State aid in the broadcasting sector: Has the right balance been struck between competition and public service broadcasting?

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Abstract

The application of the State aid rules to public service broadcasting has never been a straightforward exercise for the Commission. The picture became more complex in the digital era in light of the expansion of public broadcasting organizations to new media markets. Yet, in spite of the challenges it faced, the Commission has not limited itself to a marginal compatibility assessment checking solely whether the provision of public broadcasting services outweighs the harm to competition. Over the years, the Commission has developed a practice which has gone so far as to shape national public broadcasting policies. Through its decision-making practice and the adoption of a soft law instrument, the Broadcasting Communication, the Commission gradually managed to inject into national systems its own perspective of “good” State aid policy in public service broadcasting. This paper discusses the impact that the Commission State aid practice has had on national public broadcasting systems and reflects on whether the latter has struck the right balance between the conflicting values involved, namely competition and public service broadcasting. The paper argues that, while in several instances the Commission went beyond the Treaty letter, its control over State measures favoring public broadcasting has contributed substantially to ensuring a level playing field between public service broadcasters and commercial undertakings operating in the wider context of the media market.
1. Introduction

State aid for public service broadcasting has been a highly contested issue ever since the European broadcasting sector was liberalized through the Television Without Frontiers Directive and the dual broadcasting system emerged with both public and private operators providing related services. The proponents of the dual system consider State financing of public broadcasting activities essential for the fulfillment of fundamental educational, cultural and democratic needs such as the provision of impartial information, cultural diversity, freedom of expression and the preservation of a pluralistic media landscape across the Union. Its opponents argue that State financing of public service broadcasting is detrimental to competition and consumer welfare in that it creates significant entry barriers for newcomers and undercuts projects sought to be launched by private operators already active in the market. In spite of this criticism, and whilst opening the market to competition, the Member States have been financing public service broadcasting to date on public utility justifications. Yet, to the extent that related measures may bring about distortions in intra-Union competition and trade, the European Commission has a say in their implementation through the application of the State aid rules with the aim to ensure a level playing field between public and private broadcasters

2 See, for instance, the European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system, [2010/2028 (INI)], para. 2. See also Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on public service broadcasting, OJ C 30, 5.2.1999, p. 1
3 This is the stance that the private sector has taken ever since the sector was liberalized, see, for instance Commission Broadcasting Communication 2009, para. 3. Soon after the entry into force of the Television Without Frontiers Directive, several complaints were lodged by commercial broadcasters claiming that State support for public service broadcasting constitutes illegal State aid. The main allegations concerned the compatibility of the “dual financing system” (i.e. the system whereby public service broadcasters have access both to public funds and advertising revenues) with the common market and anticompetitive behavior in the advertising markets. Besides the financing issues, the complaints have also brought to the Commission’s attention issues related to how supervision on public service obligations is executed. More recent complaints have focused on the expansion of public service broadcasters to new media markets
4 Commission Broadcasting Communication 2009, para. 2
5 For an overview of public utility justifications as laid down in national legislation and licenses, contracts, agreements or charters with individual public broadcasters as part of the public service remit, see, for instance, Katsirea 2008
operating throughout the common market.\textsuperscript{6}

Over the past years, the tensions that relate to the need to preserve public service broadcasting have become more heated in light of significant market developments which have resulted in an ample variety and high quality of programs offered by commercial broadcasters and a bundle of similar or identical services provided by undertakings operating in the wider context of the media market. “Niche” channels accommodating to special interests, screen-based entertainment services, Internet surfing and 3G mobile phone usage are indicative of the range of content to which the consumers may have access in the contemporary media landscape. Considering the above, the market is said to cater for all kinds of tastes thereby rendering State financing of public broadcasting activities superfluous and, to the extent that such financing may hinder the undertaking of private initiatives, harmful to competition and consumer choice.

Yet, certain particularities that characterize the broadcasting market seem to leave some room to argue in favor of State support for public service broadcasting even in the current media environment. These particularities which were identified in the past and, in spite of technological developments, still stand, relate to the existence of a duality of consumers in the market in question, namely advertisers and viewers. As commercial broadcasters depend predominantly on advertising revenues to survive and, to the extent that advertising rates are directly related to audience shares,\textsuperscript{7} the latter will opt for producing and/or broadcast programs which appeal to the masses with the aim to attract viewers and therefore advertisers.\textsuperscript{8} This in practice means that private broadcasters, insofar as this practice secures revenues,\textsuperscript{8}

\textsuperscript{6} Financing of public broadcasting activities is usually considered likely to distort competition as it puts public broadcasters in a more favorable position than their competitors (see, for instance, Decision NN 88/98 on BBC News 24, para. 17) and intra-Union trade on the grounds that public broadcasting organizations are active in the acquisition and sale of program rights, which often take place at the international level, their ownership structure which normally extends beyond national borders and the cross-border effects of advertising (see, for instance, Decision C 62/99 on Ad hoc payments to RAI, para. 91)

\textsuperscript{7} Audience share is understood as “the proportion of people watching television at a certain time who choose that program”. Another way to measure the success of a program would be audience reach, the proportion of the total population who opt for watching a certain program. Competition among broadcasters is commonly expressed in terms of share. For more information on the differences between audience share and audience reach and the implications of each type of measurement for public broadcasting, see for instance, Biggam 2010, 171

\textsuperscript{8} Ariño 2005, 58
will tend to offer programming similar or identical to “tried recipes”, for instance a program similar to what has already proved successful for a competitor or the repetition of a program which received good audience ratings in the past, rather than investing in original programming which is too costly or programming which accommodates to cultural or linguistic minorities’ interests and thus attracts too small an audience to generate cost-recovery revenues. Taking the above into consideration, there is a strong likelihood that “firms in a competitive broadcasting market move to fill the same middle ground”\(^9\) and, for that reason, an anomaly may arise whereby, a large amount of broadcasters may not lead to a wide range of differentiated programs the viewers can choose from but rather to program duplication.\(^10\) Additionally, services aimed at audiences with special interests, for instance news or sports channels available upon subscription, which are offered by private operators, cannot substitute similar programs which are provided for free by public broadcasting organizations. In that case, the abolishment of the public broadcasting system would aggravate the information divide between citizens that can afford pay-TV and those who, although interested in watching a given program, do not have the financial means to access the service. Taking the above into consideration, preserving public service broadcasting may still be relevant, for instance as a means to offer to the public other than popular programming that leaves indifferent advertisers and, for that reason, commercial broadcasters, or as an apparatus to achieve social equality.

Nonetheless, if State financing of public service broadcasters is excessive and/or in the absence of efficient control systems to verify whether overcompensation has taken place so that relevant action can be taken, measures supporting such activities are likely to crowd out private initiatives thereby giving rise to competition concerns. In several instances, only the fact that a competitor is in receipt of public money creates significant entry barriers for newcomers or hinders projects sought to be launched by commercial operators already active in the market to the extent that the latter expect that the resulting competitive advantage will be offset by the granting of aid to public undertakings.\(^11\) These

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\(^9\) Prosser 2005, 209  
\(^10\) Craufurd-Smith 2004, 653  
\(^11\) Spector 2007, 179-180
considerations are particularly relevant for the broadcasting market considering the substantial investment that needs to be made to enter the market or the high costs the production of an innovative program usually entails. Moreover, the lack of mechanisms to ensure that State funding is limited to the costs incurred in the discharge of public service obligations or that commercial activities of public broadcasting organizations are developed in accordance with market conform principles facilitate public service broadcasters to engage in anticompetitive behavior which may take different forms, for example, the granting of privileges to commercial subsidiaries such as reduced prices in the acquisition of program rights, or the undercutting of prices in the advertising markets.

Taking due account of all the above, in particular the consideration that public service broadcasting may still be essential for the fulfillment of fundamental societal needs which the private sector is, for understandable economic reasons, unwilling to serve, as well as the fact that State financing going beyond what is necessary for the attainment of this public service mission may prove detrimental to a competitive market structure, a via media needs to be followed in order to reconcile the conflicting values involved. In that regard, whilst financing of public broadcasting may be granted to safeguard media pluralism, accommodate to the needs of racial and linguistic minorities or build a shared sense of national identity, it must also not run counter to competition and consumer welfare. In that sense, a balance needs to be struck so as to ensure that the raison d’être of public broadcasting is not undermined but without creating obstacles to the functioning of the market.

Since the 1970s, it was understood that the issues related to State financing of public broadcasting activities as identified above transcend national frontiers and acquire a Union dimension. In that respect, as soon as support for public service broadcasters became a matter of concern for private operators aiming at expanding to markets that were considered until then purely national, the Court has taken the stance that public broadcasting activities are activities of an economic nature, thereby facilitating European intervention whenever privileges in favor of public
broadcasting organizations can put the realization of the European project in
danger. As a result, throughout the 1990s, soon after the liberalization of the
sector, the Commission was faced with complaints lodged by private operators
alleging \textit{inter alia} that public funding of such activities violates the State aid rules
and gradually developed a practice in the public broadcasting field.

Yet, the application of the State aid rules to measures favoring public service
broadcasting has been far from a straightforward exercise for the Commission for a
number of reasons but, first and foremost, for the competence disputes that
supranational State aid control in the sector triggers. Given its specific role in
catering for primordial societal needs and the cultural character of television
programs, public service broadcasting has been treated, since its inception, as a vital
part of national cultural policies, thereby limiting Union action on the basis of the
principle of subsidiarity. In that context, the Commission was called upon to
assess the compatibility of relevant schemes with the Treaty and thus ensure
undistorted competition throughout the common market, but without interfering
with cultural issues, in particular the advancement of national public broadcasting
policies, that are thought to be better served at national level. In view of the above,
the Commission State aid practice in the field takes the form of a balancing exercise
between the conflicting values identified above, namely competition and public
service broadcasting. And, while in the beginning of its decision-making practice in
the sector, the Commission followed a hands-off approach, ultimately it has not

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12 The first one was the Sacchi judgment: ECJ Case 155/73, Italy v. Sacchi [1974] ECR 409. See, in
particular, para. 14: “[...]Nothing in the Treaty prevents Member States, for considerations of public
interest, of a non-economic nature, from removing radio and television transmissions, including cable
transmissions, from the field of competition by conferring on one or more establishments an exclusive
right to conduct them. However, for the performance of their tasks these establishments remain subject
to the prohibitions against discrimination and, to the extent that this performance comprises activities
of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings
and undertakings to which Member States grant special or exclusive rights.”
13 The first complaints were filed by the Spanish commercial operators Gestevisión Telecinco in 1992
followed by complaints against the French and Portuguese public service broadcasters in 1993 and the
Italian public service broadcaster in 1996. For an overview of the Commission decision-making
practice in public service broadcasting see, for instance, Antoniadis 2006 and Donders and Pauwels
2008
14 Article 6 TFEU. For the challenges the European Union faces in developing consistent policies in the
field of culture see, for instance, Craufurd-Smith 2004
15 In its first decision, which concerned State measures in favor of the Portuguese public service
broadcaster RTP, the Commission considered that payments which purely offset the cost of RTP’s
public service obligations are not to be regarded as State aid. The analysis of whether State funding
exceeded the net costs incurred in the discharge of RTP’s public service obligations concluded that

[8]
limited itself to a marginal compatibility assessment, checking solely whether the provision of such services with public money outweighs the harm to competition. Over the years, the Commission has undertaken an active role in controlling relevant schemes and developed a practice which has gone so far as to shape national public broadcasting policies thereby provoking severe criticism due to the competence limitations in the cultural domain. The Commission’s influence on such policies stems clearly from decisions taken in the sector, which illustrate the negotiations with the Member States involved, so that the schemes under scrutiny are brought in line with the State aid rules. Yet, the Commission State aid practice has not been limited to the adoption of individual decisions but has been marked in essence by the Broadcasting Communication, a soft law instrument in which the Commission laid down the principles it follows when applying the State aid rules to the public broadcasting sector.

