Institute for European Studies
Vrije Universiteit Brussel

State Aid and Public Service Broadcasting

How Future-proof is the Remit of Public Broadcasting Organisations?

Karen Donders

IES WORKING PAPER 1/2009

State aid and public service broadcasting

How future-proof is the remit of public broadcasting organisations?

Karen Donders

The **Institute for European Studies** (IES) is a Jean Monnet Centre of Excellence. The IES operates as an autonomous department of the Vrije Universiteit Brussel (VUB). It hosts advanced Master programmes and focuses on interdisciplinary research in European Studies, in particular on the role of the EU in the international setting. Within this scope, the IES also provides academic services to scholars, policy makers and the general public.

The **IES Working Paper Series** is a collection of scientific articles on policy-relevant issues that deal with the EU in its international context. The Series reaches across multiple disciplines, including law, political sciences, social sciences and economics. Instructions for sending Working Paper submissions as well as comments may be found at the Working Paper Series' homepage (see www.ies.be).

ISSN Number: pending

Institute for European Studies, VUB
Pleinlaan 2, B-1050 Brussels, Belgium

ABSTRACT

The European Commission's interference through state aid rules with the Member States' support for public service broadcasting is not undisputed. Member States, public broadcasters and numerous academics fear that State aid control might limit the public service remit and, hence, the multi-platform and holistic role of public broadcasters in the converging media industries. This paper assesses to what extent the fear for Commission intervention is, indeed, justified. It starts with the assumption that the transformation from public service broadcasting to public service media is vital for the European democratic society. The paper leads to the observation that, in fact, European State aid policy might contribute to such a necessary and urgent transformation, instead of threatening it. The paper consists of three main parts. Firstly, the legal constraints and margins of the Community's State aid framework are discussed. Secondly, the application of the rules to a selection of public broadcasting cases is analyzed. Finally, some conclusions are drawn from the analysis.

ABOUT THE AUTHOR

Karen Donders holds a Master's degree in Communication Sciences. In 2006 she became a PhD researcher at the Institute for European Studies. Karen is also affiliated with the Center for Studies on Media Information and Telecommunications (SMIT), which is a partner in the IBBT research consortium. Karen's research concerns the impacts of European State aid policy on the remit, control and financial support of public broadcasting organizations in the EU, in particular whether or not European State aid control can assist the transformation from public service broadcasting to public service media.

TABLE OF CONTENTS

1 INTRODUCTION

Over the years, it has become clear that the European Communities' State aid rules[1] apply to the funding of public broadcasting organisations by the Member States. While the first complaints of Spanish, Italian, Portuguese and French private broadcasters against the dual funding of RTVE, RAI, RTP and France Télévisions respectively were stalled in the beginning of the 1990s,[2] the European Commission (hereafter: 'Commission') has become more active in its application of the State aid rules to the funding of public broadcasting organisations since 2001.

The Commission's interference with Member States' public broadcasters is not undisputed, however. While private companies complain that the application of the State aid rules to the funding of public broadcasting is not going far enough, public broadcasters and Member States' media ministries fear that the Commission is limiting the public service remit when applying the EC Treaty rules to broadcasting. They are worried the Commission imposes an increasingly strict restrictive market logic on public broadcasters.

State aid procedures involving support schemes for public broadcasters are thus characterised by two conflicting perspectives on public service broadcasting. Following one perspective, public broadcasters have a competitive advantage over other market players. They are too generously funded and their activities lack sufficient transparency and control. Proponents of this perspective are in favour of a 'small' public broadcaster that is constrained in the expansion of its services to the Internet, digital television and mobile devices.[3] Representatives of the second perspective strongly defend the idea of a 'big' public broadcaster that provides different genres of content (so, also entertainment and sports) and is active in all media markets and, as such, evolves into a public service media enterprise. These broader institutions of course need regulation but the regulatory framework must be flexible in order to guarantee the independence and innovative potential of public broadcasters.[4]

Due to these diverging opinions about public broadcasters, the application of the European Community's State aid rules to their funding is becoming increasingly important. The number of complaints and decisions is on the rise.[5]

Given the significance of State aid rules for public broadcasting organisations and their disputed nature, the aim of this paper is to provide an insight into the actual meaning of State aid policy for the remit of public broadcasting in a digital age. Hence, the question underlying this contribution is whether or not the Commission is, indeed, as is feared by public broadcasters and Member States, limiting the remit of public broadcasting organisations. The assumption that public broadcasters should be active in different markets on different platforms with a diversity of genres and content is the starting point of this analysis.

[1] Following the State aid rules, the European Commission is competent to assess the legality of Member States' State aid schemes (for example, subsidy mechanisms).
[2] Gorini 2003; Michalis 2007.
[3] See, for instance, Armstrong and Weeds 2007.
[4] See, for instance, Jakubowicz 2007.
[5] For a complete overview of all State aid decisions concerning public broadcasting, see Donders and Pauwels 2008.

The paper consists of three parts. In the first part, the author gives an overview of the EU regulatory framework on State aid and on the funding of public broadcasting organisations. There is a discussion on Art. 87(1) EC, which contains a general ban on the use of State aid. After that, the exceptions allowing for State support for public broadcasting are discussed. In the second part, the application of these rules in particular State aid cases is addressed. Here, the focus lies on recent Commission decisions like the decisions on the licence fee funding of ARD and ZDF and the support for Flemish public broadcaster VRT. Other decisions like the BBC Digital Curriculum are included where relevant to support the analysis. Finally, some conclusions are made.

2 THE STATE AID RULES: LEGAL CONSTRAINTS AND MARGINS

There are two essential questions in every State aid procedure. First, is the funding scheme in place State aid? Second, if so, can the measure be exempted from the general ban on State aid on the basis of one of the exceptions provided for by the EC Treaty?

2.1 Art. 87(1) EC: Is support for public broadcasting organisations State aid?

Measures that are State aid are incompatible with the aims of the internal market and are therefore prohibited. Art. 87(1) EC determines which support measures are State aid within the meaning of the EC Treaty.

> "Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market".[6]

The article identifies three criteria with which measures have to comply in order to be regarded as State aid: there has to be a transfer of State resources, the measure must confer a selective advantage upon certain undertakings or sectors, and the support can potentially harm trade between and competition in Member States. The funding of public broadcasting organisations normally meets these three criteria.[7] First, the public subsidies granted to public broadcasters like Flemish VRT or Dutch NOS can be regarded as a transfer of State resources. Second, governments support public and not private broadcasters. Consequently, the funding of public broadcasters is selective in nature. Third, since public broadcasters are active in advertisement and in the acquisition of transnational media rights, the funding of public broadcasters can bring about a distortion of competition and trade.

The three criteria are not undisputed, however. Public broadcasters and some Member States for example argue that the licence fee funding of public broadcasters (e.g. ARD and BBC) is not a transfer of State resources.[8] The licence fee, so they argue, is a direct transfer of citizens' contributions and is, hence, not imputable to any State authority. Nevertheless, since government authorities enforce the collection of the licence fee, the Commission has classified the licence fee as a transfer of State resources.[9] Another problem with regard to Art. 87(1) EC is the selective advantage criterion. In general a measure constitutes an advantage when a company or sector acquires certain benefits they would not have acquired in a normally functioning market. If governments' funding of public broadcasters can be motivated on the basis of sound private sector motives (e.g. the perspective on profits) there is no selective advantage. It is up to the Commission to determine whether or not governments behave like normal private undertakings. This assessment is based on the 'Market Economy Investor test'. This test has been criticised heavily,[10] and not only because of the assumptions (perfect competition, perfect information, perfect markets, etc.) that underlie it. Government support for public broadcasting organisations is motivated by some shortcomings of the market and aims to

[6] Emphasis added
[7] Some authors make a distinction between four or five criteria (state resources, selectivity, advantage, effect on trade, effect on competition).
[8] Katsirea 2008.
[9] See, for instance, Decision E3/2005 on Financing of Public Service Broadcasters in Germany, *par*. 143ff.
[10] Hakenberg and Erlbacher 2003, 434.

support services that contribute to social, cultural and democratic goals.[11] Consequently, the comparison with private undertakings' behaviour seems superfluous and biased.

