



FACULTY OF LAW  
University of Lund

Therese Clarhed

# State Aid Rules and the Funding of Public Service Broadcasting

Master thesis  
20 points

Henrik Norinder

European Community Law

2006

# Contents

<b>SUMMARY</b>	<b>1</b>
<b>ABBREVIATIONS</b>	<b>2</b>
<b>1 INTRODUCTION</b>	<b>3</b>
1.1 Purpose	3
1.2 Method and Material	4
1.3 Delimitation	4
1.4 Disposition	5
<b>2 BACKGROUND</b>	<b>6</b>
<b>3 THE APPLICATION OF COMMUNITY STATE AID RULES TO PUBLIC SERVICE BROADCASTING</b>	<b>8</b>
3.1 The Concept of State Aid: Definition	8
3.1.1 State Resources and the Transparency Directive	9
3.1.2 Conferral of an Economic Advantage	10
3.1.3 Specificity	11
3.1.4 Distortion or Risk of Distortion of Competition, Affecting Trade between Member States	12
3.2 Investigation –Existing or New Aid?	13
3.3 Derogations	14
3.4 The Amsterdam Protocol	14
3.5 The 2001 Commission Communication	15
<b>4 HOW DOES STATE AID DISTORT COMPETITION?</b>	<b>16</b>
4.1 Productive Efficiency Loss	16
4.2 Over-Funding	17
4.3 Cross-Subsidisation	18
4.4 Market Foreclosure	18
4.5 Complaints on State Aid	19
4.5.1 Kinderkanal/Phoenix	19
4.5.2 BBC News 24	21

<b>5 HOW CAN THE MEMBER STATES AVOID THE STATE AID RULES?</b>	<b>23</b>
<b>5.1 Challenging the Applicability of Article 87(1)</b>	<b>23</b>
5.1.1 Public Service Broadcasting not Economic in Nature	23
5.1.2 Funding Merely Constitutes Compensation	24
<b>5.2 Structuring Public Service Provision to Avoid Conflict with Article 87(1)</b>	<b>25</b>
5.2.1 Allocating Frequencies and Awarding Operating Licences	26
5.2.2 Commercial Funding	26
5.2.3 Open Competition	27
5.2.4 Financing Entirely out of Public Funds	28
<b>5.3 Treaty-Based Exemptions in Article 87</b>	<b>29</b>
<b>5.4 Treaty-Based Exemption in Article 86(2): Services of General Economic Interest</b>	<b>32</b>
5.4.1 Entrustment	33
5.4.2 Definition	33
5.4.3 Obstruction of Performance of General Interest Services	38
5.4.4 Affecting Trade	40
<b>6 STATE AID OR NOT? DIFFERENT APPROACHES TO FINANCING</b>	<b>42</b>
<b>6.1 The State Aid Approach</b>	<b>42</b>
6.1.1 Case Law of the State Aid Approach	43
6.1.2 Consequences of the State Aid Approach	44
<b>6.2 The Compensation Approach</b>	<b>44</b>
6.2.1 Case Law of the Compensation approach: The Ferring-Ruling	45
6.2.2 Consequences of the Ferring-Ruling	45
6.2.3 Application to the Broadcasting Sector	47
<b>6.3 Post Ferring: Altmark Trans –a Compromise?</b>	<b>48</b>
6.3.1 Altmark Trans	49
6.3.2 Consequences of Altmark Trans	50
<b>7 ANALYSIS</b>	<b>53</b>
<b>BIBLIOGRAPHY</b>	<b>58</b>
Literature	58
Articles	59
Background Materials Not Referred to in the Text	59
EU Legislation	60
Commission Communications	60
Other EU Materials	61
Websites	61

<b>TABLE OF CASES</b>	<b>62</b>
<b>Cases before the European Court of Justice and the Court of First Instance</b>	<b>62</b>
<b>Cases before the European Commission</b>	<b>63</b>

