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Competition and Public Service Broadcasting: Has the right balance been struck between European Union oversight and the Freedom of the Member States to develop their national public broadcasting policies?

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Abstract

The application of the State aid rules to public service broadcasting has never been a straightforward exercise for the European Commission (the Commission). The picture became more complex in the digital era in light of the expansion of public broadcasting organizations to new media markets. Yet, in spite of the challenges it faced, the Commission has not limited itself to a marginal compatibility assessment checking solely whether the provision of public broadcasting services outweighs the harm to competition. Over the years, the Commission has developed a practice which has gone so far as to shape national public broadcasting policies. Through its decision-making practice and the adoption of a soft law instrument, the Broadcasting Communication, the Commission gradually managed to inject into national systems its own perspective of "good" State aid policy in public service broadcasting. This paper discusses the impact that the Commission State aid practice has had on national public broadcasting systems and reflects on whether the right balance has been struck between European Union oversight and the freedom of the Member States to develop their own public broadcasting policies. The paper argues that, while in several instances the Commission went beyond the Treaty letter, its control over State measures favoring public service broadcasting has led to a substantial rationalization of the sector thereby benefiting both commercial operators and the taxpayers/citizens.

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1. Introduction

Ever since public service broadcasting became a matter of concern in the achievement of undistorted competition within the common market, it was understood that its regulation at European level would be challenging due to the competence disputes it triggers. On the one hand, given its specific role in catering for fundamental societal needs and the cultural character of television programs, public service broadcasting has been treated, since its inception, as a vital part of national cultural policies, thereby limiting Union action on the basis of the principle of subsidiarity.[1] On the other hand, the Court has ruled in several cases that public broadcasting activities are activities of an economic nature, thereby facilitating European intervention whenever privileges in favor of public broadcasting organizations can put the realization of the European project in danger.[2]

Shortly after the liberalization of the sector through the Television Without Frontiers Directive,[3] and in light of the expansion of commercial broadcasters to markets that were considered until then purely national, the issue of whether or not State financing of public broadcasting activities unduly distorts competition came to the fore.[4] The picture became more complex with the rapid development of activities beyond national frontiers, such as the acquisition and sale of program rights, and the extension of the ownership structure of commercial operators to more than one Member State. These developments soon gave rise to tensions on how to promote a core Union objective, namely the protection of undistorted competition, without interfering with cultural issues, in particular the advancement of national public broadcasting policies, that were thought to be better served at national level.

Throughout the 1990s, the Commission was faced with complaints lodged by private operators alleging *inter alia* that public funding of such activities violates the State aid rules.[5] And, while in the beginning of its decision-making practice in the field, the Commission followed a hands-off approach,[6] ultimately it has not limited itself to a marginal compatibility assessment, checking solely whether the provision of such services with public money outweighs the harm to competition. Over the years, the Commission, through the application of the State aid rules, has undertaken an active role in controlling relevant schemes and developed a practice which has gone so far as to shape national public broadcasting policies and, for that reason, has provoked severe criticism given the competence limitations in the cultural domain. The Commission's influence on such policies stems clearly from decisions taken in the sector, which illustrate the negotiations with Member States involved, so that the schemes under scrutiny are brought in line with the State aid rules. Yet, the Commission State aid practice has not been limited to the adoption of individual decisions but has been marked in essence by the Broadcasting Communication, a soft law instrument in which the Commission laid down the principles it follows when applying the State aid rules to the public broadcasting sector.

Clearly, the Commission's practice was not developed overnight. The Commission faced a number of challenges in its effort to establish a consistent framework within which public service broadcasters may operate without violating the State aid rules. The organization of the sector, which has been treated for several decades as a natural monopoly, paralyzed early Commission initiatives calling for the implementation of a set of principles for the funding of public service broadcasters.[7] These attempts found strong Member States' opposition which was not driven exclusively by the fear for unjustified expansion of Union competence in the cultural field but also by the sensitivities of the public broadcasting sector, in particular its ability to shape public opinion and therefore direct citizen behavior. The organization of the sector as a State monopoly for several decades is also the reason why the Commission had not been exposed to issues that arise from the application of the State aid rules to public service broadcasting and therefore lacked the necessary know-how to follow a more coherent approach once the first complaints were filed.

Taking the above into consideration, it does not come as a surprise that the application of the State

aid rules to public service broadcasting has not been a straightforward exercise for the Commission. The picture becomes more complex in the current media environment given the expansion of public service broadcasters to new media markets. The development of activities other than traditional broadcasting, such as online games, chats, data banks and online shops has given rise to doubts about whether such services substantiate a public service mission or whether this expansion enables spillovers of public money to commercial activities thereby harming commercial operators and taxpayers. Under pressure from the private sector and considering the amount of monies dispersed to support public service broadcasting, the Commission followed a more interventionist approach in these cases. The position it took in recent decisions dealing with the conditions under which public service broadcasters may provide new media services, subsequently codified in the revised version of the Broadcasting Communication, has provoked strong reactions by the Member States and the public broadcasters on the grounds that the Commission went way beyond the Treaty letter and, in that regard, the competence disputes have become more intense now than ever.

This paper provides an insight into the Commission decision-making practice and discusses its impact on national public service broadcasting systems. Considering the central role of the Broadcasting Communication in the Commission's decision-making, the study will focus on the application of the provisions laid down therein to relevant measures. The analysis will particularly deal with recent cases which illustrate *inter alia* the Commission's perspective of how public service broadcasters may develop new media activities without violating the State aid rules. The aim of the paper is to draw conclusions on whether the Commission has managed, through the application of the State aid rules, to reconcile the conflicting objectives identified above, namely undistorted competition and the freedom of the Member States to develop their national public broadcasting policies. The question of whether the right balance has been struck between these objectives needs to be answered sooner rather than later, not only because public service broadcasting is among the most generously financed recipients of aid across the Union[8], but also because, in the current media landscape, public service broadcasting is shaken to its very core by the variety of content offered by private operators on all available platforms.

The paper consists of three parts. The first part discusses the legal basis of the Broadcasting Communication, the primary EU law under the umbrella of which fall State measures supporting public broadcasting activities, reflects on the ambivalence generated by the applicable Treaty provisions and lays the ground for a detailed analysis of the Communication. The second part is divided in three sections which analyze the approaches the Commission followed in the examination of whether each one of the three criteria set out in the Broadcasting Communication are satisfied. In that respect, a critical assessment of the Commission practice in the field takes place using concrete examples, mostly from recent cases dealing with the expansion of public service broadcasters to neighboring media markets. Finally, the analysis concludes that, while in several instances the Commission exceeded competence, the practice it developed through the application of the State aid rules has led to the rationalization of the sector, thereby reducing to an appreciable degree the harmful effects on private competitors.

2. Primary EU Law regulating public service broadcasting: The puzzling wording of Article 106(2) TFEU and the Amsterdam Protocol on public service broadcasting

In its 15-year practice in the field, the Commission has undertaken an active role in controlling State financing of public broadcasting activities.[9] Either as a result of complaints lodged by private operators or of schemes notified by the Member States, the Commission got exposed to several issues that arise when applying the State aid rules to public service broadcasting and eventually developed a practice in the field. The Commission's perspective of how relevant measures may fit the European media environment without violating the State aid rules has passed from individual decisions to a soft law instrument, the Broadcasting Communication, laying down the principles that the latter follows when assessing schemes supporting public service broadcasters. This sector-specific approach, marked in essence by the provisions of the Broadcasting Communication, is explicated by both the heterogeneity of national public broadcasting systems[10] and the ambivalence generated by the primary EU law applicable to public service broadcasting.[11]

As regards the heterogeneity of the national systems, reference needs to be made to the diversities characterizing the European public broadcasting landscape. Indeed, divergent historical conditions and national policies have contributed to the creation of various models of public service broadcasting across the Union which differ significantly in several aspects such as the legal framework within which they operate and their financial organization. Yet, given that this study examines the impact that European oversight has had on national broadcasting systems, the analysis will focus on the ambiguous wording of the applicable Treaty provisions, in particular Article 106(2) TFEU and the Protocol on the system of Public Broadcasting in the Member States introduced by the Treaty of Amsterdam.[12]

The Commission has in general treated public financing of broadcasting activities as State aid within the meaning of Article 107(1) TFEU and, as a result, it carries on its investigation of State aid to public service broadcasting by assessing the compatibility of the measures under scrutiny with exceptions in the Treaty. The Commission has focused on the qualification of public broadcasting services as services of general economic interest[13] which triggers the application of Article 106(2) TFEU. The latter provides for an exemption from the Treaty provisions, in particular the rules on competition, insofar as the application of these rules obstructs the performance of the public service tasks which the entrusted undertakings are required to fulfill. Article 106(2) TFEU, as interpreted by the Court and further explicated by the Commission in its Broadcasting Communication, has been the legal basis on which national schemes favoring public broadcasters are saved from the general State aid prohibition for over 15 years now.[14]

The derogation laid down in Article 106(2) TFEU conveys a mixed message. For that reason, reaching the conclusion whether the exception provided for by Article 106(2) TFEU applies to a measure supporting public broadcasting services has not been a clear-cut exercise for the Commission. To the contrary, its ambiguous wording makes each case possibly falling under its umbrella an enigma to solve. Article 106(2) TFEU acknowledges the significance of services of general economic interest by providing for an exemption from the Treaty provisions to the extent, however, that the exemption does not affect trading conditions inside the Union. In that context, Article 106(2) TFEU requires the achievement of a balance between conflicting objectives, namely national public interests as perceived by the Member States, and a Union interest as attained by the Commission but without further substantiating how this balance is to be achieved.[15] Given the differences characterizing the national media landscapes, and in particular the national public broadcasting systems, a case-by-case approach is followed by the Commission,[16] which, pursuant to Article 106(3) TFEU, is entrusted with conducting the relevant balancing exercise.