> "When public authorities intervene on the market on the same terms as private investors, there is no granting of State aid. This case, however, is quite rare, since public authorities generally take action precisely because the market fails to deliver the desired supply."[12]

Notwithstanding this criticism on the Art. 87(1) EC criteria, the funding of public broadcasters in general meets the constitutional conditions set in Art. 87(1) EC. As a consequence, the funding of public broadcasting organisations qualifies in principle as State aid. However, if public broadcasting services are considered to be services of general economic interest (*infra*),[13] the application of Art. 87(1) EC is somewhat more complicated. The question indeed has arisen whether measures that purely offset the cost of a public service obligation (e.g. the public service remit of broadcasting) can be considered to be State aid within the meaning of Art. 87(1) EC.[14] Two approaches can be observed: the first one is dubbed the 'aid' approach, the second the 'compensatory' approach.[15]

> "… deux approches se sont opposées: l'approche 'compensatoire', qui voit dans ce financement non pas une aide mais une rénumération appropriée pour les services fournis ou une compensation pour les coûts de fourniture de ces services et l'approche 'aide d'état', pour qui ce financement constitue une aide d'état, susceptible le cas échéant d'être justifiée au titre de l'article 86, par 2, CE si les conditions sont loin d'être anodines, dans la mesure où les aides d'état sont soumises à une procédure de contrôle par la Commission."[16]

The 'aid' approach stands for a more critical approach that considers the funding of services of general economic interest to be State aid within the meaning of 87(1) EC. Not the goal of the measure, but rather the potentially harmful effects on competition qualify support schemes as State aid.[17] The 'compensatory' approach fiercely contradicts this stance and puts forward that State aid in favour of services of general economic interest is not intended to favour one undertaking over another, but to favour the end-user. It is for this reason that governments offset the costs of delivery of services of general economic interest. In addition, if governments merely compensate for the cost of public service obligations there is no advantage and consequently, bearing in mind the phrasing of Art. 87(1) EC, no State aid.[18] It is the latter view that is dominant with proponents of a 'broad' public broadcaster. They feel that market distortions, although not negligible, are subordinate to the public interest (and hence the citizen) that is served.[19] It seems that at present also the European Court of Justice (hereafter: 'ECJ') favours to some extent the compensatory approach. This became clear in the *Altmark* case. In this case the Court

[11] Plender 2003.
[12] Hencsey et al. 2005, 10.
[13] Whether 'public service media' would be considered as services of general economic interest remains to be seen.
[14] Antoniadis 2006, 597.
[15] Rizza 2003, 69.
16 Dony 2005, 110.
"There are two contrasting approaches: the 'compensatory' approach, which views the financing, rather than as aid, as an appropriate remuneration for the rendered services or as a compensation for the costs of providing such services; and the 'state aid' approach, which considers the financing as state aid, to be justified where necessary on the basis of Article 86(2) TEC, in case the conditions are far from neutral, insofar as the state aids are submitted to the control procedures of the Commission." (Editor's translation)
[17] See, for instance, Nicolaides 2003, 561.
[18] Dony 2005, 133.
[19] See, for instance, Barbara Thomass' assessment of the German three-step test that has the purpose to evaluate ex ante the delivery of new services by ARD and ZDF (Thomass 2008).

dealt with German compensations for universal service obligations in the transport sector. The Court ruled that measures do no constitute State aid following Art. 87(1) EC if they comply with four criteria: entrustment with a clearly defined public service mission, objective parameters for control, proportionality of government support, and selection on the basis of a public tender or evidence of efficiency.[20] However, until now no support scheme for public broadcasting has met the criteria the Court set.[21] Therefore, all support schemes for public broadcasting organisations have to be – for the moment – considered to be State aid within the meaning of the EC Treaty. As a result, the Commission usually continues its investigation of State aid to public broadcasting by assessing its compatibility with exceptions in the Treaty.

2.2 Art. 86(2) EC and the Broadcasting Communication: Can support for public broadcasting organisations be compatible with the EC Treaty?

As stipulated by Article 86(2) EC:

> "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

This Article is quite ambiguous, since it acknowledges the importance of public services on the one hand, and the weight of Community rules, on the other. It is often criticized by lawyers on the ground of its superfluous nature[22] and it has indeed given rise to heated debates about the 'balancing act' between the public interest as defined by Member States and the common interest as pursued by the Commission.

> "Article 86(2) EC, as with any exception, should be interpreted strictly. This is not always easy since its objective is to strike a balance between the Community objectives of market integration and national public service objectives. This provision is thus the main point of contact between two 'tectonic plates' moving in opposite directions. Regular 'seismic movement' is for this reason to be expected around Article 86(2) EC and its interpretation."[23]

It is up to the Commission to shape the balancing act: Art. 86(3) EC explicitly recognises the authority of the Commission to decide how to implement Art. 86(2) EC in this regard. This does not take away the ambiguity of Art. 86(2) EC, however. There is a latent contradiction between national State aid objectives and the overall goals of the Community. Article 86(2) EC recognizes this field of tension and the controversy attached to the interpretation of Community law with regard to services of general economic interest, but it does not solve it, which is a fundamental difference. This subsequently implies that every public broadcasting case will be assessed on a case by case approach, which on the negative side is, and probably will remain, problematic in *"such a*

[20] European Court of Justice, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, Case C-280/00, *par*. 87-88.
[21] For more information about *Altmark* and its inherent difficulties for public broadcasting, see, for instance, Mortensen 2008; Antoniadis 2006.
[22] Nitsche 2001, 137.
[23] Buendia Sierra 2006, 543.

fundamental area of traditional State activity."[24] On the positive side, is a case-by-case approach is to be applauded, because it allows the Commission and the Courts to take into account sector-specific sensitivities.[25] Given that public broadcasters are now also active in new markets, such a case-by-case approach is even more important. As different public broadcasters are engaging in the changing media environment at different speeds, diverging complaints and broadcasting markets require a context-specific assessment of support schemes.

The flexible rules in the Broadcasting Communication (2001), that makes explicit the criteria under which a State aid measure can qualify as compatible under Art. 86(2) EC, and the Amsterdam Protocol (1997) illustrate that a sector-specific approach is considered necessary by most stakeholders.

The Broadcasting Communication,[26] of which the first proposals were submitted by the Commission in 1995 and 1998,[27] has a dual nature. On the one hand its goal is to stress that public broadcasting serves some very important public interest objectives. On the other hand, it articulates that the funding of public broadcasters is subject to EC competition rules, despite its acknowledged social, cultural and democratic importance. The latter is justified because broadcasting no longer operates in a monopolistic, but in a 'mixed media' environment in which *"growing concerns for a level-playing field"*[28] are being raised by private undertakings and the Commission. As such, the applicability of the State aid rules to public service broadcasting is in essence an intrinsic consequence of the – from a diversity and pluralism perspective vital - liberalisation of the broadcasting market at the end of the 1980s.

On the basis of three criteria, it is up to the Commission to decide whether or not State aid to public broadcasters is indeed compatible with the EC Treaty. These criteria are: (i) definition and entrustment, (ii) control and monitoring, and (iii) proportionality. A discussion of all three criteria is relevant in light of this contribution's focus on the remit of public broadcasting in a digital era.