# Summary

The broadcasting sector is rapidly developing and has undergone major changes during the last decades when numerous private broadcasters have entered the market following the abolishment of state monopolies. The sector has always been subject to state regulation and in order to maintain a certain quality and availability of broadcasting, the national states grant financial support to broadcasters entrusted with so called public service obligations. In Europe, regulation in this area is not only a matter for national policy, but it also comes within the ambit of European Community law. State funding of public service broadcasting has the potential of distorting competition in various ways and commercial broadcasters have sought to curb the power of public service broadcasters by challenging state support, using European Community competition rules on state aid. This paper shows that there are ways in which the EU Member States can grant funding to public service broadcasters without contravening the EC Treaty rules. Apart from the opportunity of structuring their funding systems in a way that does not infringe the rules, the EC Treaty provides the Member States with derogation possibilities from the state aid prohibition contained therein. When assessing state aid under the derogation provisions of the EC Treaty, the Community institutions have been sensitive to Member State concerns. Some funding measures can even completely escape the application of the state aid rules, on the condition that the amount of financing does not exceed compensation for an extra cost incurred by public service obligations. However, the Member States have given up some autonomy when signing the EC Treaty and thus, Community competition law may affect the way in which state funding is granted and which kind of programming it will support. When deciding on the legality of state aid measures, the Community institutions must balance the interests of the Member States, the commercial broadcasters and the functioning of the common market. This is not an easy task and this paper shows that further clarification is needed in the area.

# Abbreviations

AG	Advocate General
CMLR	Common Market Law Review
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
EC Treaty	Treaty establishing the European Community as amended in accordance with the Treaty of Nice
EU	European Union
OJ	Official Journal

# 1 Introduction

Broadcasting plays a central role in the functioning of democratic societies. It provides people with information and entertainment and it promotes participation in public life. It is a powerful medium, reaching most citizens and therefore, there has always been state regulation of the broadcasting sector. Such national legislation nowadays often aims to protect common values such as freedom of expression, the right of reply, pluralism and cultural and linguistic diversity. Legislation regulating the area also typically seeks to protect minors, consumers and human dignity in general.

The broadcasting sector has gone through a major change during the last decades. State monopolies in the European Union Member States have been abolished and numerous private broadcasters have entered the market. Both the Member States and the European Community institutions recognise the importance of giving all citizens access to certain high quality programming free of charge, e.g. news, information and entertainment, in order to allow them to participate in public life and to guarantee pluralism. A number of broadcasters are therefore entrusted with so called “public service obligations” and receive state funding in order to discharge those services. The fact that public service broadcasters receive funding from the state has led to complaints from commercial broadcasters, which claim that such funding distorts competition and constitutes illegal state aid under the EC Treaty rules. They have thus brought action challenging the compatibility of the funding with the EC Competition rules.

When assessing cases concerning state aid, the Community institutions have to balance diverging interests. The competition concerns of the commercial broadcasters stands against the wish of the Member States to ensure that public service programming is provided for. The Member States’ aspiration of arranging their own financial systems, of settling the amount of state funding and of deciding the remit of public services without interference from the European Community institutions, stands against the Community’s ambition of retaining certain control in the area and of achieving the goals of the common market. There are thus several interests to take into consideration when applying the EC Treaty rules in a rapidly developing sector. It can be considered that the Member States should be able to grant funding to their public service broadcasters, at least to some extent, since they play such an important role in society, but account must also be taken of competition issues and the common market.

## 1.1 Purpose

In this paper I will try to assess how, and to what extent the Member States can grant funding to their public service broadcasters without contravening the EC Treaty. The analysis refers to television broadcasting. When discussing the different ways in which the Member States can avoid conflict

with the state aid rules when financing public service broadcasting I will analyse Treaty-based exemptions to the state aid rules, as well as other ways to bring a measure outside the state aid prohibition. A fundamental aspect is the definition of the public service remit and thus, this issue will repeatedly be brought up in different contexts. I will also analyse the implications of relevant case law for the development of state funding and finally try to evaluate the consequences for the Member States, the public service broadcasters, the commercial broadcasters and the Community of adopting one or the other different approaches to state aid taken by the Community institutions.