Clearly, the Commission’s practice was not developed overnight. The Commission faced a number of challenges in its effort to establish a consistent framework within which public service broadcasters may operate without violating the State aid rules. The organization of the sector, which has been treated for several decades as a natural monopoly, paralyzed early Commission initiatives calling for the implementation of a set of principles for the funding of public service broadcasters. These attempts found strong Member States’ opposition which was not driven exclusively by the fear for unjustified expansion of Union competence in the cultural field but also by the sensitivities of the public broadcasting sector, in particular its ability to shape public opinion and therefore direct citizen behavior. The organization of the sector as a State monopoly for several decades is also the reason why the Commission had not been exposed to issues that arise from the application of the State aid rules to public service broadcasting and therefore lacked government financing merely compensated for the said costs, therefore no advantage appeared to be conferred within the meaning of Article 107(1) TFEU (Decision on State aid financing of public television in Portugal, SG (96) D/9555, 1996). This decision was subsequently annulled by the then Court of First Instance calling upon the Commission to conduct a more detailed analysis of the relevant State aid schemes (CFI, Case T-46/97, SIC v. Commission, [2000] ECR II-02125, paras. 83 and 84)

the necessary know-how to follow a more coherent approach once the first complaints were filed.

The picture became more complex in the current media environment in light of the expansion of public service broadcasters to new media markets. The development of activities other than traditional broadcasting, such as online games, chats, data banks and online shops has given rise to doubts about whether such services substantiate a public service mission or whether this expansion enables spillovers of public money to commercial activities thereby harming commercial operators. Under pressure from the private sector and considering the amount of monies dispersed to support public service broadcasting, the Commission followed a more interventionist approach in these cases. The position it took in recent decisions dealing with the conditions under which public service broadcasters may provide new media services has provoked strong reactions by the Member States and the public broadcasters on the grounds that the Commission went way beyond the Treaty letter. In view of the above, the competence disputes have become more intense now than ever.

This paper provides an insight into the Commission State aid practice and reflects on whether the latter has secured a balance between public service broadcasting and competition. It consists of three parts. The first part discusses the ambivalence generated by the primary EU law under the umbrella of which fall State measures supporting public broadcasting activities and lays the ground for a more detailed examination of the Broadcasting Communication which further explicates the application of the relevant Treaty provisions to public service broadcasting. The second part is divided in three sections which examine the approaches the Commission followed in the examination of whether each one of the three criteria set out in the Broadcasting Communication are satisfied. In that

17 According to information provided by the Commission, European public service broadcasters receive more than €22 billion annually from license fees or direct government aid, occupying the third place, after agriculture and transport companies, in the list of recipients of state aid: See, for instance, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1072 This must be seen in comparison to other figures representing sector-specific State aid, for instance, the coal or the shipbuilding sectors which received in 2007 € 354 million and € 3.4 billion respectively according to the Autumn 2008 Scoreboard update, available at: http://ec.europa.eu/competition/state_aid/studies_reports/archive/2008_autumn_en.pdf
respect, a critical assessment of the Commission practice in the field takes place using concrete examples, mostly from recent cases dealing with the expansion of public service broadcasters to neighboring media markets. Finally, the analysis concludes that, while in several instances the Commission exceeded competence, the practice it developed through the application of the State aid rules has contributed to ensuring a level playing field between public and private operators.

2. **Primary EU regulating public service broadcasting: The puzzling wording of Article 106(2) TFEU and the Amsterdam Protocol on Public Service Broadcasting**

The Commission has in general treated public financing of broadcasting activities as State aid within the meaning of Article 107(1) TFEU and, as a result, it carries on its investigation of State aid to public service broadcasting by assessing the compatibility of the measures under scrutiny with exceptions in the Treaty. More particularly, the Commission has focused on the qualification of public broadcasting services as services of general economic interest which triggers the application of Article 106(2) TFEU. The latter provides for an exemption from the

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18 For the purposes of this study, the application of Article 107 TFEU to the public broadcasting sector will not be examined in detail. As regards Article 107(1) TFEU, it is noted that the Commission has treated public financing of such activities as State aid within the meaning of Article 107(1) TFEU. In the vast majority of the decisions it adopted in the field, the Commission found that the criteria laid down by the aforementioned provision are met meaning that schemes favoring public service broadcasting do not escape the general State aid prohibition thus fall under Commission scrutiny. On that point, the Commission carries on its investigation of State aid to public service broadcasting by assessing the compatibility of the measures under scrutiny with exceptions in the Treaty, in particular the derogation laid down in Article 106(2) TFEU. The Commission has never made use of the exception provided for by Article 107(3)(d) TFEU to justify State funding of public broadcasting organizations. Article 107(3)(d) TFEU provides for an exception to the general State aid prohibition for measures aimed at promoting culture. Considering the cultural character of broadcasting activities, the exception laid down in Article 107(3)(d) TFEU appears to be relevant. Yet, since its first decisions in the field, the Commission considered that Article 107(3)(d) TFEU needs to be interpreted restrictively and must be applied only insofar as a Member State provides for both a separate definition and separate funding of State aid intended to promote culture alone (see, for instance, Decision NN 88/98 on BBC News 24, para. 36). Although the Commission does not exclude the possibility to declare a measure supporting public service broadcasting compatible with the common market on the basis of Article 107(3)(d) TFEU (see, in particular, Commission Broadcasting Communication 2009, para. 32), the practice it developed thus far provides sufficient proof that the cultural derogation will continue to play a marginal role in State measures favoring public broadcasting activities. For more information on the application of the cultural State aid exception to public service broadcasting see, for instance, Psychogiopolou 2006, 314-321

Treaty provisions, in particular the rules on competition, insofar as the application of these rules obstructs the performance of the public service tasks which the entrusted undertakings are required to fulfill. Article 106(2) TFEU, as interpreted by the Court and further explicated by the Commission in its Broadcasting Communication, has been the legal basis on which national schemes favoring public broadcasters are saved from the general State aid prohibition for over 15 years now.\textsuperscript{20}

Yet, the derogation laid down in Article 106(2) TFEU has been far from mechanically applied in that it conveys a mixed message. For that reason, reaching the conclusion whether the exception provided for by Article 106(2) TFEU applies to a measure supporting public broadcasting services has not been a clear-cut exercise for the Commission. To the contrary, its ambiguous wording makes each case possibly falling under its umbrella an enigma to solve. While acknowledging the significance of services of general economic interest by providing for an exemption from the Treaty provisions, it requires that the provision of such services does not affect intra-Union competition and trade to an extent that would be contrary to the common interest. In that regard, Article 106(2) TFEU requires the achievement of a balance between conflicting objectives, namely national public interests as perceived by the Member States, and a Union interest as attained by the Commission but without further substantiating how this balance is to be achieved.\textsuperscript{21} Pursuant to Article 106(3) TFEU, the Commission is entrusted with conducting the relevant balancing exercise.

Parallel considerations are made in relation to the Protocol on the system of Public Broadcasting in the Member States introduced by the Treaty of Amsterdam.\textsuperscript{22} The Protocol acknowledges the role of public service broadcasting in

\textsuperscript{20} With the exception of Decision N 631/2001 on BBC license fee, all other schemes supporting public broadcasting activities were declared compatible with the internal market under Article 106(2) TFEU
\textsuperscript{21} Donders 2010, 192
\textsuperscript{22} The text of the Protocol on the system of public broadcasting in the Member States reads as follows: “The High Contracting Parties, considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretive provisions, which shall be annexed to the Treaty on European Union and to the Treaty establishing the European Community: The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and insofar as such funding is granted to broadcasting
fulfilling the democratic, social and cultural needs of the society and the need to preserve and promote media pluralism. It also makes clear that the Member States have sole competence to decide whether or not to introduce a public service broadcasting system, and if so, to define and organize the provision of public broadcasting services in the manner of their choosing. However, the Protocol also lays down that financing of public service broadcasting may not bring about distortions in intra-Union competition and trade. Similar to the derogation under Article 106(2) TFEU, the Protocol endorses the significance of national public service broadcasting as a cornerstone of democracy and a means to cater for fundamental societal needs but it does not provide for a full exemption from the Treaty provisions. For that reason, and while many scholars consider the introduction of the Protocol an important development in the field, it does not seem to contribute significantly to the conceptual clarity in the area. This argument is reinforced by its interpretative character. It appears that the Member States feared expansion of Union competence in the media arena which can explain why they agreed on the introduction of a Protocol interpreting Article 106(2) TFEU rather than a provision in its main text.

The assessment of the compatibility of State aid to public service broadcasters under Article 106(2) TFEU and the Amsterdam Protocol is made on a case-by-case basis as the Commission considers that the relevant analyses must take due account of the heterogeneity characterizing the European public broadcasting landscape. Indeed, divergent historical conditions and national policies have contributed to the creation of various models of public service broadcasting across the Union which differ significantly in several aspects such as the legal framework in which they operate, their financial organization, and the remit they are expected to deliver the latter being inextricably linked to distinct national preferences.

organizations for the fulfillment of the public service remit, as conferred, defined and organized by each Member State, and insofar as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account”

See, for instance, Raboy 2003

Donders 2010, 196

Harrison and Woods 2007, 295

Commission Broadcasting Communication 2009, para. 41

For more information on the diversity characterizing the European public broadcasting environment see, for instance, Pauwels 2010
differences among the national media markets, for instance their competitive structure, are additional specificities that are taken into consideration in the case-by-case analysis conducted by the Commission.\textsuperscript{28} Besides the fact that this type of assessment is more flexible as the Commission may adjust its decision-making to the legal and economic context in which a specific case is decided, it also addresses some of the drawbacks identified above in relation to the controversial wording of the applicable legal framework in that each case is examined separately. The differences among national systems and the inconclusive wording of Article 106(2) TFEU and the Protocol as discussed above have undoubtedly made the application of the State aid rules to public service broadcasting far from a straightforward mathematical exercise for the Commission. Yet, this case-by-case approach facilitated the latter to develop a practice in the sector and therefore identify common principles on the basis of which relevant measures may be declared compatible with the Treaty. This body of principles has been codified in a soft law instrument, the Broadcasting Communication, which has marked in essence the Commission decision-making in the public broadcasting field.

The Commission had long stressed the need for a more consistent approach in the compatibility assessment of measures favoring public service broadcasting. Initiatives at European level can be traced back to 1998 suggesting that the establishment of a coherent framework is essential through the adoption of a set of principles applicable to related schemes.\textsuperscript{29} While the basis on which these initiatives were undertaken is questionable considering that the Commission had not adopted a single decision in the field at the time, and thus had not acquired the necessary experience to identify such principles, they surely acknowledged the particularities of public service broadcasting and laid down the ground for the efforts that followed. Apparently, the Commission waited for the momentum (both political and empirical) to codify certain common standards after having developed a relevant practice. The provisions of the 2001 Broadcasting Communication started to apply

\textsuperscript{28} Commission Broadcasting Communication 2009, para. 95
\textsuperscript{29} See, for instance, the DG IV Discussion Paper: Application of Articles 90, section 2, 92 and 93 of the EC Treaty in the Broadcasting Sector (Oct. 1998), an initiative undertaken by former Competition Commissioner Karel van Miert and Report from the High Level Group on Audiovisual Policy: “the Digital Age: European Audiovisual Policy” chaired by former Commissioner for Culture Marcelino Oreja (Oct. 1998). For more information on the initiatives undertaken that period of time see, for instance, Humphreys 1999
after two final decisions were adopted\textsuperscript{30} and several investigation procedures were opened,\textsuperscript{31} therefore after the Commission had been exposed to several issues arising from the application of the State aid rules to public service broadcasting.\textsuperscript{32} It has recently been revised to deal with issues that arise from the expansion of public service broadcasters to new media markets.

