

Liberalization and Public Service Broadcasting

COMPETITION REGULATION, STATE AID AND THE IMPACT OF LIBERALIZATION

by Michael A. Wagner, European Broadcasting Union

This speech was given at the Seminar on "Liberalisation and public service broadcasting" in London on 15 October 1999, co-organized by the British Film Institute, London and the Centre d'études sur les médias, Sainte-Foy (Quebec). The proceedings of the Seminar were published in May 2001 (ISBN 2-92-2008-18-5).

1. Introduction: How to secure a balance within the dual broadcasting system

With the experience of the last 20 years nobody would probably dispute that viewers and listeners in Europe have been best served by the dual broadcasting system. The mix of public and commercial broadcasting has extended the public's choice. And it is not only consumers and citizens who have benefited. The audiovisual market has expanded, to the benefit of the audiovisual programming industry, rightowners, advertisers, equipment manufacturers and many others.

The stability of the dual broadcasting system relies on two pillars, public broadcasting and commercial broadcasting. Their balanced coexistence cannot be taken for granted. Public broadcasters may have been tempted in the past to make it difficult for commercial operators to enter the market. Commercial broadcasters, after achieving a strong position on the market, may now try to marginalize public broadcasting. In some countries, especially in Central and Eastern Europe, commercial broadcasters may be in a position, with the help of foreign capital, to destabilize completely the public broadcasters and threaten their very survival.

I think that the wave of complaints by commercial competitors about the public or mixed funding of public broadcasters, or about new programme activities, has to be seen in this context. In my view, these are attempts to curb or paralyse as much as possible the development of public service broadcasting. This would allow commercial broadcasters to secure for themselves a bigger share of the audiovisual market, or even the whole lot.

The main concern of all regulators, including competition authorities, should be to safeguard the existence and development of the dual broadcasting system. For this it is necessary to have a certain balance, also in the marketplace, between public and commercial broadcasting. Both sectors must remain viable, and neither must be allowed to be marginalized or destabilized.¹ Only then can public broadcasters serve as a benchmark for quality also for their commercial competitors - as commercial competitors can serve as a benchmark for operational efficiency.

What legal solutions could contribute to such a balance and reconcile free market and public service principles?

2. Article 86 - Services of general economic interest

Some see the solution in Article 86 of the EC Treaty. Paragraph 2 says that undertakings entrusted with the operation of services of general economic interest shall be subject to the rules contained in the Treaty, and in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance of the particular tasks assigned to them.

It is true that public broadcasting is a service of general economic interest, but commercial broadcasting may also fall into this category. This category does not refer to the features which distinguish public broadcasting from commercial broadcasting, and it does not go to the heart of the public service remit. Public service broadcasting's functions are not so much *economic* as *political, democratic, cultural* and *social*.² These functions have been described in detail in the 1994 Council of Europe Resolution on the future of public service broadcasting. The main functions have also been recognized in the Amsterdam Protocol on Public Service Broadcasting.

- Democratic, cultural and social aspects of the public broadcasting remit

Public service broadcasting is essential for the *political and democratic systems* in Europe. This is the main reason why the Member States of the European Union (and even more so, for example, the German Länder) are so sensitive about their competence for public broadcasting. In Germany, each Land is extremely keen to have, if not its own public broadcasting organization, at least specific public radio and television services specially produced for its territory. This is regarded as a crucial element in the political life of the Länder.³

¹ Without suggesting a definition of viability, I would refer to the widespread view that public service broadcasters need an audience share of at least 30% to be viable, which means to fulfil their role for society and to maintain the political legitimacy of their source of funding, mainly through broadcasting licence fees.

² The specificity of this remit makes public service broadcasting different from the "normal" services of general economic interest in, for example, the areas of transport, telecommunications, water and energy supply, etc.

³ The German term sometimes applied here is *Eigenstaatlichkeit*, referring to the Länder as political entities functioning within the federal State.

Or we can take the case of Switzerland. We know that Switzerland is still hesitant about joining the European Union but in any case it will wish to maintain its political system, which contains a strong element of direct democracy. Nowadays such a system very much depends on the media, and on support from a strong public broadcaster in particular. Switzerland also has three (or even four) language areas, which are all catered for by the public broadcaster (SRG/SSR). These language regions are too small to constitute markets for strong commercial broadcasters, having to compete with commercial broadcasters from much bigger countries sharing the same language. The Swiss public broadcaster is therefore a decisive element in the functioning of the Swiss political system, and perhaps even in the survival of the Swiss nation state. How could the Swiss national identity survive if the French-speaking Swiss primarily watched television from France (to mention just one language region)?

It is very important for the European Union, and for the European Commission in particular, to understand these legitimate concerns of existing (or future) Member States.

