

## **Public service broadcasting and state aid – frequently asked questions**

(see also IP/05/250)

### **Do the EC Treaty state aid rules prohibit financing of public broadcasters?**

Not at all. Although the financing of public service broadcasters (PSBs) through contributions from the State budget or licence fees is usually state aid as defined in Article 87(1) EC Treaty, it may well be justified if the financing is necessary to fulfil a task in the public interest (“service of general economic interest”, SGEI). This is consistent with the EC Treaty’s rules whereby the application of competition rules to public undertakings and undertakings to which Member States grant special or exclusive rights should not obstruct the performance of the tasks assigned to them (Article 86(2)), as interpreted by the so-called Amsterdam Protocol on public service broadcasting (see below) and the Commission’s 2001 Communication on applying state aid rules to public service broadcasting (see [IP/01/1429](#)).

### **Should public financing of PSB even be regarded as state aid?**

Usually, yes. The recent ruling by the European Court of Justice in the “Altmark” case (Case C-280/00, 24 July 2003) provides that compensation for the costs incurred in the discharge of a public service obligation do not qualify as state aid if a number of conditions are cumulatively met:

- clear public service obligations
- pre-established parameters for determining the compensation
- no overcompensation and
- either selection of operator through tender procedure or determination of compensation with reference to costs of a typical, well-run undertaking.

So far, the Commission has, in all cases of public service broadcasting examined, concluded that the “Altmark” conditions were not fulfilled. In most cases, there were no objective pre-established parameters for determining the compensation. Furthermore, public service broadcasters have not been selected by way of a tender procedure, and the compensation was not determined on the basis of an analysis of the costs of a typical well-run undertaking.

### **Are Member States entitled to decide for themselves how PSB should be organised and financed?**

Yes, provided that the Member States’ decisions meet certain criteria of good governance which the Member States themselves have set out. The Member States agreed upon a Protocol to the Amsterdam Treaty which interprets the basic Treaty rules in the light of the particular nature of the broadcasting sector (referred to as the “Amsterdam Protocol”). It recognises that it is the prerogative of the Member State to organise and fund the public service broadcasters.

Nevertheless, the Protocol states that the funding shall not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest. Therefore, it is the task of the European Commission, in accordance with Article 86 (2) EC Treaty, to assess whether there is an appropriate balance between the requirements of public service broadcasting and fair competition.

### **Can the Commission's investigation force the broadcasters to cut their licence fees?**

No, provided that the licence fee revenues available to PSBs do not exceed what is necessary to finance the public service tasks. Insofar as Member States ensure that the financing of PSBs is not excessive, it is for them to establish the various means of financing, including the licence fee and to fix the level of the fee.

### **Under which conditions can state financing of PSBs be regarded as justified?**

The Member State must:

1) **Set out in a formal act a clear remit for public service broadcasting.** The Member State has to define in a clear manner the tasks which the public broadcaster has to fulfil. The tasks can be broad, covering a balanced and varied programme, including information but also entertainment and sports. The Commission does not intervene in the Member State's choice of programmes. But the definition needs to be as precise as possible so as to also allow other operators to plan their activities. The Commission checks only whether the definition is not evidently wrong ("manifest errors"), i.e. whether it does not include activities that cannot reasonably be considered to meet the "democratic, social and cultural needs of each society" (as laid down in the 2001 Communication). Online information activities may be included, but, for example, e-commerce and the sale of advertising space should not be included. These are commercial activities which cannot be funded with public money.

2) **Ensure independent national monitoring of the fulfilment of the PSB remit.** The public service obligations should be laid down in an official act and the fulfilment of the public task as set out in that act should be checked by an independent (national) monitoring authority.

3) **Ensure that the funding of the PSB is proportionate.** First of all, the State financing must not exceed the costs of the public service (the costs of the public service need to be determined based on separate accounts as required by the Transparency Directive – i.e. Commission Directive 80/723/EEC, as amended by Commission Directive 2000/52/EC). In relation to this, for its part the public service broadcaster must not distort competition more than is necessary to fulfil its remit. For example, PSBs should not sell advertising or programmes below market prices. In other words, state aid rules do not prohibit PSBs from undertaking commercial activities. However, it is necessary to ensure that these commercial activities do not benefit from any state support and that PSBs carry out commercial activities according to market conditions.

### **Has the Commission changed its policy as regards PSBs? Is it now taking a tougher line?**

No. The approach followed in the letters sent to Ireland, The Netherlands and Germany on 3<sup>rd</sup> March 2005 (see IP/05/250) is a continuation of the Commission's policy established in earlier cases.