3. **The Broadcasting Communication: The Commission’s perspective of “good” State aid policy in Public Service Broadcasting**

The Broadcasting Communication\textsuperscript{33} embodies the principles followed by the Commission in the application of the State aid rules, with a clear emphasis on Article 106(2) TFEU as previously discussed, to the public funding of audiovisual services in the broadcasting sector.\textsuperscript{34} Formally, it binds only the Commission,\textsuperscript{35} however, in clarifying under which conditions a relevant measure may be declared compatible with the Treaty, the Communication has also served as a guiding tool for both the private sector and the Member States.\textsuperscript{36} The Broadcasting Communication\textsuperscript{37} was welcomed by the industry because it established a certain degree of legal certainty in the broadcasting market\textsuperscript{38} and proved rather useful for the Commission in its decision-making practice. Eight years after its adoption, during which the Commission adopted over 20 decisions in the field, the

\begin{itemize}
\item Decision NN 70/1998 on Phoenix/Kinderkanal and Decision NN 88/98 on BBC News 24
\item Decision NN 2/2002 on ZDF Medienpark, Decision C 62/99 on Ad hoc payments to RAI and Decision C60/99 on Ad hoc payments to France 2 and 3
\item This is established practice in the Commission decision-making practice. A good example in the field of competition law is the adoption of, for instance, the Block Exemption Regulation on franchise agreements after the Commission had acquired relevant experience on the basis of individual notifications by the parties to the agreement applying for an exemption under Article 101(3) TFEU.
\item Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2009] OJ C257/01
\item Ibid., para. 8
\item Mestmäcker and Schweitzer 2004, 1108 and fol.
\item This was in the Commission’s intentions once the adoption of the Broadcasting Communication was decided. See, for instance, Press Release IP/01/1429 on the adoption of the 2001 Broadcasting Communication: “In order to take into account recent developments […], treat consistently the various cases and provide guidance to public authorities and operators, the Commission has decided to draft a Communication on the application of State aid rules to public service broadcasting”
\item Communication 2001/C 320/04 of the European Commission on the Application of the State aid rules to Public Service Broadcasting [2001] OJ C 320/5
\item See, for instance, the comments made by interested stakeholders such as the Association of European Radios (AER) or Antena 3 in the context of the public consultation launched by the Commission for the revision of the 2001 Broadcasting Communication: AER 2008, 1 and Antena 3 2008, 1, available at: [http://ec.europa.eu/competition/consultations/2008_broadcasting/index.html](http://ec.europa.eu/competition/consultations/2008_broadcasting/index.html)
\end{itemize}
The Communication was revised to introduce *inter alia* the Commission’s perspective of how public service broadcasters may fit the new media landscape without relevant support measures violating the State aid rules.

The Communication makes reference to the three conditions posed by Article 106(2) TFEU as interpreted by the Court and further explicates them. If State support for public broadcasters complies with the following criteria that must be met cumulatively, the measure under investigation is compatible with the common market: a. the public service remit must be defined in a clear and precise manner (definition), b. the undertaking in question must be explicitly entrusted by the Member State with the provision of that service whereas there must be an effective monitoring mechanism in place to ensure that the public service obligations are complied with (entrustment and supervision) and c. State financing must not exceed the net costs of the public service mission (proportionality).  

The analysis below evaluates how has the Commission interpreted, in its 15-year practice in the field, each one of the above criteria and reflects on whether the relevant decision-making has managed to reconcile the conflicting values involved, namely public service broadcasting and competition. In that regard, it examines whether the Commission, a supranational competition authority, has focused on how to protect undistorted competition in the common market and if so, whether it has interfered with the formulation of national broadcasting policies by going beyond the Treaty letter in the pursuit of that objective. For that purpose, the study inevitably considers the impact that the application of the principles embodied in the Broadcasting Communication has had on national public broadcasting systems, and appraises whether the Commission has gone so far as to dictate the content of national schemes favoring public service broadcasting. The analysis also evaluates how has the Commission reasoning developed so as to face the relevant competition concerns that arose in the digital era, especially in light of the development of new media activities by public broadcasters, and discusses whether national financing regimes repositioning public service broadcasters by allowing the provision by the latter of new media services are marked by the perceptions of a competition

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39 Commission Broadcasting Communication 2009, para. 37
authority.

3.1. Definition: From Public Service Broadcaster to Public Service Media

- Not a “mission creep”, but under which criteria?

As regards the criterion of a clear and precise definition, the Commission’s role is limited to checking whether a manifest error has occurred.\(^{40}\) That would normally be the case if commercial activities were included in the public service mandate.\(^{41}\) This manifest error approach accords with the Amsterdam Protocol which lays down the freedom of the Member States to define and organize the public service remit as they deem appropriate. However, and in spite of the fact that the Commission is restricted to checking for manifest errors, the assessment of whether the criterion of a clear and precise identification of the public mandate is fulfilled has been far from crystalline. To the contrary, the control of whether the clear definition condition is met, has been by far the most controversial one.

Achieving a balance between competition and public service broadcasting in the context of the clear and precise definition control is undoubtedly a challenging exercise. As mentioned above, in line with the Amsterdam Protocol, the Member States are entitled to define the public service remit in accordance with their national cultural traditions and diverse societal needs whereas the Commission is limited to monitoring that no commercial activities are included therein. Yet, the borderline between which service fulfills a public mission and a service which constitutes a commercial operation aimed at generating revenues is not always easy to be drawn precisely for the controversies that arise when notions such as “national cultural traditions” and “diverse societal needs” come to the fore. In that regard, the Commission had to cope with legacy characteristics of the monopoly era, such as broad public service remits, under the umbrella of which potentially fall all kinds of

\(^{40}\) Ibid., paras. 39 and 48
\(^{41}\) Commission Broadcasting Communication 2009, para. 48: The Commission refers to advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring and merchandising. Such activities are unlikely to substantiate the wording of the Amsterdam Protocol
broadcasting services, and ensure that not every service sought to be provided by public service broadcasters can be swept away under the carpet of cultural justifications. In its effort to deal with the above so as to avoid spillovers of public money to commercial activities on, for instance, cultural diversity and social cohesion grounds and thus leave room for private initiatives, the Commission has taken differing views as to the conditions under which the provision of public broadcasting services would not constitute an abuse and, in several instances, went so far as to stipulate controversial criteria and provoke severe criticism, which is to a certain extent justifiable considering its marginal role in the definition of the public mandate. The disputes became more intense recently given the development of activities other than traditional broadcasting. Nonetheless, an analysis of several decisions which touch upon various issues related to the application of Article 106(2) TFEU to public service broadcasting provides sufficient proof that the Commission has made considerable efforts to improve contestable approaches followed in earlier cases.

The selection of decisions the examination of which follows has been based on a number of factors. First and foremost, the decisions tackle a plethora of issues that arise in relation to the definition of the remit, such as the limits of the Commission control, the universality of the service sought to be provided and the technology neutral character of the envisaged scheme. Additionally, the cases deal with the most relevant-for the definitional issues-categories of Commission decisions, in particular decisions on the compatibility of individual projects launched by public service broadcasters and decisions on general regimes financing public broadcasting activities. As regards the decisions on the general funding mechanisms supporting public service broadcasters, the focus lies on recent cases tackling the issue of expansion of public broadcasters to new media markets and therefore better illustrate the challenges the Commission faced in assessing the

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42 The Commission decisions in the public broadcasting field may be divided in three categories, namely decisions dealing with the compatibility of the general financing regimes with the Treaty, decisions on ad hoc measures aimed at alleviating the deterioration of the economic situation of the public service broadcasters thus aimed at maintaining the national status quo supported by the general funding mechanisms and, finally, decisions dealing with individual projects launched by public service broadcasters. The second category includes decisions in which the Commission is primarily concerned about whether the proportionality criterion is met. The objective of the ad hoc measures is to support the provision of services already covered by the remit under the general regime, and for that reason, in the relevant decisions definitional issues to support our analysis do not arise.
conditions under which the enhancement of technological developments by public service broadcasters does not constitute an abuse. The decisions are examined in chronological order.

- **BBC News 24: Respect for Member States’ definitional freedom, Universality of the service and Technology Neutral character of the scheme**

In **BBC News 24**, the Commission was called upon to decide whether the launch of a 24-hour advertising-free news channel out of the license fee by the BBC is compatible with the common market. The complaint was lodged by the British media mogul, BSkyB, alleging *inter alia* an infringement of Article 106 TFEU.\(^{43}\) This decision touches upon three different aspects related to the application of Article 106(2) TFEU to public service broadcasting: first, the demarcation between issues falling under national law and issues which must be dealt with by the Commission in the context of its manifest error task, second, the universality of the service sought to be provided and, third, the technology neutral character of the scheme under scrutiny.

One of the complainant’s main allegations was that the launch of a thematic news channel does not constitute a “public service” within the meaning of the BBC Charter, the BBC’s constitutional basis, and could not therefore benefit from the derogation laid down in Article 106(2) TFEU.\(^{44}\) More particularly, the Charter laid down the possibility to provide, in addition to the main public services, other services, whether or not broadcasting, referred to as “ancillary services”.\(^{45}\) Given that the BBC had requested, in accordance with the procedures envisaged in the Charter, and gained the approval from the Secretary of State to launch **BBC News 24** as an ancillary service,\(^{46}\) the complainant argued that the project was not classified as a public service and therefore the exemption under Article 106(2) TFEU could not apply. The Commission considered respectively that it is not within

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\(^{43}\) Decision NN 88/98 on BBC News 24, paras. 1 and 16
\(^{44}\) Ibid., para. 16(iii)
\(^{45}\) Ibid., para. 5
\(^{46}\) Ibid., paras. 11, 12
its competence “to pronounce on the concept used in national legislation to define
the provision of such services, nor to discuss the concepts of ‘public service’ and
‘ancillary service’ as defined in the Charter”47 stressing that its task is to ensure that
no manifest error has taken place in the definition of services which fall to be
assessed under Article 106(2) TFEU as “services of general economic interest”.48 In
that regard, the Commission took into consideration the specific features of the
channel and concluded that no abuse had occurred in its characterization as a
service of general economic interest inter alia because the service in question
“would help to meet the democratic and social needs of a society […] by allowing
the coverage of a wider range of events and a more in-depth analysis of the
events”.49 This approach accords with the Amsterdam Protocol which leaves upon
the Member States the definition and organization of the public service remit in the
manner of their choosing. Taking into consideration that BBC News 24 was one of
the first decisions adopted in the field, the Commission followed a cautious
approach as any attempts to meddle with concepts laid down in national law would
probably open “the Pandora box” finding strong Member States’ opposition.50

The complainant also claimed that BBC News 24 could not be considered a
public service as it was not available to the entirety of the UK population but only to
viewers connected to analogue cable services (more or less 10% of all British

47 Ibid., para. 46
48 Ibid., para. 47
49 Ibid., para. 49
50 Craufurd-Smith 2001, 14. According to Article 106(3) TFEU the Commission is entrusted with
ensuring the application of the provisions laid down therein without leaving room for the involvement
of other institutions or the Member States in that task. A literal interpretation of the Treaty provision
gives the Commission the green light to decide which types of public broadcasting services may be
funded so as to fall under the exception of Article 106(2) TFEU and ultimately have a say on what
services may be covered by the public service remit. Needless to make reference to the opposition of
the Member States to such an interpretation. Nonetheless, leaving upon the Member States the
determination of which services fall under the public service umbrella as a purely national matter lays
the ground for potential abuses in that it enables the latter to include in the remit commercial activities.
For that reason, in its first decisions in the sector, the Commission followed a via media aimed at
reconciling the conflicting interests involved. In BBC News 24, as mentioned above, and
Phoenix/Kinderkanal, while acknowledging the freedom of the Member States to define and organize
the remit, the Commission made sufficiently clear that its role is limited to checking whether an abuse
likely to distort competition and affect intra-Union trade has taken place. It appears that the
Commission made an effort to bridge the conflicting interests involved through a more flexible
interpretation of the text of the Treaty. The Commission Communication on Services of General
Economic Interest reiterates that it is up to the Member States to define such services whereas the
Commission’s role is subject to control for manifest error.
households) thereby lacking the character of universal service.\textsuperscript{51} Yet, the Commission found that “BBC News 24 has been made available to the maximum number of viewers possible, taking into account the existing technical constraints […], \textit{and with the aim of distributing it to the whole population as soon as this becomes technically possible} (e.g. it is distributed also on the digital satellite platform since this became available)” [emphasis added].\textsuperscript{52} The Commission has therefore accepted that a service which in principle lacks universality\textsuperscript{53} may nevertheless qualify as a service of general economic interest provided that the intention of the State authorities is to make it available to the entire population within a given period of time once technical or other types of constraints are resolved. This approach is not \textit{de facto} problematic but it would seem logical to expect that such restrictions will be lifted within a reasonable time frame so that the service can be provided throughout the national territory to all citizens for it to be considered a service of general economic interest.

