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Public Financing of Public Service Broadcasting and its Qualification as State Aid

With Particular Regard to the
Altmark Trans Jurisprudence

A. Introduction

Broadcasting is of particular importance in the modern structure of democracy. It helps building cultural identity, develops citizenship and has the potential of strengthening social cohesion.¹ Consequently, in the European tradition, broadcasting has become part of public services, i.e. infrastructural services supported by the state to meet public needs.² Such public service broadcasting (PSB) provides broadcasting services that are of higher quality and of more cultural value to the community than services provided by commercial broadcasters. To ensure the operation of PSB, Member States of the European Union have introduced various measures to support broadcasters.

Over the last two decades, the public aid provided to public service broadcasters has become more and more controversial. This has not always been the case. Up to the late 70s/beginning of the 80s, broadcasting was performed solely on a monopolistic or oligopolistic basis due to the limited technical possibilities,³ and, as a result, this support did not have the potential to influence competition. By virtue of new transmission technologies, the market was opened up to private broadcasters, which did not receive public support.⁴ Until the middle of the 80s all West European countries were seeing the introduction of private broadcasters that were solely financed by revenues earned from commercial activities (e.g. sale of advertisement space).⁵ As public service broadcasters and commercial broadcasters were competing for the same license rights (e.g. sports, films), the same viewers and (at least partly) for the same advertisers and sponsors, public funding was seen more critically as it carried the potential to distort competition in the broadcasting market.⁶ The situation aggravated as advertising revenues were falling by virtue of the significantly

1 *Katsirea*, Public Broadcasting and European Law, p. 323.

2 *Kübler*, in: *Fuchs/Schwintowski/Zimmer*, Festschrift für Ulrich Immenga zum 70. Geburtstag, p. 231.

3 *Schnaitter*, Möglichkeiten und Grenzen der Ausgestaltung des Programmauftrags der öffentlich-rechtlichen Rundfunkanstalten, p. 16. Cf. also *Niejahr*, in: *Montag/Säcker*, Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht) – Band 3, Sektoren para. 134; *Tigchelaar*, EStAL 2003, 169, 169 et seq.

4 Cf. *Commission*, Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 320/5 of 15.11.2001), para. 2.

5 Cf. *Schnaitter*, Möglichkeiten und Grenzen der Ausgestaltung des Programmauftrags der öffentlich-rechtlichen Rundfunkanstalten, pp. 16 et seq.

6 *Katsirea*, Public Broadcasting and European Law, pp. 323 et seq.

increased number of channels.⁷ In particular, (possible) competitors of the favoured broadcasters saw considerable potential for market damage as the tasks of the public service broadcasters were broadly defined, thus enabling broadcasters to move both vertically and horizontally into neighbouring markets.⁸

European State aid law was soon discovered by competitors as an area of law that might preclude funding measures for public service broadcasters. Hence, in 1992, two Spanish commercial broadcasters filed the first State aid complaints regarding this matter.⁹ Until then, precedents, or any other form of guidelines as to how to solve these cases, were completely lacking.¹⁰ The Commission issued its first final decision in October 1996,¹¹ followed by decisions regarding the financing of the German channels 'Kinderkanal' and 'Phoenix'¹² and a decision concerning the British channel 'BBC News 24'¹³ in 1999. Additionally, in 2001, the Commission adopted a communication on PSB which provided guidelines for the Member States regarding the conditions under which the Commission would see public funding to be in line with the requirements of State aid law.¹⁴ Since 2001, more than 20 decisions have been made based on the Communication.¹⁵ In 2009 the Communication adopted in 2001 was superseded by new guidelines.¹⁶

7 *Katsirea*, Public Broadcasting and European Law, p. 324.

8 See *Depypere/Tigchelaar*, Competition Policy Newsletter 2004 (2), 19, 19 et seq. who mention the example of a cooking programme that leads to the publication of cookery books. Another example would be the launch of a website.

9 Cf. *Bartosch*, in: *Koenig/Bartosch/Braun*, EC Competition and Telecommunications Law, p. 164; *Katsirea*, Public Broadcasting and European Law, p. 324; *Tigchelaar*, EStAL 2003, 169, 170.

10 *Niejahr*, in: *Montag/Säcker*, Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (Kartellrecht) – Band 3, Sektoren para. 134.

11 *Commission*, Decision of 02.10.1996, State aid No NN 141/95, *RTP*.

12 *Commission*, Decision of 24.02.1999, State aid No NN 70/1998, *Kinderkanal/Phoenix*.

13 *Commission*, Decision of 14.12.1999, State aid No NN 88/98, *BBC News 24*.

14 *Commission*, Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 320/5 of 15.11.2001).

15 *Commission*, Communication from the Commission on the application of State aid rules to public service broadcasting, (OJ C 257/1 of 27.10.2009), para. 4.

16 *Commission*, Communication from the Commission on the application of State aid rules to public service broadcasting, (OJ C 257/1 of 27.10.2009).