Similar considerations are made in relation to the Protocol on the system of Public Broadcasting in

the Member States introduced by the Treaty of Amsterdam.[17] The Protocol acknowledges the role of public service broadcasting in fulfilling the democratic, social and cultural needs of the society and the need to preserve and promote media pluralism. It also makes clear that the Member States have sole competence to decide whether or not to introduce a public service broadcasting system, and if so, to define and organize the provision of public broadcasting services in the manner of their choosing. Yet, the Protocol also lays down that financing of public service broadcasting may not bring about a distortion in competition and intra-Union trade. Its wording illustrates the division of powers between the Member States and the Union by setting out the conflicting objectives pursued. The Protocol endorses the significance of public service broadcasting as a cornerstone for democracy and a means to cater for fundamental societal needs but it does not provide for a full exemption from the Treaty provisions.[18] While many scholars consider the introduction of the Protocol an important development in the field,[19] it does not seem to contribute significantly to the conceptual clarity in the area. This argument is reinforced by its interpretative character: it seems that the Member States feared expansion of Union competence in the media arena[20] which can explain why they agreed on the introduction of a Protocol interpreting Article 106(2) TFEU annexed to the Treaty but not a provision contained in its main text.[21]

Given the inconclusive wording of Article 106(2) TFEU and the Protocol as discussed above, the Commission had long stressed the need for a more consistent approach in the compatibility assessment of measures favoring public service broadcasting. Initiatives at European level can be traced back to 1998 suggesting that the establishment of a coherent framework is essential through the adoption of a set of principles applicable to related schemes.[22] While the basis on which these initiatives were undertaken is questionable considering that the Commission had not adopted a single decision in the field at the time thus had not acquired the necessary experience to identify such principles, they surely acknowledged the particularities of public service broadcasting and laid down the ground for the efforts that followed. Apparently, the Commission waited for the momentum (both political and empirical) to codify certain common standards after having developed a relevant practice. The provisions of the 2001 Broadcasting Communication started to apply after two final decisions were adopted[23] and several investigation procedures were opened,[24] therefore after the Commission had been exposed to several issues arising from the application of the State aid rules to public service broadcasting.[25] It has recently been revised to deal with issues that arise from the expansion of public service broadcasters to new media markets.

3. The Broadcasting Communication: The Commission's perspective of "good" State aid policy in Public Service Broadcasting

The Broadcasting Communication embodies the principles followed by the Commission in the application of the State aid rules, with a clear emphasis on Article 106(2) TFEU as previously discussed, to the public funding of audiovisual services in the broadcasting sector.[26] Formally, it binds only the Commission,[27] however, in clarifying under which conditions a relevant measure may be declared compatible with the Treaty, the Communication has also served as a guiding tool for both private operators and the Member States.[28] The Communication was welcomed by the industry because it established a certain degree of legal certainty in the broadcasting market[29] and proved rather useful for the Commission in its decision-making practice. Eight years after its adoption, during which the Commission adopted over 20 decisions in the field, the Communication was revised to introduce *inter alia* the Commission's perspective of how public service broadcasters may fit the new media landscape without relevant support measures violating the State aid rules.[30]

The Communication makes reference to the three conditions posed by Article 106(2) TFEU as interpreted by the Court and further explicates them. If State support for public broadcasters complies with the following criteria that must be met cumulatively, the measure under investigation is compatible with the common market: a. the public service remit must be defined in a clear and precise manner (definition), b. the undertaking in question must be explicitly entrusted by the Member State with the provision of that service and there must be an effective monitoring mechanism in place to ensure that the public service obligations are respected (entrustment and supervision) and c. State financing must not exceed the net costs of the public service mission (proportionality).[31]

The analysis below evaluates the decision-making practice the Commission has developed in its assessment of whether each of the above criteria are satisfied and discusses the impact the approaches it followed had on national public broadcasting policies. A selection of cases has taken place with the study focusing on recent decisions dealing with the expansion of public service broadcasters to new media markets. The objective is to appraise how the Commission reasoning has developed in its 15-year practice in the field to face the challenges that arose in the digital era and draw conclusions on whether, in light of the development of new media activities by public broadcasters, the Commission managed to reconcile the conflicting objectives referred to above, in particular undistorted competition and the freedom of the Member States to develop their national public broadcasting systems.

3.1. Definition: From Public Service Broadcaster to Public Service Media

As regards the definition of the public service remit, the Commission's role is limited to checking whether a manifest error has occurred. That would normally be the case if commercial activities are included in the public service mandate thereby enabling spillovers of public money to activities that do not necessarily fulfill a public service mission.[32] This manifest error approach accords with the Amsterdam Protocol which lays down the freedom of the Member States to define and organize the public service remit as they deem appropriate. The fact that the Member States are entrusted with the definition of the public service obligations confers upon them a significant margin of discretion. However, and in spite of the fact that the Commission is limited to checking for manifest errors, the assessment of whether the criterion of a clear and precise identification is fulfilled has not always been a straightforward exercise. Besides legacy characteristics of the monopoly era, such as broad public service remits, under the umbrella of which potentially fall all kinds of broadcasting services, the Commission had to deal with rapid technological changes and the development of new business models in the media markets. The above factors are indicative of the challenges the Commission faced in the context of its manifest error control.

Yet, the ambivalence about what types of services may be covered by the remit is not tackled by the Broadcasting Communication which, on the one hand, lays down that "***the definition*** of the public service mandate by the Member States ***should be as precise as possible***"[33] but on the other, considers legitimate "a qualitative definition entrusting a given broadcaster with the obligation to provide ***a wide range of programming and a*** balanced and ***varied broadcasting offer***" [emphasis added].[34] This ambiguity related to the obligation to provide for a clear and precise definition has its origins in the 2001 Broadcasting Communication[35] and, despite the fact that the literature has pointed out the relevant confusion,[36] the above provisions have been introduced without modifications in the revised version of the Communication. Any Commission attempts to establish more stringent rules on the remit would probably find strong Member States' opposition in the name of the principle of subsidiarity and the safeguarding of the editorial independence of public service broadcasters. Nonetheless, this inconclusiveness of how clear and precise should the public remit be leaves considerable room for manœuvre of which the Commission has taken advantage in its case-by-case compatibility assessment.

In the context of its manifest error control, the Commission has taken differing views as to the conditions under which the provision of the service sought to be provided would not constitute an abuse. The relevant criteria the Commission has occasionally stipulated in its decision-making practice have provoked severe criticism, which is to a certain extent justified considering the competence constraints in the definition of the remit. The main criticism lies in the fact that the Commission has been in several instances rather interventionist in issues dealing with the remit thereby exceeding the limits of its manifest error control and acting in violation of the Amsterdam Protocol. The disputes became more intense recently given the development of activities other than traditional broadcasting. Nonetheless, an analysis of several decisions which touch upon various issues related to the application of Article 106(2) TFEU to public service broadcasting provides sufficient proof that the Commission has made considerable efforts to improve contestable approaches followed in earlier cases.

The selection of decisions the examination of which follows has been based on a number of factors. First and foremost, the decisions tackle a plethora of issues that arise in relation to the definition of the remit, such as the limits of the Commission control, the universality of the service or the technology neutral character of the envisaged scheme. Additionally, the cases deal with the most relevant -for the definitional issues- categories of Commission decisions, in particular decisions on the compatibility of individual projects launched by public service broadcasters and decisions on general regimes financing public broadcasting activities.[37] As regards the decisions on the general funding mechanisms supporting public service broadcasters, the focus lies on recent cases tackling the issue of expansion of public broadcasters to new media markets and therefore better illustrate the challenges the Commission faced in assessing the conditions under which the enhancement of technological developments by public service broadcasters does not constitute an abuse. The decisions are examined in chronological order.

- **BBC News 24: Hands off Member States' definitional freedom, Universality of the service and Technology Neutral character of the scheme**

In *BBC News 24*, the Commission was called upon to decide whether the launch of a 24-hour advertising-free news channel out of the license fee by the BBC is compatible with the common market. The complaint was lodged by the British media mogul, BSkyB, alleging *inter alia* an infringement of Article 106 TFEU.[38] This decision touches upon three different aspects related to the application of Article 106(2) TFEU to public service broadcasting: first, the demarcation between issues falling under national law and issues which must be dealt with by the Commission in the context of its manifest error task, second, the universality of the service sought to be provided and, third, the technology neutral character of the scheme under scrutiny.

One of the complainant's main allegations was that the launch of a thematic news channel does not

constitute a public service within the meaning of the BBC Charter, the BBC's constitutional basis, and could not therefore benefit from the derogation laid down in Article 106(2) TFEU.[39] More particularly, the Charter laid down the possibility to provide, in addition to the main public services, other services, whether or not broadcasting, referred to as "ancillary services".[40] Given that the BBC had requested, in accordance with the procedures envisaged in the Charter, and gained the approval from the Secretary of State to launch BBC News 24 as an ancillary service,[41] the complainant argued that the project was not classified as a public service and therefore the exemption under Article 106(2) TFEU could not apply. The Commission considered respectively that it is not within its competence "to pronounce on the concept used in national legislation to define the provision of such services, nor to discuss the concepts of 'public service' and 'ancillary service' as defined in the Charter"[42] stressing that its task is to ensure that no manifest error has taken place in the definition of services which fall to be assessed under Article 106(2) TFEU as "services of general economic interest".[43] In that regard, the Commission took into consideration the specific features of the channel and concluded that no abuse had occurred in its characterization as a service of general economic interest *inter alia* because the service in question "would help to meet the democratic and social needs of a society […] by allowing the coverage of a wider range of events and a more in-depth analysis of the events".[44] This approach accords with the Amsterdam Protocol which leaves upon the Member States the definition and organization of the public service remit in the manner of their choosing. Taking into consideration that *BBC News 24* was one of the first decisions adopted in the field, the Commission followed a cautious approach as any attempts to meddle with concepts laid down in national law would probably open "the Pandora box" finding strong Member States' opposition.[45]

The complainant also claimed that BBC News 24 could not be considered a public service as it was not available to the entirety of the UK population but only to viewers connected to analogue cable services (more or less 10% of all British households) thereby lacking the character of universal service.[46] Yet, the Commission found that "BBC News 24 has been made available to the maximum number of viewers possible, taking into account the existing technical constraints […], ***and with the aim of distributing it to the whole population as soon as this becomes technically possible*** (e.g. it is distributed also on the digital satellite platform since this became available)" [emphasis added].[47] The Commission has therefore accepted that a service which in principle lacks universality[48] may nevertheless qualify as a service of general economic interest provided that the intention of the State authorities is to make it available to the entire population within a given period of time once technical or other types of constraints are resolved. This approach is not *de facto* problematic but it would seem logical to expect that such restrictions will be lifted within a reasonable time frame so that the service can be provided throughout the national territory to all citizens for it to be considered a service of general economic interest.

