Balancing Culture and Competition

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Balancing Culture and Competition: State Support for Film and Television in European Community Law

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I. INTRODUCTION

ALTHOUGH THE EUROPEAN Community Treaty does not contain a specific chapter or article dedicated to the audiovisual sector, European Community law has had a significant impact on the way in which Member States regulate their film and television industries. Given the commercial nature and international reach of many media goods and services this should not be surprising, but Community oversight has here been particularly controversial because of the importance ascribed to cultural and political considerations. This article examines how such considerations have been accommodated within the European Community legal system and the impact that Community law has had on domestic audiovisual policies in practice. It focuses on those measures introduced by states to support their domestic film and television industries and to ensure that domestic audiences have access to films and television programmes that are culturally relevant and meaningful.

Rather than leave the content of media services to be determined solely by market forces, Member States, or the competent regional bodies, have sought to influence directly what is broadcast on television or shown in the cinema.[1] Television, in particular, is regarded as having the potential to contribute to individual and social development by providing information about domestic and international events, helping to create a sense of

[1] In federal countries such as Germany, competence to regulate the media may be devolved to constituent states, on which see W Schulz, T Held, S Dreyer and T Wind, 'Regulation of Broadcasting and Internet Services in Germany, a Brief Overview', Hans Bredow Institute Working Paper No 13 (2008), available at <http://www.hans-bredow-institut.de/english/publications/ap/13-2Mediaregulation.pdf> accessed 18 August 2008.

shared identity and encouraging respect for cultural diversity. As a result, Member States impose a variety of obligations on broadcasters requiring, for example, coverage of regional and local as well as national news and the transmission of programmes that reflect the range of cultures or languages present within their territories.[2]

In the film sector, Member States have been primarily concerned to sustain domestic production in the face of strong American competition. American films account for over 60 per cent of box office takings in most European countries and in some countries, such as Germany, their share has at times exceeded 80 per cent.[3] These concerns have been voiced particularly forcefully by France, but also find reflection in, for example, the UK scheme to support the transmission of 'non-Hollywood' films through the creation of a digital screen network.[4] Nor is this objective solely an industrial one, in that film, like television, is seen as capable of both reflecting and commenting on the cultures that surround it. Indeed, film, unlike television, is widely considered to be an art form in its own right, with the result that countries such as France provide greater assistance to their film than their television industries.

State support for the audiovisual sector generally takes one of two forms. Firstly, states may require the audiovisual industry itself to support the production or distribution of certain types of film or television programme through, for example, the imposition of investment, production or transmission/exhibition quotas. Secondly, Member States may themselves provide financial assistance for the production of specific content, through, for example, direct subsidies, the award of preferential loans or tax concessions. Not all forms of assistance fall clearly into one or the other category and there has been considerable controversy over whether the television licence fee, levied on the owners of television receiving equipment in order to finance public service broadcasting, falls within the second category.[5] Classification in this way is not merely a matter of academic interest, in that the Community state aid regime generally applies to measures that fall within the second but not the first category.

[2] For examples, consider Art 11 of the German Interstate Agreement on Broadcasting, detailed in W Schulz, 'The Public Service Broadcasting Mandate Seen as the Process of its Justification', report commissioned by Friedrich-Ebert-Stiftung (English summary), March 2008, 11–12 available at <http://www.hans-bredow-institut.de/english/publications/FES080310Schulz_Public%20Value_en.pdf> accessed 18 August 2008 and s 264 of the UK Communications Act 2003. For a more general review of cultural requirements, see T Ader, 'Cultural and Regional Remits in Broadcasting' (2006) 8 *IRIS Plus* 2.

[3] V Henning and A Alpar, 'Public Aid Mechanisms in Feature Film Production: The EU MEDIA Plus Programme' (2005) 27 *Culture, Media and Society* 229, 231–2; and for an earlier discussion, NK Aas, 'Challenges in European Cinema and Film Policy' (2001) European Audiovisual Observatory online, publication at <http://www.obs.coe.int/online_publication/reports/aas.html> accessed 18 August 2008.

[4] State aid N 477/04, *United Kingdom—Digital Screen Network*.

[5] See discussion accompanying n 42 below.

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[11] Case C-353/89, above n 6

However, whether a measure falls within category one or two, it is likely to be suspect under Community law. This is because regulations designed to support domestic audiovisual production or the production of goods and services that reflect domestic culture will usually discriminate, either directly or indirectly, against non-domestic producers and may be a form of covert protectionism.[6] The Court of Justice has held that even measures that apply without distinction to domestic and non-domestic providers of services will fall within the scope of Community law where they are liable to prohibit, impede or render less advantageous the activities of the non-domestic provider.[7] More fundamentally, such measures run counter to the Community's inbuilt preference for reliance on the market to determine which goods and services are made available to the public. Articles 12, 28, 29, 49, and 87 of the European Community Treaty (hereinafter, EC Treaty), which prohibit discrimination on grounds of nationality, ensure that goods and services can gain access to markets across the European Union and promote fair competition, are thus particularly relevant in this context.[8]

Although Member States have not generally been successful in their attempts to exclude culturally motivated regulations from Community review, Article 151(4) EC requires the Community, when applying the provisions of the EC Treaty, 'to take cultural aspects into account ... in order to respect and to promote the diversity of its cultures'.[9] More specifically, Article 87(3)(d) EC establishes a derogation from the Community state aid rules for aid that promotes 'culture and heritage conservation', while Article 86(2) EC provides a more general exemption from the Treaty rules for services of general economic interest, a term which covers media services subject to certain public service obligations.[10] The Court of Justice has also recognised that the free movement of goods and services, protected under Articles 28, 29 and 49 EC respectively, may legitimately be curtailed on cultural grounds, provided the state measures in question are not directly discriminatory, are suitable for achieving their objective and are proportionate.[11] The question is thus not whether cultural and political concerns can be accommodated within the Community legal system, but how much weight is in fact attributed to them.

[6] Consider, eg: Case C-353/89, *Commission v Netherlands* [1991] ECR I-4069.

[7] See, eg: Case C-17/00 *De Coster* [2001] ECR I-9445, para 29; and Joined Cases C-544 & 545/03, *Mobistar and Belgacom Mobile* [2005] ECR I-7723, para 29.

[8] The Court of Justice held in Case 155/73, *Sacchi* [1974] ECR 409 that the sale of a physical film would be treated as the provision of a good and the transmission of television programmes a service under Community law. Subsequently, Case C-17/92, *FEDECINE v Spain* [1993] ECR I-2239 confirmed that cinema exhibition would be treated as the provision of a service.

[9] Member States have, for example, had some limited success in arguing that the operation of certain sporting rules fall outside the scope of the EC Treaty, on which see discussion in Case C-519/04 P, *Meca-Medina and Majcen* [2006] ECR I-6991.

[10] For a more detailed discussion of these provisions, see text accompanying n 63 below.

[11] Case C-353/89, above n 6.

Where Member States restrict the freedoms guaranteed in the EC Treaty or constrain competition on cultural grounds, the Community institutions tend to pursue one of two quite distinct approaches. In certain cases, emphasis is placed on the fact that the state is seeking to derogate from the EC Treaty, so that the relevant exception is applied strictly and its scope carefully limited. In others, because cultural considerations are at stake, states are afforded considerable discretion and their measures are only overturned where found to be manifestly inappropriate or protectionist.[12] Although it is possible to find examples of both approaches, support for the argument that the Community should exercise restraint when reviewing culturally motivated measures can be derived from a range of sources.

First, it is apparent from Article 151 of the EC Treaty that the European Community itself ascribes considerable importance to the preservation of cultural diversity. The Charter of Fundamental Rights of the European Union similarly provides that the European Union is to respect 'cultural, religious and linguistic diversity' (Article 22) and the 'freedom and pluralism of the media' (Article 11).[13] Both the EC Treaty and Charter also emphasise, in Articles 16 and 36 respectively, the importance that the Community ascribes to services of general economic interest. If adopted, the Lisbon Treaty will reinforce this by recognising in Protocol 26 that national, regional and local authorities are to have 'wide discretion in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users' and that such services may vary depending on geographical, social and cultural situations.[14] More specifically, Protocol 23 to the Amsterdam Treaty acknowledges the democratic, social and cultural importance of public service broadcasting.

Secondly, the Community and Member States are parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter, UNESCO Convention on Cultural Diversity), the principal objective of which is to 'protect and promote the diversity of cultural expressions' (Article 1(a)).[15] The Convention affirms 'the *sovereign rights of States* to maintain, adopt and implement policies and measures *that they deem appropriate*' in order to preserve cultural diversity (Article 1(h), emphasis added) and state sovereignty in the cultural field is one of the

[12] Consider the narrow and broad scope afforded to the concept of culture in the Commission's rulings on Arts 86(2) EC and 87(3)(d) EC, discussed at text accompanying n 59 below.

[13] Under Art 6 of the Treaty of Lisbon, [2007] OJ C306/01, the Charter is to become legally binding, subject to the Protocol relating to its application in the UK and Poland. At time of writing, the future of the Lisbon Treaty was in doubt given the results of the June 2008 Irish referendum.

[14] Protocol on Services of General Interest, Treaty of Lisbon, above n 13, Art 1. An amendment to Art 16 of the European Community Treaty does, however, afford the Community direct legislative competence in this area.

[15] The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> accessed 18 August 2008. The Convention binds the Community and Member States within their respective spheres of competence.

eight guiding principles that underpin the Convention (Article 2(2) and see also Article 5). In addition, Article 6 lists a number of measures that parties may take in order to enhance cultural diversity in their territory, including support for non-profit-making and public institutions, the provision of public finance and 'measures aimed at enhancing the diversity of the media including through public service broadcasting'. Although the Convention specifically states that it does not modify 'the rights and obligations of the Parties under any other treaties to which they are parties', a provision that clearly applies to the European Community Treaty, Parties are nevertheless required to 'foster mutual supportiveness' between the Convention and other treaties to which they are parties and to take the Convention into account 'when interpreting or applying them' (Article 20).[16]

Although the principles that guide the application of Community law in this field are by now well established, recent Court of Justice and European Commission decisions have helped to resolve a number of remaining questions. In particular, they address the legitimacy of state support for services in new or developing media markets, for example, television relayed over mobile phones or news services combining text and video available on the internet. The Commission is also actively reviewing whether the two communications that it published in 2001 on state funding for public service broadcasting and film respectively should be revised in the light of subsequent developments.[17] It is thus an opportune time to consider whether the balance that has been struck between domestic and Community competence in this field is an appropriate one or whether, as some commentators have suggested, the Community has 'seriously encroached upon the prerogatives of [the] Member States'.[18] This article focuses on aid for the production of audiovisual content, where questions of cultural policy are most pronounced, and does not consider aid for transmission networks or infrastructure.