Finally, BBC initially aimed at launching the channel on the digital platforms but later on, due to technical constraints, decided to make it available on all platforms including the existing broadcasting infrastructures. The complainant then contested the public service nature of the service and claimed that BBC News 24 should be offered as a commercial service.\textsuperscript{54} The Commission not only remained within its manifest error tasks by pointing out that it is up to the State authorities to decide which services fulfill certain societal needs but also considered respectively that “\textit{[t]he 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 […], such service remains a public service regardless of the delivery platform, as long as its program concept and its funding arrangements remain unchanged. In the case in hand, the content of BBC News 24 was known from the very beginning, and its funding arrangement has remained completely

\textsuperscript{51} Decision NN 88/98 on BBC News 24, para. 59
\textsuperscript{52} Ibid., para. 60
\textsuperscript{53} See, for instance, Commission Communication on Services of General Economic Interest 2001, para. 14 which lays down the universal service obligation, i.e. the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions. See also ECJ Case C-320/91 Corbeau, [1993] ECR I-2563, para. 15 and ECJ Case C-393/92 Almelo [1994] ECR I-01477, para. 48. The universal service obligation is discussed in more detail below in the analysis of Decision N 54/2005 on Chaîne française d’information international
\textsuperscript{54} Decision NN 88/98 on BBC News 24, para. 54
unchanged” [emphasis added].\textsuperscript{55} This approach is in line with both the Protocol and the technology neutrality principle on the basis of which State measures should not favor one particular technology or platform.\textsuperscript{56} This principle underpins the Commission decision-making practice in the fast-evolving media and telecommunications sector.\textsuperscript{57}

- **BBC Digital Curriculum: The Closely Associated Criterion**

In *BBC Digital Curriculum* the Commission was called upon to decide whether a new online service aimed at providing interactive learning materials free to homes and schools is compatible with the common market.\textsuperscript{58} In its assessment of whether the provision of such services falls within the existing State aid scheme supporting the BBC, the Commission found that “[t]he inclusion of ‘non television and radio’ services as ancillary services of the BBC is a matter for UK legislation. The provision of educational material over the internet may be considered to be within the ‘existing aid’ nature of the scheme to the extent that it remains closely associated with the BBC’s “television and radio services. If, however, the proposed ‘ancillary service’ sheds this ‘close association’ it can no longer be considered as one offering continuity within the existing scheme” [emphasis added].\textsuperscript{59}

This approach is problematic in that services sought to be provided by public service broadcasters will fall under the remit insofar as they are closely associated with the television and radio services on offer. On that point, the establishment of a compulsory link to such services restricts the Member States’ definitional freedom\textsuperscript{60} and is likely to undercut the potential of public broadcasting organizations by limiting both originality and innovation. Additionally, the requirement to plan activities in close relation to television and radio services is against the technology

\textsuperscript{55} Ibid., para. 57
\textsuperscript{56} It is noted that, if the UK authorities had notified the original scheme which was aimed at supporting the launch of the channel on the digital platforms only, the technology neutrality principle would have been infringed
\textsuperscript{57} See, for instance, Commission Broadband Guidelines 2009, para, 51(d)
\textsuperscript{58} Decision N 37/2003 on BBC Digital Curriculum, para. 4
\textsuperscript{59} Ibid., para. 36
\textsuperscript{60} Psychogiopoulou 2006, 321
neutrality principle because it implies a dependence on specific platforms and technologies and runs counter to what was decided earlier in *BBC News 24* where the Commission explicitly stated that the distribution platform should not determine the public nature of a service.

- **CFII: Lack of Universality**

  This case concerned an initiative of the French State to launch an international news channel, *la Chaîne Française d’Information International* (hereafter *CFII*) intended to be broadcast overseas. In its assessment of whether an abuse in the definition of the remit took place, the Commission followed a somewhat different approach in comparison to other similar cases. More particularly, in its analysis of whether the service sought to be provided constitutes a service of general economic interest and, therefore, whether the latter may qualify for an exemption from the general State aid prohibition, the Commission made reference to the specific characteristics of the channel, in particular the fact that *CFII* was not intended to be broadcast in the French territory thereby excluding the provision of the service to residents in France as well as the fact that the mission of *CFII* “to bring the French point of view on international news to foreign audiences” does not establish a sufficiently clear link to the fulfillment of the democratic, social and cultural needs of the French society. Departing from these considerations, the Commission found that the classification by the French authorities of a channel with such characteristics as a service of general economic interest is not *de facto* problematic but considered more appropriate to conduct an analysis not on the basis of the Protocol or the Communication but on the basis of

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61 See, for instance, Harvey 2010, 3 and Donders 2010, 309
62 Decision NN 88/98 on BBC 24 hours news channel, para. 57
63 Decision N 54/2005 on Chaîne française d’information international, para. 39. The channel was not intended to be broadcast within the French territory via analogue, cable or satellite transmission. It would be only marginally accessible by residents in France in possession of special equipment (antenna satellite or decoder) permitting the receipt of the signal via satellite through which the channel would be broadcast in Europe. It would also be accessible to members of the French society residing in a foreign country
64 Commission Press Release IP/05/689
65 Decision N 54/2005 on Chaîne française d’information international, para. 40
Article 106 TFEU.\textsuperscript{66} In order to establish that the service under scrutiny constitutes a service of general economic interest within the meaning of the derogation under Article 106(2) TFEU, the Commission took into account the relevant national law provisions which laid down that the promotion of the French culture and language is an objective to be pursued by the public service organizations of audiovisual communication, \textit{CFII} falling within that category as its activities were to be predominantly financed by the French Government.\textsuperscript{67} Additionally, the obligations undertaken by \textit{CFII}, for instance the commitment to disseminate pluralistic information or offer a balanced and varied programming, provided sufficient proof as to the public nature of the services in question.\textsuperscript{68} In that regard, after considering the public service mission of \textit{CFII} and the public nature of its programming, the Commission concluded that the French authorities had not committed a manifest error in the definition of \textit{CFII}'s public mandate.\textsuperscript{69}

This decision is contestable in one fundamental aspect: the lack of universality of the service sought to be provided. In order to benefit from the derogation under Article 106(2) TFEU, the State measure under scrutiny must favor the provision of a service of general economic interest as defined by the relevant case-law of the Court. According to the latter, one key element of a service of general economic interest is its provision to the public as a whole throughout the national territory at an equalized price affordable by all.\textsuperscript{70} The Communication on Services of General Economic Interest (hereafter SGEI) in which the Commission further explicates the application of competition rules to such services reiterates that the provision of services of general economic interest needs to be underpinned by the universal service obligation, i.e. “the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions […]”.\textsuperscript{71} Taking the above into consideration, State intervention should be aimed at fulfilling the needs of the citizens residing in the French territory for the scheme

\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid., para. 41
\textsuperscript{68} Ibid., para. 42
\textsuperscript{69} Ibid., para. 43
\textsuperscript{70} See, for instance, ECJ Case C-320/91 Corbeau, [1993] ECR I-2563, para. 15 and ECJ Case C-393/92 Almelo [1994] ECR I-01477, para. 48
\textsuperscript{71} Commission Communication on Services of General Economic Interest (SGEI) 2001, OJ C 17/04, para. 14
supporting the launch of CFII to fall under Article 106(2) TFEU. It is to be noted that the special reference in the Communication on SGEI to public service broadcasting was made in order to clarify issues related to the compatibility of mechanisms financing public broadcasting organizations with the common market and in no case does it imply that such services are exempted from the universal service obligation. In that regard, questions are raised as to the legal basis on which the decision was adopted and, in particular, why the Commission approved a measure which would burden the taxpayers/viewers without them being able to be provided with the service in question. It is worth mentioning that this case is differentiated from BBC News 24 discussed above in that the scheme supporting the launch of CFII did not envisage the provision of the service within the French territory at some point in the future.

- Financing of German Public Service Broadcasters ARD and ZDF: The Business Model criterion and the request for an Added Public Value to justify the provision of new services

In Financing of public service broadcasters in Germany, the Commission was called upon to assess the compatibility of the general funding regime supporting German public broadcasting organizations with the Treaty. In its analysis, the Commission raised a number of issues for which it considered that the scheme was no longer in line with the State aid rules. The definitional issues that arose in the case and for which the Commission expressed distress concerned the lack of a clear distinction between public service and commercial activities and the absence of a sufficiently clear definition of the public service remit in particular as regards new media services sought to be provided by the public service broadcasters.

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72 The Communication on SGEI clarified issues that had long been raised by the private sector in relation to the “dual financing” system of public service broadcasters whereby the latter have access to both public funds and advertising revenues. The Commission acknowledged that “it is for the Member States, in conformity with EC law, to decide whether they want to establish a system of public service broadcasting, to define its exact remit and to decide on the modalities of the financing”, para. 15. For more information see Communication on SGEI 2001, 19-20

73 Decision N 54/2005 on Chaîne française d’information international, see in particular para. 39

74 Decision E 3/2005 on financing of public service broadcasters in Germany, para. 75
As regards the first issue identified above, the Commission justifiably considered that the lack of a clear delineation between public service and commercial activities may lead to abuses thereby bringing about distortions of competition and affecting intra-Union trade.\(^{75}\) On that point, the Commission removed the “closely associated” criterion and considered that it is not the type of technology which defines the public or commercial nature of a service but the business model behind it.\(^{76}\) This is an improvement in comparison to the approach followed in *BBC Digital Curriculum* as it is more in line with the Member States’ right to define the remit in the manner of their choosing. Nonetheless, the classification by the Commission of pay services, such as pay-TV or pay-per-view services, as commercial services\(^{77}\) is problematic in that it interferes with the Member States’ freedom to opt for the funding mechanism they deem appropriate. Apart from being in violation of the Protocol, this approach also runs counter to the case law of the Court which ruled in several instances that the Member States are free to decide on the types of funds financing public service broadcasting, for instance advertising or license fee revenues, provided that these funds remain under State control and are therefore available at any given moment to the public authorities.\(^{78}\)

As for the vagueness related to the provision of new media services, the Commission found that the general mission of such services to promote culture, information and education as laid down in national law does not fulfill the requirement of a clear and precise definition and stated respectively that “it remains unclear what is the *public service value of these channels in addition to* the already existing channels”\(^{79}\) This criterion interferes to a certain degree with the Member States’ definitional freedom in that it seems to require a more specific justification for the provision of such services. This must been in comparison to previous cases which dealt with the provision of new services by public service broadcasters but for the launch of which the Commission gave its

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\(^{75}\) Ibid., paras. 237 and fol.  
\(^{76}\) Donders 2010, 200  
\(^{77}\) Decision E 3/2005 on financing of public service broadcasters in Germany, paras. 239-240  
\(^{79}\) Decision E 3/2005 on financing of public service broadcasters in Germany, para. 227
approval without asking for such specific justification. For instance, in *BBC Digital Curriculum*, which dealt with the launch of a new online service aimed at providing interactive learning materials free to homes and schools, and *BBC News 24*, which concerned the launch of a thematic news channel out of the license fee by the BBC, both of them previously discussed, the Commission approved the relevant schemes without calling upon the UK authorities to advocate for the additional public value the services in question were likely to create and in spite of the fact that similar services were already provided by the market.\(^{80}\)

Yet, this approach is understandable considering the wider context in which the decision was adopted, in particular the increasing concerns of private operators about public service broadcasters converting into media moguls. Indeed, the development of activities other than broadcasting simply on the grounds that they educate, inform and entertain without a more precise justification why such services are covered by the public service mandate would facilitate freewheeling of public broadcasters to neighboring media markets. Therefore, in order to avoid spillovers of public money to newly developed commercial activities and establish some legal certainty for the sake of private operators, the Commission concluded that “without a clearer circumscription of what is meant by ‘culture, information and education’ most program genres offered by public service broadcasters could be covered by these concepts” and for that reason “the current possibility granted to public service broadcasters to offer additional channels with a focus on information, culture and education is not sufficiently precise”.\(^{81}\) Following Commission recommendations, the German authorities undertook relevant commitments which were found to be in line with the State aid rules. For instance, with reference to the unclear distinction between public service and commercial activities, the German authorities engaged in securing that commercial operations of public service broadcasters would be carried out by subsidiaries which would operate as distinct legal entities and which would maintain separate accounts\(^{82}\) thereby facilitating the control that no spillovers of public money to commercial activities have taken place. As regards the provision of new media services by the public broadcasters, Germany committed to introduce,

\(^{80}\) Decision N 37/2003 on BBC Digital Curriculum, paras. 19 and 24 and Decision NN 88/98 on BBC News 24, para. 28

\(^{81}\) Decision E 3/2005 on financing of public service broadcasters in Germany, paras. 227-228

\(^{82}\) Ibid., para. 343
upon Commission recommendation, a prior evaluation procedure for each new service sought to be provided. A detailed analysis of the introduction of a prior evaluation procedure for the launch of new media services by public service broadcasters will take place below.