The first criterion demands that the remit and mandate of public broadcasting is clearly defined and that its fulfilment is legally entrusted to the public broadcaster receiving State resources. This norm has been quite flexible since the Commission can only pursue a 'manifest error' approach vis-à-vis the remit of public broadcasters. The manifest error concept implies that the Commission can merely challenge the remit when Member States are without doubt funding commercial and not public services. So far, the Commission has sometimes doubted Member States' definitions of public broadcasting,[29] but never formally contested them in a final State aid decision. It is not unthinkable that the Commission would do so in the near future, however. Now that public broadcasters engage in digital services themselves, it is clear to the Commission that this activity should also be clearly defined and entrusted. The definition of manifest error becomes increasingly crucial as digital services are often assumed to be more of a commercial than public nature. The Commission moreover forcing the Member States to define the public service remit in the digital sphere runs the risk of limiting the definitional freedom of Member States.

[24] Szyszczak 2004, 190.
[25] Moreover, one can claim that – notwithstanding there are some guiding precedents - a case-by-case approach is followed throughout the entire field of competition policy.
[26] Commission Broadcasting Communication 2001.
[27] See Commission Proposal on State aid and public broadcasting 1998.
[28] Commission Broadcasting Communication 2001 *par*. 3.
[29] See, for instance, Decision 3E/2005 on Financing of Public Service Broadcasters in Germany.

The two other criteria concerning the monitoring and control of public service delivery and the proportionality of public funds are closely linked to the remit of public broadcasting. The monitoring and control principle means that Member States should check whether public broadcasters are living up to set public objectives and stay within the legal framework underlying their operation. Also this criterion could be more scrupulously assessed in a new media market. Proponents of a 'smaller' public broadcaster (see introduction of the paper, *supra*) indeed argue that the new media activities of public broadcasters necessitate more government control.

The third proportionality criterion, has also been very contentious. Here, the Commission determines whether there is any overcompensation of the public service task, which in turn assumes a high degree of transparency in public broadcasters' financial records. In addition, the criterion implies that the Commission analyses to what extent public support of public broadcasting is more or less than the actual cost of providing the required public services. The proportionality calculation is, however, not undisputed. It is not a simple and straightforward mathematical exercise. The separation of commercial and public revenues and costs of public broadcasters is a prerequisite to assess whether or not the funding is proportional. Such a separation of course interferes with the difference between public services and commercial services. Now that also public broadcasters are experimenting with new sorts of business models, new questions emerge with regard to the proportionality criterion. In particular the debate on pay services is very vivid: can they fit the remit of public broadcasting given their lack of universality?[30]

Taking into account the ambitious – primarily market-oriented – policy goals the Commission has set itself with regard to the development of an integrated European market[31] and a European competitive knowledge economy[32] - and the level-playing field approach[33] underlying it - the digital expansion of the remit of public broadcasting might challenge the flexibility of the Broadcasting Communication. In a digital media environment, the economic potential of developing new media services is indeed booming and more emphasis has been placed on the achievement of a 'fair' balance between private and public undertakings to exploit the potential benefits of digitalisation. For some this search for a 'fair' balance is in practice a threat for public broadcasters,[34] for others it is a necessity to ensure a level-playing field in the broadcasting market.[35]

2.3 The Amsterdam Protocol: muddling through

In addition to the above discussion of Art. 87(1) EC, Art. 86(2) EC and the Broadcasting Communication, it is important to include the Amsterdam Protocol in the analysis. Although the Amsterdam Protocol has been agreed upon in 1997, the Protocol remains relevant and is revitalised in light of the current expansion of public broadcasters to new media markets.

> "The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of the Member States to provide for the funding of public service broadcasting in so far as such funding is granted by broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State,

[30] See, for example, the diverging views on this issue in a position paper of the Association of Commercial Television (ACT) and the European Broadcasting Union (EBU) (ACT 2008; EBU 2008).
[31] Goodwin and Spittle 2002; Dinan 1999.
[32] Pauwels and Burgelman 2003.
[33] Harcourt 2004, 10.
[34] See, for instance, Coppieters 2003.
[35] See, for instance, Hobbelen et al. 2007; Antoniadis 2006; Depypere and Tigchelaar 2004.

> and in so far 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 that public service shall be taken into account."[36]

The Amsterdam Protocol reflects the growing concerns of Member States about the direction in which media policy was heading under pressure of European State aid policy. In 1997 Belgian Prime Minister Dehaene and German Chancellor Helmut Kohl lobbied, herein supported by various lobbying groups (most importantly the European Broadcasting Union), for the implementation of the Amsterdam Protocol in the Amsterdam Treaty.[37] The Protocol can be seen as a political commitment to a 'European-style' concept of public broadcasting.[38] It recognises the importance of public broadcasting for European democracy and emphasizes Member States' autonomy to organize their own system of public service broadcasting. At the same time the Protocol ensures the application of European competition policy to this particular field of media policy. Opinions on the importance of the Protocol differ. Some find it a major political achievement.[39] Others find this appraisal of the Protocol too optimistic. Nihoul,[40] for example, says that the 'bilan' of the Protocol is rather disappointing, and that it merely contains *"quelques indications politiques et l'annonce d'un statu quo juridique"*[41]. The Protocol indeed has not led to a complete exception of public broadcasting from the EC Treaty. Member States are not completely free in determining their policies with regard to public service broadcasting. From a legal point of view this might be a muddled solution.[42] One should, however, not overlook the importance of political signals, nor the legal obligation of the Commission and the Courts to take the Protocol, that is part of Community law after all, into account.

In the light of the current discussions about the role of public broadcasters on new media platforms, the Amsterdam Protocol is back in the centre of attention. It is argued that the Protocol contains a specific position for public 'broadcasting' only, and not necessarily for public service 'media'. Member States and public broadcasters, however, argue that the Protocol is not linked to any specific medium, but to a political intention. The fact that this intention is extended beyond the broadcasting medium to, for example, the Internet and mobile devices does not change the validity of the Protocol. The Commission, although supporting the notion of technology-neutrality, has not yet intervened in this debate on the width of the Amsterdam Protocol.[43]

The discussion of the State aid legal framework[44] already indicates that the assessment of support schemes for public broadcasting will not be straightforward. The rules themselves are inspired by sometimes opposing political objectives and contain concepts that are more often than not difficult to define (see, for example, the discussion of the 'aid' and 'compensatory' perspectives on the presence of a 'selective advantage' when assessing the support for services of general economic interest, *supra*).

---

[36] Amsterdam Protocol 1997.
[37] For information on the Amsterdam Treaty, see, for instance, Héritier 2001; Duff 1997.
[38] Humphreys 2003, 2.
[39] See, for instance, Raboy 2003, 46.
[40] Nihoul 1998, 346.
[41] "a few political guidelines and the confirmation of a *status quo* in law" (editor's translation).
[42] Nitsche 2001, 152.
[43] For more information about these different standpoints, see, for instance, AER 2008; Biggam 2008; EBU 2008, 10; Plasterk 2008; Vlaamse Regering 2008.
[44] In our discussion of the legal framework we have not discussed Art. 87(3)d EC, the so-called 'cultural derogation' in the Treaty. The relevance of this Article is for the moment rather limited in the application of the State aid rules to public service broadcasting and will, therefore, not be discussed in this chapter. For more information about Art. 87(3)d EC see, for instance, Psychiogopoulou 2006.

3 THE APPLICATION OF THE STATE AID RULES: STILL 'TO INFORM, TO EDUCATE AND TO ENTERTAIN'?

The aim of this paper is to analyse whether or not the Commission's application of the legal framework has a negative impact on the remit of public broadcasting organizations and should as a consequence rightly be perceived as a threat for public service broadcasting. Here, the focus lies on the expansion of the remit to new media markets. In order to answer this question a selection of rather recent Commission decisions has been made, in particular the decisions concerning the funding of the German public broadcasters ARD and ZDF (14 April 2007) and Flemish public broadcaster VRT (27 February 2008). These decisions are relevant since they represent the most up to date interpretation of Community law by the Commission. For the sake of argumentation other decisions that concern the funding of public broadcasters in the Netherlands, the United Kingdom, Denmark, etc. are introduced in the analysis.[45] The findings are based on the analysis of Commission decisions and on interviews conducted with experts in the field of media policy and EU officials. The case analysis is divided into three parts. It addresses the issues of definition and entrustment, monitoring and control, and proportionality, i.e. the three criteria of the Broadcasting Communication. As already indicated in the discussion of the Broadcasting Communication, all three criteria pose particular questions with regard to the expansion of the remit to new media platforms.