II. THE LEGITIMACY IN COMMUNITY LAW OF REGULATORY MEASURES DESIGNED TO SUPPORT THE AUDIOVISUAL SECTOR

As noted above, Member States adopt a variety of measures to support their film and television sectors, not all of which involve state provision of facilities or finance. Such measures can take the form of production, investment

[16] UNESCO Convention on Cultural Diversity Art 20, above n 15.

[17] Commission, 'Communication on the Application of State Aid Rules to Public Service Broadcasting', [2001] OJ C320/05 and 'Communication on Certain Legal Aspects Relating To Cinematographic and Other Audiovisual Works', [2002] OJ C43/06. See also Commission, 'State Aid: Future Regime for Cinema Support' MEMO/08/329 and 'Explanatory Memorandum Regarding the Questionnaire on the Application of State Aid Rules to Public Service Broadcasting' at <http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_memorandum.pdf> accessed 18 August 2008.

[18] W Wiedemann, 'Public Service Broadcasting, State Aid, and the Internet: Emerging EU Law' (2004) 47 *DIFFUSION online* 1, 11.

or exhibition quotas, as well as 'must-carry' regulations that require the transmission of designated television or radio services over certain, primarily cable, networks. France, for example, requires 40 per cent of films and series broadcast on the main terrestrial television channels to be original French language productions and 40 per cent of songs played on French radio stations to be in French or a regional language spoken in France. In addition, French broadcasters are required to produce a certain percentage of programmes in French and invest a proportion of their annual revenue in the production of French language films, while French cable companies are required to include the services of the terrestrial public service broadcasters on their networks.[19]

Certain of these measures will be easier to justify under European Community law than others. On the one hand, measures that specifically privilege goods and services made by domestic companies or individuals are directly discriminatory and cannot be justified in Community law on cultural grounds. Thus, in *FEDECINE*, the Court of Justice held that Spanish rules that granted film distributors licences to dub foreign films only where they also undertook to distribute a certain number of domestic films were discriminatory and could not be justified on cultural grounds.[20] As a result, Member States have either abolished their domestic film and television content quotas or converted them into European or cultural quotas of the kind discussed below. Spain, for example, now requires cinemas to screen at least 25 per cent European films.[21]

On the other hand, measures designed to support goods or services that reflect the culture of the regulating state or that require production in that state will generally be indirectly, rather than directly, discriminatory. Although in theory both foreign and domestic companies can take advantage of such measures, in practice they tend to benefit domestic rather than foreign companies. Indirectly discriminatory measures can be justified

[19] For further details on these quotas, see Open Society Institute, EU Monitoring and Advocacy Programme and Network Media Programme, *Television Across Europe, Regulation, Policy and Independence*, Vol 2 (New York, Open Society Institute, 2005) 693. A requirement that TV broadcasters invest in audiovisual production will not be considered state aid where the film or programme produced constitutes 'reasonable compensation' for the investment, on which see Commission, Communication on Cinematographic Works, above n 17, 8. It is also possible that the aid will not be considered to have come from state resources, on which see the discussion of the *PreussenElektra* case at text accompanying n 44 below.

[20] Case C-17/92, *FEDECINE v Spain* [1993] ECR I-2239. Although there have been indications that the Community might reconsider its position and allow cultural justifications to be put forward in the context of directly as well as indirectly discriminatory measures, the Court of Justice has not to date modified its approach, an issue discussed by N Shuibhne, 'Labels, Locals and the Free Movement of Goods' in R Craufurd Smith (ed), *Culture and Community Law* (Oxford, Oxford University Press, 2004) 101–6.

[21] C Troya and E Enrich, 'Spain: Recent Developments Regarding Cinema Law' (2007) *IRIS* 10–11/18 available at <http://merlin.obs.coe.int/iris/2007/10/article18.en.html> accessed 18 August 2008.

in Community law on a range of general interest grounds including the promotion of cultural diversity and media pluralism, provided they are suitable for attaining their objective and are proportionate.[22] A requirement that domestic cinemas exhibit a limited number of films in the national language or that reflect the country's culture or history may thus be perfectly lawful. The European Community consequently draws a distinction between cultural expressions and their mode of creation. It does not accept that there is a necessary link between the cultural authenticity of a particular work and the nationality of its creator or creators.[23]

The recent *Pan-Europe Communications Belgium SA* case, referred to the Court of Justice by the Belgian *Conseil d'État*, provides a good illustration of how the principles discussed above operate in practice.[24] The case concerned Belgian legislation that required cable companies, operating in the Brussels area, to include on their networks the Belgian public service stations and certain designated commercial stations broadcasting to the French and Belgian Communities. The object of the legislation was to 'preserve the pluralist nature of the range of television programmes available in the bilingual region of the Brussels-Capital' and to 'safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region'.[25] The must-carry provisions in the Universal Service Directive were not applicable in this case because the Belgian legislation had been passed prior to the adoption of the directive.[26] The case thus turned on the impact of the free movement provisions in the EC Treaty. More particularly, it was argued by the Belgian cable companies that the legislation made it more difficult for non-domestic broadcasters to obtain space on their networks contrary to Article 49 EC.

It was not clear from the terms of reference whether or not the legislation was directly discriminatory, allowing only companies established in Belgium to take advantage of its provisions, but the Court concluded that, even if both domestic and non-domestic companies could apply for must-carry status, domestic companies would be more likely to fulfil the criteria used to determine such status, namely transmission of programmes covering events in Belgium or programmes concerned with Belgian culture. The legislation was consequently indirectly discriminatory and restricted the free movement of services within the terms of Article 49 EC. However, before referring the matter back to the domestic court, the Court of Justice

[22] See, eg: *Commission v Netherlands*, above n 6.

[23] On which see in particular *FEDECINE*, above n 20, paras 20–1.

[24] Case C-250/06, *United Pan-Europe Communications Belgium SA, Coditel Brabant SPRL, Société Intercommunale pour la Diffusion de la Télévision (Brutélé), Wolu TV ASBL v État belge*, judgment of 13 December 2007.

[25] *Ibid*, paras 42 & 43.

[26] Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, [2002] OJ L108/51, Art 31.

provided further guidance as to whether the must-carry provisions could be justified in light of their objectives.

At first sight it appears that Community law here affords Member States considerable latitude. Thus, the Court accepted the legitimacy of the cultural and social objectives pursued and the suitability of the measures taken without engaging in extensive analysis. Moreover, the Court stated that Member States enjoy a 'wide margin of discretion' when determining what measures are required, at least where they seek to promote media pluralism.[27] The Court went on, however, to set out a number of important requirements that significantly constrain how Member States can pursue such polices in practice. First, any procedures introduced to implement the policy must be clear and transparent. Secondly, operative criteria that determine how the policy is to be applied must be precise, objective and published in advance so that those who wish to take advantage of, or plan around, the policy can do so in good time. Thirdly, the policy must not be implemented in a directly discriminatory way and, where it leads to indirect discrimination, any steps taken must *be essential* for the cultural objective to be realised. This final requirement imposes a more exacting test of proportionality than that applied to the policy itself, so that the distinction between the policy and its mode of implementation assumes some importance.[28]

The Court of Justice's emphasis on the establishment of transparent procedures, precise criteria and advance publication is intended to prevent domestic cultural policies operating in an arbitrary or discriminatory fashion and to inject a degree of predictability into a field that is often characterised by subjective value judgments. Clear parallels can be drawn with the way in which the Commission now applies the Treaty provisions on state aid and services of general economic interest in the audiovisual context, discussed further below. The Court's criteria also mirror the requirements set out in the Universal Service Directive for the imposition of must-carry obligations. Article 31 of the directive provides that such obligations are to be imposed 'only where necessary to meet clearly defined general interest objectives', and must be proportionate and transparent. Cable companies argue that domestic regulations frequently fail to conform to these legislative requirements so that the Court may also have intended to remind states that these requirements flow not just from the directive, but also from the European Community Treaty itself and apply whenever they seek to derogate from the Treaty's fundamental freedoms on general interest grounds.[29]

[27] Case C-250/06, above n 24, para 44.

[28] The difficulty of establishing that there is no alternative, less restrictive, way of implementing a particular cultural policy is illustrated by Case C-368/95, *Familiapress* [1997] ECR I-3689.

[29] See the response of Cable Europe to the Commission Consultation on the Review of the EU Regulatory Framework, October 2006, available at <http://www.cableeurope.eu/uploads/documents/pub-33_en-ecca_4793_-_cablee_position_on_the_review_nrf_-_final.pdf> accessed 18 August 2008.

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[31] IMCA, Identification and
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III. THE LEGITIMACY IN COMMUNITY LAW OF STATE AID FOR THE AUDIOVISUAL SECTOR

Europe's film and television industries are heavily subsidised by the Member States, including regional and local bodies, as well as by the European Community and Council of Europe.[30] The public sector is the main source of funding for the film industry, and it has been estimated that, on average, around 40 per cent of a European film's finances derive from public sources.[31] Support for film generally takes the form of direct grants or tax concessions. The UK, for example, offers both, with grants funded from the National Lottery and a range of tax concessions.[32] In relation to television, the majority of Member States levy a licence fee on the owners of television receiving equipment, a term which may now include not only television sets, but also broadband connected computers and mobile phones.[33] Greece and Cyprus impose a charge on electricity bills. The resultant income is used to subsidise public service broadcasters such as ARD and ZDF in Germany or the BBC in the UK, where just over 20 per cent of all television revenue is derived from public funds.[34] A number of Member States finance their public service broadcasters through direct subsidies, loans, tax concessions or the grant of facilities or spectrum either free or at advantageous rates.