- State financing of Irish public broadcasters RTÉ and TNAG and State funding for Flemish public broadcaster VRT: Request for an Effective Mechanism Monitoring Compliance with the Public Service Mandate

In more recent cases, for instance State financing of Irish public broadcasters RTÉ and TNAG or State funding for Flemish public broadcaster VRT, the Commission follows a different path. Similar to the German case discussed previously, the complaints which triggered Commission scrutiny touched upon various aspects of the general financing regime of the public service broadcasters such as the unclear distinction between public and commercial activities and the haziness around the provision of new media services as part of the remit. In both cases, the Commission considered that the definition of traditional public broadcasting services is in line with the requirement of a clear and precise identification but reached the opposite conclusion regarding the definition of new media services sought to be covered by the public service mandate.

The approach the Commission follows in its assessment of the Irish and the Flemish general financing regimes is differentiated from the cases discussed above in that the focus here does not lie on the establishment of criteria related to the service itself but rather on the duty of the State to establish an effective mechanism monitoring compliance with the public service obligations. For example, in the Irish case, the Commission does not dictate which new media services are to be regarded as covered by the remit nor does it point to the need for an added public value or a

83 Ibid., para. 328
84 See in particular section 3.3
86 Ibid., para. 88 and paras. 178-179 respectively
certain business model to distinguish public from commercial services but draws the attention to the problematically general wording of the statutory provision which enables the public broadcaster to provide services “any other than broadcasting”. 87

The Commission reasonably considered that this ambiguity enables public broadcasters to include commercial services in the public mandate. 88 On that point, and without interfering with the freedom of the Member States to define the remit in the fast-evolving media landscape, the Commission links the lack of clarity concerning the provision of new media services to the difficulties the State encounters in exercising efficient control of how public money is spent or whether the public service obligations are complied with and states respectively that “[i]n the absence of such further clarification as regards the exact scope of the public service remit, control of both the fulfillment of the public service remit and the use of the license fee would not seem to be effective”. 89 The same conclusions were reached in the investigation of the system supporting the Flemish public broadcaster VRT. 90

Following Commission recommendations, both the Irish and the Flemish authorities undertook relevant commitments which were found to be compatible with the State aid rules. For instance, as regards the vagueness as to what services fall under the public mandate, the Irish authorities committed to introduce changes in national legislation on the basis of which public service broadcasters would need to adopt, after having conducted a public consultation, public service broadcast charters every five years containing a detailed description of the activities they plan on developing within these five years. Besides the charter, public service broadcasters would be expected to prepare annual statements of commitments outlining the intended outputs in the following twelve months. 91 These obligations, which contribute to a clear delineation of the public service remit, increase transparency in relation to what types of services is public money spent for and contribute to a level playing field between public and private operators in that the latter can better plan their activities once they know the activities sought to be

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87 Decision E 4/2005 on State aid financing of RTE and TNAG (TG4), para. 89
88 Ibid., para. 94
89 Ibid., para. 89
90 Decision E 8/2006 on State funding for Flemish public broadcaster VRT, para. 173
91 Decision E 4/2005 on State aid financing of RTE and TNAG (TG4), para. 134
developed by a competing undertaking in receipt of public money. Similar commitments were made by the Flemish authorities: the public service broadcaster would be required to publish a charter laying down \textit{inter alia} the commercial services that the latter intends to provide\textsuperscript{92} thereby making clear the distinction between public and commercial operations. As for new media services, both the Irish and the Flemish authorities committed to introduce, upon Commission recommendation, a prior evaluation procedure for each new service sought to be provided.\textsuperscript{93} As stated above, an analysis of the undertaking to establish such a procedure will take place below.

The analysis which preceded provides sufficient proof that achieving a balance between the definitional freedom of the Member States and undistorted competition by ensuring that no spillovers of public money to commercial activities takes place has been far from a straightforward exercise for the Commission. The range of services that fell under Commission scrutiny has enabled the latter to take differing views on what types of services may fall under the public service remit, several of which contestable. In the context of its manifest error tasks, the Commission has taken directions that deviate from its obligation to respect the freedom of the Member States to define the public mandate in accordance with their respective cultural traditions, national media environments and societal needs. For instance, in \textit{BBC Digital Curriculum} and \textit{Financing of public service broadcasters in Germany}, the Commission followed a rather interventionist approach by stipulating arbitrary criteria which established a dependence of the public service upon specific platforms or technologies and business models.

The latest approach followed in \textit{State financing of Irish public broadcasters RTÉ and TNAG} and \textit{State funding for Flemish public broadcaster VRT} seems to be more in line with the Protocol. While leaving upon the Member States the freedom to position their public service broadcasters in the current media environment, the Commission identified grey areas in order to avoid freewheeling of public broadcasters to new media markets. The Commission did not associate the provision

\textsuperscript{92}Decision E 8/2006 on State funding for Flemish public broadcaster VRT, 229
of new media services with specific technologies, platforms or business models but focused on vague definitions which can potentially lead to abuses and therefore bring about distortions of competition. This approach is clearly an improvement in the Commission reasoning and addresses the drawbacks that were identified under the “closely associated”, “business model” or “added public value” criteria.

In CFII, the Commission’s reasoning is problematic in that the measure lacked universality, one of the prerequisites to benefit from the derogation laid down in Article 106(2) TFEU. In future cases which will touch upon similar issues, the Commission is expected to follow the BBC News 24 approach where the compatibility of the scheme depended upon the State’s intention to remove technical constraints in order for the service to be available to the entire population.

Overall, the direction marked by BBC News 24, State financing of Irish public broadcasters RTÉ and TNAG and State funding for Flemish public broadcaster VRT should guide the Commission in the future in order to achieve the desired balance in issues related to the criterion of a clear definition.

3.2. Entrustment: Towards a better delineated public service mission?

An act of entrustment, to the extent that it describes in a sufficiently clear and precise manner the public service obligations with which a specific organization is entrusted, plays a major role in achieving a balance between public service broadcasting and competition in that it prevents public service broadcasters from developing commercial activities under the Amsterdam Protocol mantra, ensures accountability when using public funds as it facilitates control of whether the public service obligations have been complied with and enables private operators to plan their business.

In the past, the Commission has rarely contested the fulfillment of the entrustment criterion. The assessment of whether an adequate entrustment of a broadcasting organization with a public service mission by the public authorities has
taken place did not raise any issues, first and foremost because of the organization of the sector as a natural monopoly for several decades. Since its inception, public service broadcasting has been reserved to the State mostly because of the limited availability of frequencies and high market entry barriers with the State monopoly being justified on public interest objectives that are of interest to everyone. Falling under the State monopoly umbrella, the provision of relevant services was commonly assigned on an exclusive basis to specific undertakings by virtue of law which laid down inter alia the public service obligations these undertakings are required to discharge. In that regard, the national legislation entrusting one or certain operators with the delivery of a public service mission has been considered by the Commission to be an adequate act of entrustment.

Nonetheless, lately, in light of the expansion of public service broadcasters to new media markets, and under pressure from the private sector, the Commission seems to follow a stricter approach. In recent decisions, the Commission objected to the general wording of statutory provisions laying down that public service broadcasters may provide any service, other than traditional broadcasting, without there being a specific act of entrustment for the provision of each new service sought to be provided. This approach is justifiable considering that vague national law provisions envisaging that public service broadcasters may provide any media service without specifying the objectives of the service in question and the relevant tasks undertaken by the public service broadcaster are far from being considered a sufficiently precise act of entrustment. And, while public service broadcasters may enhance technological developments as a means to serve their mission and diversify for that purpose their activities in the digital era, the re-positioning of public service broadcasting would seem to contribute to the fulfillment of that mission.

94 Commission Broadcasting Communication 2001, para. 1
95 For a description of the historical and legal background of such policies, see, for instance, Decision C 62/99 on Ad-hoc payments to RAI, paras. 21 and fol. and Decision E 8/2005 on Financing of RTVE, paras. 13 and fol.
96 See, for instance, Decision C 85/2001 on Ad-hoc payments to RTP, paras. 174 and fol., Decision C 62/99 on Ad-hoc payments to RAI, paras. 103 and fol. and Decision E 8/2005 on Financing of RTVE, paras. 60 and fol.
through a clear assignment of the public service tasks. In view of the above, a separate entrustment for the provision of new media services may increase transparency in the sector and enable private undertakings operating in the wider context of the media market to design their business plan.

Similar considerations were made by the Commission for the definition criterion in relation to new media services sought to be provided by public broadcasters. Alongside the concerns about the lack of a separate act of entrustment, the Commission expressed distress about the absence of a further specification of the nature and scope of new services and the way in which their provision would substantiate the wording of the Amsterdam Protocol thereby justifying public expenditure. On this point, the Commission called upon the Member States whose general financing regimes scrutinized to establish an evaluation procedure prior to the launching of new media services (also referred to as *ex ante assessment* or *Amsterdam test* after the Amsterdam Protocol on public service broadcasting) essentially preceding the aforementioned separate act of entrustment. The obligation to establish this prior evaluation procedure touches upon both definitional and entrustment issues and presents certain other particularities (for instance, the competence and effectiveness disputes that it triggers) and, for these reasons, will be examined separately.

### 3.3. Separate definition and entrustment for new media services through the Amsterdam test: Stretching competence to address market and consumer needs

The imposition of the establishment of a prior evaluation procedure upon the Member States has been severely criticized for several reasons but, first and foremost, on the grounds that the Commission lacked competence to go so far as to dictate how the Member States will define and organize the public service remit in the current media landscape.

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99 Supra. 123
This prior evaluation procedure for the launch of new media services was inspired by the BBC’s Public Value Test (PVT), which was introduced in 2007, alongside other changes in light of the BBC Charter review, as a means to better position the BBC’s role in the digital age. The BBC PVT consists of two parts, a Public Value Assessment (PVA) which is conducted by the BBC Trust and a Market Impact Assessment conducted by Ofcom. The Trust takes into consideration the results of both procedures and decides to launch the service insofar as the impact of the market is sufficiently justified by the public value the new service is likely to create. The reports of both the PVA and the MIA are published for the sake of transparency whereas the test also involves a consultation with interested stakeholders including license fee payers.

