

Increased transparency and efficiency in public service broadcasting. Recent cases in Spain and Germany ⁽¹⁾

Pedro Dias and Alexandra Antoniadis

Introduction

Since the adoption of the Broadcasting Communication in 2001, the Commission followed a structured and consistent approach in dealing with numerous complaints lodged against the financing of public service broadcasters in Europe. It reviewed in particular the existing financing regimes and discussed with Member States measures to ensure full compliance with the EU State aid rules. The experience has been positive: Several Member States have either already changed or committed themselves to changing the financing rules for public service broadcasters to implement fundamental principles of transparency and proportionality ⁽²⁾.

The present article reviews the two most recent decisions in this field which are examples of increased efficiency and transparency in public service broadcasting.

Financing of workforce reduction measures of RTVE

In the context of the review of the previous financing regime in favour of RTVE, the Spanish Government had given a series of commitments, including the adoption of safeguards against over-compensation and possible non-market conform behaviour of RTVE ⁽³⁾. In particular, in the future RTVE was to be financed through annual contributions limited to the net public service costs as determined based on separate accounts. The Spanish Government also announced the establishment of a new corporation under private law. Due to its new legal status, RTVE would no longer benefit from the unlimited State guarantee and the tax exemption which were regarded by the Commission as incompatible aid.

⁽¹⁾ The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ See in particular the Commission decisions concerning the financing of the Italian, French and Spanish public service broadcasters in April 2005 (see IP/05/458) as well as the Commission decision regarding the financing of the Portuguese public service broadcaster in March 2006 (see IP/06/349).

⁽³⁾ See State aid case E 8/2005, Commission decision of 20 April 2005, published in the original language on: http://ec.europa.eu/competition/state_aid/register/index.html

The annual contribution granted to RTVE was made dependent upon the adoption of measures to increase efficiency. The Spanish authorities commissioned a study on the financial situation of RTVE which revealed that the — at the time — existing workforce exceeded what was necessary for the fulfilment of the public service tasks. Agreement could be reached between the Spanish authorities, RTVE and trade unions on a significant reduction of the workforce through early retirement measures. The Spanish State decided to finance these measures, thus alleviating RTVE of costs it would normally have to bear. The savings in terms of labour costs and consequently public service costs of RTVE exceeded the financial burden of the Spanish State due to the financing of the workforce reduction measures. The Commission approved the aid under Article 86 (2) EC Treaty, also considering the overall reduction of State aid to the public service broadcaster ⁽⁴⁾.

The reform of the financing regime for RTVE is a good example of the positive impact of State aid investigations into the financing of public service broadcasters. The Commission's investigation led to an overhaul of the previous financing system and triggered a system of transparent financing based on annual contributions to cover the estimated public service needs of RTVE. At the same time, RTVE adopted measures to limit the costs (here labour-related costs) to what is really necessary for the fulfilment of its tasks.

General financing regime of ARD and ZDF

The investigation concerning the financing of ARD and ZDF was triggered by several complaints bringing forward a series of allegations, ranging from the lack of a clearly defined public service remit, the lack of transparency (i.e. non compliance with the requirement laid down in the Transparency Directive) to alleged over-compensation and cross-subsidisation into what were regarded as purely commercial activities.

In March 2005, DG COMP informed the German Government of its preliminary view that

⁽⁴⁾ State aid No NN 8/2007; the Commission decision of 7th March 2007 can be found on the Internet at: http://ec.europa.eu/competition/state_aid/register/index.html, see also IP/07/291.

the financing regime was no longer compatible with the EU State aid rules. This so-called Article 17 letter was followed by a further exchange of information and then in 2006 by concrete and constructive discussions between the Commission services and the German authorities. In the end, Germany submitted proposals for measures to be implemented within the next two years. The Commission closed the investigation after having assessed these commitments and concluded that they ensured a financing of public service broadcasters in full respect of the EU State aid rules⁽⁵⁾.

The commitments concern first of all safeguards that have already been implemented in a number of other Member States, such as a clear separation of accounts for public service and other (purely commercial) activities, a limitation of the available public funding to the net public service costs of public service broadcasters subject to regular *ex post* control and the respect of market principles for purely commercial activities. The cost separation will be achieved by the fact that commercial activities will be carried out by commercial subsidiaries of public service broadcasters. The relationship between the public service broadcasters and these subsidiaries must be at arm's length. Also, all investments of public service broadcasters into other undertakings must respect the MEIP. These principles will be subject to adequate *ex post* control. It is thus ensured that purely commercial activities do not unduly benefit from public funding and that the public funding will not be unnecessarily increased by non market conform behaviour.