When states finance their film or broadcasting industries in this way they potentially infringe Article 87(1) of the European Community Treaty. This prohibits any aid that is granted by a Member State or through state resources that affects trade between Member States and 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods'. In relation to state financing of television, the first formal complaints under Article 87(1) EC were referred to the Commission early in 1990 and concerned Spain, Portugal and France.[35] Since then the Commission has

[30] The European Community MEDIA programme, for example, has a budget of €755 million for the seven years 2007–13, while contributions in 2000 by the then 15 Member States to their film industries were just under €950 million, see Aas, above n 3.

[31] IMCA, Identification and Evaluation of Financial Flows Within the European Cinema Industry by Comparison with the American Model, study for the European Commission, April 2004 at para 3.3. The study is available at <http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm> accessed 18 August 2008.

[32] See State aid NN6/2006, *UK Film Production and Development Funds*; State aid N 477/04, *UK Film Council Distribution and Exhibition Initiatives: Digital Screen Network*; and State aid N 461/05, *UK Film Tax Incentive*.

[33] See, eg: M Leidig, 'German Mobile Phone Users To Pay TV Licence Fee' *Media Guardian*, 10 January 2005.

[34] For 2006, the figure for public funding was estimated to be 23%, on which see OFCOM, 'Response to the Commission's Consultation on the Application of State Aid Rules to Public Service Broadcasting' at 4, available at <http://www.ofcom.org.uk/tv/ifi/stateaidrules/of comresponse.pdf> accessed 18 August 2008. Luxembourg is alone in the EU in having a purely commercial radio and television sector.

[35] See Commission Press Release, 'Commission Clarifies Application of State Aid Rules to Public Service Broadcasting' IP/01/1429, 17 October 2001. These early cases are discussed by

investigated a steady stream of complaints from providers of media services, concerning funding provided by, amongst others, Belgium, Denmark, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.[36] A number of cases, such as those concerning the BBC licence fee and digital curriculum, were referred to the Commission directly by the Member State involved in order to ensure compliance with Article 88(3) EC, which requires states to notify and obtain approval from the Commission prior to altering existing aid schemes or granting new aid.[37] In 2001, the Commission drew together the principles it had established in its early decisions in a Communication on the Application of the State Aid Rules to Public Service Broadcasting (the 'Broadcasting Communication') and is currently considering whether this requires clarification or modification in the light of recent developments.[38]

In relation to film, an initial complaint was made to the Commission in 1997 concerning French cinema subsidies.[39] Although complaints are sometimes made, as here, by private parties the majority of investigations are triggered by Member State references under Article 88(3) EC. The French case led the Commission to consider in more detail how the state aid rules should apply to the numerous domestic funding schemes and in 2001 it published its Communication on Certain Legal Aspects Relating To Cinematographic and Other Audiovisual Works (the 'Cinema Communication').[40] The Cinema Communication is also under review and the Commission has indicated that it will publish its initial proposals for revision during the latter half of 2008.[41]

A. When is State Funding of the Audiovisual Sector 'State Aid' Within the Meaning of Article 87(1) EC?

Member State attempts to convince the Commission and Court of First Instance that their aid schemes fall outside the scope of Article 87(1) EC

A Bartosch, 'The Financing of Public Broadcasting and EC State Aid Law: an Interim Balance' (1999) 4 *European Competition Law Review* 197; and R Craufurd Smith, 'State Support for Public Service Broadcasting: The Position Under European Community Law' (2001) 28 *Legal Issues of Economic Integration* 3.

[36] For commentary, see J Harrison and L Woods, *European Broadcasting Law and Policy* (Cambridge, Cambridge University Press, 2007) 290–311; Wiedemann, above n 18; and D Ward, 'State Aid or Band Aid? An Evaluation of the European Commission's Approach to Public Service Broadcasting' (2003) 25 *Media, Culture and Society* 233.

[37] State aid N 37/2003, *United Kingdom, BBC Digital Curriculum*; and State aid N 631/2001, *United Kingdom, BBC Licence Fee.*

[38] See above n 17.

[39] State aid N 3/98, *France, Aid for Film Production.*

[40] Above n 17.

[41] Commission Memo, 'State Aid—Future Regime for Cinema Support', MEMO/08/329 of 22 May 2008.

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[44] Case C-379/98, *Preussen*
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and C-482/99 *France v Comm*

have been almost universally unsuccessful.[42] In relation to the broadcasting sector, two main arguments have been deployed: first, that the aid has not been provided by the state or through state resources and, secondly, that the 'aid' in fact constitutes payment for the provision of a public service and thus does not distort competition by favouring certain undertakings.

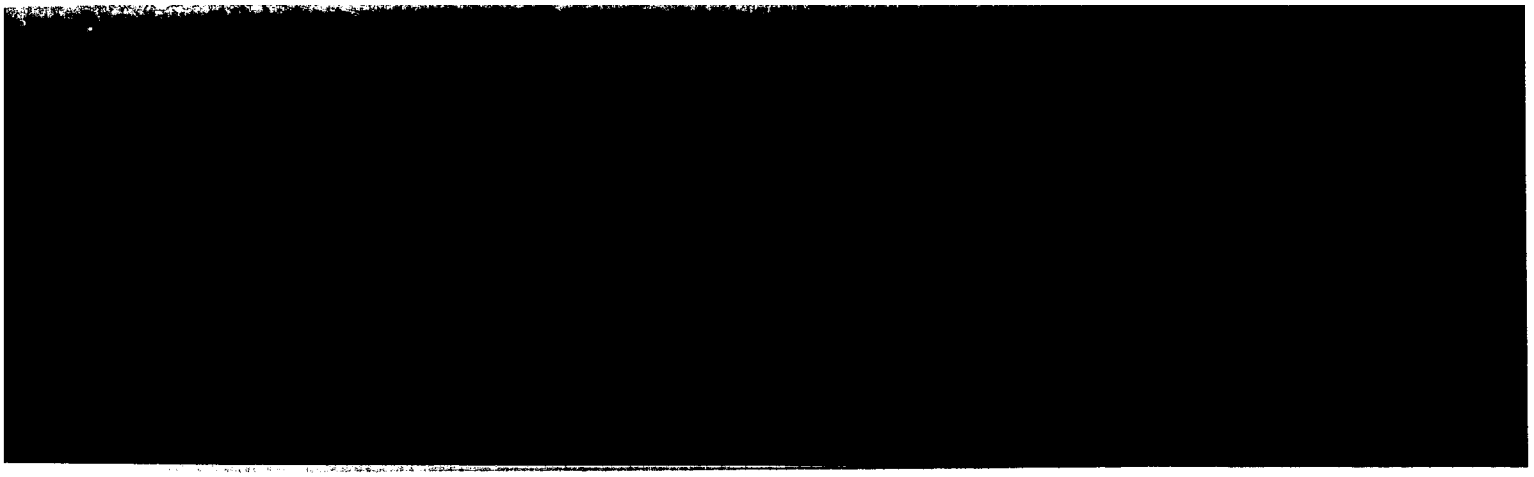
In the Commission's recent review of the funding of German public service broadcasters ARD and ZDF (the '*ARD/ZDF* case'), Germany put forward both arguments.[43] In relation to the first, it sought to rely on the Court of Justice's judgment in *PreussenElektra*.[44] This concerned legislation that required electricity supply operators to purchase a certain proportion of electricity derived from renewable sources at minimum prices. The scheme thus supported the renewable energy sector by guaranteeing a market for its electricity at prices it would not otherwise have been able to charge. The additional costs imposed on the supply operators were then spread across a number of private electricity operators. The Court concluded that there was no direct or indirect transfer of state resources to the renewable energy companies and thus no state aid. The financial benefit obtained by these companies was instead provided, albeit under a legal obligation, by the private supply companies and those to whom the additional costs of the scheme were distributed. Germany sought to draw parallels between this case and the financing of ARD and ZDF through the licence fee, which is levied on the owners of broadcast receiving equipment and collected by the public service broadcasters through their agent, the *Gebührenzugszentrale*. The financial benefit, as in *PreussenElektra*, is thus derived directly from private entities and Germany argued that the licence fee revenues were 'neither controlled nor imputable to the State'.

The Commission rejected these arguments, holding that the level of state involvement here meant that the licence fee constituted a state resource under state control. In particular, it noted that the licence fee was compulsory, paid to public entities entrusted with public service duties and fixed by a public body at a level that would ensure those duties could be fulfilled. Moreover, the power to collect the licence fee ultimately rested with the Länder, which had delegated this task to the broadcasters. That delegation could, however, be revoked so that ultimate control over the revenue rested with the Länder. Nor did the Commission accept the analogy with

[42] A major, early, Portuguese success in the case NN141/95, *Portugal, aid for public service broadcasting*, was subsequently overturned by the Court of First Instance in Case T-46/97, *SIC v Commission* [2000] ECR II-2125. This latter ruling has now to be read in the light of the Court of Justice's ruling in *Altmark*, discussed at text accompanying n 47 below.

[43] State aid E 3/2005, *Financing of Public Service Broadcasting in Germany*.

[44] Case C-379/98, *PreussenElektra AG and Schleswag AG* [1999] ECR I-3735. Germany also cited in support cases C-345/02, *Pearle BV, Hans Prijs Optiek Franchise BV, Rinck Opticiëns BV and Hoofdbedrijfschap Ambachten* [2004] ECR I-7139 (hereinafter, '*Pearle*'); and C-482/99 *France v Commission (Stardust Marine)* [2001] ECR I-4397.



PreussenElektra, in that there was no private law, contractual relationship between those paying the licence fee and the broadcasters. The licence fee could not be regarded as a genuine payment for access to the public channels, in that it was levied regardless of whether those paying it actually watched ARD or ZDF.[45] Support for this conclusion has recently been provided by the Court of Justice, which was called to consider whether the Community public procurement rules applied to the German public service broadcasters. The Court of Justice found that the public broadcasters were 'financed for the most part by the State', noting also that there was no contractual relationship between the licence fee payer and the broadcasters and that owners of receiving equipment were required to pay the fee regardless of whether they watched the public service channels.[46]

Germany fared no better with its second argument, here relying on the case of *Altmark*, in which the Court of Justice held that where the state pays an undertaking to provide a public service, that payment will only constitute state aid where it confers on the recipient a competitive advantage.[47] The Court went on to provide that a competitive advantage would be inferred unless four conditions were met: the recipient of the aid must be subject to clearly defined public service obligations; the basis on which the compensation is to be calculated must be established in advance in an objective and transparent manner; the compensation must not exceed the costs of the service; and, where the undertaking is not chosen using a public procurement procedure, the level of compensation must be determined by reference to the costs that a typical, well-run and suitably equipped undertaking would incur to provide the service. The Commission was not convinced that the German system met any of these requirements and thus categorised the licence fee as state aid.

