)

This statement can be regarded as an acknowledgment of the last part of the Amsterdam Protocol, which says that in the final analysis "the realisation of the remit of that public service shall be taken into account". This formulation, which is not to be found in either Article 86 or Article 87 of the EC Treaty, can be regarded as a special refinement of the proportionality principle, giving additional weight to the need, not least for the Commission, to make sure that the public service broadcasting remit can be fulfilled completely, in view of its cultural, democratic and social importance.

- **Final assessment requiring a case-by-case analysis**

  "The analysis of the effects of State aid on competition and development of trade will inevitably have to be based on the specific characteristics of each situation." (Point 60)

The Commission stresses that a final assessment under Article 86(2) of the compatibility of state aid to public broadcasters can be made only on a case-by-case basis, taking into account the actual competitive structure and the other characteristics of each of the markets. It has thus obviously given up the idea of defining any general criteria or thresholds to the effect that where a certain number of clearly-defined criteria are fulfilled, public service broadcasting activities and their funding enjoy "legal certainty" and can no longer be challenged under European state aid rules.

This means that the key assessments, particularly regarding the proportionality test, will still have to be made, on a case-by-case basis, in individual Commission decisions. Thus, although the Communication makes the Commission's reasoning more transparent, it has only limited value in increasing legal certainty for public service broadcasters.