## **1.2 Method and Material**

When making the analysis of how the Member States can avoid their funding measures to be caught by the state aid rules, I have used traditional legal method. The EC Treaty provisions, the Amsterdam Protocol and the 2001 Commission Communication have been vital for the analysis and in order to interpret these sources I have to a large extent relied on key cases decided by the Commission and the Community Courts. By analysing case law, I have also tried to assess which are the implications of the recent development of the Community institutions' approach in the field.

It is clear that the subject of state aid law has been neglected in the literature. Not much literature is written about Article 87 and 86 – especially not in the context of the broadcasting sector- and therefore, I have had to rely to a large extent on legal journal articles. Because of the fact that the subject of state funding of public service broadcasting is very narrow, drawing parallels to comments on state aid in other areas and to cases concerning similar situations has been necessary. A problem has been that the existing literature, principally consisting of articles in legal journals, mainly refers back to the 2001 Commission Communication and reports case law in the field. Few authors give any creative comments of their own on state aid to public service broadcasters and the area seems to be somewhat unclear.

## **1.3 Delimitation**

The purpose of this paper is to assess the extent to which the Member States can grant funding to their public service broadcasters and to analyse how the Member States can avoid infringing the EC Treaty rules on state aid when doing this. The paper thus focuses on the applicability of the state aid rules and the various derogation possibilities to these rules, both Treaty-based ones and others. As for the Treaty provisions, the most important ones in the context are Article 87 and Article 86(2). Definition of the public service remit is given much attention, since this is vital for the application of an important exemption provision. Furthermore, the recent development in the



practice of the Community institutions is interesting and therefore an analysis of this is presented. I have also chosen to include a brief discussion of how state aid distorts competition, in order to give a background for the other issues of the paper and in order to facilitate the understanding of the state aid rules.

Even if there are other rules in the EC Treaty applicable to the broadcasting sector, for instance provisions guaranteeing the freedom to provide services and the right of establishment, I have left these out since the focus of this analysis is on state aid. The Television Without Frontiers Directive is interesting, but not important for the application of the state aid rules and therefore it is not discussed in this context. Neither *de minimis* nor procedural issues are very relevant for the analysis in this paper and those questions are therefore left out, except for a brief discussion of investigation of aid measures.

In order to more deeply understand the problems of state aid, it can be interesting to make a detailed economic analysis, but this paper focuses on the legal aspects and not so much on the economic ones. Therefore, I will not go deep on the economic issues. Another interesting relating subject is that of the position of ancillary internet services. Lately, many public service broadcasters have namely started offering internet services in order to complement their television channels. How to treat state funding of such services, and whether they do constitute public services that can be granted exemption from the state aid rules or not, is an interesting issue. This topic, however, deserves a separate discussion and is thus not included in this paper.

## **1.4 Disposition**

When approaching the problem of state financing of public service broadcasting I find it accurate to firstly explain the concept of state aid and examine the EC Treaty rules which govern the area. A discussion on how and when these rules are applicable and a description of the interpretative materials are thus initially presented. After that, a brief explanation of how state funding distorts competition in the broadcasting sector is given as a background for the following analysis and in order to explain the commercial broadcasters' concerns. After having given this background, the main discussion of the paper is presented, namely how the Member States can avoid the state aid rules and what strategies they can use in order to do so. This analysis is given much consideration. Finally, I try to assess the implications of the recent case law concerning state aid and which effects this may have in the broadcasting sector.