Finally, BBC initially aimed at launching the channel on the digital platforms but later on, due to technical constraints, decided to make it available on all platforms including the existing broadcasting infrastructures. The complainant then contested the public service nature of the service and claimed that BBC News 24 should be offered as a commercial service.[49] The Commission not only remained within its manifest error tasks by pointing out that it is up to the State authorities to decide which services fulfill certain societal needs but also considered respectively that "***[t]he public service nature of a service cannot be judged on the basis of the distribution platform***. Once the UK Government has defined a certain service as being a public service […], such service remains a public service regardless of the delivery platform, as long as its program concept and its funding arrangements remain unchanged. In the case in hand, the content of BBC News 24 was known from the very beginning, and its funding arrangement has remained completely unchanged" [emphasis added].[50] This approach is in line with both the Protocol and the technology neutrality principle on the basis of which State measures should not favor one particular technology or platform. This principle underpins the Commission decision-making practice in the fast-evolving media and telecommunications sector.[51]

- **BBC Digital Curriculum: The closely Associated Criterion**

In *BBC Digital Curriculum* the Commission was called upon to decide whether a new online service aimed at providing interactive learning materials free to homes and schools is compatible with the common market.[52] In its assessment of whether the provision of such services falls within the existing State aid scheme supporting the BBC, the Commission found that "[t]he inclusion of 'non television and radio' services as ancillary services of the BBC is a matter for UK legislation. The provision of educational material over the internet may be considered to be within the 'existing aid' nature of the scheme ***to the extent that it remains closely associated with the BBC's "television and radio services***. If, however, the proposed 'ancillary service' sheds this 'close association' it can no longer be considered as one offering continuity within the existing scheme" [emphasis added].[53]

This approach is problematic in that services sought to be provided by public service broadcasters will fall under the remit insofar as they are closely associated with the television and radio services on offer. On that point, the establishment of a compulsory link to such services restricts the Member States' definitional freedom[54] and is likely to undercut the potential of public broadcasting organizations by limiting both originality and innovation. Additionally, the requirement to plan activities in close relation to television and radio services is against the technology neutrality principle because it implies a dependence on specific platforms and technologies[55] and runs counter to what was decided earlier in *BBC News 24* where the Commission explicitly clarified that the distribution platform should not determine the public nature of a service.[56]

- **CFII: Lack of Universality**

This case concerned an initiative of the French State to launch an international news channel, *la Chaîne Française d'Information International* (hereafter *CFII*) intended to be broadcast overseas. In its assessment of whether an abuse in the definition of the remit took place, the Commission followed a somewhat different approach in comparison to other similar cases. In particular, the Commission took the view that the link between the principal objective of *CFII* "to bring the French point of view on international news to ***foreign audiences***" [emphasis added][57] and the fulfillment of the democratic, social and cultural needs of the French society is not sufficiently clear to conclude whether *CFII* fulfills a public service mission. Yet, the Commission considered that the pursuit of such an "international" mission is not *de facto* problematic and conducted an analysis not on the basis of the Protocol or the Communication but on the basis of Article 106 TFEU.[58] In order to establish that the services sought to be provided by *CFII* constitute services of general economic interest, the Commission made reference to the relevant national law provisions which laid down that the promotion of the French culture and language is an objective to be pursued by the public service organizations of audiovisual communication, *CFII* falling within that category as its activities were to be predominantly financed by the French Government.[59] Additionally, the obligations undertaken by *CFII*, for instance the commitment to disseminate pluralistic information or offer a balanced and varied programming, provided sufficient proof as to the public nature of the services in question.[60] Taking the above into consideration, the Commission concluded that the French authorities did not commit a manifest error in the definition of the public service which *CFII* was expected to offer.

This decision is contestable in one fundamental aspect: the lack of universality of the service sought to be provided. In order to benefit from the derogation under Article 106(2) TFEU, the State measure under scrutiny must favor the provision of a service of general economic interest as defined by the Court[61] and further explicated by the Commission Communication on Services of General Economic Interest (SGEI). According to the latter, the provision of services of general economic interest needs to be underpinned by the universal service obligation, i.e. "the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions […]".[62] This provision implies that State intervention should be aimed at fulfilling the needs of the citizens residing in the French territory for the

scheme supporting the launch of *CFII* to fall under Article 106(2) TFEU. It is to be noted that the special reference in the Communication on SGEI to public service broadcasting was made in order to clarify issues related to the compatibility of mechanisms financing public broadcasting organizations with the common market[63] and in no case does it imply that such services are exempted from the universal service obligation. Taking the above into consideration, questions are raised as to the legal basis on which the decision was adopted and, in that regard, why the Commission approved a scheme which would burden taxpayers/viewers without them being able to be provided with the service in question. It is worth mentioning that this case is differentiated from *BBC News 24* discussed above in that *CFII* was not intended to be provided in the future throughout the French territory and only residents in France in possession of special equipment (satellite antenna or decoder) would be able to receive the channel.[64]

- **Financing of German Public Service Broadcasters ARD and ZDF: The Business Model criterion and the request for an Added Public Value to justify the provision of new services**

In *Financing of public service broadcasters ARD and ZDF*, the Commission was called upon to decide on the compatibility of the general funding regime supporting the above public broadcasting organizations with the Treaty. The decision tackled a number of issues related to the existing scheme, for instance, whether the license fee mechanism financing related activities constitutes State aid, *lacunae* of the system which facilitated spillovers of public money to commercial activities, and the imprecision as to which new media services sought to be provided by public service broadcasters are covered by the public service mandate. As this section deals with the criterion of clear definition, the analysis will essentially focus on relevant issues that arose in the case, in particular, the unclear distinction between public and commercial services and concerns related to the provision of new media services by public service broadcasters.[65]

As regards the first issue identified above, the Commission justifiably considered that the lack of a clear distinction between commercial and public service activities may lead to abuses thereby distorting competition and affecting intra-Union trade.[66] On that basis, the Commission removed the "closely associated" criterion and considered that it is not the type of technology which defines the public or commercial nature of a service but the business model behind it.[67] This is clearly an improvement in comparison to the approach followed in *BBC Digital Curriculum* as it is more in line with the Member States' freedom to devise the national public broadcasting system in the manner of their choosing but still problematic in relation to this definitional and organizational freedom. The classification by the Commission of pay services, such as pay-TV or pay-per-view services, as commercial services[68] is fallacious in that it interferes with the Member States' right to opt for the funding mechanism they deem appropriate. Apart from being in violation of the Protocol, this approach also runs counter to the case law of the Court which ruled in several instances that the Member States are free to decide on the types of funds financing public service broadcasting, for instance advertising or license fee revenues, provided that these funds remain under State control and are therefore available at any given moment to the public authorities.[69]

As for the vagueness related to the provision of new services, in particular the launch of new digital channels, the Commission found that the general mission of such services to promote culture, information and education as laid down in national law does not fulfill the requirement of a clear and precise definition and stated respectively that "it remains unclear what is the ***public service value of these channels in addition to*** the already existing channels"[emphasis added].[70] This criterion interferes to a certain degree with the Member States' definitional freedom in that it seems to require a more specific justification for the provision of such services. Yet, this approach is understandable considering the wider context in which the decision was adopted, particularly the increasing concerns of private operators for public service broadcasters converting into media moguls. Indeed, the development of activities other than broadcasting

simply on the grounds that they educate, inform and entertain without a more precise justification why such services are covered by the public service mandate would facilitate freewheeling of public broadcasters to neighboring media markets. Therefore, in order to avoid spillovers of public money to newly developed commercial activities and establish some legal certainty for the sake of private operators, the Commission concluded that "without a clearer circumscription of what is meant by "culture, information and education" most program genres offered by public service broadcasters could be covered by these concepts" and for that reason "the current possibility granted to public service broadcasters to offer additional channels with a focus on information, culture and education is not sufficiently precise".[71] Following Commission recommendations, the German authorities undertook relevant commitments which were found to be in line with the State aid rules.[72]

- **State financing of Irish public broadcasters RTÉ and TNAG and State funding for Flemish public broadcaster VRT: Request for an Effective Mechanism Monitoring Compliance with the Public Service Mandate**

In more recent cases, for instance *State financing of Irish public broadcasters RTÉ and TNAG* or *State funding for Flemish public broadcaster VRT*, the Commission follows a different path. Similar to the German case discussed previously, the complaints which triggered Commission scrutiny touched upon various aspects of the general financing regime of the public service broadcasters such as the unclear distinction between public and commercial activities and the haziness around the provision of new media services as part of the remit. In both cases the Commission considered that the definition of traditional public broadcasting services is in line with the requirement of a clear and precise identification[73] but reached the opposite conclusion regarding the definition of new media services sought to be covered by the public service mandate.[74]

The approach the Commission follows in its assessment of the Irish and the Flemish general financing regimes is differentiated from the cases discussed above in that the focus here does not lie on the establishment of criteria related to the service itself but rather on the duty of the State to establish an effective mechanism monitoring compliance with the public service obligations. For example, in the Irish case, the Commission does not dictate which new media services are to be regarded as covered by the remit nor does it point to the need for an added public value or a certain business model to distinguish public from commercial services but draws the attention to the problematically general wording of the statutory provision which enables the public broadcaster to provide services "any other than broadcasting".[75]

The Commission reasonably considered that this vagueness gives the freedom to public broadcasters to include commercial services in the public mandate.[76] On that point, and without interfering with the freedom of the Member States to define the remit in the fast-evolving media landscape, the Commission links the lack of clarity concerning the provision of new media services to the difficulties the State encounters in exercising efficient control over how public money is spent or whether the public service obligations are complied with and states respectively that "[i]n the absence of such further clarification as regards the exact scope of the public service remit, control of both the fulfillment of the public service remit and the use of the license fee would not seem to be effective".[77] The same conclusions were reached in the investigation of the system supporting the Flemish public broadcaster VRT.[78] Following Commission recommendations, both the Irish and the Flemish authorities undertook relevant commitments which were found to be in line with the State aid rules.[79]

The analysis which preceded provides sufficient proof that achieving a balance between the definitional freedom of the Member States and undistorted competition by ensuring that no spillovers of public money over commercial activities takes place has been far from a straightforward exercise for the Commission. The range of services that fell under Commission scrutiny has enabled the latter to take

differing views on what types of services may fall under the public service remit. In the context of its manifest error tasks, the Commission has taken directions that deviate from its obligation to respect the freedom of the Member States to define the public mandate in accordance with their respective cultural traditions, national media environments and societal needs. For instance, in *BBC Digital Curriculum* and *Financing of public service broadcasters in Germany*, the Commission followed a rather interventionist approach by stipulating arbitrary criteria which established a dependence of the public service upon specific platforms or technologies and business models.

