

## Commission and Germany agree on better control for the use of State aid in the broadcasting sector

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On 18 December 2008, Germany's 16 *Länder* signed a new inter-state treaty on broadcasting, which implements a set of appropriate measures under the terms of a Commission Decision of April 2007. The case is an important precedent for the Commission's approach to State aid control in the area of public service broadcasting. It also highlights the value of constructive cooperation between the Commission and Member States during the implementation of appropriate measures for modifying an existing aid scheme.

In a joint press statement dated 18 December 2008 Commissioner Kroes and the *Ministerpräsidenten* of Germany welcomed the fact that from now on the public funding of Germany's broadcasters ARD, ZDF and Deutschlandradio for new audiovisual media services will be in line with the EC State aid rules.<sup>(2)</sup> The signature of the 12th Inter-State Treaty on broadcasting concluded a long-standing discussion between the Commission and Germany's 16 *Länder* which raised no less important questions than whether EC State aid rules apply to the audiovisual media sector at all.

### Controlling the use of State aid at national level: the "Drei Stufen Test"

Germany's *Länder* and the Commission agreed in April 2007 on a set of appropriate measures which should bring the public financing of ARD, ZDF and Deutschlandradio into line with the EC State aid rules. These measures addressed in particular the financing of "new media services", including offers on the internet. The Commission considered that State aid authorisation for offering new media services could only be warranted based on a clear definition of the public service mission and a proper entrustment process.

To address this concern, Germany proposed that new media offers of public service broadcasters must contribute to "editorial competition". Establishing whether this requirement is met involves

analysing the contribution new offers will make to opinion shaping while also taking into account already existing offers on the market. Germany also pledged to give private operators an opportunity to comment on the expected market impact of the envisaged new offers.

This evaluation process is today referred to as the "*Drei Stufen Test*" in Germany as it consists of three steps,<sup>(3)</sup> with the second step of the test addressing the potential market impact of a new offer. The BBC have already since 2006 been operating a similar test, which they refer to as a "Public Value Test".<sup>(4)</sup> Smaller Member States such as Ireland and Belgium are in the process of implementing similar tests too.<sup>(5)</sup>

### Problems resulting from a long implementation period

The 2007 Decision provides for an unusually long implementation period of two years, contrary to other comparable State aid cases in this sector.<sup>(6)</sup>

This long implementation period was deemed proportionate for several reasons. First, media policy is a matter of regional competency under Germany's federal constitution. Hence, the revision of the existing Inter-State Treaty on public service broadcasting requires coordination between the 16 *Länder*. Second, the implementation process was made more complex by the need for public broadcasters to adopt a series of side-measures which were to spell out and supplement the provisions of the Inter-State Treaty.

<sup>(1)</sup> 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.

<sup>(2)</sup> Commission Decision of 24 April 2007, E 3/2005 (IP 07/543). The Decision was adopted under Articles 17 and 8 of Council Regulation (EC) No 659/1999 of 22 March 1999, OJ L 83, 27.3.1999, p. 1. See Competition Policy Newsletter 2007 No 2, p. 67.

<sup>(3)</sup> The three steps of the *Drei Stufen Test* require each public service broadcaster in Germany to evaluate whether a new and significant offer (1) serves the democratic, social and cultural needs of German society and (2) contributes in a qualitative way to "editorial competition" (*publizistischer Wettbewerb*) and (3) to specify the financial impact of such offers.

<sup>(4)</sup> [http://www.bbc.co.uk/bbctrust/framework/public\\_value\\_test/index.html](http://www.bbc.co.uk/bbctrust/framework/public_value_test/index.html)

<sup>(5)</sup> See Competition Policy Newsletter 2008 No 3, p. 81 on the Irish and Belgian cases.

<sup>(6)</sup> The Decision of February 2008 on the Irish public broadcasting system requires Ireland to notify the Commission of the entry into force of the new Broadcasting Act and to submit the final law to the Commission no later than December 2008 (see Commission Decision of 27 February 2008 in case E 4/2005, at para. 189).