Apart from issues similar to those in other cases, the German case also raised new issues in particular as regards the financing of new media activities and sports rights.

More particularly as regards the financing of new media activities, the Commission considered that a mere authorisation given to public service broadcasters to offer new media services without the exact scope of these activities being sufficiently clear would neither satisfy the requirement for a clear definition of the public service mission nor the requirement for a proper entrustment. The Commission considered that the current definition of programme-related and programme-accompanying new media services could not be regarded as sufficient in order to demonstrate to what extent these new media activities would serve

the same democratic, social and cultural needs of society. In its commitments, Germany proposed to further clarify the public service remit for new media activities through the establishment of additional criteria, the enumeration of functions that public service broadcasters need to fulfil as well as an illustrative list of activities which do (not) normally fall within the scope of the remit. In particular the criterion requiring new media offers to make a contribution to editorial competition would require an analysis of the contribution of new offers to opinion shaping while also taking into account already existing offers on the market. Also, private operators will have the opportunity to give their comments on the expected market impact of the envisaged new offers. In the end, the Länder endorse proposals by the public service broadcasters for new media activities and formally entrust public service broadcasters with these tasks.

The acceptance of these commitments by the Commission was based on the following general considerations.

The Commission confirmed that the public service remit can encompass more than traditional television broadcasting and can also include new media activities. Also, the Commission recognised that the mere distribution of the same content over new platforms does not affect the public service character of these programmes. On the other hand, the Commission pointed out that the principle of technological neutrality does not mean that any service offered over new platforms would automatically constitute a service of general economic interest. Therefore, it was necessary that new services were subject to a prior evaluation of the particular public service character — or in the wording of the Broadcasting Communication: that they addressed the same democratic, social and cultural needs of society. The findings of that evaluation would then need to be reflected in a formal act of entrustment. In this respect, it was stressed that it cannot be left to the public service broadcasters alone (including their internal control bodies) to determine the scope of their activities. Proposals elaborated and developed by the public service broadcaster would need to be endorsed by public authorities. On the other hand, the Commission also clarified that the need for a clearly defined and a properly entrusted public service remit did not put into question fundamental principles of independence from the State and the resulting programme autonomy of public service broadcasters.

These considerations are also valid for similar cases in other Member States. It should neverthe-

⁽⁵⁾ State aid No E 3/2005; the Commission decision of 24th April 2007 published on the internet: http://ec.europa.eu/competition/state_aid/register/ii/by_case_nr_e2005_000.html#3; see also IP/07/543 and MEMO/07/150.

less be stressed that the Commission will continue to assess the financing regime in each Member State on its own merit.

The complaints also raised questions about the permissible scope of sports rights acquired with public money. The Commission came to the conclusion that in the present case, there were no indications that public service broadcasters showed “too much sports” on public TV channels or that they emptied the market for, in particular, premium sports rights. Even though public service broadcasters had acquired a significant proportion of sports rights of particular appeal to the German audience, this did not prevent other operators from acquiring rights for equally attractive sports events. Also, the Commission considered that public service broadcasters were not precluded from acquiring exclusive rights. Even though they were — due to the State funding — less dependent upon exclusivity for financial reasons, exclusivity could still be regarded as necessary for the fulfilment of their remit. On the other hand, the Commission considered that the financing of sports rights which remained unused by public

service broadcasters would not be permissible under Article 86 (2) EC Treaty. Consequently, such unused rights would normally have to be offered to third parties for sub-licensing. According to the commitments given by Germany, public service broadcasters will have to make the scope and rules for sublicensing transparent so as to allow other operators to plan their activities.

The requirements as specified in this decision are essentially about introducing rules of good governance: transparency in the definition, proportionality in the funding and accountability of public service broadcasters, both as regards the fulfilment of their public service tasks and the use of public money. Within the agreed parameters and the overall requirement for transparency, the decisions about media policy and its implementation are left to the stakeholders at national level. They have now the opportunity to design a system which reconciles the requirements for public service broadcasting with fair competition between public and private operators in the new media landscape.