The latest approach followed in *State financing of Irish public broadcasters RTÉ and TNAG* and *State funding for Flemish public broadcaster VRT* seems to be more in line with the Protocol. While leaving upon the Member States the freedom to position their public service broadcasters in the current media environment, the Commission identified grey areas in order to avoid spillovers of public money to commercial activities developed in new markets. The Commission did not associate the provision of new media services with specific technologies, platforms or business models but focused on vague definitions which can potentially lead to abuses and therefore bring about a distortion of competition. This approach is clearly an improvement in the Commission reasoning and addresses the drawbacks that were identified under the "closely associated", "business model" or "added public value" criteria.

In *CFII*, the Commission's reasoning is problematic in that the measure lacked universality, one of the prerequisites to benefit from the derogation laid down in Article 106(2) TFEU. In future cases which will touch upon similar issues, the Commission is expected to follow the *BBC News 24* approach where the compatibility of the scheme depended upon the State's intention to remove technical constraints so that the service be available to the entire population.

In conclusion, the direction marked by *BBC News 24*, *State financing of Irish public broadcasters RTÉ and TNAG* and *State funding for Flemish public broadcaster VRT* should guide the Commission in the future in order to achieve the desired balance in issues related to the criterion of a clear definition.

3.2. Supervision: Steps toward a more independent public service broadcaster?

In its assessment of whether an efficient control mechanism is in place to guarantee that public broadcasters comply with the mandate, the Commission has been rather tolerant in the past. This tolerance is sufficiently proven by the fact that in several instances monitoring mechanisms in which political actors were actively involved gained Commission approval. For instance, in *ad hoc payments to RAI* the Commission did not consider problematic the supervision of the Italian public broadcasters *inter alia* by a specific parliamentary commission and the Post and Telecommunications Ministry.[80] In *ad hoc payments to RTP* the Commission reached the same conclusion[81] even though the Minister for Finance and the member of the government responsible for the media were entrusted with verifying compliance with the public service contracts.[82] This approach raises several questions in relation to the transparency of public broadcasting activities and efficient compliance with the public service obligations. Taking into consideration that most public service broadcasters are required to disseminate objective, accurate and pluralistic information, how is it ensured that the obligation, for instance, to reserve broadcasts for political parties, trade unions, religious groups or professional associations is complied with if a Minister, i.e. a member of the Government, is actively involved in that assessment?

In more recent cases, however, the tide appears to have turned with the Commission calling upon the Member States whose general financing regimes scrutinized to establish external and independent control systems. As opposed to the Italian and Portuguese cases discussed above, in *State aid financing of Irish public broadcasters RTÉ and TNAG* the Commission made explicit reference to the provisions of the Broadcasting Communication that lay down the need for an independent body charged with the task of exercising such control. In assessing compatibility with these provisions, the Commission found that the

Irish system, which envisaged that the control would be conducted by an internal body, the RTÉ Authority, was not in line with the Broadcasting Communication. The Commission stated respectively that "[t]he RTÉ Authority's reporting obligations and the preceding responsibility of ensuring that RTÉ complies with its legal obligations would not, in the Commission's view, be sufficient to ensure effective supervision, ***since the RTÉ Authority is not a control body independent from the RTÉ but rather an integral part of it***" [emphasis added].[83] The Irish authorities, following Commission recommendation, committed to the establishment of a new independent content regulator, the Broadcasting Authority of Ireland, entrusted *inter alia* with safeguarding compliance with the public service obligations.[84] The same approach was followed in the decision dealing with *State financing of the Austrian public broadcaster ORF* in which the Austrian authorities, again upon Commission recommendation,[85] committed to establish an authority external to and independent from the Austrian public broadcaster ORF.[86]

Notwithstanding the above, the Commission recent practice reveals some inconsistencies. In the German case discussed previously, the Commission took a rather different approach when it came to assessing the effectiveness of the monitoring mechanism envisaged by the German State. In Germany, compliance with the public service obligations is monitored by internal control bodies, the so-called Broadcasting Councils. These bodies consist of representatives of the various groups of the German society and are entrusted *inter alia* with approving the budget and electing the Director of the public broadcasting organizations.[87] Private competitors may lodge complaints when, in their view, public service obligations are not respected, however, these complaints are examined first by the Broadcasting Councils and later on by the *Länder* in the context of an external control mechanism. Now taking into consideration that those in charge of exercising the external control are often members of the Broadcasting Councils,[88] the question arises why the Commission has found this system to fulfill the effective control criterion. It is reminded that ten months after the German case was decided, the Commission found that the Irish system in which the RTÉ Authority -an internal body- exercised the relevant supervision, was not in line with the State aid rules.

Nonetheless, it is noted that the German case was the first in which the Commission was called upon to assess the compatibility of a general financing regime with the Treaty in light of the expansion of public broadcasters to new media markets. In cases with a similar factual background that followed, the Commission made explicit recommendations to the Member States to establish independent authorities therefore the inconsistency originating from what was decided for Germany may be seen as an isolated incident. It seems that in the future the Commission will follow the approach it took in the Irish, Flemish or Austrian cases. This argument is reinforced by the fact that the revised Broadcasting Communication reiterates the necessity for external and independent control by stating that "supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies in so far it is necessary to ensure respect of the public service obligations".[89] Yet, considering the size of the German market as well as the fact that the content provided by German broadcasters is accessible to an even wider audience for linguistic reasons, the Commission's choice to legitimize this type of supervision is regretted.

The Commission's approach towards a more independent and external control is applauded. It appears that the Commission's direction was tuned as a result of the expansion of public broadcasters to new markets: monitoring public service activities becomes more complex in the current media environment given the various types of technologies and platforms through which the provision of public services is now possible. This approach better serves both commercial operators through increased transparency of public broadcasting activities and citizens through the abolishment of political control over the information disseminated by public broadcasters. It is not overlooked that calling upon the Member States to entrust an external body independent from the public broadcaster with ensuring respect of the public service obligations needs the relevant infrastructure thus public expenditure, but at least it does not undermine the impact of public service broadcasting on opinion shaping.

3.3. Separate definition and entrustment for the launch of new media services through the Amsterdam test: Stretching competence to address market and consumer needs

In the past, the Commission has rarely contested the fulfillment of the entrustment criterion. However, in recent cases, given the expansion of public service broadcasters to new media markets, and under justified pressure from the private sector, the Commission seems to follow a stricter approach. The same is true for the definition criterion in relation to new services sought to be provided by public service broadcasters as previously discussed. In latest decisions, the Commission expressed concerns about the lack of clear definition and entrustment for the launch of new media services. For instance, in *Financing of public service broadcasters in Germany*, the Commission considered problematic "the absence of a sufficiently clear definition and adequate entrustment of the public service remit (***in particular as regards new media activities and additional digital channels***) [..]" [emphasis added].[90] Similarly, in *State financing of Irish public broadcasters RTÉ and TNAG*, the Commission expressed distress about "the possibility of RTÉ to use license fee revenues to provide ***any service (other than a broadcasting service)***, ***without there being a further specification of the actual nature or scope of such service and formal entrustment by the Irish authorities***" [emphasis added].[91]

On that point, the Commission called upon the Member States whose general financing regimes scrutinized to establish an evaluation procedure prior to the launching of new media services. The imposition of the establishment of a prior evaluation procedure (also referred to as *ex ante assessment* or *Amsterdam test* after the Amsterdam Protocol on public service broadcasting) upon the Member States has been severely criticized for several reasons but, first and foremost, on the grounds that the Commission lacked competence to go so far as to dictate how the Member States will define and organize the public service remit in the current media landscape.

This prior evaluation procedure for the launch of new media services was inspired by the BBC's Public Value Test (PVT), which was introduced in 2007, alongside other changes in light of the BBC Charter review, as a means to better position the BBC's role in the digital age.[92] The BBC PVT consists of two parts, a Public Value Assessment (PVA) which is conducted by the BBC Trust[93] and a Market Impact Assessment conducted by Ofcom.[94] The Trust takes into consideration the results of both procedures and decides to launch the service insofar as the impact of the market is sufficiently justified by the public value the new service is likely to create.[95] The reports of both the PVA and the MIA are published[96] for the sake of transparency whereas the test also involves a consultation with interested stakeholders including license fee payers.[97]

The first Commission decision in which a Member State committed to establish such a procedure for the scheme to be in line with the State aid rules is the one dealing with the general financing regime of the German public broadcasters, discussed above in a different context. Since then, a practice has been developed on the basis of which all Member States whose general funding mechanisms were scrutinized, in particular Ireland, Belgium and the Netherlands, were requested to envisage similar procedures.[98] This practice has been codified in the revised version of the Broadcasting Communication which lays down the Member States' obligation to introduce an ex ante assessment of new services and provides guidelines on several aspects the procedure in question must entail.[99]

Prior to discussing in detail the issues that arise from the imposition of the ex ante assessment of new services, it is essential to give a short description of the procedure in question as embedded in the Broadcasting Communication. The Commission entrusts the Member States with setting up a mechanism whereby both the public value of the new service and its impact on the market must be appraised. The Commission does not provide detailed guidance on the public value assessment on the basis that each Member State is in a better position to decide whether a new service substantiates the wording of the

Amsterdam Protocol considering the specificities of the national public broadcasting systems and the respective societal needs.[100] As regards the impact on the market, the Commission, in an indicative manner, refers to several factors that can be included in the analysis such as the existence of similar or substitutable offers, editorial competition, the market structure, the position of the public service broadcaster in the said market, the level of competition and the potential impact on private initiatives.[101] The Commission requires this impact on the market to be balanced with the public value of the services sought to be provided and "[i]n the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer".[102] Finally, the procedure must also involve interested stakeholders by means of an open consultation.[103]

The Commission's initiative to impose upon the Member States the establishment of a prior evaluation procedure as a means to legitimize the provision of new media services by public service broadcasters and with the objective to reduce distortions of competition in the current media environment has provoked severe criticism. More particularly, the requirement to set up an ex ante assessment raises serious doubts as to whether the Commission stayed within the limits of its manifest error task or has exceeded them thereby interfering with the freedom of the Member States to define and organize the public service remit. The reactions of interested stakeholders which accuse the Commission of going too far allegedly taking action in violation of the Protocol and the subsidiarity principle do not come as a surprise.[104] Additionally, Article 107 and Article 106(2) TFEU, as interpreted by the Court and further explicated in the Broadcasting Communication, do not stipulate the criterion of a prior evaluation procedure for new media services,[105] and it is far from clear whether a broad interpretation of the aforementioned provisions would lead to that conclusion. Therefore, doubts are raised as to whether the Commission can declare incompatible with the Treaty a support scheme which has not set up an ex ante assessment.