In reviewing the *Altmark* conditions, the Commission focused in particular on the fourth and final one. The Länder do not invite tenders for the provision of public service broadcasting, so the question was whether the level of the licence fee was fixed in relation to the costs of a typical, well-run undertaking. In Germany, the public broadcasters submit what they calculate to be the costs of providing their services to the *Kommission zur*

[45] State aid E 3/2005, n 43 above, paras 143–51. The Commission relied in particular on the ruling in *Pearle*, n 44 above, in which the Court concluded that an advertising campaign organised by a public body was not state aid in part because that body 'served merely as a vehicle for the levying and allocating of resources collected for a purely commercial purpose previously determined by the trade and which had nothing to do with a policy determined by the Netherlands authorities' (para 37).

[46] Case C-337/06, *Bayerischer Rundfunk, Deutschlandradio, Hessischer Rundfunk, Mitteldeutscher Rundfunk, Norddeutscher Rundfunk, Radio Bremen, Rundfunk Berlin-Brandenburg, Saarländischer Rundfunk, Südwestrundfunk, Westdeutscher Rundfunk, Zweites Deutsches Fernsehen v GEWA*, judgment of 13 December 2007, paras 41–7.

[47] Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

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Ermittlung der Finanzierung der Rundfunkanstalten (KEF), an independent body of experts that evaluates their submissions in light of the principles of 'efficiency and thriftiness'. On the basis of this evaluation the KEF then recommends the level at which the licence fee should be set to the Länder. Germany argued that it would make no sense for the KEF to carry out the sort of benchmarking envisaged in *Altmark* because the costs of the public service and commercial operators were not comparable.[48] Public service broadcasters are expected to meet high standards of quality, both technical and in terms of content, and this often imposes additional costs. In its 1999 decision regarding UK funding of the BBC News 24 channel, the Commission accepted that the costs of the BBC service were higher than those of competing commercial services such as SkyNews because it employed more staff and ran a considerably larger network of international offices.[49] In relation to the German complaint, however, the Commission concluded that it was not enough for the KEF simply to review the figures put forward by the public broadcasters, instead it needed to develop criteria for establishing what the costs of an efficient operator would be were it to provide similar services. The Commission did not accept that it would be 'impossible and purely hypothetical' for the KEF to establish the costs of such an operator as a benchmark. Moreover, even if the costs put forward by the public broadcasters could be considered those of efficient organisations, Germany had not provided sufficient information for the Commission to assess whether this was in fact the case and the burden of proof here rested with the Member State.

The *ARD/ZDF* case indicates how difficult it is for states to avoid the application of Article 87(1) EC where they do not wish to put their public services out to tender. Adopting a competitive tendering process would have major implications for the way public service broadcasting is currently organised within Europe. Member States tend to impose public service obligations on one or two 'institutional' broadcasters, which, over time, develop a particular public service ethos. Were these broadcasters to be required to bid to provide such services there is a risk that cost considerations would predominate, leading ultimately to a lowering of standards.[50] Repeated change in the public service provider from one contractual period to another could also undermine any longer-term commitment to public

[48] Germany here sought to rely on Joined Cases C-83, 93 & 94/01 P, *Chronopost v Ufex* [2003] ECR I-6993. See in particular paras 31–7.

[49] State aid NN 88/98, *United Kingdom, Financing of a 24-hour advertising-free news channel out of the licence fee by the BBC*, para 85.

[50] Although S Santamato and N Pesaresi, 'Compensation for Services of General Economic Interest: Some Thoughts on the *Altmark* Ruling' (2004) 1 *Competition Policy Newsletter* 17, note that a public service provider, because of its assets and market position, may be able to win a tender and still be overcompensated: a tender does not guarantee that there is no overcompensation and one may have a system of fair compensation without a tendering process.

service objectives. Yet the alternative approach indicated in *Altmark*, namely to establish funding levels with reference to what a commercial operator would charge for providing a comparable service, will entail considerable administrative costs. Given that the remaining *Altmark* requirements relating to transparency and overcompensation are similar to those that operate in the context of the exemption for services of general economic interest in Article 86(2) EC, the incentive for states to seek to conform to *Altmark* will be quite limited. Nevertheless, compliance with *Altmark* does offer distinct advantages in that it absolves Member States from the need to notify the Commission prior to granting aid and insulates them from the risk that the Commission will order any aid that has been paid to be returned. Moreover, there will be no need to convince the Commission that new services will not unacceptably distort trade under Article 86(2) EC.[51]

The *Altmark* ruling highlights the extent to which Community law looks to the commercial sector to set benchmarks against which public provision is to be judged. The adoption of benchmarks derived from the operation of commercial broadcasters is, however, likely to lead to downward pressure on the revenues allocated for public service broadcasting. One view is that this is eminently desirable: greater efficiency and reduced costs lighten the financial burden on the taxpayer. Spain, for example, has recently reorganised its public broadcaster RTVE, laying-off 4,150 employees, around 44 per cent of its total workforce.[52] Another view is that there is a risk that the additional costs of public service provision will simply be regarded as an indication of inefficiency. It is thus questionable whether it is appropriate to apply the fourth *Altmark* condition in circumstances where commercial and public services are qualitatively distinct.

Although Germany has explicitly stated that it does not accept the Commission's categorisation of the licence fee as state aid, it did not push the matter further by seeking judicial review, perhaps fearing that a negative decision would be worse than no decision at all.[53] Without further judicial examination of this issue it is, however, unlikely that the Commission will modify its approach given that this is itself derived directly from the case law of the Court of Justice. It is notable that the application of *Altmark* to state funding of public service broadcasters is not one of the matters the Commission has raised in its review of the 2001 Broadcasting Communication.

[51] See discussion at text accompanying n 73 below. Aid will exceptionally be assumed not to unduly distort trade and the state exempt from the requirement to notify the Commission where aid less than €30 million is provided to firms with a low turnover under the terms of Commission Decision 2005/842/EC on the Application of Article 86(2) of the EC Treaty to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted with the Operation of Services of General Economic Interest, [2005] OJ L312/67.

[52] Commission Press Release, 'State aid: Commission endorses measures to finance early retirement scheme for Spanish public broadcaster RTVE', IP/07/291, 7 March 2007.

[53] See State aid E 3/2005, above n 43, para 323. Schulz, above n 2, 5 suggests that the compromise reached with the Commission was at least partially to avoid further dispute on this issue.

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Nor have the Member States been much more successful when arguing that their film support schemes fall outwith the scope of the Community state aid provisions. Although the Commission has concluded that the French requirement that television broadcasters invest a proportion of their revenue in French language film production falls within the *PreussenElektra* ruling, in that the finance is here provided by the broadcasters, not the state, most film schemes distribute funds derived directly from the state.[54] Thus, in its 2006 review of the German Film Fund, the Commission was quick to conclude that the aid came from central state resources and was consequently state aid.[55] Some states have argued that aid for the film sector does not distort competition or affect trade between Member States because of the parlous state of the European film industry. Very few European films are released theatrically and even fewer are distributed outside their home territory.[56] The Commission has here, however, adopted a strict approach, holding that it is enough that the aid merely 'threatens' to distort competition and trade between Member States for it to be caught by Article 87(1) EC. It has consequently found support for projects that have no prospect of economic success, such as the funding provided by Spain for short films that are not released in the cinema or on television and are shown only at film festivals, to constitute state aid.[57]

B. When is State Aid for the Audiovisual Sector Compatible with Community Law?

Two main exemptions from the state aid rules have been relied on by the Member States in the audiovisual context. Article 87(3)(d) EC establishes an exemption for aid 'to promote culture and heritage conservation', while Article 86(2) EC exempts 'services of general economic interest' from the application of the EC Treaty rules where the operation of these rules would impede performance of the public service tasks. In both instances, trade must not be distorted contrary to the common interest. Article 87(3)(c) EC, which covers aid to facilitate the development of certain economic activities or areas, has on occasion also been successfully relied on when Article 87(3)(d) EC was not applicable,[58] while Article 87(3)(a) EC, which concerns aid for areas with a low standard of living or high unemployment, can be deployed to exempt certain development schemes that include media projects.

[54] State aid NN 84/04, *French Support for the Cinema and Audiovisual Sectors*, paras 390–8. It should be noted that although such measures are not caught by Art 87(1) EC, they may nevertheless impede the free movement of goods and services under Arts 29 and 49 EC.
[55] State aid N 695/06, *German Film Fund*, para 20.
[56] Henning and Alpar, above n 3, 232.
[57] State aid N 449/05, *Madrid, Support for the Production of Short Films*, para 17.
[58] State aid N 481/2007, *Spain, Promotion of Movies and DVDs in Basque*.

In relation to Article 87(3)(d) EC, the Treaty does not provide a definition of 'culture'. When introducing Community support measures under Article 151 EC, the Commission has, however, stated that 'culture is no longer restricted to "highbrow" culture (fine arts, music, dance, literature). Today, the concept also covers popular culture, mass-produced culture, everyday culture'.[59] In particular, it observed that '[t]he new information and communication technologies, which give scope for new realities and new areas of culture (cyberculture), offer considerable opportunities for mutual understanding, cultural dialogue, transmission of ideas and information on cultural output'.[60] Given that both television and film are important media through which established cultural practices can be mirrored back to society and new cultural possibilities explored, one might have expected that Article 87(3)(d) EC would be heavily relied on in both contexts. In relation to television, however, Article 87(3)(d) EC has to date proved of little, if any, assistance. In an early state aid complaint concerning two thematic television channels—Kinderkanal, a channel for children, and Phoenix, a current affairs channel—the Commission held that, as an exemption from a Treaty prohibition, Article 87(3)(d) EC had to be interpreted in 'a rather strict sense'.[61] The concept of culture was here to be limited 'to a generally accepted sense and not extended beyond' so that it did not cover the sort of educational or current affairs programmes that were in issue.[62] The case consequently suggested that an exemption under Article 87(3)(d) EC would only be available where funding was provided for what the Commission would term 'highbrow' programming concerned with, for example, literature, music, dance, sculpture, painting or architecture.

