Funding of public service broadcasting and State aid rules — two recent cases in Belgium and Ireland

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Introduction ([1])

The present article illustrates the Commission's State aid assessment practice concerning funding for public service broadcasters on the basis of two recent cases which were both concluded in February 2008. The cornerstones of the Commission's assessment of the State financing of public service broadcasting were set out in the 2001 Broadcasting Communication ([2]) and further developed in its decision making practice ([3]).

The basic requirements of the EC State aid rules for the funding of public service broadcasters are the following:

- A clear and precise definition of the public service remit;
- Proper entrustment with the public service mandate and supervision that public service tasks are provided as required;
- Separation of the accounts for commercial and public service activities (in accordance with the Transparency Directive);
- Limitation of public funds to the net public service costs and adequate ex post control mechanisms;
- Respect of market conform behaviour in the public service broadcasters' commercial activities.

These rules aim at ensuring transparency, proportionality and accountability of the funding regimes for public broadcasters. In both the Belgian and the Irish cases, one of the main issues was to enable public service broadcasters to meet the challenges posed by the new media environment, while ensuring a proper definition of the public service mandate also in the field of new media services.

In view of the challenges brought by technological progress, and building on the experience gained in more than twenty decisions since 2001, the Commission also launched a process of modernisation of the Broadcasting Communication in early 2008.

State financing of the Flemish public service broadcaster VRT

Background

In 2004, the Commission received complaints against various aspects of the State financing granted by the Flemish Community of Belgium to the public service broadcaster VRT (Vlaamse Radio- en Televisieomroep) ([4]). Private competitors argued that the definition of the public service remit was not sufficiently precise and that there were no effective control mechanisms. The complainants also claimed that the public financing received by VRT for the fulfilment of its public service tasks was not proportionate to the net costs of carrying out these tasks.

The Commission initiated a preliminary investigation and requested further information from the Belgian authorities, who had meanwhile initiated a number of modifications to the applicable legal framework. In July 2006, DG Competition informed the Belgian government, by means of

([1]) Directorate-General for Competition, unit C-4 and Task Force Pharmaceuticals Sector Inquiry. The authors would like to thank Alexandra Antoniadis and Jan Gerrit Westerhof for their valuable comments. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

([2]) Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320, 15.11.2001, pages 5-11

([3]) See, for instance, EC Competition Policy Newsletter 2004, number 2: 'The Commission's State aid policy on activities of public service broadcasters in neighbouring markets', EC Competition Policy Newsletter 2006, number 3: 'State aid in the broadcasting sector: two decisions regarding ad hoc aid to public service broadcasters in Portugal and the Netherlands' and EC Competition Policy Newsletter 2007, number 2: 'Increased transparency and efficiency in public service broadcasting. Recent cases in Spain and Germany'.

([4]) In 1971, due to changes in the organisation of the Belgian State, the Flemish authorities became responsible for radio and television broadcasting in the Flemish Community of Belgium.

a so-called Article 17 letter ([5]), of its preliminary view that the financing regime in favour of VRT was no longer compatible with EU State aid rules, initiating a so-called existing aid procedure. In such a procedure, which concerns aid measures already in place before the entry into force of the EC Treaty rules in the respective countries ([6]), the Commission aims to establish a compatible legal framework for the future in line with the State aid requirements in cooperation with the Member State. In the Article 17 letter, Belgium was requested to clarify a number of points, in particular concerning the definition of the public service remit, especially in relation to new media services, the effective supervision and control of VRT´s fulfilment of its public service obligations, as well as the prevention of overcompensation for public service activities.

In late 2007, the Belgian authorities submitted proposals by the Flemish government to amend the legal framework during 2008. The Commission assessed these commitments and concluded that the modifications would be suitable to ensure compliance with EC State aid rules. On this basis, the Commission concluded on the case in February 2008, issuing a decision ([7]) that the public funding of VRT was compatible with Article 86 (2) of the EC Treaty, conditional on the implementation of the commitments proposed by February 2009. The Commission will monitor the implementation of these commitments.

The acceptance of these commitments by the Commission was, *inter alia,* based on the following considerations.

Definition of public service mission including new services

The Flemish authorities will amend the legal framework to introduce a provision which will clarify that the VRT may not launch new services or activities which are not covered by the on-going five-year management contract without a prior *('ex ante')* evaluation and an explicit entrustment by the Flemish government. The authorities will set out the criteria which will be used to determine whether a service will be considered as a new service not covered by the current management contract and hence subject to an evaluation. These criteria may also be helpful in assessing whether new media services and activities serve the same democratic social and cultural needs of society as do traditional broadcasting services.