Apart from the competence issues, which are not to be neglected, the establishment of the Amsterdam test raises questions as to its utility. The prior evaluation of new services on a case-by-case basis may limit the potential of a vibrant public broadcasting sector on the grounds that "[a] judgment of singular services can far too easily introduce a market failure logic into the public broadcasting project and eventually lead to the marginalization of public broadcasting organizations".[106] Yet, a market failure approach undermines the objectives pursued by public service broadcasting in that it eventually reduces programming diversity and leads to the provision of services catering for cultural elites and minorities. Additionally, taking into consideration the significant differences that characterize the national media landscapes, it is dubious whether the uniform requirement of an ex ante assessment is suitable for all public service broadcasters of all the Member States.[107] On the same line, it is also doubtful whether such a procedure, inspired by the BBC's public value test, therefore a test envisaged for a specific organization, fulfilling the needs of a specific society and pertaining in a specific media environment, can successfully be introduced in other Member States, in particular smaller Member States which may lack the resources for the needed infrastructure.[108]

There are solid grounds for the above concerns. Nonetheless, the introduction of the Amsterdam test must be placed in the wider economic and legal context in which it was decided. Technological developments and the Member States' affirmation that "the ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age"[109] have enabled the shift from public service broadcasting to public service media. This means that the environment in which these undertakings operate has inevitably expanded encompassing a number of markets operating side by side. Alongside the technological evolution, the development of new business models has blurred the boundaries between public and commercial services raising concerns about the nature of activities over which public money is spent. And, insofar as such concerns arise, the Commission has a say within the limits of its manifest error

tasks. However, given how complex and fast evolving the media and telecommunications sector is, the Commission's ex post manifest error control does not seem sufficient to protect the interests of both commercial operators and the taxpayers.

For the reasons stated above, the establishment of an ex ante assessment should be treated as something more than a necessary evil. Without trying to advocate for an omnipotent Commission and while *prima facie* the establishment of a prior evaluation procedure goes beyond the Treaty letter, the following questions need to be raised: Should one directly conclude that the Commission stretched its competence without founding its choice on any legal basis which could even remotely justify the need for an ex ante assessment? Or did the Commission find the applicable framework inefficient and promoted a change which, in its view, would better position public service broadcasters in the current media environment taking also into account how the interests of the private sector and the consumers would be more adequately served? In order to answer that question, one should momentarily neglect the competence issues that arise and consider the following: the prior evaluation procedure may increase transparency in the market as each new service is to be assessed individually. Therefore, the provision of new services is not buried under broad remit definitions and, in that respect, it can establish legal certainty for media market players, not just broadcasters, whose role is not limited to lodging complaints and waiting for lengthy investigation procedures to give the answer but have a say on the proposed services during the consultation process. Moreover, given the criticism that the maintenance of the public broadcasting system faces in the current media environment where private operators offer a wide range of services, allegedly enough to cater for all kinds of interests and tastes, the ex ante test may constitute a means to position public broadcasters in the market.[110] The above reasons may convincingly justify the establishment of the ex ante assessment of new media services.

Besides reflecting on the added value the prior evaluation procedure is likely to create in the media markets, one should also consider the effects on the Commission decision-making practice had such procedure not been envisaged. In light of the continuous development of new media activities by public service broadcasters, the lack of an ex ante assessment and the case-by-case approach followed by the Commission in such cases would substantially increase its workload and therefore the quality of the decisions adopted in the field. It is to be noted that, until last September, 40 relevant tests were ongoing in Germany.[111] It is also worth mentioning that the German authorities agreed to the introduction of the ex ante test in 2007[112] and since then no investigation procedures have been opened by the Commission dealing with State measures favoring public broadcasting activities in Germany.[113] It may therefore be argued that the establishment of an ex ante assessment for new media services may reduce significantly the Commission's workload and contribute to a more efficient decision-making practice in the sector.

Taking the above into consideration, and while the imposition of the obligation to introduce a prior evaluation procedure goes beyond the powers vested in the Commission by the Treaty, the ex ante assessment itself is an assignment of competences by the Commission to the Member States. As previously mentioned, if the Amsterdam test had not been envisaged, the Commission would be in charge of deciding on the compatibility of the measure supporting the provision of the new service with the common market. The procedure, in particular the equilibrium which needs to be achieved between the public value the service is likely to create and the market impact, resembles greatly to the balancing exercise the Commission conducts in scrutinizing public broadcasting schemes. In its State Aid Action Plan, the Commission lays down a shared responsibility between the Commission and Member States for the application of the State aid rules on the basis that "the Commission cannot improve State aid rules and practice without the effective support of Member States and their full commitment to comply with their obligations to notify any envisaged aid and to enforce the rules properly".[114] In that respect, the responsibility of the Member States lies primarily in the provision of complete notifications and efficient enforcement mechanisms of the State aid rules in the domestic sphere. The introduction of the ex ante test seems to go a step further through the decentralization of the application of Article 106(2) TFEU in the fast-evolving media market. In that regard, not only is it likely to reduce the Commission's workload, but

it also leaves upon the Member States the freedom to conduct the relevant balancing exercise -and one should not neglect here the criticism exercised over the Commission, a supranational competition agency, balancing national public interests with competition[115]- and decide on whether the proposed service substantiates the wording of the Amsterdam Protocol.

This approach, which entrusts the Member States with both the definition of a "new service" as well as whether the market impact is justified by the public value the service is expected to create,[116] accords with the Protocol and respects the specificities of the national media environments. The ways in which the evaluation procedure is implemented by the various Member States, be it the *Drei-Stufen-Test* in Germany,[117] the *Public Value-Market Impact test* in Ireland[118] or the *Angebotskonzept* in Austria,[119] is a facet of media diversity across the Union. Leaving therefore the above to the Member States' discretion, the Commission rather focuses on outlining certain aspects of the procedure, for instance the two parts of the assessment (public value and market impact) to be further substantiated by the Member States, the launch of an open public consultation which increases transparency and involves interested stakeholders,[120] and the need for an independent body to carry out the assessment.[121]

Nor should the Commission's choice to import the BBC's public value test to the European legal order and impose a similar test upon the other Member States be condemned simply on the grounds that smaller Member States will not be in a position to successfully implement an ex ante assessment because they lack the necessary resources. A good example is the system envisaged by the Austrian authorities which involves in the procedure already existing infrastructure, in particular the national competition authority and the national media regulator.[122]

The imposition of an ex ante assessment is one of the most obvious examples of the Commission's role in advancing ***negative integration***. While it was feared that after the adoption of the Amsterdam Treaty, which introduced an ambiguous provision on services of general economic interest[123] and a more ambiguous Protocol on public service broadcasting with interpretative character, the Commission would slow down the negative integration process in the public service areas, the approach it followed post-Amsterdam demonstrates the exact opposite. Scharpf, shortly after the Amsterdam Treaty entered into force, stated respectively that "the Amsterdam 'Protocol' on Public Service Broadcasting was adopted at a time when the Commission had not yet taken action against publicly financed networks that were also allowed to compete with their private counterparts for advertising revenue. [..] Therefore, the Commission itself had proceeded with caution, rather than extending competition rules to their logical conclusion, and in that sense, the Amsterdam declarations and protocols were not doing much more than to express approval and political support for the existing practice of self-restraint".[124] Nonetheless, more than a decade later, the Commission practice in the public broadcasting arena, as examined above, provides sufficient proof that this fear was not verified. Taking into consideration the evolution of State aid law, the Commission decision-making practice cannot be characterized as a "practice of self-restraint". Blauberger makes reference to the practice developed in other areas, such as regional or environmental aid, in order to draw conclusions on the Commission's impact on national State aid policies and convincingly argues that "ambiguous Treaty rules and heterogeneous Member States' preferences have enabled the European Commission to act as a supranational entrepreneur, not only enforcing the prohibition of distortive state aid, but also developing its own vision of "good" state aid policy".[125] The analysis which preceded proves that this was the case also for public service broadcasting.

The imposition of an ex ante assessment has been codified in the revised version of the Broadcasting Communication, and has therefore passed to form part of the soft law the Commission has adopted in the field. Given the mechanisms the Commission has set up to make its soft law binding upon the Member States, namely enforcing indirectly its soft law via individual decisions or forcing the Member States to accept the provisions laid down therein by threatening to open formal investigations procedures in all relevant existing schemes,[126] and given that several Member States have already adapted to this new requirement, it is expected that the imposition of a prior evaluation procedure will prevail. That leads to

the conclusion that in the digital era the Commission has undoubtedly found its way to affect national public broadcasting policies. Now the discussions whether the Amsterdam test ultimatum goes beyond the Commission's competence may be missing the point. Ariño points to the right direction by arguing that "the distribution of competences in the media arena should not be a power struggle between Member States to avoid interference by the Community".[127] In conclusion, if the ex ante assessment can contribute to bridging conflicting policy concerns and interests of a number of groups, namely private operators, consumers and the public broadcasters themselves, it seems that the competence disputes get hold of the wrong end of the stick. The substantive questions that will arise in the near future should focus on the timely and effective implementation of the Amsterdam test by the Member States which have made relevant commitments and whether the Commission is willing to go so far as to initiate infringement proceedings in case these commitments are not respected.

3.4. Proportionality: Steps toward a more rationalized financial management of public service broadcasters?

In its assessment of whether the proportionality criterion is met the Commission needs to verify that the derogation provided for by Article 106(2) TFEU does not affect competition in the common market in a disproportionate manner. Therefore, "[t]he test is of a negative nature: it examines whether the measure adopted is not disproportionate".[128] The principle which guides the Commission in its proportionality control is that the amount of public compensation should not exceed the net costs incurred in the discharge of public service obligations.[129] However, the proportionality check has not always been a straightforward mathematical exercise for the Commission for two fundamental reasons. The first concerns the lack of transparency in the accounts of public broadcasters and the second is inherently related to the complexities of the national public broadcasting systems and, in particular, the mechanisms the Member States have set up to finance public broadcasting activities.

It follows logically that the conclusion whether the payments made by the State supersede the net costs of the public service mission may be reached insofar as there is a clear demarcation between public and commercial services offered by the public service broadcasters. Only then can it be determined whether the public financing is actually limited to the costs of the public service obligations the broadcaster is expected to discharge. For that reason, the need for separate accounts between public and non-public activities has long been identified by the Commission as the primary means to ensure transparency and accountability when using public funds.[130] This obligation is laid down in the Transparency Directive applicable to undertakings entrusted with the provision of services of general economic interest.[131]

It is noted that significant progress has been made regarding the proportionality check in measures favoring public broadcasters and, in particular, the inherently related to it transparency requirement. The initial version of the Transparency Directive which was subsequently amended several times excluded from its scope of application the telecommunications sector.[132] This lack of transparency raised serious doubts as to the quality of the proportionality control conducted by the Commission. Yet, the quality of the Commission decision-making in that regard is linked to a great extent to the unwillingness of the Member States to take relevant action. A good example is Germany which, until 2007, had not adopted the necessary provisions that ensure the separation of accounts[133] even though the 2001 Broadcasting Communication envisaged this obligation.[134] Unsatisfactory implementation of the Transparency Directive was also found during the investigation of the schemes supporting the Irish and Austrian broadcasters. Upon Commission recommendation, the aforementioned Member States undertook commitments to ensure such a separation thereby increasing transparency in their national public broadcasting systems.