3.1 Definition: how precise can/should the remit be?

The Broadcasting Communication is rather ambiguous with regard to the required specificity of the definition of the remit.[46] In *par.* 33 of the Communication one can read that *"a wide definition may be considered legitimate"*, whereas *par.* 37 states that *"the definition should be as precise as possible"*. Recently, with the expansion of public broadcasters' activities to new media markets, this haziness has given rise to substantial problems of interpretation.[47]

The Commission fears indeed that Member States might abuse the flexible Treaty provisions and the Amsterdam Protocol in order to fund public broadcasting services that go beyond the remit of public broadcasting organisations (so-called 'mission creep'). As a consequence the Commission, notwithstanding its hesitance to go against the Member States' autonomy to define the remit of public broadcasters, has become more active in questioning the definition of the remit. This, of course, provokes quite some criticism.[48]

Until now, the Commission has put forward three differing approaches[49] towards this issue of definition.

Closely associated

The first approach starts from the concept 'closely associated'. In the BBC Digital Curriculum case, in which the Commission assessed the funding of online educational

[45] For a complete overview of Commission decisions on State aid and public service broadcasting, see, Donders and Pauwels 2008.
[46] As is also suggested by Ross Biggam in another contribution to this edited collection.
[47] It seems to make more sense that a wide remit, that is precisely defined, is considered legitimate. A wide definition, that is at the same time precise, seems to be illogical.
[48] See, for instance, Holtz-Bacha 2005; Wiedemann 2004; Meijnen 2007.
[49] We discuss these approaches in chronological order.

services of the BBC, it was maintained that the remit concerned only those services that were closely associated with, and therefore limited to, radio and television services. The inclusion of "non television and radio services as ancillary services of the BBC is a matter of UK legislation. The provision of educational material over the internet may be considered to be within the 'existing aid' nature of the scheme to the extent that it remains closely associated with the BBC's television and radio services.[50] If, however, the proposed 'ancillary service' sheds this 'close association' it can no longer be considered as one offering continuity within the existing scheme. The use of public funding to enter markets that are already developed and where the commercial players have had little or no exposure to the BBC as a competitor cannot be considered as maintaining the status quo regarding the nature of the scheme."

Two remarks can be made with regard to this approach. Firstly, the above statement infringes Member States' competence to define what are services of general economic interest. It implies that services that are not closely associated with radio and television services cannot be part of the remit and can subsequently not be regarded as a public broadcasting service (which is a service of general economic interest). Secondly, it is not clear whether this approach is technology neutral. This tendency could run against the overall philosophy of the Commission's Information Society policy. In this policy field the Commission indeed stresses that regulation should become technology neutral: given fast developments in the media sector, regulation should not depend on specific platforms or technologies.[51] The concept 'closely associated' implies a difference on the basis of technology however. Radio and television services are at the core of the remit, whereas other services are situated within or even outside the margin of the remit, depending on how 'closely associated' they are with the core.

The 'closely associated' approach is, hence, problematic in two respects: firstly, with regard to the reference made to specific *types* of services, and secondly, concerning the different *platforms* on which these services can be offered.

Added public value

The imperfections of the BBC Digital Curriculum decision were not neglected by the Commission. It puts forward a slightly different approach in its decision on German licence fee funding of ARD and ZDF. In this decision the Commission makes three clearly discernible remarks with regard to the definition of the remit in a new media landscape.

Firstly, the Commission says that there is no clear dividing line between commercial and public services in the German public broadcasting system.[52] The lack of clarity in the definition of the remit could give ARD and ZDF the possibility to exploit commercial services on the basis of public funding, which would constitute a manifest error and lead to the incompatibility of the State aid with the Treaty. Hence, it is not the platform or the technology underlying the platform that can give rise to a manifest error, but the business model that supports the service and determines its nature (commercial or public). This statement is more in line with the issue of technology neutrality and also with the Commission's task to find a manifest error. However, it is potentially problematic since the Commission could imply – with this statement – that e.g. pay-per-view services (a specific business model underlying some on-demand services) cannot be considered as public

[50] Decision N37/2003 on BBC Digital Curriculum, *par*. 36.
[51] See, for instance, Reding 2006, 4.
[52] Decision E3/2005 on Financing of Public Service Broadcasters in Germany, *par*.238-239.

services.[53] So, if public broadcasters exploit their archives[54] and charge the consumer a reasonable market price for this content, this would imply that these services would be commercial and not public broadcasting services. This logic is not conclusive as it denies Member States' right to decide upon the funding mechanisms that benefit public broadcasting organisations. The nature of revenue streams, be it a licence fee, advertising revenue or pay-per-view income, is to be determined by Member States and does not affect the public character of a service.[55] Moreover, even if the Commission has no formal position on pay-services yet,[56] the classification of pay-services as commercial services could potentially harm innovation in service delivery with public broadcasters.

Secondly, the definition of the remit – so it can be read in the decision - is too vague, in particular with regard to new media services. The delivery of these services cannot be justified on the basis of imprecise cultural, educational and democratic objectives. There is a need for a 'clearer circumscription'. The Commission insists that *"it remains unclear what is the public service value of these channels in addition to the already existing channels."*[57] It is disputable whether this demand for an 'added public value' for new media services is technology neutral and can, in addition, be seen as legitimately falling within the scope of Art. 86(2) EC and the Broadcasting Communication. Yet, the fact that the Commission insists on a more clear definition of the remit in a more complicated digital era is given its task to check for any manifest error, justified. The underlying idea of this more active approach toward the issue of definition is that not everything can be swept away under the carpet of democracy, social cohesion, universal service delivery, cultural diversity, etc. Moreover, a more precise definition of the remit might perhaps be perceived by public broadcasters as burdensome and uncomfortable – and indeed one should be careful when intervening with the independence of public broadcasting organisations – yet it is necessary to legitimate better the need for public broadcasting in a fast developing and far more complex media landscape.

Thirdly, the Commission asserts that *"the public service remit might include certain services that are not 'programmes' in the traditional sense, such as on-line information services."*[58] This remark illustrates very well that there remains a conceptual problem in the 'added value' approach. This problem goes beyond the mere quest for technology neutrality and illustrates how difficult it is to leave behind the old mindsets in media policy. The Commission mentions 'programmes' in the traditional sense and compares them with non traditional services like online services, because nobody really knows how to phrase it otherwise. Taking into account the legal importance and possible impacts of using certain concepts, a thorough rethinking of concepts is not just necessary. It is urgent.

---

[53] *Idem. par*.239-240.

[54] The exploitation of archives is often mentioned in the debate about pay-services. Although the author is not necessarily against the offering of pay-services as public services, she thinks that it is advisably to study and communicate what exactly the costs of the digitization and exploitation of archives are. Quite some public broadcasters get additional funds to stimulate digitization of content. The cost of the exploitation of archives should, therefore, be linked to copyrights, operational and/or technical costs. It is not clear to what extent these costs (for example, some public broadcasters hold most copyrights of programmes themselves) justify remuneration by citizens who have already paid for the content offered.

[55] See, for example, Court of First Instance, *TV2/Danmark and others v Commission*, Cases T-309/04, T-317/04, T-329/04 and T-336/04.

[56] The issue is under debate in the current update process of the Broadcasting Communication. In January 2008 the Commission launched a consultation on a possible review of the 2001 Broadcasting Communication. One of the issues being discussed is the public or commercial nature of pay-services (see Commission Questionnaire on the Application of State Aid Rules to Public Service Broadcasting, 2008 *par*.2.4.2.