Despite the various decisions of the Commission,¹⁷ and those of the *CFI*,¹⁸ the question as to if and when public funding of public service broadcasters is to be qualified as illegal State aid has not yet been clarified.¹⁹ In particular, a ruling of the European Court of Justice (*ECJ*) is still lacking.

In its *Altmark Trans*-ruling,²⁰ the *ECJ* (in a case concerning public transportation services) laid down specific criteria under which compensation for services of general economic interest (SGEI) should not be considered State aid in the sense of Art. 107(1) TFEU. These criteria are significant for the assessment of public funding for PSB, as PSB is part of the SGEI.²¹ Nevertheless, the Commission frequently applies Art. 106(2) TFEU – a derogation from Art. 107(1) TFEU – as the decisive

17 *Commission*, Decision of 03.04.2002, State aid No NN 2/2002, *ZDF Medienpark*; Decision of 22.05.2002, State aid No N 631/2001, *BBC license fee*; Decision of 01.10.2003, State aid No N 37/2003, *BBC Digital Curriculum*; Decision of 15.10.2003, State aid No C 62/99, *RAI* (ad-hoc payments); Decision of 15.10.2003, State aid No C 85/2001, *RTP* (ad-hoc payments); Decision of 10.12.2003, State aid No C 60/99, *France 2 and 3* (ad-hoc payments); Decision of 19.05.2004, State aid No C 2/2003, *TV2*; Decision of 06.10.2004, State aid No N 313/2004, *TV2* (recapitalisation); Decision of 20.04.2005, State aid No E 8/2005, *RTVE*; Decision of 20.04.2005, State aid No E 10/2005, *France 2 and 3*; Decision of 20.04.2005, State aid No E 9/2005, *RAI*; Decision of 07.06.2005, State aid No N 54/2005, *Chaîne française d'information internationale*; Decision of 22.03.2006, State aid No E 14/2005, *RTP*; Decision of 22.03.2006, State aid No N 638/2005, *Aide à la création de la chaîne corse Via Stella*; Decision of 22.06.2006, State aid No C 2/2004, *Ad-hoc financing measures of Dutch public service*; Decision of 04.07.2006, State aid No NN 31/2006, *RTP*; Decision of 07.03.2007, State aid No NN 8/2007, *RTVE*; Decision of 24.04.2007, State aid No E 3/2005, *Financing of public service broadcasters in Germany*; Decision of 27.02.2008, State aid No E 4/2005, *RTE and TNAG (TG4)*; Decision of 27.02.2008, State aid No E 8/2006, *VRT*; Decision of 16.07.2008, State aid No N 279/2008, *France Télévisions*; Decision of 04.08.2008, State aid No N287/08, *TV2/Denmark A/S* (rescue aid); Decision of 01.09.2009, State aid No C 27/2009, *France Télévisions*; Decision of 28.10.2009, State aid No E 2/2008, *ORF*; Decision of 03.12.2009, State aid No C 38/2009, *RTVE*; Decision of 26.01.2010, State aid No E5/2005, *Dutch public broadcasters*; Decision of 20.04.2011, State aid No C 2/2003, *TV2*; Decision of 20.04.2011, State aid No C 19/2009, *TV2* (restructuring); Decision of 20.12.2011, State aid No SA.33294, *RTP* (amendment of decision NN 31/2006); Decision of 20.12.2011, State aid No C 85/2001, *RTP* (years 1992–1998).

18 *CFI*, 10 May 2000, Case T-46/97, *SIC*; 26 June 2008, Case T442/03, *SIC*; 22 October 2008, joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2*; 11 March 2009, Case T-345/05, *TFI*; *EGC*, 16 December 2010, Joined Cases T-231/06 and T-237/06, *ad hoc financing of Netherlands public service broadcasters* (on appeal, cf. C-104/11P).

19 See for example only *Degenhart*, K&R 2008, 214, 218 ICW fn. 41 and *Michel*, MMR 2005, 284, 285.

20 *ECJ*, 24 July 2003, Case C-280/00, *Altmark Trans*. Regarding the decision see the following in-depth analysis: *Linke*, *Die Gewährleistung des Daseinsvorsorgeauftrags im öffentlichen Personennahverkehr*, pp. 109 et seqq.

21 See below C. I. 1) a).

law, whereas the question whether the measures constitute State aid in the sense of Art. 107(1) TFEU is usually²² answered in the affirmative.²³ This focus on Art. 106(2) TFEU is also illustrated in the aforementioned Communication of 2009, since these guidelines mention the *Altmark*-criteria, but do not give any further explanation as to their application to PSB.²⁴

