

# Public Service Broadcasting and State Aid

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State aid for public broadcasting is a hot issue within the broadcasting sector. The issue has united commercial broadcasters in their fight against public broadcasting, and in the last ten years has led to a continuous stream of complaints. Although the European Commission has dealt with most of these complaints, there are still some interesting cases pending.

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In the next fifteen to twenty minutes, I shall discuss the relationship between state aid and public broadcasting. I shall do my best to summarize the underlying EU regulation as well as the investigations carried out by the European Commission and their outcomes. I shall end my presentation by identifying the most relevant issues that are at stake, by giving an analysis of general trends and by asking the obvious question, namely: 'What will the future bring?'

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In the programme, this part of the meeting is entitled 'State aid for public service broadcasting'. The title indicates one of the most essential aspects of the discussion by putting the issue of state aid first. It is interesting to see in the discussions about public broadcasting how much emphasis is put on the economic aspects. That public broadcasters have to compete against commercial broadcasters and money – in the form of state aid or otherwise – is at the core of every debate. This is no surprise, however, bearing in mind the dominance of the European Union and its emphasis on economics and competition.

Let me already mention one of my conclusions. In the debate about public service in general and about public service broadcasting in particular, there is a need for a paradigm shift. Before entering into a somewhat endless debate about the legal details of state aid, the main question should be what public service broadcasting is all about. To put it more bluntly, in many situations a comprehensive vision on public service broadcasting is lacking.

However, the legitimization of public broadcasting lies at the core of every discussion about its financing, independent of whether legal or illegal state aid is involved. The real quest is to find the ‘ten commandments’ of public service broadcasting.

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But I shall leave aside this more conceptual approach for a moment and return to the other side of the coin: the issue of state aid. From an outsider’s point of view, the European regulatory framework on state aid resembles to some extent the Dutch broadcasting system. It is all too often said that this system is so complex that it takes a whole day to explain it. However, if we omit most of the irrelevant details, it is possible to summarize it in less than five minutes. The same applies to the European regulation on state aid.

The first question to answer is whether relevant state aid is involved – because without a relevant state aid issue, there is no involvement of the European Commission and the case need not be notified. This is one of the outcomes of the famous Altmark case. In this decision, the European Court of Justice defines four criteria to determine whether or not a relevant form of state aid is at stake. I shall more or less quote the findings of the Court:

- First, has the recipient undertaking actually been given public service obligations and have those obligations been clearly defined?
- Second, have the parameters on the basis of which the compensation is calculated been established beforehand in an objective and transparent manner?
- Third, does the compensation not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations?

- Fourth, where the undertaking that is to discharge public service obligations is not chosen in a public procurement procedure, has the level of compensation needed been determined on the basis of an analysis of the costs that a typical undertaking, well run and adequately provided with means, incurs in order to fulfil the public service requirements?

If these criteria are met, there is no role for the European Commission. However, if a case does not pass the 'Altmark test', the Commission will investigate whether the state aid involved is allowed under the exemptions of the EU treaty. The main relevant exemption in this case is whether or not a service of general economic interest is involved. This is where the Maastricht treaty with its protocol on public service broadcasting plays a role. It contributes to an environment in which the Member States have an almost unlimited discretionary power to define public service broadcasting as a service of general economic interest.

The next step in the process involves the European Commission checking whether the requirements related to permitted forms of state aid are met. In its 'Communication on state aid and public service broadcasting', the European Commission mentions three criteria for the justification of state aid, namely:

- Member States must set out in a formal act a clear remit for public service broadcasting. The European Commission only checks whether the definition is not evidently wrong.
- Member States must ensure national monitoring of the fulfilment of the public service broadcasting remit. This needs to be done by an independent body.
- Member States need to assure that the funding of the public service broadcasting is proportionate.

These three criteria are largely identical to the components of the Altmark test. Therefore, it is primarily a question of the half-full or the half-empty bottle. In order to determine whether state aid is involved, more or less the same test applies as to whether state aid might be justified.