Let me also say a few words about the *cultural* functions of public broadcasting. The importance of cultural identity and diversity will probably be demonstrated once again in the forthcoming Round of world trade negotiations. Public service broadcasting and its public funding are often mentioned as being among the core European assets that will have to be defended in these negotiations. This recognizes the role of public broadcasting in cultural life and development throughout Europe, particularly for the smaller cultural and linguistic areas.

Last but not least, public broadcasting has a *societal* function in that its programming contributes to social coherence and integration of society. It will have an important task in preventing the creation in the information society of a great divide between those who can afford access to information and those who can't. (The information haves and the information have-nots.)

- Freedom of expression and programme autonomy

All these (democratic, cultural and social) concerns, and the concerns about political and cultural pluralism, fall outside the notion of services of general economic interest.⁴

The key element in the public service remit is content. From this, in connection with freedom of expression, there follows on another important principle, that public broadcasting must be distanced from the state, that it must be autonomous and independent. This basic requirement has been well formulated in the 1996 Council of Europe Recommendation on the independence of public service broadcasting.⁵

⁴ They may have just one point in common: the aspect of universal coverage or, in other words, the availability for everyone of public broadcasting services. "Universal coverage" is close to the "universal service" idea advanced for other services of general economic interest. It refers to the *transmission* element of broadcasting.

⁵ Recommendation No. R(96)10 on the guarantee of the independence of public service broadcasting.

Therefore, state authorities cannot prescribe in full detail what content, or what programmes, public broadcasters should offer. Accordingly, the public broadcasting remit is normally described in fairly general terms. The decisions on how to make this general remit operational, the programming decisions, are taken at levels which are kept well away from the state. Organizational and procedural safeguards ensure that these decisions respect political and cultural pluralism and comply with the interests of the public. What counts is not a detailed definition of the remit but an *organizational and procedural framework*. This framework has to ensure that the public service remit is understood and fulfilled in the interests of society as a whole. The independent supervisory bodies play a major role here.

In view of all this, I would argue that Article 86 paragraph 2 of the EC Treaty cannot provide a satisfactory solution.

Firstly, the notion of services of general economic interest highlights economic aspects instead of democratic, cultural and social ones. Secondly, the idea of "particular tasks assigned" is incompatible with the necessary independence of public broadcasting, where it is not so much the definition of the public service remit but the organizational set-up which ensures the fulfilment of this remit. And finally - this is an aspect which I have not mentioned before - Article 86 is formulated as an exception. It provides a derogation only in so far as the application of the Treaty rules would *obstruct* the performance of the service. This narrow approach does little to reconcile conflicting principles. It is nothing more than an "emergency brake".

3. The Amsterdam Protocol on public service broadcasting

I have already mentioned the Amsterdam Protocol on the system of public service broadcasting in the Member States, which is now part of the EC Treaty. Does this Protocol provide for the reconciliation of the free market and of public service that we are seeking?

In comparison with Article 86, this Protocol certainly has a number of advantages. In its preamble it properly reflects the main functions of public broadcasting. It recognizes that the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism.

The Protocol clarifies that it is for each Member State to set up and organize the public broadcasting system, to define its public service remit and to provide for the funding of that public service. Significantly, it uses the term "public service remit" and not the term "particular tasks assigned".

The Protocol also strives for a balance by stressing that, on the one hand, public funding must not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, and, on the other, that the realization of the public service remit must be taken into account. This latter aspect has sometimes be overlooked by people interpreting the Protocol. It means that a balance needs to be struck between two principles, allowing the realization of the public service remit *and* the functioning of the audiovisual market.⁶

The fact that the Protocol focuses on the funding aspect is no surprise since the complaints by commercial broadcasters about the funding of public broadcasting prompted Member States to clarify the situation by means of this Protocol.

4. Outstanding questions and possible solutions

In its recent decisions on the German Phoenix and Kinderkanal Channels and the BBC News 24 channel, the Commission has made reference to this Protocol, but it seems that some problems remain.

From a public broadcasting perspective there is cause for satisfaction that the complaints have been rejected. However, the reasoning behind these decisions is throwing up new problems. The first problem is that the decisions are based on the general equation "public funding equals state aid". The second problem is that the decisions squeeze the general principles laid down in the Protocol into the rigid structure of Article 86.