Increased competition between private and public broadcasters in the early 1990s led to numerous complaints by private broadcasters against the financing of PSBs in several Member States. Private broadcasters alleged that the public service task was not described in a clear manner, that there was no adequate independent supervision, that the accounts were not transparent and that the public broadcasters received more funding than necessary for their tasks. Where the financing mechanisms are not transparent PSB could use public funds for their commercial activities. Based on these complaints, the Commission assessed *ad hoc* financing measures in France, Italy and Portugal in 2003, coming to the conclusion that PSBs had not in fact benefited from over-compensation.

However, these investigations revealed that the general financing regimes for PSB did not foresee sufficient safeguards against overcompensation. Consequently, in 2003, the Commission concluded that the yearly financing schemes of the public broadcasters in Italy, France, Portugal and Spain had to be amended so as to ensure compliance with fundamental principles: separation of accounts, introduction of a legal mechanism to prevent over-compensation, obligation on PSB to carry out commercial activities in line with market conditions and establishment of an independent authority which controls compliance of these rules. These four Member States have already adopted or proposed to adopt the above mentioned measures.

The financing regimes in The Netherlands, Germany and Ireland have been assessed on the basis of the same principles. The investigation revealed that the financing regimes do not ensure compliance with the requirements laid down in the 2001 Communication on applying state aid rules to public service broadcasting and the principles of clarity in the definition, transparent financing and market behaviour as regards PSBs' commercial activities. Therefore, the Commission's approach in the Dutch, German and Irish cases is wholly consistent with its approach in these earlier cases.

### **What are the specific concerns in the Dutch, German and Irish cases?**

Based on complaints, the Commission's investigation covers the financing of services outside the traditional television programme activities of PSBs. In the Dutch and the German cases, the Commission needs to assess complaints regarding the PSBs' online activities. In both cases, the Commission has concerns that, whereas online information services may be included, online activities such as e-commerce and mobile telephone services may not be regarded as a "service of general economic interest".

In addition in the German and the Irish cases, the Commission assesses allegations from complainants about the PSBs' behaviour when acquiring sports rights. The Commission is of the opinion that sport – including high-quality premium sport - is part of a balanced and varied programme and can therefore be publicly financed. However, competition on the market for acquisition of sports rights should not unduly be distorted. The question is thus whether certain acquisition practices, like the acquisition of Pay TV rights, do not lead to an unnecessary distortion of competition.

Besides the investigation into the existing framework for financing the public service broadcasters in the Netherlands, there is also a formal investigation procedure opened by the Commission in February 2004 regarding new “ad hoc” financing of the Dutch public service broadcasters ([IP/04/146](#)). The “ad hoc” financing issue is still under assessment, but the Commission is likely to take a decision soon. The outcome of that procedure is however not related to the existing framework financing for public service broadcasters.

### **What is the procedure for assessing the financing of PSB under state aid rules?**

The Commission follows different procedures depending on whether the aid measure is “new” or “existing”.

As regards the new aid procedure, if the Commission has doubts about the compatibility of an aid measure, it decides to open the formal investigation procedure (that was the case for the investigations of *ad hoc* financing measures in France, Italy and Portugal). This decision is published in the Official Journal and the Member State concerned as well as all interested parties have the opportunity to comment. After the formal investigation, the Commission can decide either that there is no aid, or that there is aid but that it is compatible with EC Treaty state aid rules (possibly after changes are made by the Member State) or that the aid is incompatible (because it is liable to distort competition) and so cannot be put into effect, or even that incompatible aid would have to be reimbursed (‘recovered’), because the aid was granted without being notified to the Commission and was thus granted “illegally”.

On the contrary, when the measure is existing aid, because for example it was introduced before the entry into force of the EC Treaty, a cooperation procedure is followed. The Commission carries out an assessment and then sends its preliminary view to the Member State concerned for comments (by letter pursuant to Article 17 of Council Regulation 659/1999, which lays down procedures for applying the state aid rules). In this letter, the Commission may already informally identify measures which would ensure compatibility. The assessment will be based on the Member State’s comments and possible commitments. The Commission may then adopt a formal recommendation to the Member State proposing appropriate measures to amend the aid scheme (Article 18 of the procedural Regulation), and if the Member State accepts the recommended measures, it is legally bound to implement them (Article 19 of the procedural Regulation). If the Member State refuses to implement the recommended measures, the Commission can open a formal investigation, potentially leading to a negative decision.

The distinction is important because the existing aid procedure aims ultimately at amending the financing system for the future, whereas the new aid procedure investigates possible overcompensation in the past and may lead to an order to recover incompatible aid.

In line with its previous practice, the Commission sent letters to The Netherlands, Germany and Ireland explaining the preliminary view of the Commission that the general financing regime was no longer compatible with the EC Treaty and proposing measures which would ensure compliance. The three Member States will now have the opportunity to comment on the preliminary view during the next months. The Commission and the Member States will discuss the amendments necessary to clarify the role and the financing of the public broadcasters. If Member States adopt the necessary measures, the Commission will be able to subsequently close the case pursuant to Articles 18 and 19 of the procedural Regulation.