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What has been done with this regulatory and policy framework? The European Commission has investigated state aid in relation to public service broadcasting in at

least nine Member States. Some of these investigations will be discussed by other speakers in more detail. I shall therefore concentrate on the general outcome of the investigations.

In at least four cases, the European Commission closed the investigation after the Member States involved agreed to implement remedies. In one of the pending cases – the Dutch one – certain remedies have been introduced, but there are some remaining issues. Another case that has not been formally closed by the Commission concerns state aid to the Danish public broadcaster.

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What can we learn from these cases? Which issues were addressed? I shall mention just five of them.

1. First of all, the public funding of public service broadcasting as such, including licence fees and advertising. In essence, the European Commission has no problem with whatever form of financing.
2. The public service remit. As mentioned earlier, the Commission respects the definitions of the Member States and only checks whether the definition is not evidently wrong. News, information, education and entertainment can be part of the remit.
3. Several Member States have been forced to introduce the separation of accounts and mechanisms for transparent financing in order to avoid cross-subsidization between public service and non-public service activities.
4. Several decisions include a calculation to determine the existence of over-compensation or non-proportionate effects on the market.
5. Finally, the Commission checked whether or not state aid might lead to anti-competitive behaviour, such as undercutting advertising tariffs or overbidding when acquiring broadcasting rights.

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What is my analysis of the European Commission's activities to date in state aid cases?

It is clear that the Commission knows that public broadcasting and its financing is a very tricky issue: it's a hot potato that the commission prefers not to swallow (yet?). I think that it is not without reason that the European Court of Justice needed to intervene, as a result of a 'failure to act', in order to force the Commission to deal with the first cases. The original complaints about the financing of the Spanish and of the French public broadcasting system were made in 1992 and 1993, respectively, but it took about ten years before the European Commission closed the investigations. Since then, however, things have changed and the Commission takes a more active approach.

It is not difficult to summarize the outcome of all the cases. State aid is not the issue; rather, it is primarily a question of how to structure such aid. All the Member States involved have been able to provide sufficient remedies, and the 'lessons learned' have been implemented by other Member States, sometimes quickly. We are now in a kind of transition phase and I expect that in the coming years most Member States will restructure or further restructure their public service broadcasting system in such a way that it complies with the relevant state aid rules. However, I can imagine that this is not a very satisfactory outcome for the plaintiffs. And the same might apply to the European Commission, which in none of the broadcasting cases concluded that the relevant Member State had fulfilled the Altmark test and therefore was in the position to open an investigation.

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One might therefore wonder what the future will bring. Might the European Commission become stricter and change its present approach? In this respect, what will happen to the remaining issues of the Danish and the Dutch case?

There has always been something rotten about the state of Denmark (to quote the English bard), and the Dutch have a longstanding record of protective measures that were overthrown by the European Court of Justice. Or will it be business as usual? Convergence could be an additional driver in this. When we look at the Dutch case, the Commission seems to draw a line between traditional broadcasting and 'new media'. In its comments, the Commission explicitly mentions that information society services come under a different regime and that these services are not covered by the Maastricht protocol. Here, I see some similarities with the telecommunications sector where the definition of 'voice telephony' was gradually narrowed in order to create more room for competition.

At the beginning of my presentation, I mentioned the issue of a paradigm shift. Perhaps recent political developments have created a new environment in which to discuss the true relationship between means and goals. Has competition not become a goal in itself, whereas it was supposed to be a means to create more welfare? I think that in this respect, public service broadcasting shares the same concerns as have been expressed regarding other public service remits, such as the provision of sufficient healthcare and good education. However, for such a renewed awareness it is essential to have a clear view on what the public service remit is. Given the developments in technology and user behaviour, such a remit should not be restricted to broadcasting in its traditional sense, but should focus on a more broad, technology-neutral spectrum of activities to serve public interests in the information society.

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In short, the problem boils down to a kind of triple P triangle. In one corner there are the policy developments at the executive level of the European Commission; in another corner there is the question of a paradigm shift regarding public service issues; and in the third corner there is renewed thinking about the public service remit in the information society.

Thank you for your attention.