[57] Decision E3/2005 on Financing of Public Service Broadcasters in Germany*, par*.227.

[58] *Idem, par*.222.

No hands-off approach[59]

In the decision on Flemish public broadcaster VRT the Commission clarifies its approach further. Emphasis is put on the competences of Member States with regard to definition and the acceptability of a wide definition.[60] Nonetheless, the Flemish authorities should ensure that the remit is not determined by the VRT but by the government itself. In the current situation, so the Commission maintains, this is not the case and as a consequence, it is difficult to judge which new services are part of the remit as defined by the Flemish government and which are not. As a result, the Commission observes a lack of transparency about what the VRT is doing and a high degree of uncertainty for other players in the market.[61] The latter argument is reasonable and is explicated further by the Commission.

> "The Commission does not contest the participation of public broadcasters in new technological developments, nor does it argue against their distribution of television and radio content over different platforms. Yet, the Commission upholds that the possibility to use new platforms does not automatically mean that all services offered by public broadcasters over new platforms are necessarily public broadcasting services. New platforms offer quite some opportunities to distribute services that differ considerably from the traditional remit of public broadcasters and traditional television programmes *offered by them. The relevance of these* services for the democratic, social and cultural needs of society is not always clear."[62]

Hence, in the VRT case, the evaluation of the definition criterion, as identified in the Broadcasting Communication, is captured in one single question: is there a mechanism, imposed by Member States, that prevents public broadcasters from freewheeling in new media markets? In other words: do governments ensure that public broadcasting organisations are active in merely these markets where they are required to be, or do they uphold a hands-off approach vis-à-vis public broadcasting organisations (and as such allow (again) everything to be swept under the carpet of democracy, social cohesion, universal service delivery, cultural diversity, etc.)?

Even if this approach is still not completely technology neutral, it is – in comparison with the 'closely associated' and 'added value' approaches discused above, more in line with the State aid rules. These try to guarantee that the funding behaviour of EU Member States does not harm competition and trade to an unacceptable extent. At the same time, they for services of general economic interest also give Member States the nearly autonomous right to define the remit of these services. In this approach, the Commission indeed limits itself to checking governments' definition of the remit and tries to make sure a certain level of predictability for other players in the market. In other words, the Commission asks Member States to take responsibility and ensure a clear definition of a possibly wide remit. In doing so, the Commission seems to find a balance between the necessity for public broadcasters to evolve in rapidly developing media markets and the concerns of commercial undertakings that there would be no clear limits to this evolution.[63]

[59] The Commission prevents Member States from upholding a 'hands-off' approach with regard to their public broadcasters. In particular, it is required that Member States control their public broadcasters' expansion to new media markets.
[60] Decision E8/2006 on the Public Financing of Public Service Broadcaster VRT, *par*.170-174.
[61] *Idem. par*.178-180.
[62] *Idem. par*.181 (Quote translated from Dutch).
[63] See, for instance, ACT 2008.

In short, the Commission's approach towards the definition of the public service remit has evolved over different cases. Initial approaches were fine tuned and have been brought in line with the State aid rules. The line between the Commission's and Member States' competences with regard to the definition of the remit remains a thin one however. Overall, it is clear (as has been put forward already several times, *supra*) that the Commission fears a stretching or abuse of Member States' competences to define the remit and wants to prevent an outsized expansion of the remit on the basis of vague and not necessarily justified (or explicitated) democratic, social and cultural policy objectives.

3.2 Monitoring and control: imposing a/the public value test?

The impact of Commission policy on the remit of public broadcasting organisations is substantial, but for now there remains a lot of room for manoeuvre for Member States to determine what their public broadcasters have to do. With regard to the second assessment criterion in State aid cases, i.e. monitoring and control, matters have very recently become more complicated and contentious.

Notably in the decision on the German licence fee funding of ARD and ZDF, the decision on the Irish funding for RTE and the decision on the financing of Flemish public broadcaster VRT, the Commission has demarcated its approach toward monitoring and control. Two elements come to the front: demands for, (i) external control of public broadcasters' performance and, (ii) ex ante evaluation of new media services.

Firstly, the Commission asks Member States to set up external monitoring bodies checking whether or not public broadcasters fulfil their public service objectives. The Irish and Flemish governments, as a consequence of Commission intervention, created such a regulator. In Ireland this is the Broadcasting Authority Ireland and in Flanders the Flemish Regulator for the Media. In Germany, the Länder did not go along with this Commission demand and stayed loyal to the Broadcasting Councils.[64]

Secondly, and the focus of the contribution lies on this element, the Commission has devoted significant attention to the entrustment of new media services to public broadcasters. In the above mentioned decisions, the Commission argues that a general entrustment of the remit does not suffice when new media services are concerned. There is a need for a separate entrustment of new or additional services. This separate entrustment should be preceded by an *ex ante* evaluation of the new media service in question. Such an *ex ante* evaluation, shaped after the BBC's public value test,[65] should check whether or not a particular service fits the remit of public broadcasters and has a proportionate effect on the market.

The Commission explicitated this approach for the first time in the preliminary investigation on the funding of Dutch public broadcaster NOS. In the Dutch case, the

[64] In Germany all public broadcasters are controlled by the so-called Broadcasting Councils. These Councils are not external to the public broadcasting organizations. Their members represent different groups in society and often have an expertise in the field of media policy. The Councils have been created in order to ensure public values like pluralism, quality, independence, etc.

[65] The Public Value Test (PVT) is one of the key components of the British public service broadcasting regime since January 1, 2007. It is a tool to evaluate every substantial change to the BBC's activities. The public value test consists of two parts: a Public Value Assessment (PVA, done by the BBC Trust) and a Market Impact Assessment (MIA, responsible for this is OFCOM). A new service that is considered to be a substantial change to the BBC's 'normal' activities is subject to the test. The test takes six months. After the Trust's evaluation (although OFCOM is responsible for the Market Impact Assessment, the BBC Trust takes the lead) the service is approved upon or not (the Trust can also ask for modifications to, for example, limit possible market distortive effects). Fore more information about the Public Value Test see, for instance, BBC Trust 2007.

Commission observed that 'side activities' (including for example some new media activities) of the different broadcasting organisations that participate in the overall Dutch public broadcasting system were not formally entrusted to the public broadcasters involved. Moreover, the Commission found the definition of new media activities vague and ambiguous, which might lead to uncertainty about the activities of NOS on commercial markets and eventually to the entrustment of services that do not fall within the remit.[66] The Commission elaborated on the above ideas in its decision on the German licence fee funding of ARD and ZDF:

> "in line with Commission practice, a mere authorisation granted to a public service broadcaster to perform activities which are described in a very broad way cannot be regarded as sufficient for the act of entrustment. This general possibility would need to be further substantiated and the public service broadcaster be specifically entrusted with the provision of the thus specified services."[67]

It is not clear what 'Commission practice' is, however. This is one of the first decisions in which the Commission actually pays attention to the entrustment criterion. The preliminary investigation on the Dutch funding of NOS cannot as such be regarded as 'Commission practice'. Therefore, it is not entirely clear to what 'practice' the Commission is reffering. Moreover, it is noted that the Commission requires an additional entrustment for new media services. The entrustment of a general remit is thus no longer adequate for these less traditional activities. It may be added that this approach might not be technology neutral. In spite of these more critical remarks, it might become rather difficult for the Commission to control State aid to public broadcasters without a more specific entrustment. In many EU Member States, public broadcasters have – given the fast developments in the media market – justifiably expanded their activities, and governments have not always supervised this expansion. As a result the legal framework that should support the current activities of public broadcasters is sometimes somewhat outdated. It is no longer fully in line with what public broadcasters are actually doing, which presents the Commission with some evaluation and assessment problems. Hence, it comes as no surprise that the Commission repeats its request for a more specific and detailed entrustment in its decision on the funding of Flemish public broadcaster VRT.[68] Similar demands for a clear and separate entrustment can be expected in future cases.