Given this restrictive approach to Article 87(3)(d) EC, Member States have instead relied on Article 86(2) EC, which applies to a wider range of audiovisual services. The term 'services of general economic interest' like 'culture' is not defined in the Treaty, but appears to cover those key services that, in a modern society, are generally regarded as essential for a socially acceptable standard of living.[63] In its 2003 Green Paper on Services of General Interest, the Commission stated that:

> ... the term refers to services of an economic nature that Member States or the Community subject to specific public service obligations by virtue of a general

[59] Commission, Communication on the First European Community Framework Programme in Support of Culture (2000–2004), COM(1998)226 final, 3.

[60] *Ibid*, 4.

[61] State aid NN 70/98, *Kinderkanal and Phoenix*, 6.2. See also para 26 of the Broadcasting Communication, above n 17.

[62] *Ibid*. See also State aid NN 88/98, above n 49, para 36.

[63] D Edwards and M Hoskins, 'Article 90: Deregulation and EC Law. Reflections Arising from the XVI FIDE Conference' (1995) 32 *CML Rev* 157, 168–9. See also Commission, Communication on Services of General Interest, Including Social Services of General Interest: A New European Commitment, COM(2007)725 final, 3–4.

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[64] Commission, Green Paper

[65] Joined Cases T-528, 542
Italiane SpA, GestevisióTelecinc
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[66] State aid NN 70/98, above

[67] State aid N 695/06, above

interest criterion. The concept of services of general economic interest thus covers in particular certain services provided by the big network industries such as transport, postal services, energy and communications. However, the term also extends to any other economic activity subject to public service obligations.[64]

In relation to television, the Court of First Instance has recognised that these public service obligations include the provision 'of varied programming including cultural, educational, scientific and minority programmes without any commercial appeal' and coverage of 'the entire national population irrespective of the costs'.[65] This indicates that apart from providing a particular type of content, public services must also be widely available. The Amsterdam Protocol on Public Service Broadcasting (hereinafter, 'the Amsterdam Protocol') also underlines the role played by public service broadcasting in addressing not only the cultural but also the democratic and social needs of society and in enhancing media pluralism. Thus, although the children's and current affairs channels, Kinderkanal and Phoenix, were held not to be cultural within the meaning of Article 87(3)(d) EC, the Commission concluded that they were covered by Article 86(2) EC. Such services pursued social and democratic objectives, while the absence of advertising on the channels helped to insulate the broadcasters from commercial pressures, thus enhancing media pluralism.[66]

In relation to film, the Commission's approach has been rather different, with Article 87(3)(d) EC applied in a more flexible way. Thus, in its 2006 ruling on German aid for films, documentaries and cartoons, the Commission accepted that a range of criteria could be used to establish that a film has a sufficient cultural dimension.[67] These criteria include not only use of the German language and locations, but also whether a film focuses on, amongst other things, 'relevant issues for Germany'; religious, philosophical or social issues; historical or contemporary figures; major historical events; and different ways of life, in particular of minorities. It is clear that certain educational films or films dealing with current events could be classified as 'cultural' on this basis, nor is there any automatic barrier to programmes of a certain genre being so classified. Although these divergent approaches may reflect a particular appreciation of the respective cultural merits and demerits of film and television, a more attractive conclusion is that the law relating to Article 87(3)(d) EC has simply developed further in the film context. This would mean that the principles that the Commission now applies in its film decisions are equally applicable to television. Support

[64] Commission, Green Paper on Services of General Interest, COM(2003)270 final, para 17.
[65] Joined Cases T-528, 542, 543 & 546/93, *Metropole Télévision SA, Reti Televisive Italiane SpA, GestevisióTelecinco SA and Antena 3 de Televisión v Commission* [1996] ECR II-649, para 116.
[66] State aid NN 70/98, above n 61, 6.3.
[67] State aid N 695/06, above n 55.

for this is provided by the Broadcasting Communication where, although the Commission expressly endorsed its ruling in *Kinderkanal and Phoenix*, it also noted that education could have a cultural aspect.[68] Member States, it indicated, would be able to rely on Article 86(3)(d) EC in the television context where they employ clear criteria and ensure that all the programmes they fund are cultural.[69]

There is thus no legal barrier to Member States introducing television production funds along the lines developed in the film sector. Moreover, Article 86(2) EC should also be applicable in this context, even though funding will be fragmented across a number of public service providers.[70] Outside the EU, countries such as New Zealand have introduced production funds to finance programmes that would not normally be produced on a commercial basis.[71] Although the New Zealand experience suggests that there are drawbacks to this approach, a number of European countries have recently considered, or are actively considering, the introduction of television production funds. For example, OFCOM in the UK has proposed a number of options for funding public service programming in the future, including the introduction of an agency to award funding on a competitive basis. OFCOM has not, however, proposed the abolition of the BBC or questioned its funding through the licence fee and even the Netherlands, which has been considering quite radical reform proposals, remains committed to an independent public provider for news.[72] Given that institutional public service providers appear set to remain part of the media landscape for some time to come, Member States will continue to rely primarily on Article 86(2) EC to justify their financing of television services and Article 87(3)(d) EC for film funding. Given the very different nature of these exemptions, the impact of Community law on the television and film sectors is considered separately below.

[68] Broadcasting Communication, above n 17, para 26.

[69] *Ibid*, para 27. A number of decisions in 2006 concerning Slovakian aid for the press suggest, however, that the Commission may still be reluctant to find that programmes on political, socio-economic, family and social issues have a cultural dimension—see State aid N 663/2006, *Slovak Republic, Aid for periodical 'Varsarnap'*; and N 664/2006, *Slovak Republic, Aid for 'Uj Szo'*.

[70] For an example of a case where private bodies collectively support the provision of a service of general economic interest, see State aid N 89/2004, *Ireland, Guarantee in Favour of the Housing Finance Agency and Social Housing Schemes Funded by the HFA*. Where companies are invited to tender for contracts to produce public service programming, the state may also be able to rely on *Altmark* to exclude the application of the Community State aid rules altogether—see above n 47.

[71] J Bardoel and L d'Haenens, 'Reinventing Public Service Broadcasting In Europe: Prospects, Promises and Problems' (2008) 30 *Media, Culture And Society* 337, 345.

[72] OFCOM, Second Public Service Broadcasting Review, Phase One (2008) available at <http://www.ofcom.org.uk/tv/psb_review> accessed 18 August 2008. For discussion of developments in the Netherlands, see Bardoel and Haenens, above n 71 above, 347.

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C. Article 86(2) EC and Aid for the Television Sector

For Member States to be able to obtain an exemption from the state aid rules under Article 86(2) EC, they must establish that: (i) the service they are funding, or intend to fund, meets the description of a 'service of general economic interest'; (ii) the remit of the service is clearly defined; (iii) the recipient of the aid will be formally entrusted with the provision of that service; (iv) without the aid the broadcaster will find it difficult to provide such a service; and (v) the recipient of the aid will not be overcompensated and exemption from the state aid rules will not affect the development of trade contrary to the interests of the Community.[73] The Commission's early state aid decisions and its 2001 Broadcasting Communication went a considerable way to clarify what Member States would have to do to comply with each of these requirements. Subsequent complaints revealed, however, that uncertainties remained, particularly in relation to where the outer limits of public service provision should be drawn. These issues have recently been addressed by the Commission, and it is increasingly apparent that although Community law affords Member States considerable latitude in this field, it also imposes on them a heavy burden of proof to show that they have complied with all aspects of Article 86(2) EC.

One question that is highly controversial is the extent to which technological and economic developments alter the range of services that fall within the scope of Article 86(2) EC. Viewers across Europe are now offered not three or four but hundreds of television channels and can access these over a variety of distribution devices, including the Internet and mobile phones. Increasing competition among those offering television channels has led to an escalation in the cost of rights for popular content, especially sport. Given this very different environment, is it acceptable for Member States to continue to finance generalist public service channels, increasing still further the competition for attractive rights? The case for such provision would certainly seem to be undermined by the amount of entertainment and sports programming that is now available on competing commercial channels.

A related question is whether public service broadcasters should be allowed to develop 'new media' internet or mobile services, possibly foreclosing or limiting the development of commercial alternatives? Over the last four or five years a series of complaints concerning the funding of the German, Irish, Dutch and Belgian public service systems were lodged with the Commission raising just these issues.[74] The complaints were formulated

[73] See discussion in the Broadcasting Communication, above n 17 above, para 29.

[74] Commission press releases: 'State aid: Commission requests Germany, Ireland and The Netherlands to Clarify Role and Financing of Public Service Broadcasters', IP/05/250, 3 March 2005; and 'State aid: Commission requests Belgium to clarify financing of public service broadcaster VRT', IP/06/1043, 20 July 2006.

so that they brought into play both points (i) and (v) above, namely, whether the services funded by the states could properly be characterised as services of general economic interest and whether, by providing this funding, the states had distorted competition contrary to the Community interest.

The 2006 decision by the Commission in the German *ARD/ZDF* case was the first of this group of complaints to be formally resolved and is likely to prove a template for the other rulings (which at the time of writing had still to be published). The *ARD/ZDF* case concerned the development by the German public broadcasters of online and mobile services and their acquisition of extensive sports rights packages, including exclusive new media and pay-TV rights.[75] It was always going to be difficult for the commercial operators to convince the Commission that such services should not be considered services of general economic interest, in that the Commission has repeatedly confirmed that it considers its role here to be limited to 'checking for manifest errors'.[76] In this, the Commission has undoubtedly been influenced by the 1997 Protocol on Public Broadcasting, which states that the EC Treaty is without prejudice to:

> ... the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit *as conferred, defined and organised by each Member State*, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account (emphasis added).

Although the Protocol has interpretative force only and cannot, therefore, override the application of Article 86(2) EC, the message it directed at the Commission was quite clear: Member States should be allowed to determine the remit and scale of their public broadcasting systems in the light of domestic policy considerations.