Due to this situation, Germany could not base its proposal for appropriate measures on one all-encompassing bill of law. Rather, the appropriate measures it offered were set out in broad terms which inevitably necessitated further refinements in the implementation process.<sup>(7)</sup>

However, during the long implementation period Germany's public service broadcasters continued to develop their media offers on all platforms.<sup>(8)</sup> This increasingly threatened to undermine the very effectiveness of the appropriate measures envisaged by the *Drei Stufen Test* for all "new" or "significantly modified" offers. "Existing services" merely have to be enumerated in a "*Gesamtkonzept*" but not tested with respect to their value for citizens and the impact on the market.<sup>(9)</sup>

Half-way through the implementation process, Germany's *Länder* could no longer sufficiently distinguish pre-existing services from new offers. To address that difficulty, Germany's *Länder* in the end decided to apply the test to all internet offers which should still be on the market at the end of the implementation period in April 2009.<sup>(10)</sup>

### The wider importance of a balancing test for new media offers

The *Drei Stufen Test* — and similar forms of ex ante assessment — are important mechanisms to safeguard the principles of the Amsterdam Protocol at national level. The Amsterdam Protocol interprets Article 86(2) EC in an authentic and binding manner. It has two parts. First, the Protocol clarifies that Member States have full freedom to define the public service remit (i.e. the SGEI) in the broadcasting sector with reference to "the democratic, social and cultural needs" of their societies. Second, the Protocol obliges Member States to prevent State funding

affecting 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 that public service shall be taken into account".

The assessment of new media in a balancing test replicates these two elements of the Amsterdam Protocol and hence it is also called the "Amsterdam test". One crucial aspect of the test is that citizens and market participants (e.g. private broadcasters or newspaper publishers) are granted the opportunity to give their views within a public consultation on the value and the potential market impact of a planned offer *before* irreparable harm is caused and public funds are spent. The views of this public consultation should be taken into account in balancing — at the national level — the pros and cons of using State aid for financing a new media activity. If the outcome of that balancing exercise is negative, the service should only be provided on market terms without using State funds.

The Commission's review of the 2001 Broadcasting Communication, which ended in July 2009, consolidates its practice in more than 20 decisions including the German, Irish and Belgian cases. Upon entry into force, the revised Communication will also consolidate the "Amsterdam test" at the national level<sup>(11)</sup>.

### How to ensure the effectiveness of the balancing test

The Commission's implementation discussions with Germany's *Länder* soon focused on how the *Drei Stufen Test* is implemented both in the Inter-State Treaty and in the guidelines adopted by ARD and ZDF. The appropriate measures leave Germany discretion to entrust the test to the *Rundfunkräte* of ARD and the *Fernsehrat* of ZDF<sup>(12)</sup> rather than to a public authority.<sup>(13)</sup> When Germany's *Länder* made use of this possibility, the Commission insisted on accompanying measures to prevent any possible conflict of interest in order to safeguard the effec-

<sup>(7)</sup> Thanks to effective coordination between Germany's 16 *Länder*, which were headed by a group of four *Länder*, the implementation talks between the Commission and Germany took no longer than four months, starting in September and ending in December 2008. However, the preceding internal discussion in Germany actually took more than a year.

<sup>(8)</sup> ARD and ZDF had already put some of their new digital channels on the market prior to the adoption of the Decision and further developed those channels during the implementation period. Moreover, during the implementation period, both ARD and ZDF started "*Mediatheken*", large on-line portals which offer viewers the possibility to download TV and radio programmes for free. ARD's portal alone contains approximately 15 000 TV and radio programmes.

<sup>(9)</sup> Commission Decision of 24 April 2007 in case E 3/2005, at paras 328 and 333.