## 2 Background

Ever since the introduction of popular radio broadcasting in the 1920s, national governments have tried to use broadcasting policies in order to promote domestic economic, political and social goals. National legislation governing broadcasting often aims to protect common values such as freedom of expression, the right of reply, pluralism, cultural and linguistic diversity and the protection of minors, of human dignity and of consumers. Over the last two decades, broadcasting has undergone important changes. Apart from the rapid technological development that has fundamentally altered the competitive environment, there has also been abolition of monopolies, leading to new players entering the market. Public service broadcasters, i.e. broadcasters that are subject to so called public service obligations, tended initially to be publicly owned but nowadays they are often private companies, although subject to specific public service obligations.<sup>1</sup>

There is no universal definition of the concept of public service broadcasting, but it usually means that the broadcaster in question has to provide a universal service throughout the territory of a given state, offer programmes catering for minority as well as majority interests, reflect national concerns and preoccupations and comply with certain technical and programme standards.<sup>2</sup> Since these obligations often come with an extra cost for the public service broadcasters, many of them receive financial assistance from the state, normally in the form of license fees or state grants. Some services are financed wholly by such resources, but the majority of Europe's public service broadcasters receive a mixture of license fee, i.e. state funding, and advertisement revenues, i.e. commercial funding. Since state funding can be subject to the state aid prohibition of the EC Treaty, the possibilities for the Member States to avoid this provision or to be granted exemption when funding their public service broadcasters is an interesting question. However, not all assistance to the public service broadcasters is provided at the state's expense. Some advantages derive from a regulatory regime, which favours certain broadcasters over others in that they oblige cable and satellite operators to make available to their subscribers public service channels, meaning that other stations will be excluded where there is limited transmission capacity. Such advantages that are gained from state regulation rather than state finance, fall outside the Community state aid rules, since application of these provisions require funding through state resources.<sup>3</sup> In such cases broadcasters may instead rely on the EC Treaty provisions guaranteeing free movement of services and establishment, but

---

<sup>1</sup> Commission of the European Communities, *Communication on the application of State aid rules to public service broadcasting*, [2001] OJ C320/04. ("The 2001 Commission Communication")

<sup>2</sup> R. Craufurd Smith: 'State Support for Public Service Broadcasting: The Position Under European Community Law', *Legal Issues of Economic Integration* 28(1): 3, 2001, p. 4.

<sup>3</sup> *ibid.* p. 4.

these situations will not be dealt with in this paper, which instead focuses on the state aid rules.

Commercial broadcasters have sought to curb the power of the public service broadcasters by challenging state support using EC competition rules, in particular the rules on state aid laid down in Articles 87-89 of the EC Treaty. Their main arguments have been that public service broadcasters use public revenues to undercut the prices of advertising time, in order to offer unrealistic prices for popular programming and to foreclose developing markets by providing new services, for example internet sites, all leading to distortion of competition.<sup>4</sup> Complaints have been made over funding of new thematic channels introduced by public broadcasters and funding arrangements mixing state aid and income from advertising.<sup>5</sup>

Thus, there is a conflict between competition and the granting of state aid and this problem is of course not limited to the broadcasting sector. There is often a need to balance the requirements of the single market and effective competition with the social policy objectives which lie behind the provision of public services.<sup>6</sup> The conflict lies particularly between the Member States and the Community, since the individual Member State does not want to have its domestic policy choices scrutinised and questioned by the Community institutions. Public service broadcasting is a sensitive field, involving political, social and cultural aspects and thus, Community interference is not welcomed by the Member States.

Balancing the conflicting interests of the Member States, the commercial broadcasters and the Community common market goals can be difficult. In the following, the issue of state funding of public service broadcasting and whether it contravenes the Community rules of state aid will be discussed.

---

<sup>4</sup> R. Craufurd Smith, p.4.

<sup>5</sup> As for new channels see Commission Decisions NN 70/98, *Kinderkanal/Phoenix* [1999] OJ C238 and NN C-88/98, *BBC News 24*, published at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-1998/nn088-98.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-1998/nn088-98.pdf). As for funding arrangements see for instance Case T-46/97, *SIC v Commission* [2000] 3 CMLR 987.

<sup>6</sup> See Commission of the European Communities, *Communication on Services of General Interest in Europe*, COM (2001) 580 final at para. 19.