In addition to its demand for a more clear entrustment act, the Commission urges Member States to implement an *ex ante* control of new media activities (before entrusting these services to public broadcasters). After negotiations between the Commission, on the one hand, and the German Länder on the other, an agreement was made to develop a public value test to assess ARD's and ZDF's new media services. Also the Flemish government agreed to implement an *ex ante* control or evaluation of new media services. In the Commission decision on the Flemish public broadcaster VRT, it was stated that *"without any prior evaluation and explicit entrustment of the Flemish government, the VRT is not allowed to deliver services or perform activities that are not covered by the Beheersovereenkomst."*[69]

The demand for *ex ante* control can be problematic for several reasons. First, while the Commission indeed has the intention to foster transparency, it might stretch its

[66] Commission Preliminary Investigation 2004/C on *ad-hoc measures to Dutch Public Broadcasters and NOB*, *par*. 91-92.
[67] Decision 3E/2005 on Financing of Public Service Broadcasters in Germany, *par*.245.
[68] Decision E8/2006 on the Public Financing of Public Service Broadcaster VRT, *par*.63.
[69] *Idem*. *par*.239.

competence with regard to State aid and public broadcasting, since the Broadcasting Communication does not mention an *ex ante* controle of new media services. Second, the idea of *ex ante* control is inspired by the public value tests that have been introduced in the UK already more than a year ago. However, it is not clear whether the UK system can be exported succesfully to for example smaller Member States that do not have the same resources to apply an *ex ante* test. Third, the Commission justifies its demand for an *ex ante* control by pointing at the rising number of complaints by private actors. It is upheld that the implementation of an *ex ante* evaluation will curb the number of complaints significantly. Yet, the increasingly fierce competition in media and communications markets will probably yield more complaints. It is most unlikely that an *ex ante* control, in which the private sector might awkwardly co-determine the remit of public broadcasters, will change this trend. Fourth, and perhaps most crucial, *ex ante* evaluations concern individual services, whereas public broadcasters represent a more holistic project. A judgement of singular services can far too easily introduce a market failure logic into the public broadcasting project and eventually lead to the marginalization of public broadcasting organizations.

By consequence, Member States' caution with regard to *ex ante* control is certainly understandable and – to some extent – justified. This does not mean, however, that an *ex ante* test, cannot – if adapted to local circumstances – be a useful exercise to strengthen public broadcasters' position in a new media environment. Public broadcasters' role is, in light of technological and economic evolutions, under fire.[70] As public broadcasters are expanding activities to new markets, it is vital to illustrate the importance of their presence there. Steemers[71] puts her finger on the spot when saying that "*failing to demonstrate both uniqueness and appeal across a broad range of output, the consensus surrounding public funding could conceivably dissolve.*" In this regard, Suter stresses that it is vital to treat the test as something more than a necessary evil. Because "*PSBs face unprecedented pressure to make, and justify, investment in new means of productions and distribution,*"[72] they have to illustrate how new services deliver public value to – ad ultimo – citizens. An *ex ante* test cannot only strengthen public broadcasters' legitimate presence in new media markets, but has the potential to improve the internal organizational structure of public broadcasters. Following this point of view, the idea of a public value test or *ex ante* evaluation should be grasped as an opportunity to pro-actively tackle questions about the position of public broadcasters (especially) in new media environments: should public broadcasters offer on-demand sports content? are pay-services public services? are there limits to public broadcasters' presence online? is there a justification for an 'internet licence fee'; etc. Such questions will certainly arise and might lead to a decline in public, and also political, support for public broadcasting. However, imposing an *ex ante* evaluation on Member States will not encourage them, nor their public broadcasters, to genuinely and honestly complete an evaluation of new services. The current development of the German three-step-test shows that Member States will try to adopt a test that is as loosely defined as the European Commission will accept. In the German three-step-test the importance of the market impact assessment is reduced and, in addition, it remains highly unclear which services will be subject to the test. The current tensions between the European Commission, on the one hand, and the German Länder, on the other – also triggered by private companies that are dissatisfied with the actual implementation of Commission demands in relation to the funding of ARD and ZDF – illustrate how much the public value test debate focuses on (the lack of) competences. The

[70] See, for example, Armstrong and Weeds 2007.
[71] Steemers 2003, 133.
[72] Suter 2008, 5.

legal basis of the public value test in European State aid law is indeed – to say the least – disputed. This does not mean the public value test cannot have an inherent value for, not against (!), public broadcasters.

In short, the discussion about an *ex ante* evaluation for the moment largely misses the point. Arino convincingly argues that "the distribution of competences in the media arena should not be a power struggle between member states to avoid interference by the Community."[73] Even if the Amsterdam Protocol gives Member States discretion over the organization of their public broadcasters, the question should be whether an *ex ante* evaluation, despite the problems possibly attached to it, can contribute to a stronger public broadcaster. This is a scenario worth exploring.

3.3 Proportionality: transparency of accounts

The Broadcasting Communication devotes significant attention to the proportionality of funding and to the transparency of accounts. It is the application of this criterion that has had a big, concrete impact on the financial and organisational structure of public broadcasters.

Before focussing on Commission decisions, two remarks should be made with regard to the proportionality criterion. Firstly, the fact that public compensations should not exceed the net costs of public service delivery, and that commercial and public revenues and costs should be separated in public broadcasters' accounts, does not imply that public broadcasters can only receive public revenues. In principle, the nature of the funding system, be it dual or single, is determined by Member States.[74] However, it has already been indicated that the discussion on pay-services challenges this to some extent. Secondly, proportionality is an important criterion since it stresses the need for transparency in public broadcasters' accounts and structures. Without such transparency and clarity the Commission cannot check the compatability of the public funding with State aid rules. Yet, the relevance of transparency and its practical application (e.g. separation of accounts) lies not so much in its value for the Commission's assessments of State aid, but rather in its positive effect on public broadcasters. For long, public broadcasters have been known for their inefficient management, complex accounting systems, troubled financial relationships with subsidiaries, political intervention, etc. The Commission's demands for more clarity have created a momentum for reform of public broadcasters and in many countries the financial and organisational structures of public broadcasters have been changed significantly, and to the better, over the last decade.

Despite its intrinsic positive merit for public broadcasting, proportionality and transparency have been controversial in the framework of State aid control. Several[75] State aid cases illustrate the somewhat problematic nature of the proportionality assessments in some instances.

The Commission's analysis of overcompensation, on the basis of which two negative decisions have been taken so far (concerning the ad hoc funds for Dutch NOS and the

[73] Arino 2004, 125.
[74] Antoniadis 2006, 596.
[75] For example, in a Commission decision on the funding of TV2/Danmark the proportionality was highly disputed and has – in the meanwhile – been rejected by the Court of First Instance. The latter claiming that the Commission's investigation and analysis was based on inadequate reasoning (Decision C2/2003 on Measures Implemented by Denmark for TV2/Danmark, 2004; Court of First Instance, *TV2/Danmark v Commission, SBS TV and SBS Danish Television v Commission, Viasat Broadcasting UK Ltd v Commission*, Case T-309/04, T-317/04 and T-336/04).