The first case in which commitments to introduce a prior evaluation procedure were made by national authorities for the scheme to be in line with the State aid rules is the one dealing with the general financing regime of the German public broadcasters, discussed above in a different context. Since then, a practice has been developed on the basis of which all Member States whose general funding mechanisms were scrutinized, in particular Ireland, Belgium, the Netherlands and Austria, were requested to envisage similar procedures. This practice has been codified in the revised version of the Broadcasting Communication which lays down the Member States’ obligation to introduce an ex ante assessment of new services and provides guidelines on several aspects the procedure in question must entail.

100 For more information on the BBC Charter review see: Department for Culture, Media and Sport, A Public Service for all: the BBC in the digital age, 2006, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.bbccharterreview.org.uk/have_your_say/white_paper/bbc_whitepaper_march06.pdf accessed on 16/02/2011
101 The BBC Trust is the governing body of the BBC consisting of 12 Trustees and assisted by a team of independent experts, the Trust Unit. For more information on the BBC Trust see: http://www.bbc.co.uk/bbctrust/about/who_we_are/index.shtml
102 BBC Trust 2007, Public Value Test (PVT): Guidance on the conduct of the PVT, 4
103 Ibid, 18. Several criteria are taken into account in the context of the PVA, for instance whether the new service stimulates creativity and cultural excellence and whether it sustains citizenship and civil society. For more information on the factors that are considered in the framework of the PVA, see supra. 81, 13
104 Ibid., 17
105 Ibid., 12
106 Decision E 4/2005 on State financing of public broadcasters RTE and TNAG, Decision E 8/2006 on State funding for Flemish public broadcaster VRT, and Decision E 2/2008 on State funding for Austrian public broadcaster ORF. See also Tosics, Van de Ven and Riedl 2008, 81-84
107 Commission Broadcasting Communication 2009, paras. 84-91
Prior to discussing in detail the issues that arise from the imposition of the ex ante assessment of new services, it is essential to give a short description of the procedure in question as embedded in the Broadcasting Communication. The Commission entrusts the Member States with setting up a mechanism whereby both the public value of the new service and its impact on the market must be appraised. The Commission does not provide detailed guidance on the public value assessment on the grounds that each Member State is in a better position to decide whether a new service substantiates the wording of the Amsterdam Protocol taking into consideration the specificities of the national public broadcasting systems and the respective societal needs. As regards the impact on the market, the Commission, in an indicative manner, refers to several factors that can be included in the analysis such as the existence of similar or substitutable offers, editorial competition, the market structure, the position of the public service broadcaster in the said market, the level of competition and the potential impact on private initiatives. The Commission requires this impact on the market to be balanced with the public value of the services sought to be provided and “[i]n the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer”. Finally, the procedure must also involve interested stakeholders by means of an open consultation.

The Commission’s initiative to impose upon the Member States the establishment of a prior evaluation procedure as a means to legitimize the provision of new media services by public service broadcasters and with the objective to reduce distortions of competition in the current media environment has, as previously mentioned, provoked severe criticism. More particularly, the requirement to set up an ex ante assessment raises serious doubts as to whether the Commission stayed within the limits of its manifest error tasks or has exceeded them thereby interfering with the freedom of the Member States to define and

108 Ibid., para. 86
109 Ibid., para. 88
110 Ibid.
111 Ibid., para. 87
organize the public service remit. The reactions of interested stakeholders which accuse the Commission of going too far allegedly taking action in violation of the Protocol and the subsidiarity principle do not come as a surprise.\textsuperscript{112} Additionally, Article 107 and Article 106(2) TFEU, as interpreted by the Court and further explicated in the Broadcasting Communication, do not stipulate the criterion of a prior evaluation procedure for new media services,\textsuperscript{113} and it is far from clear whether a broad interpretation of the aforementioned provisions would lead to that conclusion. Therefore, doubts are raised as to whether the Commission can declare incompatible with the Treaty a support scheme which has not set up an ex ante assessment.

Apart from the competence issues, which are not to be neglected, the establishment of the Amsterdam test raises questions also as to its utility. More particularly, it has been argued that the prior evaluation of new services on a case-by-case basis may limit the potential of a vibrant public broadcasting sector on the grounds that “[a] judgment of singular services can far too easily introduce a market failure logic into the public broadcasting project and eventually lead to the marginalization of public broadcasting organizations”.\textsuperscript{114} Yet, as previously discussed, a market failure approach undermines the objectives pursued by public service broadcasting in that it eventually reduces programming diversity and leads to the provision of services catering for cultural elites and minorities. It has also been argued that a case-by-case assessment of new services which is based on market impact criteria interferes with the editorial independence of public broadcasters as taking into account existing commercial offers is likely to dictate the programming on offer.\textsuperscript{115} Additionally, doubts are raised about whether a centralized ex ante assessment is appropriate considering the significant differences that characterize the national media landscapes.\textsuperscript{116} It has respectively been considered that public service broadcasting is inherently linked to national traditions, and in that regard, diverse cultural, democratic and social needs, as well as divergent regulatory frameworks. Therefore, a uniform requirement to introduce

\textsuperscript{112} European Federation of Journalists 2008, 7 and European Region of UNI-MEI Global Union 2008, 5
\textsuperscript{113} Ibid.
\textsuperscript{114} Donders 2010, 206
\textsuperscript{115} See, for instance, Czech Republic 2008, 8 and Communauté française de Belgique 2008, 11
\textsuperscript{116} See, for instance, European Broadcasting Union 2008, 10
a prior evaluation procedure for the definition of new services does not take into consideration the variety of regulatory models for public service broadcasting across Europe and commands legislative changes where such changes may not be necessary. On the same line, distress has also been expressed about whether such procedure, inspired by the BBC’s public value test, therefore a test envisaged for a specific organization, fulfilling the needs of a specific society and pertaining in a specific media environment, can successfully be introduced in other Member States, in particular smaller Member States which may lack the resources for the needed infrastructure.

There are solid grounds for the above concerns. Nonetheless, the introduction of the Amsterdam test must be placed in the wider economic and legal context in which it was decided and be perceived as something more than a necessary evil. Without trying to advocate for an omnipotent Commission and while prima facie the establishment of a prior evaluation procedure goes beyond the Treaty letter, the following questions need to be raised: Should one directly conclude that the Commission stretched its competence without founding its choice on any legal basis which could even remotely justify the need for an ex ante assessment? Or did the Commission find the applicable framework inefficient and promoted a change which, in its view, would better position public service broadcasters in the current media environment taking also into account how the interests of the private sector and the consumers would be more adequately served? In order to answer that question, one should momentarily neglect the competence issues that arise and consider the following: the prior evaluation procedure may increase transparency in the market as each new service is to be assessed individually. Therefore, the provision of new services is not buried under broad remit definitions and, in that respect, the ex ante assessment can establish legal certainty for media market players, not just broadcasters, with the latter not being limited to lodging complaints and waiting for lengthy investigation procedures to give the answer but having a say on the proposed services during the consultation process. The above reasons may convincingly justify the establishment of the ex ante assessment of new media.

117 See, for instance, Danish Broadcasting Corporation 2008, 21
118 See, for instance, Association of Commercial Television in Europe 2008, 6 and Czech Republic 2008, 9
Besides reflecting on the added value the prior evaluation procedure is likely to create in the media markets, one should also consider the effects on the Commission decision-making practice had such procedure not been envisaged. In light of the continuous development of new media activities by public service broadcasters, the lack of an ex ante assessment and the case-by-case approach followed by the Commission in such cases would substantially increase its workload and therefore the quality of the decisions adopted in the field. It is to be noted that, until last September, 40 relevant tests were ongoing in Germany.119 It is also worth mentioning that the German authorities agreed to the introduction of the ex ante test in 2007120 and since then no investigation procedures have been opened by the Commission dealing with State measures favoring public broadcasting activities in Germany.121 It may therefore be argued that the establishment of an ex ante assessment for new media services may reduce significantly the Commission’s workload and contribute to a more efficient decision-making practice in the sector.

Taking the above into consideration, and while the imposition of the obligation to introduce a prior evaluation procedure goes beyond the powers vested in the Commission by the Treaty, the ex ante assessment itself is an assignment of competences by the Commission to the Member States. As previously mentioned, if the Amsterdam test had not been envisaged, the Commission would be in charge of deciding on the compatibility of the measure supporting the provision of the new service with the common market. The procedure, in particular the equilibrium which needs to be achieved between the public value the service is likely to create and the market impact, resembles greatly to the balancing exercise the Commission conducts in scrutinizing public broadcasting schemes. In its State Aid Action Plan, the Commission lays down a shared responsibility between the Commission and the Member States for the application of the State aid rules on the basis that “the Commission cannot improve State aid rules and practice without the effective

119 Donders and Pauwels 2010, 6
120 Decision E 3/2005 on Financing of public service broadcasters in Germany, para. 328
121 This is concluded by the table of cases handled by the Commission thus far which includes, in addition to final decisions adopted in the field, decisions to open formal investigation procedures. The table in question is available at: http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf
support of Member States and their full commitment to comply with their obligations to notify any envisaged aid and to enforce the rules properly." In that respect, the responsibility of the Member States lies primarily in the provision of complete notifications and the effective enforcement of State aid law at national level. The introduction of the ex ante test seems to go a step further through the decentralization of the application of Article 106(2) TFEU in the fast-evolving media market. On that point, not only is it likely to reduce the Commission’s workload, but it also leaves upon the Member States the freedom to conduct the relevant balancing exercise -and one should not neglect here the criticism exercised over the Commission, a supranational competition agency, balancing national public interests with competition- and decide on whether the proposed service substantiates the wording of the Amsterdam Protocol.

This approach, which entrusts the Member States with both the definition of a “new service” as well as whether the market impact is justified by the public value the service is expected to create, accords with the Protocol and respects the specificities of the national media environments. The ways in which the evaluation procedure is implemented by the various Member States, be it the Drei-Stufen-Test in Germany, the Public Value-Market Impact test in Ireland or the

122 Commission State Aid Action Plan 2005, para. 15
123 See, for instance, Harrison and Woods 2007, 295
124 Commission Broadcasting Communication 2009, paras. 85-86
125 See, for instance Repa and Tosics 2009, 97-99. The Drei-Stufen requires public service broadcasters to evaluate whether the service sought to be provided 1. Is covered by the public service remit and therefore substantiates the wording of the Amsterdam Protocol, 2. Contributes to editorial competition taking into account the scope and quality of already existing freely available offers, the importance of the envisaged offer for opinion shaping and finally assess 3. the expected impact of the offer on the market. For a short description of the Drei-Stufen Test see Decision E 3/2005, para. 328. For an evaluation of the implementation of the Drei-Stufen thus far see, for instance, Donders and Pauwels 2010
126 See, for instance, Kroes 2008, 4. In Ireland the prior evaluation procedure consists of the following: the public service broadcaster informs the Minister of the service sought to be provided. Subsequently, the Minister, the competent independent regulator (BAI) and the public service broadcaster agree to a description of the service which is followed by a public value assessment to be conducted by the Minister who is required to consult with the BAI, the public service broadcaster and such other persons as he deems appropriate and a sectoral impact assessment to be conducted by the BAI which is required to consult with the Minister, the public service broadcasters and other persons as it deems appropriate. Upon completion of the sectoral impact assessment, the BAI reports to the Minister and makes relevant recommendations if necessary. Prior to granting his consent, the Minister takes into consideration the outcomes of both assessments and is entitled to attach conditions to the final decision as he sees fit. For a more detailed description of the prior evaluation procedure envisaged by the Irish authorities see also Decision E 4/2005, paras. 143 and fol.
Angebotskonzept in Austria,\textsuperscript{127} is a facet of media diversity across the Union. Leaving therefore the above to the Member States’ discretion, the Commission rather focuses on outlining certain aspects of the procedure, for instance the two parts of the assessment (public value and market impact) to be further substantiated by the Member States, the launch of an open public consultation which increases transparency and involves interested stakeholders,\textsuperscript{128} and the need for an independent body to carry out the assessment.\textsuperscript{129}

Nor should the Commission’s choice to import the BBC’s public value test to the European legal order and impose a similar test upon the other Member States be condemned simply on the grounds that smaller Member States will not be in a position to successfully implement an ex ante assessment because they lack the necessary resources. A good example is the system envisaged by the Austrian authorities which involves in the procedure already existing infrastructure, in particular the national competition authority and the national media regulator.\textsuperscript{130}

The imposition of an ex ante assessment has been codified in the revised version of the Broadcasting Communication, and has therefore passed to form part of the soft law the Commission has adopted in the field. Considering the mechanisms the Commission has set up to make its soft law binding upon the Member States, namely enforcing indirectly its soft law via individual decisions or forcing the Member States to accept the provisions laid down therein by threatening to open formal investigations procedures in all relevant existing schemes,\textsuperscript{131} and given that several Member States have already adapted their systems to this new requirement, it is expected that the imposition of a prior evaluation procedure will

\textsuperscript{127}See, for instance, Bron 2010, 15-16. In Austria the ex ante assessment initiates with the elaboration of a concept (Angebotskonzept) by the public service broadcaster, ORF, which entails inter alia a concise description of the offer, a justification why the service sought to be provided falls under the public service remit and how the public service broadcaster is expected to finance the new activity. This concept must be published by ORF online inviting third parties to submit their comments within a given period of time. ORF is required to submit both the concept and the outcome of the consultation to the regulatory authority which is entrusted with forwarding the above information to the competition authority and a council of experts. The latter decides on whether the offer falls under ORF’s remit. The balancing exercise as laid down in the Broadcasting Communication is conducted by the regulatory body after consulting with the Austrian competition authority. For more information on the established procedure see Decision E 2/2008, paras. 201 and fol.