When the Amsterdam Protocol was drawn up, the prevailing opinion was that the public funding of public broadcasting was not state aid if it was compensation for services provided. As early as July 1994, the German Länder, represented by one of the Minister-Presidents Mr Rudolph Scharping, expressed their concern to the Commission regarding the possible scrutiny of public funding of public service broadcasting under the European state aid rules. In October 1994, the then President of the European Commission, Mr Jacques Delors, wrote a reassuring letter to Mr Scharping confirming that public funding was not to be regarded as state aid if it was compensation for services with which the recipient was entrusted by the state. The draft DG IV guidelines of March 1995⁷ and the Commission decision on the Portuguese television case in October 1996 took a similar approach. At the same time, the European Parliament considered that public funding for public service broadcasting did not constitute state aid as long as the overall funding (...) was commensurate with the broadcasters' public service remit.⁸ The same views were expressed at the Expert Seminar organized by the Dutch Presidency in February 1997, which paved the way for the Amsterdam Protocol.

⁶ This signifies that certain negative effects on the development of that market may need to be tolerated out of concern for the public service remit and the underlying democratic, social, cultural and pluralistic objectives pursued by the Member States. The Protocol refers to the "provisions of the Treaty" and not only the competition rules. It can therefore also be applied to reconcile public service principles with, for example, internal market principles.

⁷ Draft guidelines on state aid for the arts and culture.

⁸ Resolution on the role of public service television in a multimedia society of 19 September 1996.

A few weeks later came a decision from the European Court of First Instance⁹. The Court had to examine certain tax concessions granted to the French Post Office to offset the additional cost incurred in operating certain services in rural areas. The Court considered this to be state aid but regarded it as permissible under Article 90, now Article 86, paragraph 2. This decision has apparently turned everything upside down since then, but its publication came too late to influence the discussion on the Protocol.

This legal “landslide” has had two unfortunate repercussions.

The first is that public funding is almost automatically and without further reflection regarded as state aid - despite being an essential part of public broadcasting, for which it is the specific (if not unique) form of permanent funding.

The second repercussion is that the search for a solution has been focused on Article 86. As a consequence, the Amsterdam Protocol has been forced into the “Procrustean bed” of this Article instead of being considered in its own right. If we look closely at the Amsterdam Protocol we see that it was not meant to be an interpretation of Article 86. It was formulated with Article 87 in mind, and particularly the clause of Article 87(3)(d) dealing with aid to promote culture.

The qualification as state aid and the application of Article 86 expose public broadcasting to considerable threats.

A first threat is that the Protocol's carefully drawn up balance between free market and public broadcasting principles will be lost. This may result in wrong decisions in cases which are less clearcut than those already decided upon by the Commission.

Another threat is that we may end up with wholly inadequate procedural rules. Apparently there was a clause in the Commission decision on BBC News 24 which regretted that the United Kingdom put the state financing of this new BBC news channel into effect without respecting Article 88 of the EC Treaty. This Article requires Member States to inform the Commission of any plans to grant or alter aid, and they are not allowed to put the proposed measures into effect until the procedure has resulted in a final decision by the Commission.

Once it is accepted that public funding is state aid it may appear only logical to apply the *notification* and *standstill* requirements of Article 88.

In practice, however, this would mean that not only any increase in public funding (even its adaptation to inflation) but also any use of existing funds for new services would trigger the mechanism contained in Article 88. In each case it would be for the Commission to carry out an *ex ante* control. Pending the outcome of these examinations, Member States would not be allowed to grant public funding, and public service broadcasters would not be allowed to offer new services.

⁹ Judgment of the Court of First Instance of 27 February 1997 (FFSA/La Poste).

It was one of the peculiarities of the United Kingdom case that no additional public funding was granted for the news channel and that it was for the BBC to finance the new service from the existing resources by means of a relocation of funds and through savings. If it is accepted that this already prompts the notification and standstill requirements, would there still be a limit to Community interference? What about changes in the character of an existing channel? What about programme changes within a channel? What about new interactive features? Electronic programme guides?

If all these programming decisions were subject to the prior approval of the Commission we would have the exact opposite of an adequate legal framework for public broadcasting. It would deny public broadcasters the programme autonomy and the stable funding they need. Programme autonomy and funding stability are basic principles for public broadcasting which have repeatedly been upheld by national legislators and courts, including constitutional courts; they have also been called for by Recommendations and Resolutions of the Council of Europe and the European Union.

At the moment, the Commission seems to be on a very dangerous path which could lead to highly unfortunate conflicts not only between the Commission and national governments but also between European and national courts. I very much hope that the Commission will find a safe way out of this minefield.

Perhaps the best solution would be to rethink the very basis of the current approach, which concentrates on Article 86 and the qualification of public funding as state aid. Instead of using the “emergency brake” of Article 86 with uncertain results, why not take a step back and try to find a stable solution, building on the balance between free market and public service principles as set out in the Amsterdam Protocol? As long as there is no serious threat to the balance between public and commercial broadcasting, there should be no case for Community intervention, and the Commission should not run the risk of encroaching upon the responsibilities and sensitivities of the Member States.