funding of TV2/Danmark) is often said to be empirically flawed. In the Dutch case, for example, the mathematical exercise, that underlied the observation of a € 76.8 million excess aid, did not only include a cost/revenue assessment of the scrutinized ad hoc funds (e.g., matching funds to anticipate rising prices of program rights), but it also took into account the entire annual funding of NOS.[76] Leaving aside the impossibility of doing it otherwise, the assessment of the proportionality of the ad hoc funds (that added the ad hoc funds and the annual public revenues) could not determine to what extent the ad hoc funds exceeded the net cost of the public service delivery for which they were intended. Therefore, the Dutch authorities argued that the Commission was empirically wrong to declare the State aid measures incompatible with the EC Treaty. They moreover pointed at the Amsterdam Protocol that explicitly states that funding of public service broadcasting is acceptable "*insofar such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest.*" Since the Commission could not verify that there was indeed a negative impact of the behavior of the Dutch public broadcaster on overall competition in the media market, it should – following the Dutch complaint brought against the Commission before the Court of First Instance – not have reached its negative conclusion of overcompensation.[77] This argument should, however, not be taken too far since the lack of facts and figures about public broadcasters' accounts is partly caused by the empirical flaws in the Commission's analysis. Certainly the incapability (or unwillingness) of Member States to provide for all necessary figures, makes it extremely difficult, if not virtually impossible, for the Commission to conclusively assess the compatibility of State aid. Moreover, the blurry nature of most public broadcasters' accounts, which of course gives the impression that funding is not proportionate vis-à-vis the public service tasks they need to fulfil, inhibits not only a solid proportionality assessment, but also efficient service delivery. Certainly with regard to public broadcasters' entrance in new media markets, public broadcasters and Member States alike would benefit from more transparency of accounts and should moreover try to adapt the organisation of their financial accounts to the complexity that goes along with the expansion of the remit to digital activities. This will, however, not prevent the balancing act between the 'socio-cultural' remit and 'economic' market distortion from remaining fundamentally difficult.

[76] Commission Preliminary Investigation 2004/C on *Ad-hoc Measures to Dutch Public Broadcasters and NOB*.
[77] Action T237/06 *Nederlandse Omroep Stichting v Commission of the European Communities*, 49.

4 CONCLUSION[78]

The discussion of the State aid rules underlying the assessment of support schemes for public broadcasting and the analysis of recent State aid decisions illustrates the impact of the Commission's policy on the remit of public broadcasting. In these recent decisions, there is a focus on the expansion of the remit to new media markets. Observing an impact does not equal a conclusive finding of a limited remit, however. Some conclusions can be drawn from the analysis.

Firstly, the analysis illustrates that the Commission's approach towards the definition of the remit has sometimes been flawed. However, the Commission has gradually adapted its approach. The formulation of a 'closely associated' principle has not occurred any longer and more recent decisions reflect a more prudent policy line with regard to the definition of the remit. In addition, the analysis suggests that State aid control of the funding of public broadcasting, is not pushing public broadcasting in the margin, but is, on the contrary, making public broadcasters more responsive as regards their core competences (see, the discussion on *ex ante* evaluation). This is to be applauded and leads us to the conclusion that the Commission's State aid policy, perhaps indirectly, has benefited democracy. By forcing governments to make their public broadcasters more transparent and increasingly responsive, the Commission has served the citizen and/or tax payer.

Secondly, Member States retain the competence to regulate their public broadcasters. The Amsterdam Protocol is largely respected – obviously also because Member States continuously (and rightly) stress the subsidiarity principle in this regard. The concrete implementation of the public value test in Germany ('three-step-test'), for example, illustrates that the commitments that Member States make in the course of a State aid procedure, can be (and are) flexibly translated in national measures and rules, hereby taking into account the specific historical development of public broadcasters.

Thirdly, it is unclear whether and to what extent the Commission would indeed stimulate a level-playing-field in the broadcasting sector. Whereas citizens, Member States' governments and public broadcasters have benefited from State aid control policy, it is unclear to what extent market distortions are effectively remedied by DG Competition's assessments of public broadcasters' funding. This observation does not necessarily mean that public broadcasters are distorting the market as much as the private sector claims. This statement cannot be made as neither the public nor the private sector are sufficiently transparent with regard to their activities. This makes it difficult for academics, but undoubtedly and regrettably also for the Commission, to examine complaints of the private sector and public broadcasters' defense against these attacks.

Finally, it must be emphasized that the objective of State aid policy cannot and should not be the limitation of the public service remit of public broadcasters. Pushing public broadcasters in the margin of the market is unacceptable and does not correspond with a holistic and integrating (*i.e.* reaching a majority of the population with a variety of content) perspective on public broadcasting. The past and current decision practice of DG Competition does not prove that such a squeezing of public broadcasting is happening. Even

[78] The conclusions of this contribution are based on an assessment of a rather limited number of Commission decisions. For the purpose of this contribution, which mainly focuses on public service remit-related aspects of the application of State aid law to the funding of public service broadcasting, only a small amount of cases have been introduced in the analysis. Similar conclusions, based on a more comprehensive case analysis, have been made in another publication of the author (for this, see, Donders and Pauwels 2008).

if the conditions for granting exceptions to State aid have become more strictly defined (here, reference can be made to the demand for an *ex ante* control of new media services), and even if an increased vigilancy of the Commission can be observed, the findings tend to invalidate the idea that the Commission is limiting the remit of public broadcasting organizations. In the course of the years, all parties have tried to be more explicit on the framework in which public broadcasters are expected to evolve and be controled. Member States have thought about entrustment and control, while public broadcasting organizations have been pushed towards greater transparency. This can be considered as the positive outcome of Commission activities, and has benefited the democratic objectives that public broadcasting stands for, in particular with regard to the end-users of public broadcasting services.

LIST OF REFERENCES

Aigner, Gisela, Oliver Budzinski, and, Arndt Christiansen. 2006. The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand after *Sony/BMG* and *Impala*? Marburg Working Papers on Economics 200614. Marburg: University of Marburg.

Bailey, David. 2003. Standard of Proof in EC Merger Proceedings: A Common Law Perspective. *Common Market Law Review* 40 (4):845-888.

ACT. 2008. Response to the Commission Questionnaire. http://ec.europa.eu/comm/competition/state_aid/reform/comments_broadcasting/index.html. (Accessed September 25, 2008)

AER. 2008. Response to the Commission Questionnaire. http://ec.europa.eu/comm/competition/state_aid/reform/comments_broadcasting/index.html. (Accessed September 25, 2008)

Antoniadis, Alexandra. 2006. The Financing of Public Service Broadcasting. In *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*, edited by Michael Sanchez Rydelski, 591-630. London: Cameron May.

Arino, Monica. 2004. Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps. *Communications and Strategies* (54): 97-126.

Armstrong, Marc, and Helen Weeds. 2007. Public Service Broadcasting in the Digital World. In *The Economic Regulation of Broadcasting Markets: Evolving Technology and Challenges for Policy*, edited by Paul Seabright, and Jürgen von Hagen, 81-149. Cambridge: Cambridge University Press.

BBC Trust. 2007. Public Value Test (PVT): Guidance on the Conduct of a PVT. London: BBC Trust.

Biggam, Ross. 2008. Public Broadcasting and State Aid in the New Media Environment. Speech delivered at the Institute for European Studies' Spring Lecture Series, Brussels, April 16.

Buendia Sierra, José Luis. 2006. An analysis of Article 86(2) EC. In *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade*, edited by Michael Sanchez Rydelski, 541-574. London: Cameron May.

Communication 2001/C 320/04 of the European Commission on the Application of the State Aid Rules to Public Service Broadcasting [2001] OJ C320/5.

Coppieters, Sandra. 2003. The Financing of Public Service Broadcasting. In *The Law of State Aid in the European Union*, edited by Andrea Biondi, Piet Eeckhout, and James Flynn, 265-279. Oxford: Oxford University Press.

Court of First Instance, *TV2/Danmark and others v Commission,* Cases T-309/04, T-317/04, T-329/04 and T-336/04 [2008] not yet reported.

Decision E 3/2005 of the Commission of 24 April 2007 Relating to Financing of Public Service Broadcasters in Germany.

Decision E 8/2006 of the Commission of 22 February 2008 Relating to Public Financing of Public Service Broadcaster VRT.

Decision N 37/2003 of the Commission of 1 October 2003 Relating to BBC Digital Curriculum.