Before deciding on an entrustment, the authorities will request the advice of the Flemish Media Council *(Raad voor Cultuur, Jeugd, Sport en Media),* an independent specialist advisory body. The Media Council will look at developments in the Flemish media market and in technology, the evolution of the Flemish media landscape and the role of the VRT therein. The Council will also take observations of third parties into consideration and its advice will be made public. The need to include the observations of third parties pre-supposes that these parties have had the possibility to see the proposal for a new service or activity. This will also entail public consultation during the evaluation procedure.

Furthermore, to ensure a maximum degree of transparency in the procedure leading to the definition of the public service mission of the VRT in future management contracts, the Flemish authorities will conduct a public consultation of all stakeholders to be performed when a new management contract is prepared every five years. The consultation will result in a recommendation by the Media Council to the Flemish government which will also be made public.

An updated framework for merchandising and related activities of the VRT will further clarify which services can be considered as commercial and are clearly outside the public service remit. The public availability of this framework will further increase transparency and enhance the ability of commercial operators to plan their own activities.

The provisions outlined above will allow the supervisory authorities to check that the VRT does not extend its activities at its own discretion and — where necessary — to enforce the entrustment requirement.

([5]) Article 17(2) of Council Regulation (EC) N° 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty provides the following: *'Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period.*'

([6]) With regard to those Member States which have acceded in 2004 and 2007, special rules apply. In the case of these countries, the cut-off date for existing aid is 10 December 1994. In addition, those measures included in the lists annexed to the Treaties of Accession, and those approved under the so-called 'interim procedure' are also considered existing aid.

([7]) Commission decision of 27 February 2008 on State aid E 8/2006, see under: http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_e2006_0000.html.

Proportionality of public financing

The Flemish authorities also committed themselves to strengthening the annual monitoring and correction mechanisms concerning the control of possible overcompensation. As from the financial year 2008, any possible overcompensation of the VRT is capped at a maximum of 10% of the annual public financing received by the VRT in any particular year. If the 10% threshold is exceeded, the VRT must repay the surplus to the Flemish Community where the funds will be held in a special account. These funds may be used by the authorities to compensate for eventual funding deficits related to the public service mission in subsequent periods of the ongoing management contract period.

Any accumulated net surplus at the end of a five-year management contract period will be taken into account in the calculation of the public financing needs for the next management contract period and will be deducted from the State funds to be received by the VRT.

The overseeing of these mechanisms to monitor any overcompensation and possible repayments will be carried out by the *Inspectie van Financiën* on the basis of the annual accounts of the VRT. The *Inspectie van Financiën* is an independent body which exercises an *ex ante* control over the budget of the VRT and all funds granted by the Flemish Community to the VRT.

State financing of Irish public service broadcasters RTE and TG4

Background

The Commission's existing aid procedure concerning the financing of the Irish public service broadcasters RTÉ *(Radio Teilifís Éireann)* and TG4 *(Teilifís na Gaeilge)* was, as in other cases, prompted by a complaint. The complainant argued that the legal provisions did not contain a proper definition of the public service remit, and that the public broadcasters were not properly entrusted with public service obligations. Furthermore, the complainant claimed that the use of public funds lacked the necessary transparency to verify that the level of funding was proportionate and to make sure that public funds were not used for commercial activities.

On the basis of this information, and of further exchanges with the Irish authorities and the complainant, the Commission initiated the existing aid procedure by means of an Article 17 letter in March 2005.

In the Article 17 letter, the Commission considered that the funding system which dated from before Ireland's accession to the EU could be considered as existing aid. At the same time, the Commission raised concerns regarding the compatibility of the scheme. The Commission considered that the definition of the public service remit in particular in fields other than broadcasting was not sufficiently clear. Furthermore, it expressed concern that there were no satisfactory *ex-post* controls to verify whether State funding exceeded the net public service costs (overcompensation), whether commercial activities had unduly benefited from licence fee revenues (cross-subsidisation) or whether the public service broadcasters' commercial activities were in line with market principles.