In its 2001 Broadcasting Communication, the Commission consequently noted that it was not its responsibility 'to decide whether a programme is to be provided as a service of general economic interest, nor to question the nature or the quality of a certain product'.[77] In particular, 'a mandate encompassing a wide range of programming' would be legitimate to ensure balance *and maintain audience figures*.[78] It even appeared, therefore, that the purchase of popular programme rights might be justified on the basis that transmission of such programmes would attract viewers to the public service.

[75] State aid E 3/2005, above n 43 above, para 72.
[76] Broadcasting Communication, above n 17 above, para 36.
[77] *Ibid.*
[78] Broadcasting Communication, above n 17 above, para 13.

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The Commission's official approach was thus extremely accommodating, but it was not universally endorsed within the various internal directorates.

In a discussion paper prepared by the Competition Directorate-General in 1998—after, that is, the Amsterdam Protocol was adopted, but prior to the 2001 Communication—it had been suggested that funding for the transmission of sports events and entertainment shows would fall outside the discretion granted by Community law to Member States.[79] Programming of this type could not be held to fulfil 'any democratic, social or cultural needs of the society' nor help to preserve media pluralism. It was also suggested that, at least for public service broadcasters in receipt of both licence fees and advertising, there should be no exemption for programmes that were made available '*under exactly the same conditions even in the absence of public broadcasters*, by private operators'.[80] The potential implications of the paper were far-reaching in that it not only brought into question the established public service remit to inform, educate *and entertain*, it also sought to limit the public sector to the provision of programmes of a type not generally available on commercial stations, even where those programmes would otherwise be considered within the public service remit. For public service broadcasters, this would mean death by a thousand cuts.

Member State alarm at the implications of the discussion paper and concern in other Directorates-General meant that the proposal went no further. Nevertheless, a subsequent paper in 2004, again by officials working in the competition directorate, suggested that, as public service broadcasters move to offer thematic rather than generalist channels, the rationale for including sport and popular entertainment programming within the public service remit might be undermined.[81] Depypere and Tgchelaar argued that to date such programmes have been considered to fall within this remit either because they encourage viewers to watch the public service programmes that follow them or because they pull together a wide audience, thereby ensuring continued support for the public channels, a rationale suggested in the 2001 Broadcasting Communication. With the specialisation and fragmentation that comes with the development of digital and new media services, they doubted that such arguments could be maintained, with the result that the public service remit would become more circumscribed. The authors also argued that Member States should only be allowed to finance

[79] D-G for Competition internal discussion paper, 'Application of Articles 90 paragraph 2, 92 and 93 of the EC Treaty in the Broadcasting Sector' (mimeo, 1998).

[80] *Ibid*, 7.

[81] S Depypere and N Tgchelaar, 'The Commission's State Aid Policy On Activities of Public Service Broadcasters in Neighbouring Markets' (2004) 2 *Competition Policy Newsletter* 19. The comments by these Commission insiders do, of course, mirror a much wider debate about the continuing justification for public service provision within the Member States.

additional public services where those services have special characteristics not shared by services offered by commercial operators.[82]

Despite these internal doubts over the continuing viability of a broad public service mandate, the Commission in its *ARD/ZDF* ruling held firm to the line it had established in its 2001 Broadcasting Communication. It confirmed that it was prepared to accept a wide definition of public service broadcasting, comprising 'a varied and balanced programme ... based on more qualitative than quantitative criteria'.[83] Public service broadcasters are not therefore prevented from offering programmes of a type also found on commercial stations and can acquire the rights to popular entertainment and sporting events, even exclusive rights. No mention is here made of sport as a mechanism to attract viewers or maintain support for public service media and there are indications that the Commission regards sport to be a valuable programming component in its own right.[84] Public funding certainly ensures that the general public obtain 'free' access to events of some social, if not cultural, importance that might otherwise migrate to pay-TV channels.

The reference to qualitative rather than quantitative criteria does, however, indicate that the providers of public service channels should be required to meet high standards, for example, technical and editorial standards, across all programme genres, even popular entertainment or sport. Such standards may serve to distinguish public service from commercial channels and their maintenance may also encourage other services to compete in terms of quality resulting in a general levelling-up of standards. OFCOM in the UK has argued that public service broadcasting, a term that in the UK is not limited to state-funded services, should be defined in terms of its policies and characteristics rather than genres. The distinctive characteristics of public service broadcasting were stated to be quality, innovation, originality, the provision of challenging programmes and wide availability.[85] Identification of such characteristics will allow states to put

[82] *Ibid*, 22. On the latter point they drew on the article by Santamato and Pesarasi, above n 50, 21. See also the concerns voiced by Wiedemann, above n 18.

[83] State aid E 3/2005, above n 43, para 224. The Commission's 2007 Communication on Services of General Interest also emphasises that states have wide discretion when determining the mandate of public services in light of the Lisbon Treaty Protocol on Services of General Interest: above n 63.

[84] State aid E 3/2005, above n 43 above, para 291. Support for this view may also be derived from the Commission's efforts to ensure that the rights to popular sporting events are divided among a number of different broadcasters, on which see Commission Notice concerning Case COMP/C.2/37.398—Joint Selling of Media Rights of the UEFA Champions League on an Exclusive Basis, [2002] OJ C196/3.

[85] OFCOM, Review of Public Service Television Broadcasting (2004), para 148. OFCOM also noted at para 159 that 'citizens' interests can be met through many programme types and indeed may be most effectively met via programming which viewers think will entertain them as well as "make them think"'.

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[86] State aid E 3/2005, above

[87] *Ibid*, para 355.

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[89] State aid NN 88/98, above

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Where sport is provided as part of a generalist service, the Commission indicated that the proportion of airtime dedicated to sport must not be excessive. The 10 per cent limit to airtime allocated to sport that ARD and ZDF had adopted was here considered acceptable, particularly since this included coverage of both mainstream and minority sports, but the Commission called on Germany to ensure that these commitments were made binding.[86] The requirement that attractive programming of this type should not take up a disproportionate amount of time on publicly funded generalist channels does, therefore, leave some scope for commercial competitors to challenge the scheduling or acquisition policies of public service stations in the future. The decision also confirmed, however, that there is no barrier in principle to states financing dedicated sports channels, provided the requirements of Article 86(2) EC can be shown to be met.[87] In its earlier BBC Licence Fee decision it had, in fact, already accepted that the BBC could extend its services to include a digital sports channel, in this case a radio channel.[88]

The Commission also examined whether the use of public funds to purchase sports rights had distorted competition contrary to the Community interest. The Commission here adopted a fairly limited form of review along the lines evident in earlier decisions. In its *BBC News 24* decision it had, for example, concluded that 'some distorting effect [of the funding] has to be taken into account and tolerated, whilst it must neither be made impossible for competitors to continue to do business nor must potential competitors be precluded from entering the market'.[89] It would appear from this that Member States are not free to completely replace or prevent the development of commercial provision by sanctioning publicly funded services, but otherwise enjoy considerable latitude.[90] The Commission consequently considered whether ARD and ZDF were able, because of their financial position, to consistently outbid their rivals and prevent other broadcasters from obtaining key events. It found that although the public broadcasters had been able to purchase about one-half of the most attractive rights for the German market, including those to the German

[86] State aid E 3/2005, above n 43, para 292.
[87] *Ibid*, para 355.
[88] State aid N 631/2001, *United Kingdom, BBC Licence Fee*.
[89] State aid NN 88/98, above n 49.
[90] Where competition among particular services, classical music channels, for example, is not viable, a decision to prefer public service over commercial provision should arguably not be excluded, particularly given the high standards and audience accountability expected of public service providers. For discussion of this issue in the rather different context of broadband provision, see L Papadias, A Riedl and J Westerhof, 'Public Funding for Broadband Networks—Recent Developments' (2006) 3 *Competition Policy Newsletter* 13.

Football League, the Champions League, Formula One and the Tour de France, commercial free to air and pay-TV broadcasters had bid successfully for a range of major events such as the German Premier League. There was thus no evidence that ARD and ZDF were able to entirely shut competitors out of the market. In relation to sport, the most constraining aspect of the decision is thus likely to prove the injunction that public service broadcasters should not buy or retain rights that they cannot use.[91] Scheduling constraints tend to restrict the amount of sport that public service broadcasters can show on mainstream channels and they may also be unable to exploit pay-TV or Internet rights, which have been bundled with the rights they do wish to use. The Commission indicated that in such circumstances the unused rights must be made available to companies that are able and willing to exploit them.

Similar latitude is evident in relation to state financing of new media services. The Commission held that states may support such services provided they perform the same democratic, social and cultural functions identified in the Amsterdam Protocol. There is thus no barrier in principle to the relaying of existing public services over alternative platforms, for example via mobile, internet or digital terrestrial networks, nor to the development of additional services that exploit these transmission possibilities.[92] The decision also expressly confirmed that a definition of public service that includes services that are not programmes in the traditional sense, such as websites, would be acceptable.[93]

In Germany, the Interstate Treaty on Broadcasting, as amended, allows public service broadcasters to engage in certain 'telemedia' activities, where these activities support, or are closely related to, their established television channels.[94] The term 'telemedia' includes services such as the electronic press, chat rooms, news groups, video-on-demand, teletext, traffic/weather/stock exchange information, email, teleshopping, telegames and internet search facilities.[95] The German public broadcasters have engaged in a number of these activities offering, apart from additional information on their programmes and archive material, online games, chat and discussion fora, online data/information services, links to external service providers,

[91] State aid E 3/2005, above n 43, paras 299–305.
[92] *Ibid*, para 240.
[93] *Ibid*, para 222, referring to the Broadcasting Communication, above n 17, para 34. The decision is thus in line with the earlier *BBC News 24* ruling, where it was held that 'the public service nature of a service cannot be judged on the basis of the distribution platform' as well as the *BBC Licence Fee* and *BBC Digital Curriculum* decisions where state funding for digital and internet services were approved, see above nn 49 and 37.
[94] See Art 11 of the Interstate Treaty on Broadcasting, which is available in English (as amended by the ninth amendment) at <http://www.alm.de/fileadmin/Englisch/9_RAEStV_Englisch.pdf> accessed 18 August 2008. The Interstate Treaty has been subsequently amended and a 12th amendment is now awaited.
[95] See State aid E 3/2005, above n 43, para 18.

