

Chapter 8

State Aid Control in the Broadcasting Sector: Has the Right Balance been Struck between Competition and Public Service Broadcasting?

Konstantina Bania

European University Institute, Italy

ABSTRACT

The application of the State aid rules to public service broadcasting has never been a straightforward exercise for the European Commission (hereafter 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 related services outweighs the harm to competition. Through its decision-making and the adoption of a soft law instrument, the Broadcasting Communication, the Commission gradually managed to inject into national schemes supporting broadcasting activities its own perspective of “good” State aid policy. This chapter discusses the impact that the Commission State aid practice has had on national systems and reflects on whether the latter has struck the right balance between the conflicting values involved, namely competition and public service broadcasting. The chapter argues that, while in several instances the Commission went beyond the Treaty letter, its control over relevant State measures has contributed substantially to ensuring a level playing field between public broadcasters and commercial undertakings operating in the wider context of the media market.

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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 (Article 6 TFEU). 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 (ECJ Case 155/73, *Italy v. Sacchi* [1974] ECR 409, para. 14).

Shortly after the liberalization of the sector through the Television without Frontiers Directive, 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 broadcasting activities unduly distorts competition came to the fore. 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 private broadcasters to more than one Member State, 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 commercial operators alleging *inter alia* that public funding of such activities violates the State aid rules, and while in the beginning of its decision-making the Commission followed a hands-off approach, ultimately it

has not limited itself to a marginal compatibility assessment checking solely whether the provision of broadcasting 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 related schemes and developed a practice which has gone so far as to shape national public broadcasting policies. The Commission's influence on such policies stems clearly from the relevant decisions, which illustrate the negotiations with the 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 broadcasting sector.

Clearly, such practice was not developed overnight. The Commission faced a number of challenges in its effort to establish a consistent framework within which public 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 to schemes supporting public broadcasting activities. 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 particularities of public service broadcasting, 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 measures favoring public broadcasting and therefore lacked the necessary know-how which would allow it to follow a more coherent approach once the first complaints were filed.

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