\textsuperscript{128}Commission Broadcasting Communication 2009, para. 87

\textsuperscript{129}Ibid., para. 89

\textsuperscript{130}Decision E 2/2008 on State funding for Austrian public service broadcaster ORF, paras. 201 and fol.

\textsuperscript{131}Ibid., 17

[40]
prevail. That leads to the conclusion that in the digital era the Commission has undoubtedly found its way to affect national public broadcasting policies. Now the discussions whether the Amsterdam test ultimatum goes beyond the Commission’s competence may be missing the point.

Technological developments and the Member States’ affirmation that “the ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age”¹³² have enabled the shift from public service broadcasting to public service media. This means that the environment in which these undertakings operate has inevitably expanded encompassing a number of markets operating side by side. Alongside technological evolution, the development of new business models has blurred the boundaries between public and commercial services raising concerns about the nature of activities over which public money is spent. And, insofar as such concerns arise, the Commission has a say within the limits of its manifest error tasks. However, given how complex and fast evolving the media and telecommunications sector is, the Commission’s ex post manifest error control does not seem sufficient to protect the interests of both commercial operators and the taxpayers.

In view of the above, to the extent that the ex ante assessment can contribute to bridging conflicting policy concerns, in particular public service broadcasting and competition, and interests of a number of groups, namely private operators and the consumers/taxpayers, it seems that the competence disputes get hold of the wrong end of the stick. The substantive questions that will arise in the near future should focus on the timely and effective implementation of the Amsterdam test by the Member States which have made relevant commitments and whether the Commission is willing to go so far as to initiate infringement proceedings where these commitments are not respected knowing that the issue of competence will most likely be raised in Court.

3.4. Supervision: Steps toward a more independent public broadcaster?

The degree of effective supervision of public service broadcasters is inherently linked to the existence of an independent monitoring body checking delivery of the public service remit. The Commission has respectively laid down in both the initial and the revised versions of the Broadcasting Communication that for the criterion of supervision to be fulfilled, the relevant control of compliance with the public service obligations needs to be exercised by a body effectively independent from the management of the public service broadcaster, the latter having the powers and resources to carry out supervision uninterruptedly.133

In the past, the Commission appears to have followed a more relaxed approach in relation to the monitoring mechanisms the Member States have envisaged to ensure respect for the public service obligations. For instance, in *ad hoc payments to RTP*, compliance with the public service performance was based on annual reports elaborated by the internal board of auditors134 and an external audit which had to be carried out every year.135 In addition to the conflict of interest which arises insofar as the elaboration of the relevant reports by an internal body is concerned, the case was also problematic in that the external audit did not accompany them on a regular basis.136 Yet, and in spite of the fact that the complainants expressed distress about the lack of an efficient mechanism ensuring independent control,137 the Commission considered that the supervision criterion was fulfilled.138 Concerns about the absence of an effective national body checking compliance with the public service obligations were also expressed by the complainants in *ad hoc payments to RAI*.139 Nonetheless, the Commission did not consider necessary the establishment of a body entrusted with such a mission.

133 Commission Broadcasting Communication 2001, para. 42 and Commission Broadcasting Communication 2009, para. 54
134 Decision C 85/2001 on Ad-hoc payments to RTP, para. 178
135 Ibid., para. 180
136 Ibid., para. 181
137 Ibid., para. 84
138 Ibid., para. 181
139 Decision C 62/99 on Ad-hoc payments to RAI, para. 51
Lately, however, the tide seems to have turned. In recent cases, the Commission called upon the Member States whose general financing regimes scrutinized to establish external and independent control systems. As opposed to the Italian and Portuguese cases discussed above, in *State aid financing of Irish public broadcasters RTÉ and TNAG* the Commission made explicit reference to the provisions of the Broadcasting Communication that lay down the need for an independent body charged with the task of exercising such control. In assessing compatibility with these provisions, the Commission found that the Irish system, which envisaged that the control would be conducted by an internal body, the RTÉ Authority, was not in line with the Broadcasting Communication. The Commission stated respectively that “[t]he RTÉ Authority's reporting obligations and the preceding responsibility of ensuring that RTÉ complies with its legal obligations would not, in the Commission's view, be sufficient to ensure effective supervision, since the RTÉ Authority is not a control body independent from the RTÉ but rather an integral part of it” [emphasis added].\(^\text{140}\) The Irish authorities, following Commission recommendation, committed to the establishment of a new independent content regulator, the Broadcasting Authority of Ireland, entrusted *inter alia* with safeguarding compliance with the public service obligations.\(^\text{141}\) The same approach was followed in the decision dealing with *State financing of the Austrian public broadcaster ORF* in which the Austrian authorities, again upon Commission recommendation,\(^\text{142}\) committed to establish an authority external to and independent from the Austrian public broadcaster ORF.\(^\text{143}\)

Notwithstanding the above, the Commission recent practice reveals some inconsistencies. In the German case discussed previously, the Commission took a rather different approach when it came to assessing the effectiveness of the monitoring mechanism envisaged by the German State. In Germany, compliance with the public service obligations is monitored by internal control bodies, the so-called Broadcasting Councils. These bodies consist of representatives of the various groups of the German society and are entrusted *inter alia* with approving the budget

\(^{140}\) Decision E 4/2005 on State aid financing of RTE and TNAG (TG4), para. 97
\(^{141}\) Ibid., para. 151
\(^{142}\) Decision E 2/2008 on State funding for Austrian public broadcaster ORF, para. 177
\(^{143}\) Ibid., para. 209
and electing the Director of the public broadcasting organizations.\textsuperscript{144} Private competitors may lodge complaints when, in their view, public service obligations are not respected, however, these complaints are examined first by the Broadcasting Councils and later on by the \textit{Länder} in the context of an external control mechanism. Now taking into consideration that those in charge of exercising the external control are often members of the Broadcasting Councils,\textsuperscript{145} the question arises why the Commission has found this system to fulfill the effective control criterion. It is reminded that ten months after the German case was decided, the Commission found that the Irish system in which the RTÉ Authority -an internal body- exercised the relevant supervision, was not in line with the State aid rules.

Nonetheless, it is noted that the German case was the first in which the Commission was called upon to assess the compatibility of a general financing regime with the Treaty in light of the expansion of public broadcasters to new media markets. In cases with a similar factual background that followed, the Commission made explicit recommendations to the Member States to establish independent authorities therefore the inconsistency originating from what was decided for Germany may be seen as an isolated incident. It seems that in the future the Commission will follow the approach it took in the Irish and Austrian cases. Yet, considering the size of the German market as well as the fact that the content provided by German broadcasters is accessible to an even wider audience for linguistic reasons, the Commission’s choice to legitimize this type of supervision is regretted.

The Commission’s contribution to the establishment of independent bodies monitoring respect for the public service undertakings is applauded. It appears that the Commission’s direction was tuned as a result of the expansion of public broadcasters to new markets: monitoring public service activities becomes more complex in the current media environment given the various types of technologies and platforms through which the provision of public service is now possible. This approach takes due account of commercial operators’ interests in that an affective monitoring mechanism overseeing compliance with public service obligations

\textsuperscript{144} Decision E 3/2005 on Financing of public broadcasters in Germany, para. 24
\textsuperscript{145} Ibid., paras. 124 and 256-258
inhibits the use of public money for commercial activities which would enable public broadcasters to crowd out private undertakings. It is not overlooked that calling upon the Member States to entrust an external body independent from the public broadcaster with checking delivery of the remit needs the relevant infrastructure thus public expenditure, but at least it does not undermine the public service mission they are required to deliver.

3.5. Proportionality: Steps toward a more rationalized financial management of public service broadcasters?

In its assessment of whether the proportionality criterion is met the Commission needs to verify that the derogation provided for by Article 106(2) TFEU does not affect competition in the common market in a disproportionate manner. Therefore, “[t]he test is of a negative nature: it examines whether the measure adopted is not disproportionate”.146 The principle which guides the Commission in its proportionality control is that the amount of public compensation should not exceed the net costs incurred in the discharge of public service obligations.147 However, the proportionality check has not always been a clear-cut mathematical exercise for the Commission for two fundamental reasons. The first concerns the lack of transparency in the accounts of public broadcasters and the second is inherently related to the complexities of the national public broadcasting systems and, in particular, the mechanisms the Member States have set up to finance public broadcasting activities.

It follows logically that the conclusion whether the payments made by the State supersede the net costs of the public service mission may be reached insofar as there is a clear demarcation between public and commercial services offered by the public service broadcasters. Only then can it be determined whether public financing is actually limited to the costs of the public service obligations the broadcaster is expected to discharge. For that reason, the need for separate accounts between public and non-public activities has long been identified by the

146 Commission Broadcasting Communication 2001, para. 47
147 Commission Broadcasting Communication 2009, para. 71
Commission as the primary means to ensure transparency when using public funds. \(^{148}\) This obligation is laid down in the Transparency Directive applicable to undertakings entrusted with the provision of services of general economic interest. \(^{149}\)

It is noted that significant progress has been made regarding the proportionality check in measures favoring public broadcasters and, in particular, the inherently related to it transparency requirement. The initial version of the Transparency Directive which was subsequently amended several times excluded from its scope of application the telecommunications sector \(^{150}\) with public broadcasting falling under the scope of the Directive from 2000 onwards. \(^{151}\) This lack of transparency raised serious doubts as to the quality of the proportionality control conducted by the Commission. Yet, the quality of the Commission decision-making in that regard is linked to a great extent to the unwillingness of the Member States to take relevant action. A good example is Germany which, until 2007, had not transposed into national law the provisions of the Transparency Directive that lay down the obligation for public broadcasters to maintain separate accounts. \(^{152}\)

Unsatisfactory implementation/transposition into national law of the Transparency Directive was evidenced under the investigation of the schemes supporting the Irish and Austrian broadcasters. \(^{153}\) Upon Commission recommendation, the aforementioned Member States undertook commitments to ensure an effective implementation of the relevant provisions thereby increasing transparency in their national public broadcasting systems. \(^{154}\)

Guaranteeing respect for the Transparency Directive requirements, in particular separation of accounts between commercial and public service activities, is of utmost importance first because it is an effective

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149 Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within special undertakings, Recital 16
150 Commission Directive 80/723/EEC, Article 4(b)
152 Decision E 3/2005 on financing of public broadcasters in Germany, para. 314
153 Decision E 4/2005 on State financing of public broadcasters RTE and TNAG, para. 107, and Decision E 2/2008 on State funding for Austrian public broadcaster ORF, para. 85,
instrument to examine whether cross-subsidization has taken place, second because it ensures accountability when public money is spent and third, because the proliferation of services provided by public broadcasters in light of their expansion to new media markets makes more complex any relevant control.