The complex mechanisms which the Member States have set up to finance public broadcasting activities make the proportionality control even more challenging. Reference is made to, for instance, the Dutch public broadcasting system which involves several organizations entrusted with the provision of public broadcasting services, for instance ten autonomous private associations with members, twelve associations without members, an umbrella association (the NOS), and a separate foundation, STER, which is in charge of the sale and broadcasting of advertising.[135] The Dutch system establishes several funding sources to fund public broadcasting services, such as annual payments which include the State Broadcasting Contribution (collected from tax payers), advertising revenues from STER and interest revenues from the General Broadcasting Fund, ad-hoc payments, and payments from Funds to stimulate cultural productions (Stifo) or co-finance increased program right prices (matching funds payments) (!).[136] Taking into consideration these complexities, it is no wonder that the proportionality control has not been undisputed.

In the past, in spite (or because) of the difficulties identified above, the Commission has shown considerable latitude as to whether the amount of compensation has exceeded the net costs incurred in the

discharge of public service obligations. Yet, in more recent cases, the Commission has been more reluctant to conclude that the proportionality criterion is met. It seems that the experience it acquired in reviewing the compatibility of public broadcasting systems with the common market has enabled the Commission to identify lacunae which may lead to over-compensation or cross-subsidization of commercial activities. The need for a more clear framework to avoid such practices became more apparent recently given the development of activities other than traditional broadcasting. For the above reasons, in scrutinizing the financing regime of public broadcasters in Germany, the Commission did not limit itself to recommending the separation of accounts between public and commercial services but went even further. The Commission called upon the German authorities to establish the necessary safeguards in order to avoid overcompensation (for instance through the establishment of an effective ex post control mechanism) and cross-subsidization of commercial activities and introduce a legal framework which guarantees the respect of market principles for purely commercial activities (in particular, market conform behavior vis-à-vis third parties and an arm's length relationship between public service broadcasters and their commercial subsidiaries).[137] The negotiations between the Commission and the German authorities led to commitments undertaken by the latter which were found to be in line with the proportionality requirement.[138] For example, Germany agreed to introduce an ex post control mechanism to ensure that no overcompensation has taken place and envisaged a system whereby commercial activities are to be carried out by commercial subsidiaries of the public broadcasters.[139] The Commission made similar recommendations to the Austrian, Irish and Flemish authorities which committed to introduce the necessary changes, similar to the ones envisaged by Germany. It is noteworthy that the Member States have undertaken to authorize independent bodies to exercise the financial control. For instance, in Ireland such control is exercised by the BAI [140] and in Germany by the KEF.[141]

The Commission's request for a more elaborate framework governing the financial management of public broadcasting organizations is applauded. A well-functioning mechanism which prevents overcompensation and guarantees transparency and market conform behavior minimizes distortions of competition. Yet, the Commission's oversight, though reflecting a competition's authority perspective, must be considered in a wider context. Apart from the fact that the envisaged changes enable the Commission to conduct a more effective proportionality control and satisfy to a certain degree the justified demand of private operators for more clarity or at least less obscurity regarding the amount of State monies dispersed to support the activities of a competing undertaking, the relevant recommendations have contributed greatly to the reform of the sector. In that respect, the Commission's role was not limited to that of a good accountant. The stance on a more transparent and rationalized management of public service broadcasters benefited tax payers and ad ultimo citizens.

4. Conclusions

The analysis which preceded provided an insight into the practice the Commission has developed in the public broadcasting arena. Due to the complexities of the sector, for instance its organization as a State monopoly for several decades and, more recently, the development of new media activities by public broadcasting organizations, the application of the State aid rules in the field has been far from a clear-cut exercise for the Commission. In that regard, the task with which the latter is entrusted by the Treaty, namely the duty to conduct a balancing exercise involving the conflicting objectives of undistorted competition and the freedom of the Member States to develop their own national public broadcasting policies, has not been an easy one. Some conclusions on whether the desired balance has been achieved can be drawn from the analysis.

First, the examination of several cases touching upon various issues related to the freedom of the Member States to define the public service remit provides sufficient proof that the assessment of whether the public service obligations are clearly and precisely identified has been the most problematic. The range of services that fell under Commission investigation has enabled the latter to follow different approaches, which have not always been successful. Either too interventionist or too tolerant, the Commission has in several instances deviated from its obligation to respect the definitional freedom of the Member States or neglected characteristics inherent in the provision of services of general interest. The Commission went so far as to stipulate controversial criteria establishing a dependence of the service upon specific technologies, platforms or business models. Yet, this direction was lately changed to embrace a more Protocol-friendly approach. In recent decisions the Commission focused on identifying grey areas potentially leading to abuses, in particular spillovers of public money to commercial activities developed in new media markets, and focused on the State authorities' role in safeguarding compliance with the public service obligations. This approach respects the freedom of the Member States to define the public mandate in accordance with their respective cultural traditions, national media environments and societal needs and ultimately position public service broadcasters in the current media landscape in the manner of their choosing.

Second, the Commission's approach towards a more independent and external control must be upheld considering its positive effects on both the private sector and the taxpayers/citizens. Given its impact on opinion shaping and directing citizen behavior and the amount of monies dispersed to support public broadcasting activities, public service broadcasters need to be monitored by independent bodies and any kind of political involvement in their organization should be abolished. For that reason, the Commission should continue in the direction it followed in the cases dealing with the Irish and Flemish public broadcasting systems and, in the future, change its position on the German Broadcasting Councils.

As for the entrustment criterion and the establishment of a prior evaluation procedure for new media services, the competence disputes may be missing the point. In the fast evolving media environment, the ex post manifest error control the Commission exercises does not seem sufficient. The imposition of an ex ante assessment leaves upon the Member States the freedom to balance the respective national public interests with the impact the proposed service is expected to have on the market and, in that regard, it respects their freedom to define and organize the public service mandate in the digital era. Moreover, if the ex ante assessment can contribute to bridging conflicting policy concerns and the interests of a number of groups, namely private operators, consumers and the public broadcasters themselves by increasing transparency in the sector, it seems that the discussions whether the Amsterdam test ultimatum goes beyond the Commission's competence get hold of the wrong end of the stick.

Finally, recent cases that have been examined for the purposes of this study show that the Commission's proportionality control has tightened. This approach is welcomed as a well-functioning mechanism which prevents overcompensation and guarantees transparency and market conform behavior minimizes distortions of competition. It is doubted whether, in the absence of the Commission's

proportionality check, the Member States would have initiated reforms in the financial management of their public broadcasters through the introduction of, for instance, ex ante and ex post mechanisms to avoid overcompensation or cross-subsidization. In that regard, apart from the fact that the envisaged changes enable the Commission to conduct a more effective proportionality control and satisfy to a certain degree the justified demand of private operators for more clarity regarding the amount of State monies dispersed to support the activities of a competing undertaking, the relevant recommendations have contributed to the reform of the sector.

The imposition of the obligations to introduce the Amsterdam test for the launching of new media services, establish monitoring bodies external to and independent from the public service broadcasters in charge of ensuring compliance with the public service obligations, and set up mechanisms to avoid cross-subsidization and overcompensation are evidence of the impact of the European oversight on public service broadcasting. It remains to be seen whether the Member States which have made relevant commitments will act accordingly and if not, whether the Commission is willing to initiate infringement proceedings in case such commitments are not respected.

5. Footnotes

[1] Article 6 TFEU. For the challenges the European Union faces in developing consistent policies in the field of culture see, for instance, Craufurd-Smith 2004

[2] The first one was the Sacchi judgment: ECJ Case 155/73, Italy v. Sacchi [1974] ECR 409. See, in particular, para. 14: "[…]Nothing in the Treaty prevents Member States, for considerations of public interest, of a non-economic nature, from removing radio and television transmissions, including cable transmissions, from the field of competition by conferring on one or more establishments an exclusive right to conduct them. However, for the performance of their tasks these establishments remain subject to the prohibitions against discrimination and, to the extent that this performance comprises activities of an economic nature, fall under the provisions referred to in Article 90 relating to public undertakings and undertakings to which Member States grant special or exclusive rights"

[3] Directive 89/552/EEC of the Council of 3 October 1989 on the Coordination of Certain Provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of Television Broadcasting Activities OJ L 298/23-30, as amended by Directive 97/36/EC OJ L 202/60-70

[4] Soon after the entry into force of the Television Without Frontiers Directive, several complaints were lodged by commercial broadcasters whose main allegations concerned the compatibility of the "dual financing system" (i.e. the system whereby public service broadcasters have access both to public funds and advertising revenues) with the common market and anticompetitive behavior in the advertising markets.