<sup>(10)</sup> ARD and ZDF are currently in the process of preparing this first and rather voluminous test for existing internet services. The test is generally considered as a test case for the effectiveness of the new control mechanism.

<sup>(11)</sup> [http://ec.europa.eu/competition/state\\_aid/legislation/specific\\_rules.html#broadcasting](http://ec.europa.eu/competition/state_aid/legislation/specific_rules.html#broadcasting); see paragraph 88 of the revised Broadcasting Communication.

<sup>(12)</sup> Both the *Rundfunkräte* and the *Fernsehrat* are control bodies composed of politicians and representatives of diverse social and cultural groups in Germany whose role is to supervise the management of the public broadcasters.

<sup>(13)</sup> This compromise was due to the specific constitutional situation in Germany. For historical reasons the constitutional Court in Karlsruhe interprets the principle of editorial freedom of the media very widely to deter any kind of governmental intervention. Freedom of expression is also protected under Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the European Convention of Human Rights as a general principle of law the respect of which is ensured by the European Community Courts.

tiveness of the test, including measures to increase the transparency of the decision-making process and measures to enhance the factual capability of the decision makers to execute such a test.

Another question left open in the appropriate measures was the threshold for triggering the *Drei Stufen Test*. As a matter of general policy, the Commission requires State funding for any “new” and “significant” audiovisual media service to be assessed with respect to the criteria of the Amsterdam Protocol. However, in doing so, the Commission leaves Member States wide discretion to define by themselves what “new” and “significant” means. This is, amongst others, because the Commission does not wish to prejudge for Member States whether they want to test new services platform by platform (e.g. a possibility to offer downloads of TV films on the internet)<sup>(14)</sup> or rather *across* platforms (e.g. an offer under the same brand on TV, internet and radio).

For constitutional reasons (editorial freedom)<sup>(15)</sup> the German authorities again preferred ARD and ZDF to define the notions of “new” and “significant” rather than to lay down such definitions in a legislative act. Here, too, close deliberations between the Commission departments and Germany’s *Länder*, including the public broadcasters, were required to reach a fully satisfactory solution.

As a consequence, ARD and ZDF have now published guidelines on the procedure and details of the *Drei Stufen Test* which among other things also define the terms “new” and “significant”.<sup>(16)</sup>

## Conclusions

Germany’s public broadcasting system has today an effective dispute resolution mechanism at national

level which should prevent the public funding of new audiovisual media services running counter to EC State aid law.

The advantages of this form of *ex ante* control include enhanced legal certainty, improved awareness of the value of public services in this sector and ultimately more value for taxpayer’s money. This framework will allow public service broadcasters to offer high-quality and modern services, taking advantage of the opportunities technological development is offering to media companies. At the same time, this will happen in an environment where newspaper publishers, commercial broadcasters and other private media can also improve and diversify their offers without fearing to see their efforts frustrated by unfair competition that is financed with public money.

The experience with implementing the Decision in the German case also highlights the challenges resulting from a long implementation period requiring close coordination between several national bodies. It may be easier for Member States to propose appropriate measures already on the basis of a concrete bill of law. On the other hand, several issues in this case only surfaced during the implementation process. They concern details which could hardly have been foreseen in advance when the appropriate measures were put forward.

The positive solution that was found in Germany therefore speaks in favour of maintaining a close dialogue between the Commission departments and the national authorities concerned after the acceptance of appropriate measures in existing aid cases.

<sup>(14)</sup> The first *Drei Stufen Test* after the entry into force of the inter-State Treaty on 1 June 2009 concerns a joint ARD/ZDF internet portal “kikakaninchen.de” (see *epd Medien*, 6.12.2008, at p. 11).

<sup>(15)</sup> See footnote 12 above.

<sup>(16)</sup> See for instance in *epd Medien*, 17.12.2008, at p. 29. The definition of services that must be tested is based on a set of 4 positive and 7 negative criteria which must be taken together to conclude whether the test is needed.