The labyrinthine mechanisms which the Member States have set up to finance public broadcasting activities make the proportionality control even more challenging. Reference is made to, for instance, the Dutch public broadcasting system which involves several organizations entrusted with the provision of public broadcasting services, for instance ten autonomous private associations with members, twelve associations without members, an umbrella association (the NOS), and a separate foundation, STER, which is in charge of the sale and broadcasting of advertising.\textsuperscript{155} The Dutch system establishes several funding sources to fund public broadcasting services, such as annual payments which include the State Broadcasting Contribution (collected from tax payers), advertising revenues from STER and interest revenues from the General Broadcasting Fund, ad-hoc payments, and payments from Funds to stimulate cultural productions (Stifo) or co-finance increased program right prices (matching funds payments) (\textsuperscript{!}).\textsuperscript{156} Taking into consideration these complexities, it is no wonder that the proportionality control has been far from undisputed.

In the past, in spite (or because) of the difficulties identified above, the Commission has shown considerable latitude as to whether the amount of compensation has exceeded the net costs incurred in the discharge of public service obligations. Yet, in more recent cases, the Commission has been more reluctant to conclude that the proportionality criterion is met. It seems that the experience it acquired in reviewing the compatibility of public broadcasting systems with the common market has enabled the Commission to identify lacunae which may lead to over-compensation or cross-subsidization of commercial activities. The need for a more clear framework to avoid such practices became more apparent recently given the development of activities other than traditional broadcasting. For the above

\textsuperscript{155} Decision E 5/2005 on Yearly financing of Dutch public broadcasters, para. 12
\textsuperscript{156} Decision C 2/2004 on ad-hoc financing measures of Dutch public service broadcasters, paras. 35 and fol.
reasons, in scrutinizing the financing regime of public broadcasters in Germany, the Commission did not limit itself to recommending the separation of accounts between public and commercial services but went even further. The Commission called upon the German authorities to establish the necessary safeguards in order to avoid overcompensation and cross-subsidization of commercial activities and introduce a legal framework which guarantees respect for market principles for purely commercial activities, in particular, market conform behavior vis-à-vis third parties and an arm’s length relationship between public service broadcasters and their commercial subsidiaries.\(^\text{157}\) The negotiations between the Commission and the German authorities led to commitments undertaken by the latter which were found to be in line with the proportionality requirement.\(^\text{158}\) For example, Germany agreed to introduce an \textit{ex post} control mechanism to ensure that no overcompensation has taken place and envisaged a system, as previously mentioned, whereby commercial activities are to be carried out by commercial subsidiaries of the public broadcasters.\(^\text{159}\) In that regard, while subsidiaries would be entrusted with the operation of commercial arrangements, such as advertisement, sponsoring, and merchandising,\(^\text{160}\) the broadcasting corporations would be entrusted with the provision of the public service. Such commitments minimize the risk of distortions of competition that may occur in, for instance, the advertising markets, and increase transparency in the activities developed by broadcasters assigned with a public service mission as they enable a distinction between services that are provided in compliance with public service obligations and activities which the broadcaster develops when acting as a media entrepreneur with the objective of maximizing profits.

The Commission made similar recommendations to the Austrian and Irish authorities which committed to introduce the necessary changes, similar to the ones envisaged by Germany. For instance, the Irish authorities committed \textit{inter alia} to introduce an \textit{ex post} monitoring mechanism whereby the independent regulator, the BAI, previously referred to, would be entrusted with controlling on an annual and a five-year basis the fulfillment of the public service obligations and, where

\(^{157}\) Decision E 3/2005 on financing of public broadcasters in Germany, paras. 314-320  
\(^{158}\) Ibid., see, in particular, paras. 375-393  
\(^{159}\) Dias and Antoniadis 2007, 68  
\(^{160}\) Decision E 3/2005 on financing of public broadcasters in Germany, para. 366
overcompensation has taken place, adjusting the level of public funding.\textsuperscript{161} The Austrian authorities committed \textit{inter alia} to envisage a system whereby monitoring would be exercised by an independent regulator to guarantee that, for instance, the public broadcaster does not sell advertising below the market value or purchase premium sports rights above the market price.\textsuperscript{162} It is also noteworthy that the Member States have authorized independent bodies to exercise the financial control.\textsuperscript{163}

The practice which the Commission developed in relation to the proportionality criterion after dealing with complex national systems has been codified in the revised version of the Broadcasting Communication.\textsuperscript{164} In the latter, the Commission outlines certain aspects that the monitoring mechanisms checking overcompensation and cross-subsidization should entail but does not go so far as to dictate how the Member States should devise such mechanisms. The Commission explicitly states that “[i]t is within the competence of the Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfillment of the public service remit”\textsuperscript{165}. On that point, the Commission does not command how financial controls must be exercised in the domestic sphere, respects the heterogeneity of the regulatory frameworks in which public broadcasters operate and acknowledges that any attempts to impose more detailed requirements would be likely to raise issues of consistency in the national systems, in particular in relation to how compliance with the delivery of the remit is ensured by national law.

The Commission’s request for a more elaborate framework governing the financial management of public broadcasting organizations is upheld. A well-functioning mechanism which prevents overcompensation and guarantees transparency and market conform behavior minimizes distortions of competition.

\textsuperscript{161} Decision E 4/2005 on State financing of public broadcasters RTE and TNAG, para. 183
\textsuperscript{162} Decision E 2/2008 on State funding for Austrian public broadcaster ORF, paras. 222 and 225
\textsuperscript{163} Decision E 3/2005 on financing of public broadcasters in Germany, see, for instance, para. 377 et al. Decision E 4/2005 on State financing of public broadcasters RTE and TNAG, para. 157 and Decision E 2/2008 on State funding for Austrian public broadcaster ORF, para. 224
\textsuperscript{164} See, in particular, Commission Broadcasting Communication 2009, sections 6.5, 6.6, 6.8
\textsuperscript{165} Ibid., para. 77

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Yet, the Commission’s oversight, though reflecting a competition’s authority perspective, must be considered in a wider context. Apart from the fact that the envisaged changes enable the Commission to conduct a more effective proportionality control and satisfy to a certain degree the justified demand of private operators for more clarity or at least less obscurity regarding the amount of State monies dispersed to support the activities of a competing undertaking, the relevant recommendations have contributed greatly to the reform of the sector. In that respect, the Commission’s role was not limited to that of a good accountant. The stance on a more transparent financial management of public service broadcasters benefited the private sector, taxpayers and ad ultimo citizens.

4. Conclusions

The analysis which preceded provided an insight into the practice the Commission has developed in the public broadcasting arena. Due to the complexities of the sector, for instance its organization as a State monopoly for several decades and, more recently, the development of new media activities by public broadcasting organizations, the application of the State aid rules in the field has been far from a clear-cut exercise for the Commission. In that regard, the task with which the latter is entrusted by the Treaty, namely the duty to conduct a balancing exercise between the conflicting values of undistorted competition and public service broadcasting, has not been an easy one. Some conclusions on whether the desired balance has been achieved can be drawn from the analysis.

First, the examination of numerous Commission decisions provides sufficient proof that the control exercised on whether the clear and precise definition criterion is met has been the most controversial one. Achieving a balance in definitional issues is undoubtedly a challenging exercise in that the Commission is required to respect the freedom of the Member States to define the public mandate as they deem appropriate while guaranteeing that not every service sought to be provided is swept away under the carpet of cultural justifications. In its effort to avoid spillovers of public money to commercial activities on cultural grounds and thus leave room for private initiatives, and due to the wide range of services that fell under relevant investigations, the Commission has followed differing approaches, several of which
contestable. In various cases, the Commission has deviated from its obligation to respect the definitional freedom of the Member States and went so far as to stipulate controversial criteria for the scheme to be exempted by establishing a dependence of the service upon specific technologies, platforms or business models. Yet, this direction was lately changed to embrace a more Protocol-friendly approach. In recent decisions, the Commission pinpointed grey areas potentially leading to abuses, in particular spillovers of public money to commercial activities developed in new media markets, and focused on the State authorities’ role in securing compliance with the public service obligations. This approach respects the freedom of the Member States to define the public mandate in accordance with diverse cultural traditions, media environments and societal needs. Additionally, it also takes due account of the interests of commercial operators to the extent that it imposes upon the Member States the obligation to introduce the necessary safeguards so as to ensure that the quality standards public broadcasters are expected to live up to are fulfilled.

As for the obligation of the Member States to introduce the Amsterdam test, the analysis which preceded provides sufficient evidence that the establishment of a prior evaluation procedure may contribute to bridging the conflicting values of competition and public service broadcasting for a plethora of reasons. In the fast evolving media environment which enables the proliferation of new media activities developed by public broadcasters, the ex post manifest error control the Commission exercises does not seem sufficient to guarantee that no freewheeling of public broadcasters to neighboring media markets takes place. The imposition upon the Member States of the obligation to conduct the balancing exercise between national public interests that need to be catered for and the impact the proposed service is expected to have on the market, leaves upon them the freedom to define the public remit in the contemporary media landscape and organize the public broadcasting system in accordance with the diverse societal needs that arise in the digital era. The ex ante assessment may also increase transparency in the sector as each case is assessed individually and the procedure requires the involvement of interested stakeholders. On that point, private operators may better plan their activities and have a say on the repositioning of public service broadcasters in the new media environment. Taking due account of the above, the discussions whether
the Amsterdam test ultimatum goes beyond the Commission’s competence get hold of the wrong end of the stick.

Moreover, the Commission’s stance that, for the criterion of effective supervision to be fulfilled, the relevant control of compliance with the public service obligations needs to be exercised by a body independent from the management of the public service broadcaster, the latter having the powers and resources to carry out supervision uninterruptedly, has contributed to achieving a desired balance between competition and public service broadcasting. In that respect, the imposition upon the Member States of the obligation to abolish internal control and establish autonomous bodies external to the public broadcasters is applauded in that such type of control ensures compliance with the public service contracts and, besides contributing to the realization of the public broadcasting project itself, also serves the private sector by guaranteeing that public money does not fuel commercial activities. For that reason, the Commission should continue in the direction it followed in the cases dealing with the Irish and Flemish public broadcasting systems and, in the future, change its position on the German Broadcasting Councils.

Finally, relevant decisions that have been examined for the purposes of this study show that the Commission’s proportionality control has tightened thereby benefiting both taxpayers and private operators. A well-functioning mechanism which ensures that State financing is limited to the minimum necessary for the discharge of the public service obligations and guarantees transparency and market conform behavior minimizes distortions of competition. It is doubted whether, in the absence of the Commission’s proportionality check, the Member States would have initiated reforms in the financial management of their public broadcasters through the introduction of, for instance, ex ante and ex post mechanisms to avoid overcompensation or cross-subsidization. On that point, the envisaged changes enable the Member States and the Commission to conduct a more effective proportionality control and satisfy to a certain degree the justified demand of private operators for more clarity regarding the amount of State monies dispersed to support the activities of a competing undertaking.
The imposition upon the Member States of the obligations to introduce the Amsterdam test for the launch of new media services, establish monitoring bodies external to and independent from the public broadcasters to ensure compliance with the public service obligations, and set up mechanisms to avoid cross-subsidization and overcompensation, are indicative of the impact that State aid control may have on the formulation of national public broadcasting policies. Nonetheless, for the above argument to be substantiated, the stance that the Commission has made considerable efforts so as to bridge undistorted competition and public service broadcasting, in particular in relation to recent decisions, it remains to be seen whether the Member States which have made relevant commitments will act accordingly and if not, whether the Commission is willing to initiate infringement proceedings in case such commitments are not respected.
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