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EU media framework, competition law and Public Service Broadcasting

- Some comments on the impact on the current UK debate

Seminar on

OFCOM's Public Service Broadcasting Review and the European Dimension

European Media Forum

London, 12 July 2004

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Thank you, for inviting me to say a few words at the opening of this seminar¹.

Let me start with three remarks:

Firstly, this is a meeting of insiders to this debate. I therefore do not intend to go into details of EU legislation. Rather, I will concentrate on some general considerations and likely trends in the European context.

Secondly, I would like to congratulate Damian Green and the European Media Forum on the report that we have on the table². It is one of these rare documents that put issues in very concise terms and ready for political debate. I am of course looking forward to Damian Green's remarks at this seminar.

And,

This takes me to my third opening point. I think, a UK debate on the future of media, Public Service Broadcasters and the BBC Charter Review will always be a debate of its own. The UK is well advanced on many points of the audiovisual debate. It has set new standards with the Communications Bill and the OFCOM reviews, such as the ongoing Public Service Broadcasting Review. And it has of course, established with the BBC, a public service broadcaster that is seen by many in Europe as a role model as regards quality and coverage.

¹ The opinions put forward in this paper are the personal views of the author.

² Report on OFCOM's Public Service Broadcasting Review - The European Dimension, Damian Green MP, 2004. Available from the European Policy Forum, www.epfltd.org

However, we are facing a common agenda in Europe in the sector—and I believe it is useful to compare notes.

Let me therefore start with a few remarks on this common agenda across Europe:

- The sector is going through difficult times. The difficulties in the advertising market have led to very severe competition and confrontation on that major revenue resource—and it has made the situation of private broadcasters substantially more difficult.
- We have major technical and market change ahead, with the massive arrival of the new digital channels and of the New Media. Both public and private broadcasters know that they have to reposition themselves. Both know that this requires access to expensive inputs, particularly film and sport rights. Both know that major investments are required.
- We have to face the fact that in this sector one side in this game is heavily subsidised. In Europe, total public licence fees sum up to some 15 billion €, more than one fourth of the total revenues in the near 60 billion € European broadcasting market, with German ARD/ZDF combined at 7 billion € in the lead, and the BBC second at now some 4 billion €. We all know that these licence fees are raised for very good reasons of public service but inevitably in difficult times voices are questioning, if these funds are always used according to a clear mandate—and, as you know we are faced across Europe with a rising wave of complaints in this regard.

Let me against this background relate to some of the main points referred to in Damian Green's report:

- The current evolution of the main regulatory framework at European level, the Television without Frontiers Directive;
- The growing role of competition law, of course, my core topic;
- linked to this, the current debate on public service broadcasting—services of general interest in Brussels speak. This debate is currently in quite a decisive stage.

As I have said it should be up to the discussion to relate this to the national reviews and debate here in the UK.

First point

The Television without Frontiers framework at EU Level.

Three remarks here:

- One must keep in mind the overall development of the sector in Europe. The very origin of the TWF framework is a minimalist regulation approach at a European level to allow trans-border television;
- In the context of the debate of the nineties, a number of basic goals have been agreed between Member States;
- A common denominator is that audiovisual regulation mainly falls to Member States—and this is bound to remain so.

Let me expand:

One must never forget that the basic starting point for the TWF Directive was the emergence of satellite TV in Europe in the late eighties / early nineties. This meant that minimal ground rules had to be set: ground rules on which country's law was to be applied—country of origin or country of destination, access to socially important events, European content, advertisement, and the protection of minors. This minimalist line has been maintained through all of the amendments and it is also visible in the communication by the European Commission of last December which sets the framework for the current reform debate concerning the Directive (Communication on the future of European regulatory audiovisual policy)³.

The current TWF reform is prompted by the emergence of the new services. As I have said, the TWF Directive sets minimal ground rules, but ground rules after all. This means that the current reform is important and I welcome the attention given to it in Damian Green's report.

However, while setting minimal standards, the debate at European level has also enabled a basic consensus on objectives in the media sector to be worked out. These broadly agreed goals across Europe are:

- Pluralism / plurality;
- Cultural diversity;

³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The future of European Regulatory Audiovisual Policy (COM(2003) 784, 15.12.2003); available at http://www.europa.eu.int/comm/avpolicy/index_en.htm

- Choice.