[5] The first complaints were filed by the Spanish commercial operators Gestevisión Telecinco in 1992 followed by complaints against the French and Portuguese public service broadcasters in 1993 and the Italian public service broadcaster in 1996. For an overview of the Commission decision-making practice in public service broadcasting see, for instance, Antoniadis 2006 and Donders and Pauwels 2008

[6] In its first decision, which concerned State measures in favor of the Portuguese public service broadcaster RTP, the Commission considered that payments which purely offset the cost of RTP's public service obligations are not to be regarded as State aid. The analysis of whether State funding exceeded the net costs incurred in the discharge of RTP's public service obligations concluded that government financing merely compensated for the said costs, therefore no advantage appeared to be conferred within the meaning of Article 107(1) TFEU (Decision on State aid financing of public television in Portugal, SG (96) D/9555, 1996). This decision was subsequently annulled by the then Court of First Instance calling upon the Commission to conduct a more detailed analysis of the relevant State aid schemes (CFI, Case T-46/97, SIC v. Commission, [2000] ECR II-02125, paras. 83 and 84)

[7] Reference is made to *DG IV Discussion Paper: Application of Articles 90, section 2, 92 and 93 of the EC Treaty in the Broadcasting Sector* (Oct. 1998) an initiative undertaken by former Competition Commissioner Karel van Miert and *Report from the High Level Group on Audiovisual Policy: "the Digital Age: European Audiovisual Policy"* chaired by former Commissioner for Culture Marcelino Oreja (Oct. 1998)

[8] According to information provided by the Commission, European public service broadcasters receive more than €22 billion annually from license fees or direct government aid, occupying the third place, after agriculture and transport companies, in the list of recipients of state aid: See, for instance, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1072 This must be seen in comparison to other figures representing sector-specific State aid, for instance, the coal or the shipbuilding sectors which received in 2007 € 354 million and € 3.4 billion respectively according to the Autumn 2008 Scoreboard update, available at:http://ec.europa.eu/competition/state_aid/studies_reports/archive/2008_autumn_en.pdf

[9] It is not disregarded that it took the Commission quite some time to get more actively involved in cases dealing with State financing of public service broadcasters: The organization of the sector, which for several decades was considered to be a natural monopoly, played a major role in slowing down a much needed reform process. Until the early 1990s, the European Commission had not been exposed to aspects of economic regulation of public service broadcasting, for instance, the compatibility of the dual financing system (i.e. the system whereby public service broadcasters have access both to public funds and advertising revenues) supporting public broadcasting activities with the State aid rules. This lack of know-how partly explains why it took the Commission several years to adopt final decisions on the first complaints lodged by commercial broadcasters. It is noted here that, while the first complaints were filed by the Spanish commercial operator *Gestevisión Telecinco* in 1992 followed by complaints against the French and Portuguese public service broadcasters in 1993 and the Italian public service broadcaster in 1996, final decisions dealing with the relevant issues that were brought to the Commission's attention were adopted in 2003 and 2005 (reference is made to Decisions C62/99 on Ad-hoc payments to Italy, C 85/2001 on Ad-hoc payments to Portugal, C 60/99 on Ad-hoc payments to France, E 8/2005 Financing of RTVE, E 10/2005 on License fee payments to France 2 and 3 and E 9/2005 on License fee payments to RAI). This slow process is also marked by the hands-off approach the Commission followed in the very beginning of its practice in the public broadcasting field. See supra. 5

[10] See, for instance, Commission Broadcasting Communication 2001, paras. 17, 24 and 60 which make reference to the various types of schemes the Member States devise to support public broadcasting activities, the divergent legal and economic elements of which national public broadcasting systems consist and the differences in the actual competitive structure of the markets in which public service broadcasters operate.

[11] For the conflicting policy objectives that the provisions of primary EU law pursue in the public broadcasting field and their ambiguous character see, for instance, Donders 2010, 192 and Harrison and Woods 2007, 294

[12] For the purposes of this study, the application of Article 107 TFEU to the public broadcasting sector will not be examined in detail. As regards Article 107(1) TFEU, it is noted that the Commission has treated public financing of such activities as State aid

within the meaning of Article 107(1) TFEU. In the vast majority of the decisions it adopted in the field, the Commission found that the criteria laid down by the aforementioned provision are met meaning that schemes favoring public service broadcasting do not escape the general State aid prohibition thus fall under Commission scrutiny. On that point, the Commission carries on its investigation of State aid to public service broadcasting by assessing the compatibility of the measures under scrutiny with exceptions in the Treaty, in particular the derogation laid down in Article 106(2) TFEU. The Commission has never made use of the exception provided for by Article 107(3)(d) TFEU to justify State funding of public broadcasting organizations. Article 107(3)(d) TFEU provides for an exception to the general State aid prohibition for measures aimed at promoting culture. Considering the cultural character of broadcasting activities, the exception laid down in Article 107(3)(d) TFEU appears to be relevant. Yet, since its first decisions in the field, the Commission considered that Article 107(3)(d) TFEU needs to be interpreted restrictively and must be applied only insofar as a Member State provides for both a separate definition and separate funding of State aid intended to promote culture alone (see, for instance, Decision NN 88/98 on BBC News 24, para. 36). Although the Commission does not exclude the possibility to declare a measure supporting public service broadcasting compatible with the common market on the basis of Article 107(3)(d) TFEU (see, in particular, Commission Broadcasting Communication 2009, para. 32), the practice it developed thus far provides sufficient proof that the cultural derogation will continue to play a marginal role in State measures favoring public broadcasting activities. For more information on the application of the cultural State aid exception to public service broadcasting see, for instance, Psychogiopolou 2006, 314-321

[13] Case 155/73 Sacchi [1974] ECR 409, [1974] CMLR 177, para. 15; Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 Metropole Television SA, Reti Televisive Italiane SpA, Gestevision Telecinco SA and Antena 3 de Television v. Commission [1996] ECR II-649, [1996] 5 CMLR 386, para. 116

[14] With the exception of Decision N 631/2001 on BBC license fee, all other schemes supporting public broadcasting activities were declared compatible with the internal market under Article 106(2) TFEU

[15] Donders 2010, 192

[16] Commission Broadcasting Communication 2009, para. 41

[17] The text of the Protocol on the system of public broadcasting in the Member States reads as follows: "The High Contracting Parties, considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretive provisions, which shall be annexed to the Treaty on European Union and to the Treaty establishing the European Community: The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and insofar as such funding is granted to broadcasting organizations for the fulfillment of the public service remit, as conferred, defined and organized by each Member State, and insofar as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account"

[18] Harrison and Woods 2007, 294

[19] See, for instance, Raboy 2003

[20] Donders 2010, 196

[21] Harrison and Woods 2007, 295

[22] See, for instance, the DG IV Discussion Paper: Application of Articles 90, section 2, 92 and 93 of the EC Treaty in the Broadcasting Sector (Oct. 1998), an initiative undertaken by former Competition Commissioner Karel van Miert and Report from the High Level Group on Audiovisual Policy: "the Digital Age: European Audiovisual Policy" chaired by former Commissioner for Culture Marcelino Oreja (Oct. 1998). For more information on the initiatives undertaken that period of time see, for instance, Humphreys 1999

[23] Decision NN 70/1998 on Phoenix/Kinderkanal and Decision NN 88/98 on BBC News 24

[24] Decision NN 2/2002 on ZDF Medienpark, Decision C 62/99 on Ad hoc payments to RAI and Decision C60/99 on Ad hoc payments to France 2 and 3

[25] This is established practice in the Commission decision-making practice. A good example in the field of competition law is the adoption of, for instance, the Block Exemption Regulation on franchise agreements after the Commission had acquired relevant experience on the basis of individual notifications by the parties to the agreement applying for an exemption under Article 101(3) TFEU.

[26] Commission Broadcasting Communication 2001, para. 4 and Commission Broadcasting Communication 2009, para. 8

[27] Mestmäcker and Schweitzer 2004, 1108 and fol.

[28] This was in the Commission's intentions once the adoption of the Broadcasting Communication was decided. See, for instance, Press Release IP/01/1429 on the adoption of the 2001 Broadcasting Communication: "In order to take into account recent developments […], treat consistently the various cases and provide guidance to public authorities and operators, the Commission has decided to draft a Communication on the application of State aid rules to public service broadcasting"

[29] See, for instance, the comments made by interested stakeholders such as the Association of European Radios (AER) or Antena 3 in the context of the public consultation launched by the Commission for the revision of the 2001 Broadcasting Communication: AER 2008, 1 and Antena 3 2008, 1, available at: http://ec.europa.eu/competition/consultations/2008_broadcasting/index.html

[30] For the main changes introduced by the updated version of the Broadcasting Communication see related Press Release IP/09/1072, 02.07.2009, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1072&format=HTML&aged=0&language=EN&guiLanguage=en

[31] Commission Broadcasting Communication 2009, para. 37

[32] Ibid., para. 48: The Commission refers to advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring and merchandising. Such activities are unlikely to substantiate the wording of the Amsterdam Protocol
[33] Commission Broadcasting Communication 2009, para. 45
[34] Ibid., para. 47
[35] See, in particular, Commission Broadcasting Communication 2001, paras. 33 and 37
[36] See, for instance, Biggam 2010, 169
[37] The Commission decisions in the public broadcasting field may be divided in three categories, namely decisions dealing with the compatibility of the general financing regimes with the Treaty, decisions on ad hoc measures aimed at alleviating the deterioration of the economic situation of the public service broadcasters thus aimed at maintaining the national status quo supported by the general funding mechanisms and, finally, decisions dealing with individual projects launched by public service broadcasters. The second category includes decisions in which the Commission is primarily concerned about whether the proportionality criterion is met. The objective of the ad hoc measures is to support the provision of services already covered by the remit under the general regime, and for that reason, in the relevant decisions definitional issues to support our analysis do not arise.
[38] Decision NN 88/98 on BBC News 24, paras. 1 and 16
[39] Ibid., para. 16(iii)
[40] Ibid., para. 5
[41] Ibid., paras. 11, 12
[42] Ibid., para. 46
[43] Ibid., para. 47
[44] Ibid., para. 49
[45] Craufurd-Smith 2001, 14. According to Article 106(3) TFEU the Commission is entrusted with ensuring the application of the provisions laid down therein without leaving room for the involvement of other institutions or the Member States in that task. A literal interpretation of the Treaty provision gives the Commission the green light to decide which types of public broadcasting services may be funded so as to fall under the exception of Article 106(2) TFEU and ultimately have a say on what services may be covered by the public service remit. Needless to make reference to the opposition of the Member States to such an interpretation. Nonetheless, leaving upon the Member States the determination of which services fall under the public service umbrella as a purely national matter lays the ground for potential abuses in that it enables the Member States to include in the remit commercial activities. For that reason, in its first decisions in the sector, the Commission followed a *via media* aimed at reconciling the conflicting interests involved. In *BBC News 24*, as mentioned above, and *Phoenix/Kinderkanal*, while acknowledging the freedom of the Member States to define and organize the remit, the Commission made sufficiently clear that its role is limited to checking whether an abuse likely to distort competition and affect intra-Union trade has taken place. It appears that the Commission made an effort to bridge the conflicting interests involved through a more flexible interpretation of the text of the Treaty. The Commission Communication on Services of General Economic Interest clarifies that is up to the Member States to define such services whereas the Commission's role is subject to control for manifest error.
[46] Decision NN 88/98 on BBC News 24, para. 59
[47] Ibid., para. 60
[48] See, for instance, Commission Communication on Services of General Economic Interest 2001, para. 14 which lays down the universal service obligation, i.e. the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions. See also ECJ Case C-320/91 *Corbeau*, [1993] ECR I-2563, para. 15 and ECJ Case C-393/92 *Almelo* [1994] ECR I-01477, para. 48. The universal service obligation is discussed in more detail below in the analysis of Decision N 54/2005 on Chaîne française d'information international
[49] Decision NN 88/98 on BBC News 24, para. 54
[50] Ibid., para. 57
[51] See, for instance, Commission Broadband Guidelines 2009, para, 51(d)
[52] Decision 37/2003 on BBC Digital Curriculum, para. 4
[53] Ibid., para. 36
[54] Psychogiopoulou 2006, 321
[55] See, for instance, Harvey 2010, 3 and Donders 2010, 309
[56] Decision NN 88/98 on BBC 24 hours news channel, para. 57
[57] Commission Press Release IP/05/689
[58] Decision N 54/2005 on Chaîne française d'information international, para. 40
[59] Ibid., para. 41
[60] Ibid., para. 42
[61] See, for instance, ECJ Case C-320/91 *Corbeau*, [1993] ECR I-2563, para. 15 and ECJ Case C-393/92 *Almelo* [1994] ECR I-01477, para. 48
[62] Commission Communication on Services of General Economic Interest 2001, para. 14
[63] The Communication on Services of General Economic Interest clarified issues that were long raised by the private sector in relation to the "dual financing" system of public service broadcasters whereby the latter have access to both public funds and advertising revenues. The Commission acknowledged that "it is for the Member States, in conformity with EC law, to decide whether they want to establish a system of public service broadcasting, to define its exact remit and to decide on the modalities of the financing", para. 15. For more information see Communication on SGEI 2001, 19-20