In May 2005, the Irish government submitted observations and informed the Commission of plans to reform the Broadcasting Act. Following discussions between the Commission and the Irish authorities regarding the changes necessary to remove competition concerns, Ireland formally submitted in January 2008 its commitments to amend the current financing system and to bring it in line with the State aid rules. In its decision of February 2008 ([8]), the Commission concluded that the commitments were adequate to remove the concerns regarding the current funding regime. As in the case concerning Belgium, the main changes to the funding system related to the definition of the public service remit on the one hand, and to the fulfilment of the requirement for proportionality on the other.

Definition of public service mission including new services

The Irish authorities committed themselves to determining the scope of the public service remit of the public broadcasters in a more precise manner, by enumerating their respective objects and duties in the broadcasting legislation. These objects also include so-called new media activities, such as web-based services in connection with the public broadcasting activities, and non-linear audio-visual media services.

The Irish authorities also foresee a number of complementary measures to improve transparency and to further specify the public service objectives, such as the adoption of a Public Serv-

([8]) Commission decision of 27 February 2008 in the State aid case E 4/2005, available at: http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_e2005_0000.html#4.

ice Broadcasting Charter every five years, and the preparation of annual statements of commitments.

A salient feature of the proposed amendments is the introduction of a public value test and a sector-based impact test for any significant new activities by public broadcasters, as well as for any alterations of the statutory public service remit (e.g. variations of the number of channels, introduction of non-linear audiovisual media services, etc.).

The Irish authorities also specified indicative criteria for carrying out these tests. For example, the public value assessment would consider the extent to which the proposed service will contribute to meeting the democratic, cultural, linguistic, educational and social needs of Irish society, of individual groups within Irish society, and of Irish communities outside Ireland; the extent to which the proposed service is accessible to the public; the extent to which it reaches under-served audiences, or the contribution to media plurality. The criteria used for the sector-based impact test would cover considerations such as impact on availability, choice, quality and accessibility of services, as well as on related markets, on sector development, innovation and investment.

The reform entails the establishment of a new, independent Broadcasting Authority, which plays a central role in ensuring respect with the State aid requirements. This new regulatory body is to become the main expert body for assessing the impact of any new activities by public broadcasters, and plays a central role in supervising the fulfilment of the public service obligations by the broadcasters.

Proportionality of the public financing

The Irish authorities also provided commitments to ensure that there is no overcompensation, no cross-subsidisation of commercial activities, and that broadcasters respect the market principles in their commercial activities. They also committed themselves to putting in place regular control mechanisms for this purpose.

The Irish authorities made clear that public funding and surpluses generated by commercial exploitation of public broadcasting activities may only be used for the financing of public service activities. Moreover, they committed themselves to ensuring separate accounting of public service and commercial activities, as provided in the Transparency Directive. On that basis, public service broadcasters are to report on an annual basis on the use of their public funding. The independent Broadcasting Authority was entrusted with the task of controlling the level of funding and making recommendations to the Minister, if necessary, to adjust the financing. The public funding will be subject to annual reviews, and the financial situation of the public broadcasters will be assessed in depth every five years.

The Irish authorities also committed themselves to ensuring that the commercial transactions (commercial activities, investments, etc.) of the public broadcasters are clearly distinguishable from public service activities and carried out on market terms, taking into account the 'arms-length principle'. Compliance with market principles is also subject to the control by the independent Broadcasting Authority.

Conclusions

Following the April 2007 decision concerning public service broadcasting in Germany ([9]), the decisions concerning public service broadcasters in Belgium and Ireland illustrate further possible ways of complying with the EU State aid requirements in the rapidly changing new media environment. These examples also illustrate the variety of possible solutions aimed at respecting the requirements of transparency and proportionality while safeguarding the specificities of the individual broadcasting systems of each Member State.

In both cases, the Member States were granted a transitional period for the implementation of their commitments. In this period, the Commission's task is to monitor the proper implementation of the decisions ([10]). In parallel, the Commission services are working towards a revised Broadcasting Communication which meets the challenges of the present and future media environment, reaping the benefits of the recent decision-making practice in individual cases such as the two presented in this article.

([9]) Commission decision of 24 April 2007 in the State aid case E 3/2005, available at: http://ec.europa.eu/comm/competition/state_aid/register/ii/by_case_nr_e2005_0000.html#3.

([10]) The 2008 Broadcasting Bill has been published by the Irish authorities in May 2008, see: http://www.dcenr.gov.ie/Broadcasting/Broadcasting+Legislation/.