And those principles find a firmer grounding in the new draft European Constitution.

Consensus also dictates that this objective should be ensured principally by Member States. There is no EU plurality control, except the one based on competition law. The recent EU White Paper on public services of April⁴ has again confirmed this. But it also means that Member States carry substantial responsibility for implementing these values—in the context of a difficult, highly oligopolistic market across the board.

And there has been further consensus achieved at European level. Public Service Broadcasting has been assured a permanent role under Member States' control, as expressed in the famous Amsterdam Protocol. But let me come back to this.

Second point

Let me then turn to my second point: the growing role of competition law, both national and EU. Again, I can refer here to the report.

We have seen across Europe a growing role of competition law in this sector basically caused by three factors:

- With the expansion and subsequent consolidation of the sector merger control inevitably became an important factor;

⁴ White Paper on services of general interest, COM(2004) 374, 30.4.2004; available at www.europa.eu.int/Comm

- Success in the sector has become more and more dependent on access to crucial inputs—high premium content rights. Let me just mention sport rights. Our main antitrust cases in Brussels in the area now concern European and top national leagues TV rights and issues like the Olympics games rights. These are issues that cut across sectors, and cannot be covered by media-specific law;
- More generally, convergence of markets means that competition law grows in importance and media specific law will reduce its role to focus on core objectives.

In practical policy terms this means that European competition cases will be an important factor for the future development of the sector, but it *does not mean* that the European Commission will be the main actor in applying these rules. The decentralisation of EU antitrust law that has become effective as of 1st May will mean that much of this application will fall to the national competition authorities and media regulators, in this country, the OFT and the Competition Commission and OFCOM.

And there is of course a fourth major reason for the growing role of competition law:

- State Aid control / control of public subsidies via the licence fee, or other state measures.

Third point

Let me therefore turn to my third , and most difficult point. The future environment for media reforms in Europe: how to accommodate public service broadcasting in a competitive media market, particularly when both

public and commercial broadcasters are scrambling to enter the new digital channels and the new Internet media.

As I have said, the Amsterdam Protocol has firmly anchored public broadcasting under Member States responsibility. I quote:

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

But it also states:

"...and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of the public service shall be taken into account."

This means that Member States carry substantial responsibility.

The Altmark ruling of last year by the Court⁵—now reflected in the public service communication of April 2004, the White Paper—has set very clear terms. It sets four conditions for the public service broadcaster:

- clear remit / clearly defined public service tasks;
- Compensation calculated on objective basis established in advance;

⁵ European Court of Justice, ECJ case C-280/00 Altmark Trans, 24 July 2003

- No over compensation;
- An effective efficiency control: public tender or costs determined on the basis of a "well run company".

And let us put this in more general terms: we need a:

- Level playing field;
- Efficiency control;
- Containment within the limits of the PSB mandate, as far as activities are subsidised.

Let us never forget that more than often a company that is subsidised into a new market risks subsidising another company out of that market. The challenge is to transit our dual systems of public and private broadcasters on a level playing field through this decade that will be marked by digital channels, ultimate analogue switch off, and the massive arrival of the New Media.

It will be up to each Member State, and of course also to this country, to see if this can be done under a regime of self-regulation, or if every market actor should operate under the same regime of independent regulation. The results of OFCOM's PSB Review and of the BBC charter review will without doubt make a major contribution to that debate also at the European level.

At the European level, following the White Paper on services of general interest and the Altmark ruling, the application of State Aid rules to the sector is accordingly under review and further specification.

Conclusion

Let me then conclude:

- The TWF framework sets minimal ground rules at European level, but ground rules must be respected. This makes the current reform debate in Brussels also of major relevance to the debate and the reviews in this country, and I can therefore only share the conclusions of Damian Green's report;
- An open media environment can in a sustainable manner only be built on an open market environment. This makes the consistent application of competition rules a major and permanent task in the sector. The national authorities and the European Commission will share this task;
- The dual nature of the sector must be maintained during the transit into the digital world and the world of the New Media. It will be mainly up to each Member State to decide if all Public Service Broadcasters—or some of them—can remain under a regime of self-regulation and internal checks and balances, or if all market participants should be supervised by the same independent regulator.

From a European perspective, the main issue ahead will be to avoid market distortions between Member States and a series of complaints about alleged undue subsidies that may follow.