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[96] *Ibid*, para 63.
[97] *Ibid*, para 239.
[98] *Ibid*.
[99] Commission Explanatory M

electronic advertisements, some electronic commerce and mobile services.[96] Although certain of these activities appear quite distant from traditional public broadcasting services, the Commission held that only the most commercial fell definitively outside the public service remit. It was thus left for Member States to justify the inclusion of other services on the basis of their objectives and characteristics. The Commission accepted that some of the new media services provided by ARD and ZDF could perform accepted public service functions. Chat rooms, for example, may encourage the public to engage critically with issues raised by public service broadcasters, but they may also operate with little external direction and play a limited role in the transmission of information or the development of ideas. In the latter case it is unlikely that state finance can be justified. Similarly, the Commission held that online activities such as the provision of games, information services and even online dating services (!) may potentially be considered public services depending on the exact nature of their content and context.

The commercial activities that the Commission considered it would be 'manifestly erroneous' to define as public services are electronic commerce and 'advertising or sponsorship over the Internet or other new media'.[97] Pay-TV or pay-per-view services are also 'normally' to be excluded and activities considered commercial on one platform should 'in principle' also be regarded as commercial when made available over another.[98] This is not to say that companies providing public media services cannot offer such facilities, but they must do so on a purely commercial basis and ensure that their public and commercial activities are clearly separated to avoid the risk of cross subsidisation.

The inclusion of pay-TV services within this list is controversial, given that certain public service broadcasters are allowed to offer pay-services as part of their public service remit.[99] Concerns over the regressive nature of the licence fee and its imposition on those who do not watch public service stations have also led to suggestions that states should place greater reliance on subscription revenues to fund public service radio and television stations. In such circumstances the grant of additional subsidies to ensure that public service standards can be maintained would then prove problematic under Community state aid rules. The Commission's uncertainty on this point is reflected in its statement in the *ARD/ZDF* decision that pay-TV 'normally' falls out with the public service remit and it has raised this matter for consideration in its review of the Broadcasting Communication.

[96] *Ibid*, para 63.
[97] *Ibid*, para 239.
[98] *Ibid*.
[99] Commission Explanatory Memorandum, above n 17, 6.

A switch to subscription funding will mean that not all households have access to public service media and a reduction in audience reach might be thought to undermine the public status of such services. Where subscription services are offered over the internet, accessibility will be reduced further on both technical and economic grounds, with the poorer members of society likely to be particularly affected. Nevertheless, the Amsterdam Protocol states that it is for the Member States to determine how their public service broadcasting systems are to be funded and they are arguably in the best position to assess both the desirability and feasibility of new funding mechanisms in the light of their own social, technological and economic conditions. Ultimately, the question here turns not on the nature of the funding—licence fee or subscription—but on the nature of the service. Where a subscription service is required to pursue clearly defined public service objectives, is widely available, and priced so that it is generally affordable, the provision of state subsidies should be held lawful provided the other conditions in Article 86(2) EC are fulfilled.

Although such questions will undoubtedly continue to be debated, it is clear that in substantive terms Community law does not significantly constrain state funding of either traditional or new media services. Application of Article 86(2) EC could have brought the Commission into bruising conflict with the Member States, particularly in relation to whether a given media service constitutes a service of general economic interest and whether it is likely to distort competition contrary to the general interest. Both questions raise controversial policy issues—what sort of media services should the state provide and what balance should be struck between public and private provision in the media sector—which, as indicated above, are best dealt with at the domestic rather than European level. The Commission can be seen to have responded to these concerns by holding, first, that only services that clearly perform none of the functions identified in the Amsterdam Protocol will be held not to be services of general economic interest and, secondly, that only where a media service effectively stifles existing competition or completely prevents the development of new services will it be held to distort competition contrary to the general interest.

This is not to say, however, that Community law has not had a significant impact on the way in which state-supported services are organised and operate within the Member States. Rather than itself evaluating the underlying objectives or impact of state-funded services, the Commission has instead shifted the burden onto the Member States or competent regional bodies to overtly address these Community concerns. In a very real sense, therefore, the policy issues that underpin Article 86(2) EC have been repatriated to the Member States, but this repatriation is conditional. If Member States are to convince the Commission that their funding does not constitute unlawful aid they have, first, to specify with some precision and in advance the remit of the services that they intend to finance—a reference to particular genres

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[102] State aid E 3/2005, above

will not be sufficient—and, secondly, to put in place effective procedures to ensure that there is no overcompensation, that cross-subsidisation of commercial activities cannot occur, and that commercial markets will not be stifled or foreclosed. The considerable practical implications of these demands for Member States are clearly illustrated by the *ARD/ZDF* case.

The Commission found that the system in place in Germany failed on all of these counts: new media services were not sufficiently clearly defined or entrusted to the public service broadcasters, making it difficult for commercial operators to assess likely developments in the market; purely commercial services had been included within the public service remit; the system for determining the financial requirements of the public service broadcasters was not sufficiently rigorous and could lead to overcompensation; and there were risks of cross-subsidisation and unacceptable market distortion.[100] In order to address these concerns, Germany agreed to make important modifications to the way in which its devolved media system operated.

In particular, Germany undertook to clarify the remit of digital and new media services.[101] For digital channels, greater specification would be given in the Interstate Treaty as to the type of programmes that could be provided and the public service broadcasters would themselves publish 'programme concepts' for their various channels.[102] For telemedia, positive and negative lists would be developed indicating those services that normally fall within or without the public service remit. Those services that definitely fall outside the remit would also be identified. For online services, new criteria would be developed to reflect the different functions that public service media can perform on the Internet. Thus, public services might be expected to encourage citizens and minorities to participate in the information society; to help make digital services more useful for the public; to act as trusted guides to the online environment and promote 'media know-how'. Apart from these definitional points, Germany undertook to adopt a range of measures to ensure that public subsidies would not exceed public service costs, and that, where surplus revenue was obtained, it would be used solely for public service activities and be taken into account in future licence fee settlements. Commercial and public service activities were also to be clearly distinguished through, for example, the adoption of separate accounts.

Perhaps Germany's most significant commitment was to the introduction of an evaluation procedure for new digital or mobile services. This procedure is to involve a three-part test designed to consider, first, whether the service falls within the public service remit by performing democratic,

[100] State aid E 3/2005, above n 43, para 307.

[101] *Ibid*, para 327. For discussion of the lack of precision in the public service mandate, see also Schulz, above n 2, 11–13.

[102] State aid E 3/2005, above n 43, paras 335–6.

social or cultural functions; secondly, whether it contributes to 'editorial competition'; and, thirdly, the financial costs of the service. The second limb of the test will require consideration of, on the one hand, whether the service adds meaningfully to the free services already available and its contribution to shaping opinions with, on the other hand, its likely impact on existing services. The evaluation is to be carried out by the public service broadcasters themselves, with third parties being given an opportunity to comment during the course of the investigation.

This test is similar to the public value test carried out by the BBC's supervisory body, the BBC Trust, which comes into play when the BBC proposes significant changes to its existing public services. The test was introduced in the BBC's agreement with the government in July 2006 and became operational at the start of 2007.[103] Both the Commission and Germany were thus aware of its terms when discussing what undertakings Germany would need to make to convince the Commission to close its investigations. The UK test involves an assessment of the likely public value of the proposed service, which is carried out by the BBC Trust, and an assessment of its likely market impact, carried out by the independent communications regulator OFCOM. In assessing public value, the BBC Trust takes into account the extent to which the proposal will extend the BBC's reach and usage, its quality and distinctive nature, its benefit for consumers and citizens and whether it offers value for money.[104] The BBC Trust then considers whether any potential negative impact on the market that has been highlighted is outweighed by the service's potential benefits and decides whether or not to approve the proposal. Consultation with interested third parties takes place at both stages of the evaluation.

The German public value test is to be finalised during summer 2008 and given effect to through the 12th amendment to the Interstate Treaty on Broadcasting.[105] The way in which the test is likely to operate has caused controversy, not least in relation to the role of the public broadcasters. This is because ARD and ZDF will themselves apply all three limbs of the public value test and although there will be an obligation to obtain external expert advice, the assessment of the commercial impact of any proposal on competitors is unlikely to be devolved to an independent body, as is the case in the UK.[106] Despite oversight from the Television Councils and, ultimately,

[103] Agreement Between HM Secretary of State for Culture, Media and Sport and the BBC, July 2006, Cm 6872, clauses 23–33. For details, see BBC Trust, 'Public Value Test (PVT): Guidance on the Conduct of the PVT', August 2007, available at <http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/pvt/pvt_guidance.pdf> accessed 18 August 2008.

[104] BBC Trust, above n 103 above, para 5.12.

[105] ZDF adopted its own procedures in advance of this at the end of 2007 and details are contained in a ZDF Press Release, 'ZDF Television Council Responsible For Approving New Digital or Telemedia Services', 7 December 2007, available at <http://www.zdf.com/uploads/media/2007-12-07_-_ZDF_PR_Approving_new_services_01.pdf> accessed 18 August 2008.

[106] For discussion of these issues, see Schulz, above n 2.

the Länder, some commentators have suggested that the test may ultimately prove to be something of a 'toothless tiger'.[107]

The impact of Community law on the German public service media sector has nevertheless been considerable. Although Member States remain largely free to determine the extent and role of state-funded services within their jurisdiction, the operation of those services will be subject to demanding Community constraints. What is particularly striking is the way in which the Commission has used its ability to extract undertakings to 'encourage' one state to implement what it considers to be the best practice developed by another.[108] The state aid regime thus facilitates the pooling and then dissemination of ideas, leading to a gradual, yet ineluctable, ratcheting up of standards.

D. Article 87(3)(d) EC and Aid for the Film Sector

It is estimated that between 2002 and 2005 Member States provided over €6.5 billion for their film industries.[109] Much of the aid is provided for production, but funding schemes are extremely varied, ranging from project development to support for distribution and promotion.[110] The principal state aid exemption that can be relied on in this context is, as indicated above, Article 87(3)(d) EC, and the availability of this cultural exemption has had a significant influence on the way in which Member States frame their schemes. Although states such as France undoubtedly ascribe considerable importance to the cultural aspect of film, others, such as the UK, are more concerned with film's potential economic and industrial importance. It is, in fact, only since the Finance Act 2006 that eligibility for UK support has depended on meeting a 'cultural test': previous schemes focused on production expenditure in the UK and labour costs relating to UK citizens. Adoption of the new test was undoubtedly influenced by the need to comply with Community state aid rules and similar developments can be seen in other Member States.