Rather than for compelling legal reasons, the shift towards Art. 106(2) TFEU is the result of difficulties in the application of the *Altmark*-ruling. Qualification of public funding as non-state aid, however, is accompanied by considerably more advantages for the beneficiary than a declaration that the measure is compatible with the internal market. According to Art. 108(3) TFEU, for example, Member States shall not introduce State aid without the prior approval of the Commission (the so-called standstill obligation). The approval-procedure, however, does not need to be carried out if the measure is not State aid. Since it is not yet common practice for the Member States to implement the procedure according to Art. 108(3) TFEU there are also significant risks to consider when solely relying on a compliance with Art. 106(2) TFEU. Beneficiaries not complying with Art. 107(1) TFEU could face serious proceedings in front of national courts. Contrary to the proceedings in front of the Commission, where compliance with Art. 106(2) TFEU prevents the recovery of State aid, national courts have to order the recovery of any benefit received as long as the Commission has not declared the measure compatible with the internal market.²⁵ Even if compatibility is declared, national courts are generally required to order the recovery of benefits arising from the infringement of Art. 108(3) TFEU and the consequent untimely granting of the aids (for example interests).²⁶ Moreover, a breach of Art. 108(3) TFEU obliges the national courts to prevent a future payment

22 An exception was the first decision, in which payments by the Portuguese State were not qualified as State aid: *Commission*, Decision of 02.10.1996, State aid No NN 141/95, *RTP*. Another exception was the Decision of 22.05.2002, State aid No N 631/2001, *BBC license fee*, in which the *Commission* followed the reasoning of the *ECJ's Ferring-Jurisdiction*, which has been specified through the *Altmark Trans*-ruling meanwhile (cf. *Linke*, *Die Gewährleistung des Daseinsvorsorgeauftrags im öffentlichen Personennahverkehr*, pp. 100 et seq., 103). A very unique exception was the Decision of 03.04.2002, State aid No NN 2/2002, *ZDF Medienpark*.

23 This approach was confirmed by the *CFI*, 10 May 2000, Case T-46/97, *SIC*.

24 See also the criticism of *Bartosch*, *EuZW* 2009, 684, 685.

25 *Commission*, Commission notice on the enforcement of State aid law by national courts (OJ C 85/1 of 9.4.2009), paras. 30 et seq., 34. See also *Bartosch*, in: *Koenig/Bartosch/Braun*, *EC Competition and Telecommunications Law*, pp. 209 et seq.; *Niemeyer*, in: *Heidenhain*, *European State Aid Law*, § 44, paras. 24 et seq.; *Soltész*, *EuR* 2012, 60, 62.

26 *Commission*, Commission notice on the enforcement of State aid law by national courts (OJ C 85/1 of 9.4.2009), paras. 37 et seq.; *Niemeyer*, in: *Heidenhain*, *European State Aid Law*, § 44, para. 32; *Tedoldi*, in: *Santa Maria*, *Competition and State Aid*, p. 265.

from taking place.²⁷ At last, every granting act (e.g. contract, administrative decision) is invalid as a result of the Member State's breach of Art. 108(3) TFEU.²⁸

Due the aforementioned focus of the *Commission*, Art. 106(2) TFEU has been covered in much more detail in academic literature in contrast to the application of Art. 107(1) TFEU and the *Altmark*-judgment in relation to PSB. Although it has been argued that compliance with the criteria set out in the *Altmark*-judgment is impossible for public service broadcasters,²⁹ it is still not clarified as to if and when public funding for PSB might be qualified as non-State aid. An in-depth analysis of the possibility of compliance with the *Altmark*-judgment is lacking.

This work seeks to shed light on the demands of Art. 107(1) TFEU regarding public funding of PSB. Specific focus is placed on the *Altmark*-judgment, in particular, the frequently neglected 'fourth criterion'. Consequently, the work tries to enhance our understanding of the application of Art. 107(1) TFEU and contribute to the clarification of a still opaque area of law. Apart from Art. 107(1) TFEU, the work also looks at the effect of the Amsterdam Protocol (the content of the Amsterdam Protocol has now been carried over to Protocol 29 of the Lisbon Treaty), which is occasionally argued to have a significant impact on the application of the State aid rules to PSB. Although the work does not cover the exceptions according to Art. 106(2) and Art. 107(2–3) TFEU, it should be noted that the present analysis is also intended to enrich the discussion on the requirements of Art. 106(2) TFEU on PSB, as most of the requirements of the article are congruent with those of the *Altmark*-judgment.

Before delving into the examination of Art. 107(1) TFEU and its application to PSB, the work gives a brief overview of the significance of PSB and its financing.

27 *Commission*, Commission notice on the enforcement of State aid law by national courts (OJ C 85/1 of 9.4.2009), para. 28.

28 *Commission*, Commission notice on the enforcement of State aid law by national courts (OJ C 85/1 of 9.4.2009), para. 29; *Ritter/Braun*, European Competition Law – A Practitioner's Guide, pp. 1009 et seq.

29 See for example *Donders*, Public Service Media and Policy in Europe, pp. 65, 87; *Katsirea*, Public Broadcasting and European Law, p. 342. Cf. also *Mortensen*, ESTAL 2008, 239, 244; Sumrada and Nohlen, 2005, p. 613. Mentioning the difficulties in complying with the criterion: *Depypere/Broche/Tigchelaar*, Competition Policy Newsletter 2004 (1), 71.