Decision NN22/2002 of the Commission of 19 May 2004 Relating to Measures Implemented by Denmark for TV2/Danmark. Depypere, Stefaan, and Nynke Tigchelaar. 2004. The Commission's State Aid Policy on Activities in Neighbouring Markets. *Competition Policy Newsletter* (2): 19-22.

Dinan, Desmond. 1999. *Ever Closer Union: an Introduction to European Integration*. London: Macmillan.

Donders, Karen & Caroline Pauwels. 2008. Does EU Policy Challenge the Digital Future of Public Service Broadcasting? *Convergence: the International Journal of Research into New Media Technologies* 14(3): 295-311.

Dony, Marianne. 2005. Les compensations d'obligations de service public. In *Aides d'état*, edited by Marianne Dony, and Catherine Smits , 109-152. Brussels: Institut d'études Européennes.

Draft Proposal of the European Commission on the Application of the State Aid Rules to Public Service Broadcasting [1998] unpublished.

Duff, Andrew. 1997. *The Treaty of Amsterdam*. London: the Federal Trust.

EBU. 2008. Response to the Commission Questionnaire. http://ec.europa.eu/comm/competition/state_aid/reform/comments_broadcasting/index.html. (Accessed September 25, 2008)

European Commission. 2008. Review of the Communication from the Commission on the Application of State Aid Rules to Public Service Broadcasting. http://ec.europa.eu/comm/competition/state_aid/reform/broadcasting_comm_questionnaire_en.pdf. (Accessed November 20, 2008)

European Commision. 2004. Preliminary Investigation 2004/C 61/05 of 3 February 2004 Relating to Ad-hoc measures to Dutch public broadcasters and NOB

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

Goodwin, Ian, and Steve Spittle 2002. The European Union and the Information Society: Discourse, Power and Policy. *New Media and Society* 4(2): 225-250.

Gorini, Sabrina. 2003. European Commission: Decisions on State Financing of Public Service Broadcasters. *IRIS Legal Observations*. http://merlin.obs.coe.int/iris/2003/10/article4.en.html. (Accessed November 27, 2008)

Harcourt, Alison. 2004. Institution-driven Competition: the Regulation of Cross-border Broadcasting in the EU. EUI RSCAS Working Paper 2004/44. Florence: European University Institute, Robert Schuman Center for Advanced Studies.

Hencsey, Monika, Olivia Reymond, Alexander Riedl, Sandro Santamato, and Jan-Gerrit Westerhof. 2005. State Aid Rules and Public Funding of Broadband. *Competition Policy Newsletter* (1): 8-15.

Heritier, Adrienne. 2001. Market Integration and Social Cohesion: the Politics of Public Services in European regulation. *Journal of European Public Policy* 8(5): 825-852.

Hobbelen, Hein, Victoria Harris, and Ignacio Dominguez. 2007. The Increasing Importance of EC State Aid Rules in the Communications and Media Sectors. *European Competition Law Review* (2): 101-115.

Holtz-Bacha, Christina. 2005. The EU, the Member States and the Future of Public Broadcasting. *Doxa* (3): 231-237.

Humphreys, Peter. 2003. EU Policy on State Aid to Public Service Broadcasting. Paper presented at the SMIT-CEAS-TELENOR Conference, Brussels, April 7-8.

Jakubowicz, Karol. 2007. Public Service Broadcasting: a New Beginning or the Beginning of the End. http://www.knowledgepolitics.org.uk. (Accessed February 23, 2008).

Katsirea, Irina. 2008. *Public Broadcasting and European Law: a Comparative Examination of Public Service Obligations in six Member States*. New York: Wolters Kluwer International.

Letter MLB/M/2008/44.445 of Ronald H.A. Plasterk of 13 August 2008 on Broadcasting Communication/State Aid for Public Service Broadcasting.

Meijnen, Joop. 2007. Hof EU trekt grens voor staatssteun omroepen. *NRC Handelsblad*, November 9:2.

Michalis, Maria. 2007. *Governing European Communications: from Unification to Coordination*. Lamham: Lexington Books.

Mortensen, Frands. 2008. Altmark, Article 86(2) and Public Service Broadcasting. *European State aid Law Quarterly* (2): 239-249.

Nicolaides, Phaedon. 2003. Compensation for Public Service Obligations: the Floodgates of State Aid? *European Competition Law Review* (11): 561-573.

Nihoul, Paul. 1998. Les services d'intérêt général dans le Traité d'Amsterdam. In *Le Traité d'Amsterdam: espoirs et déceptions*, edited by Yves Lejeune, 341-355. Brussels: Bruylant.

Nitsche, Ingrid. 2001. *Broadcasting in the European Union: the Role of the Public Interest in Competition Analysis*. The Hague: TMC Asser Press.

Pauwels, Caroline, and Jean-Claude Burgelman. 2003. Policy Challenges Resulting from the Creation of a European Information Society: a Critical Analysis. In *The European Information Society: a Reality Check*, edited by Jan Servaes, 59-86. Bristol: Intellect.

Plender, Richard. 2003. Definition of Aid. In *The Law of State Aid in the European Union,* edited by Andria Biondi, Piet Eeckhout, and James Flynn, 3-39. Oxford: Oxford University Press.

Psychogiopoulou, Evangelia. 2006. EC State Aid Control and Cultural Justifications. *Legal Issues of Economic Integration* 33(1): 3-28.

Raboy, Marc. 2003. Rethinking Public Broadcasting Policy in the Global Media Environment. In *Broadcasting and Convergence: New Articulations of the Public Service Remit*, edited by Gregory Ferrell Lowe, and Taisto Hujanen, 41-56. Göteborg: Nordicom.

Reding, Viviane. 2006. Foreword. In *Communications, the Next Decade: a Collection of Essays Prepared for the UK Office of Communication*, edited by Ed Richards, Robin Foster, and Tom Kiedrowski. London: OFCOM.

Rizza, Cesare. 2003. The Financial Assistance Granted by Member States to Undertakings Entrusted with the Operation of a Service of General Economic Interest. In *The Law of State Aid in the European Union*, edited by Andrea Biondi, Piet Eeckhout, and James Flynn, 76-84. Oxford: Oxford University Press.

Szyszczak, Erika. 2004. Public Services in the New Economy. In *Competition, Regulation and the New Economy*, edited by Cosmo Graham, and Fiona Smith, 185-206. Portland: Hart Publishing.

Thomass, Barbara. 2008. The Debate About ARD Mediathek and ZDF Mediathek and the Public Value Test. Paper presented at the IAMCR Conference, Stockholm, July 20-25.

Vlaamse Regering. 2008. Response to the Commission Questionnaire. http://ec.europa.eu/comm/competition/state_aid/reform/comments_broadcasting/index.html. (Accessed September 25, 2008)

Wiedemann, Verana. 2004. Public Service Broadcasting, State Aid and the Internet: Emerging EU Law. http://www.ebu.ch/en/union/diffusion_on_line/pub_broadcasting. (Accessed August, 17 2007)

THE IES WORKING PAPER SERIES

5/2008	Mattelaer, Alexander. The Strategic Planning of EU Military Operations – The Case of EUFOR TCHAD / RCA.
4/2008	Van Rompuy, Ben. Standard of Proof in EC Merger Control – Conclusions from the Sony BMG Saga
3/2008	Balciunaite, Viktorija. WTO and Women's Labour Rights in Developing Countries.
2/2008	Lamensch, Marie. Swiss Banking Secrecy- The Erosion of an Institution.
1/2008	Lewis, Richard. New Europeans, New Identities – Reflections on Europe's Dilemma
2/2007	Devuyst, Youri. American Attitudes on European Political Integration – The Nixon-Kissinger Legacy
1/2007	Schnyder, Melissa. Getting by with a little help from their (EU) Friends: NGO cooperation and involvement across multi-level policy processes.