The Community is extremely wary of cultural arguments being used to cloak protectionism. In the 1993 case of *FEDECINE*, discussed above, the Court of Justice held that aid for domestic industry, even the film industry, could not be justified on cultural grounds.[111] For such a claim to be

[107] V Renner, '*ARD und ZDF drängen mit Macht ins Internet*' *Die Welt*, 14 May 2008, 8.

[108] In some cases the state will already have been considering adopting similar procedures for domestic reasons. Community oversight may nevertheless speed up or influence the form in which the procedure is ultimately adopted.

[109] J Broche, O Chatterjee, I Orssich and N Tosics, 'State Aid For Films—A Policy in Motion?' (2007) 1 *Competition Policy Newsletter* 44, 44.

[110] For comprehensive, up-to-date details, see the KORDA website of the European Audiovisual Observatory at <http://korda.obs.coe.int/web/search_aide.php> accessed 18 August 2008.

[111] Case C-17/92, above n 8.

successful, the aid would need to focus on some qualitative aspect of the goods or services produced. This approach continues to be followed today, but the line between support for industry and support for culture can be a fine one. This is illustrated by the Commission's decision concerning Spanish subsidies for dubbing/subtitling films and DVDs into the Basque language.[112] The Commission held that the aid supported a specific field of commercial activity, pre-production, and could not be brought within the scope of Article 87(3)(d) EC, even though it was designed to support a native language. The Commission did, however, find the aid to be justified under Article 87(3)(c) EC and relied on Article 151(4) EC to emphasise in this context the cultural dimension of the scheme.

To fall within Article 87(3)(d) EC, domestic schemes should thus seek to support the creation of films with particular cultural characteristics, even if this also entails support for the underlying industries. As previously indicated, the Commission has taken a rather relaxed view of what is 'cultural' in this context and Member State have been given scope to adopt markedly different approaches.[113] The German Film Fund, for example, establishes 13 distinct indicators of cultural content, only six of which relate specifically to Germany. Relevant factors include whether the film deals with religious or philosophical questions or matters of world history and if it has a European plot line. By contrast, the UK tax incentive scheme employs five cultural indicators: whether the film is set in the UK, whether the main characters are British citizens or residents, whether it is based on British subject matter, has English dialogue, and whether it reflects the diversity of British culture, British heritage or British creativity.[114] These criteria would appear to be designed to increase the likelihood that filming will take place in the UK and involve UK nationals.

To be eligible for support under both the UK and German schemes, applicants must obtain a certain number of points. Although these can be acquired by meeting the cultural criteria indicated above, points are also awarded for the employment of nationals, or nationals from another EEA country, and for production being carried out on the territory of the awarding state. Since these latter considerations are not regarded as cultural by the Commission, it reviewed the schemes to ensure that an award could not be made without there being a minimum of cultural content.

It is clear that Member States will only fund such schemes where they primarily benefit their own creative individuals and industries, yet this inevitably leads to more or less overt forms of discrimination. It is also clear that without such funding, national film industries would find it almost impossible to survive. The Commission has consequently been fairly tolerant of

[112] State aid N 481/2007, above n 58.
[113] See text accompanying n 67 above.
[114] State aid N 461/05, *United Kingdom, film tax incentive.*

domestic schemes, even where there is an element of indirect discrimination. In particular, the Commission has accepted that Member States may require that those who receive aid spend up to 80 per cent of their budget within their territory. The basis for this is that 'territorialisation clauses' of this nature, although restricting the operation of the internal market, ensure that states retain their capacity for cultural creation.[115] A recent study into these clauses suggests that their impact may be relatively limited, but the Commission has indicated that it will carry out further investigations into their influence on the internal market as part of its review of the Cinema Communication, which comes to an end in 2012.[116]

IV. CONCLUSION

The operation of Community law can be seen to have had a significant impact on the way in which Member States support their film and television industries. Its impact has, however, been rather different to that which many commentators feared, in that Member States retain considerable discretion to influence both the structure and content of their audiovisual services. At first sight, Community law appears most constraining in relation to film funding, requiring that states pursue clear cultural objectives. Further inspection reveals, however, that the Community has here accepted an extremely wide definition of culture, indicating perhaps the growing importance that the Community ascribes not only to Article 151(4) EC, but also to the UNESCO Convention on Cultural Diversity. More cynically, one might conclude that this is a context where the Community would, in any event, favour an expansive definition of culture in that funding schemes that make reference to broad genres are more likely to be accessible to producers in other Member States. The more restrictive, British, orientation of the UK film funds, for example, makes UK funding less attractive for non-nationals. Whatever the motivation, it is clear from the Commission's recent decisions that Community law does not significantly restrict the type of project that Member States may finance.

Similar latitude has been afforded to Member States in relation to their funding of television services under Article 86(2) EC and this is in line with the emphasis on state discretion in the Commission's 2007 Communication on Services of General Interest, introduced with Protocol 26 to the Lisbon

[115] Cinema Communication, above n 17, 8.

[116] Cambridge Econometrics Ltd, David Graham and Associates Ltd and Rambøll Management, 'Study on the Economic and Cultural Impact, Notably on Co-Productions, of Territorialisation Clauses of State Aids Schemes for Films and Audiovisual Productions', May 2008. See also Commission MEMO, 'State Aid: Future Regime for Cinema Support' MEMO/08/329, 22 May 2008.

Treaty in mind.[117] Thus, generalist services, which include entertainment and sports programmes, as well as new media services, can receive public subsidies. Nor is there any barrier in principle to Member States establishing production funds for the television sector just as they do for film under Article 87(3)(d) EC. The major threat to public service broadcasters comes not, therefore, from the Community, but from within their own states, as the recent proposal in the Netherlands that light entertainment should be removed from the public service remit, illustrates.[118]

Substantive freedom has, however, been bought at the cost of procedural constraint. To convince the Commission that their support schemes conform to EC Treaty requirements, Member States must now ensure that they are not only transparent and accountable, but that procedures are in place to prevent overcompensation and unjustifiable distortions of the market. The potentially far-reaching implications of these requirements were made clear by the Commission's ruling on the legality of the German public service broadcasting system. This case also illustrated the way in which the state aid rules can be used to coordinate domestic procedures, exerting pressure on those states whose practices are under review to adopt innovative procedures developed by others. Regulatory bodies and broadcasters do, of course, exchange ideas regardless of Community fiat, while economic or technical developments may make review inevitable in the longer term. Nevertheless, scrutiny under the state aid rules can trigger or advance the introduction of reforms, as they did in Germany.[119]

The Commission has not only moved to defuse the contentiousness of the state aid rules in the audiovisual field by adopting a limited form of review on key issues, it has also, through the imposition of these procedural requirements, sought to make it less likely that complaints will be made to it in the future.[120] It is certainly possible that where domestic procedures are seen by all sides to be clear, effective and legitimate, the risk of challenge will be reduced and this, given the administrative costs involved, must be attractive for Member States and the Commission alike. The Commission in its consultation document on the existing Broadcasting Communication has emphasised the importance it ascribes to giving third parties the opportunity to comment on public service remits or new services before they are approved, as well as the desirability of oversight by an independent regulatory body, thereby

[117] See above nn 14 and 63.

[118] Bardoel and d'Haenens, above n 71, 347. Consider also pressure from publishers in Germany to restrict the provision of online text services by ARD and ZDF: Renner, above n 107.

[119] Schulz, above n 2, 3.

[120] It will also facilitate assessment by the Commission where Member States themselves refer funding schemes under Art 88(3) EC. Greater devolution to Member States is in line with the approach outlined in the Commission's 'State Aid Action Plan. Less and Better Targeted State Aid: a Roadmap for State Aid Reform 2005–2009' COM(2005)107 final, 7 June 2005, particularly at paras 12–14.

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[121] Commission, Explanato

[122] *Ibid*, 5 and 9.

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indicating areas where procedures might be tightened further.[121] On the other hand, more formalised and transparent procedures may encourage those who have lost out in the process to seek judicial redress. Perhaps with this in mind, the Commission also discusses the introduction of mechanisms designed to ensure that 'complaints concerning the fulfilment and scope of the public service broadcasters' activities' can 'normally' be dealt with at the national level.[122] On any view this is very far from a European 'land grab' and indicates the desire to leave policy decisions in this area primarily for domestic determination.

The procedures that are put in place and the type of questions that are asked can, however, have a marked influence on the substantive outcome of a decision-making process. The requirement that Member States only finance projects with a clearly defined remit, that they ensure there is no overcompensation and that the potential market impact of such assistance is assessed should place their funding on a firmer footing, but it may also lead to a reduction or redirection of the aid that is provided. The challenge to articulate in a convincing way any deviation from market principles will be all the greater where third parties are incorporated into the decision-making process. Moreover, given that the Commission has adopted a very limited form of review when assessing funding remits and market impact, it is probable that domestic consideration of these issues, particularly when carried out by an independent body, will prove to be more exacting. The BBC Trust, for example, when evaluating the BBC on-demand services under the public value test, decided to exclude effectively all classical music downloads, even though OFCOM had concluded that the provision of new or less mainstream material might stimulate consumer interest and expand the market.[123] There may also be a tendency to err on the side of caution in order to avoid legal challenge by those whose commercial interests will be affected. These considerations underline the fact that although Community law has primarily addressed how Member States finance their audiovisual media it remains capable of influencing the range of films and media services that ultimately receive state support.

[121] Commission, Explanatory Memorandum, above n 17, 2 and 5.

[122] *Ibid*, 5 and 9.

[123] See BBC Trust decision on on-demand services at <http://www.bbc.co.uk/bbctrust/consult/closed_consultations/ondemand.html> accessed 18 August 2008; and OFCOM, 'BBC New On-Demand Proposals—Market Impact Assessment' at <http://www.ofcom.org.uk/research/tv/bbcmias/ondemand/> accessed 18 August 2008.