[64] Decision N 54/2005 on Chaîne française d'information international, para. 39
[65] Decision E 3/2005 on financing of public service broadcasters in Germany, para. 76
[66] Ibid., paras. 237 and fol.
[67] Donders 2010, 200
[68] Decision E 3/2005 on financing of public service broadcasters in Germany, paras. 239-240
[69] See, for instance, CFI Cases T-309/04, T-317/04T-329/04 TV2/Danmark and others v. Commission, [2008] ECR II-02935, paras. 113 and 153
[70] Decision E 3/2005 on financing of public service broadcasters in Germany, para. 227
[71] Ibid., paras. 227-228
[72] With reference to the unclear distinction between public and commercial activities, the German authorities undertook to entrust public service broadcasters with the provision of the public service only whereas purely commercial activities would be carried out by commercial subsidiaries (See para. 366 of the Decision). Regarding the confusion about the provision of new media services as part of the public service remit, Germany committed to introduce and implement the so-called *Drei-Stufen-Test* (see para. 328) preceding the launching of the new service. The introduction of the *Drei-Stufen-Test* will be examined in more detail below
[73] Decision E 4/2005 on State aid financing of RTE and TNAG (TG4), paras. 86-87 and Decision E 8/2006 on State funding for Flemish public broadcaster VRT, paras. 170-174
[74] Ibid., para. 88 and paras. 178-179 respectively
[75] Decision E 4/2005 on State aid financing of RTE and TNAG (TG4), para. 89
[76] Ibid., para. 94
[77] Ibid., para. 89
[78] Decision E 8/2006 on State funding for Flemish public broadcaster VRT, para. 173
[79] For instance, the Irish authorities laid down the obligation of public broadcasters to prepare every five years charters that outline the public service activities they intend to develop within these five years. The adoption of the charter is under approval by the Minister following consultation with the broadcasting regulator. Additionally, the public broadcasters are required to prepare annual statements which delineate the intended outputs in the following twelve months. In the adoption of these annual commitments, the Minister and the broadcasting regulator have again the final say. For more information on the commitments undertaken by the Irish authorities regarding the public service remit see Decision E 4/2005, paras. 130 and fol.
[80] Decision C 62/99 on Ad-hoc payments to RAI, para. 119
[81] Decision C 85/2001 on Ad-hoc payments to RTP, para. 177
[82] Ibid., para. 58
[83] Decision E 4/2005 on State aid financing of RTE and TNAG (TG4), para. 97
[84] Ibid., para. 151
[85] Decision E 2/2008 on State funding for Austrian public broadcaster ORF, para. 177
[86] Ibid., para. 209
[87] Decision E 3/2005 on Financing of public broadcasters in Germany, para. 24
[88] Ibid., para. 124
[89] Commission Broadcasting Communication 2009, para. 54
[90] Decision E 3/2005 on financing of public broadcasters in Germany, para. 75
[91] Decision E 4/2005 on State aid financing of RTE and TNAG (TG4),para. 44
[92] For more information on the BBC Charter review see: Department for Culture, Media and Sport, A Public Service for all: the BBC in the digital age, 2006, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.bbccharterreview.org.uk/have_your_say/white_paper/bbc_whitepaper_march06.pdf accessed on 16/02/2011
[93] The BBC Trust is the governing body of the BBC consisting of 12 Trustees and assisted by a team of independent experts, the Trust Unit. For more information on the BBC Trust see: http://www.bbc.co.uk/bbctrust/about/who_we_are/index.shtml
[94] BBC Trust 2007, Public Value Test (PVT): Guidance on the conduct of the PVT, 4
[95] Ibid, 18. Several criteria are taken into account in the context of the PVA, for instance whether the new service stimulates creativity and cultural excellence and whether it sustains citizenship and civil society. For more information on the factors that are considered in the framework of the PVA, see supra. 81, 13
[96] Ibid., 17
[97] Ibid., 12
[98] Decision E 4/2005 on State financing of public broadcasters RTE and TNAG, Decision E 8/2006 on State funding for Flemish public broadcaster VRT, and Decision E 2/2008 on State funding for Austrian public broadcaster ORF. See also Tosics, Van de Ven and Riedl 2008, 81-84
[99] Commission Broadcasting Communication 2009, paras. 84-91
[100] Ibid., para. 86
[101] Ibid., para. 88
[102] Ibid.
[103] Ibid., para. 87
[104] European Federation of Journalists and European Region of UNI-MEI Global Union 2009, 4
[105] Ibid.

[106] Donders 2010, 206
[107] See, for instance, European Broadcasting Union 2009 and European Centre of Employers and Enterprises providing Public Services 2009
[108] Association of Commercial Television in Europe 2009, 6
[109] Council Resolution 1999, para. 6
[110] See, for instance, Suter 2008, 5
[111] Donders and Pauwels 2010, 6
[112] Decision E 3/2005 on Financing of public service broadcasters in Germany, para. 328
[113] This is concluded by the table of cases handled by the Commission thus far which includes, in addition to final decisions adopted in the field, decisions to open formal investigation procedures. The table in question is available at: http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf accessed on 16/02/2011
[114] Commission State Aid Action Plan 2005, para. 15
[115] See, for instance, Harrison and Woods 2007, 295
[116] Commission Broadcasting Communication 2009, paras. 85-86
[117] See, for instance Repa and Tosics 2009, 97-99. The Drei-Stufen requires public service broadcasters to assess whether the new service sought to be provided 1. Is covered by the public service remit and therefore substantiates the wording of the Amsterdam Protocol, 2. Contributes to editorial competition taking into account the scope and quality of already existing freely available offers, the importance of the envisaged offer for opinion shaping and the expected impact of the offer on the market. For a short description of the Drei-Stufen Test see Decision E 3/2005, para. 328. For an evaluation of the implementation of the Drei-Stufen thus far see, for instance, Donders and Pauwels 2010
[118] See, for instance, Kroes 2008, 4. In Ireland the prior evaluation procedure consists of the following: the public service broadcaster informs the Minister of the service sought to be provided. Subsequently, the Minister, the competent independent regulator (BAI) and the public service broadcaster agree to a description of the service which is followed by a public value assessment to be conducted by the Minister who is required to consult with the BAI, the public service broadcaster and such other persons as he deems appropriate and a sectoral impact assessment to be conducted by the BAI which is required to consult with the Minister, the public service broadcasters and other persons as it deems appropriate. Upon completion of the sectoral impact assessment, the BAI reports to the Minister and makes relevant recommendations if necessary. Prior to granting his consent, the Minister takes into consideration the outcomes of both assessments and is entitled to attach conditions to the final decision as he sees fit. For a more detailed description of the prior evaluation procedure envisaged by the Irish authorities see also Decision E 4/2005, paras. 143 and fol.
[119] See, for instance, Bron 2010, 15-16. In Austria the ex ante assessment initiates with the elaboration of a concept (Angebotskonzept) by the public service broadcaster, ORF, which entails *inter alia* a concise description of the offer, a justification why the service sought to be provided falls under the public service remit and how the public service broadcaster is expected to finance the new activity. This concept must be published by ORF online inviting third parties to submit their comments within a given period of time. ORF is required to submit both the concept and the outcome of the consultation to the regulatory authority which is entrusted with forwarding the above information to the competition authority a council of experts. The latter decides on whether the offer falls under ORF's remit. The balancing exercise as laid down in the Broadcasting Communication is conducted by the regulatory body after consulting with the Austrian competition authority. For more information on the established procedure see Decision E 2/2008, paras. 201 and fol.
[120] Commission Broadcasting Communication 2009, para. 87
[121] Ibid., para. 89
[122] Decision E 2/2008 on State funding for Austrian public service broadcaster ORF, paras. 201 and fol.
[123] For the conflicting policy concerns laid down in Article 14 TFEU on services of general economic interest see, for instance, Harrison and Woods 2007, 294
[124] Scharpf 1997, available online: http://www.mpifg.de/pu/workpap/wp97-8/wp97-8.html accessed on 23 January 2011
[125] Blauberger 2008, 3
[126] Ibid., 17
[127] Ariño 2004, 125
[128] Commission Broadcasting Communication 2001, para. 47
[129] Commission Broadcasting Communication 2009, para. 71
[130] See, for instance, Commission Broadcasting Communication 2001, para. 48.
[131] Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within special undertakings, Recital 16
[132] Commission Directive 80/723/EEC, Article 4(b)
[133] Decision E 3/2005 on financing of public broadcasters in Germany, para. 314
[134] Commission Broadcasting Communication 2001, para. 49
[135] Decision E 5/2005 on Yearly financing of Dutch public broadcasters, para. 12
[136] Decision C 2/2004 on ad-hoc financing measures of Dutch public service broadcasters, paras. 35 and fol.
[137] Decision E 3/2005 on financing of public broadcasters in Germany, paras. 314-320
[138] Ibid., see, in particular, paras. 375-393
[139] Dias and Antoniadis 2007, 68
[140] Decision E 4/2005 on State financing of public broadcasters RTE and TNAG, para. 157

[141] Decision E 3/2005 on financing of public broadcasters in Germany, see, for instance, para. 377 et al.

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