European State Aid Policies and Public Service Broadcasting

Clear principles, diverging implementations and continuing tensions

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Outline

• The origins of EU SA control of PSB funding
• The rules applying to PSB funding
• Findings from 25 years of European Commission activity
• Remaining questions
The origins of EU SA control of PSB funding

First complaints, European inaction, emerging practice

First complaints

- First complaints from private sector against PSB at the end of the 1980s, concerning sports rights and anti-trust
- First complaint making use of State aid law in 1992, Telecinco against funding RTVE
- Subsequent complaints in Portugal, Germany, France, UK
- Amsterdam Protocol, 1997
  - "Considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism. 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 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 that public service shall be taken into account."
European inaction

• Attempt from European Commission to develop guidelines fail
  ▪ Discussion paper 1998 leaked
    - “To this purpose, DG IV would propose to exclude from the public service exemption those services
      (programs) which may be rendered under exactly the same conditions even in the absence of public
      broadcasters, by private operators and which do not require a stricter public control to guarantee the
      content of the programs.”
    - “As far as entertainment shows are concerned, DG IV believes that these programs should not be
      considered as part of the public service mission, as referred to in the Protocol, as they do not appear
      to fulfill any democratic, social or cultural needs of the society, nor do they preserve media
      pluralism.”
  ▪ Provokes fierce reactions from MS for introducing a market failure approach to
    PSB, also questioning of dual funding model
• Court of First Instance finds failure to act, 1998, 1999 & 2000
  ▪ The complexity or political sensitivity of the issue do not justify such a lengthy
    preliminary investigation period

Emerging practice

• Decisions on thematic channels Germany, UK
  ▪ Broad remit accepted
  ▪ No ‘cultural exception’ for PSB
• Continuing discussions on guidelines
  ▪ Remain difficult
    - “Given Member States’ attitude the guidelines on aid to public television are dead”.
      (Karel van Miert, 1998)
  ▪ But given rulings of Court everybody realizes guidelines are necessary
• Broadcasting Communication 2001
• More decisions follow, already at this point (early 21st century) relating to
  new media, but also cases concerning ad hoc restructuring funds, regional
  services, ‘whole package’ cases dealing with various aspects of PSB systems,
  …
The rules applying to PSB funding

From mission impossible to Broadcasting Communication

Broadcasting Communication 2001

- A clear definition
  - "The Commission’s task is to verify whether or not Member States respect the Treaty provisions. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error. It is not for the Commission 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. The definition of the public service remit would, however, be in manifest error if it included activities that could not reasonably be considered to meet – in the wording of the Protocol – the democratic, social and cultural needs of each society.”, §36

- Formal entrustment and independent control
  - Need for an official act entrusting task to public broadcaster
  - An appropriate body must control the application

- Proportionality and transparency of funding
  - No overcompensation
  - Necessary assessment condition: transparency and separation of accounts
Broadcasting Communication 2009

- Need for revision in light of changing circumstances in media sector
- Basis: issued decisions on funding of public broadcasters in Germany (2007), Ireland and Flanders (2008)
- Main change = introduction of an *ex ante* test or ‘Amsterdam test’ for new media services
  - Public value assessment
  - Market impact assessment

Findings from 25 years of European Commission activity

A clear definition, transparency & good governance, politics
A clear definition

- Thematic channels fit within the remit, the definition of the remit is a Member State competence (early cases end 1990s, Phoenix & Kinderkanal, BBC News 24)
- New media services must be closely associated to traditional radio and television services (first cases on new media services, e.g. BBC Curriculum)
- Walking the line between asking for a more precise definition on the one hand, criticising the scope of the remit, requiring a ‘close association’ between radio/tv and online services and not over-stepping on competencies on the other hand (from 2007 onwards)
  - Fear of mission creep
  - Fear of abuse of technology neutrality principle by MS to argue an unlimited array of new media services are captured by the SGEI concept
    - “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. (EC, VRT decision, §181)

Transparency & good governance

- Five key concerns:
  - Is there a compensation of the net cost of the public service delivery?
  - Is the structural and financial organisation of the public broadcaster transparent?
  - Are there mechanisms in place that allow governments or monitoring bodies to discover possible overcompensation and prevent it from happening?
  - Are there any reserves and are they ear-marked?
  - Is there market distortion?
- In particular significant progress on first four areas
- Weak economic analysis for question 5, although main concern for commercial media
  - Use of economic concepts limited
  - Use of economic (e.g. econometric) analysis even more limited
  - Although slight increase when looking at more recent decisions (< quantitative content analysis of all State aid decisions related to PSB funding, Buts, Langenus & Donders, forthcoming in ESTAL)
**Politics**

- As in other SGEI cases, conflict between MS and EC is not that surprising
  - MS define SGEI
  - EC has to ensure rules of fair competition are respected
- **Difficult balancing act of competences made more complex by:**
  - Amsterdam Protocol
  - Changing circumstances in the media sector, that result in uncertainty on economic sustainability for commercial media and hence also provoke a continuing stream of complaints
- **Results in decisions that are not always that consistent**
  - Has not ended PSB/M
  - Has not satisfied commercial media
  - Has had some positive and negative impacts on PSB/M policy-making
    - E.g., positive: transparency of accounts
    - E.g., negative: pretense of multi-stakeholderism in PSB/M policy-making

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**Remaining questions**

The limits of manifest error, the lack of economic analysis, a never-ending story.
The limits of manifest error

• How far can you go in asking Member States to refine their definition to make sure no manifest error can occur without in fact starting to co-define the public service remit?

The lack of economic analysis

• Would, in such a contentious field, the use of economic analysis contribute to a more rational, facts-based approach? Are public broadcasters distorting markets? Which markets, with what effects on competitors? In case market distortion can be shown, are ex ante tests, negative lists, ... solving this or not?
A never-ending-story?

- Do we want to continue lengthy State aid investigations that do not conclusively answer whether private sector complaints were legitimate and focus mainly on defining what is essentially a moving target?