# 3 The Application of Community State Aid Rules to Public Service Broadcasting

The EC Treaty rules which come into play when dealing with state aid are particularly Article 86-89. Article 3(1)(g), which states that the Community activities shall include a system ensuring that competition in the internal market is not distorted, can also be of relevance since its purpose is reflected as an aim of the state aid rules. Furthermore when dealing with the provisions of state aid, Article 16 on services of general economic interest is of value, since it recognises the importance of the operation of such services. This provision was added by the Treaty of Amsterdam. This Treaty also introduced an interpretative protocol on the system of public broadcasting in the Member States; the Amsterdam Protocol. Moreover, the Commission's 2001 Communication on the application of state aid rules to public service broadcasting is important for the interpretation of the rules in the area.

The system of the state aid provisions basically works like this: Article 87(1), that is fully applicable to the broadcasting sector, states that Member States may not grant any aid which distorts or threatens to distort competition insofar as it affects trade between Member States. If a Member State plan to grant or alter aid, the Commission shall be informed in accordance with Article 88(3). In order to come within the scope of Article 87(1) certain criteria, which will be dealt with in the following, have to be fulfilled. If a measure is classified as state aid, in accordance with Article 87(1), there are still possibilities of considering the aid as compatible with the common market. Exemptions are namely provided for in both Article 87 and 86, which will be further discussed.

## 3.1 The Concept of State Aid: Definition

The concept of aid has been defined as a direct or an indirect economic advantage on a beneficiary, which it would not have obtained in the ordinary course of business.<sup>7</sup> It is important to mention that the term "aid" in Article 87(1) refers to the *effects* of a measure, not to its object, aim or cause.<sup>8</sup> What is relevant when evaluating the lawfulness of a measure is thus which effects the state funding has. However, looking at the case law of the Court of Justice it seems like the aim or purpose of a measure has not

---

<sup>7</sup> Case 61/79, *Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl* [1980] ECR 1205, 1228.

<sup>8</sup> R. Plender: 'Definition of Aid', Biondi, Eeckhout, and Flynn (editors), 2004: *The Law of State Aid in the European Union*, Oxford University Press, p. 6.

always been completely irrelevant.<sup>9</sup> In a limited sense, the objective of the measure may be relevant, particularly when determining whether a certain undertaking or sector has actually received an advantage in relation to others. For instance, when funding is granted in order to resolve imbalance between undertakings created by national legislation, this aim can be taken into account when assessing whether the measure actually confers an advantage or not. Thus, in such cases, as will be seen in the following, the aim may be material when assessing the effects of a measure.

In order for a measure to classify as state aid within the meaning of Article 87(1), there are four cumulative criteria that have to be fulfilled. First of all the aid must be granted by a Member State or through state resources; second it must confer an economic advantage; third it must favour certain undertakings or specific sectors and fourth it has to distort or threaten to distort competition and affect trade between Member States.<sup>10</sup> These criteria are discussed further in the following.

### 3.1.1 State Resources and the Transparency Directive

The first condition for application of Article 87(1) is that the aid at hand is granted by a Member State or through state resources. Most Member States have broadcasters that are owned by the state and financed wholly or in part by public funds. Also amongst the privately owned broadcasters there are those who receive public financing. Some Member States have established funds or obliged users of broadcasting services to pay license fees into a fund or to an organisation and these revenues are subsequently used to pay public service broadcasting companies for providing their services. Article 87(1) applies to all funds that are publicly held or publicly financed and for instance, revenue that a state obtains from taxation and compulsory levies represents a state resource. The provision also applies to parafiscal charges, which are charges imposed on private persons and businesses and paid into a fund which finances an activity, when the existence of the fund and the payments into it are mandatory according to national law. As long as the revenue stays under public control and consequently is available to the competent national authorities, the fund is considered as state resources,

---

<sup>9</sup> See for instance Case C-6/97, *Italy v Commission* [1999] ECR I-2981, Joined Cases C-72/91 and C-73/91, *Sloman neptun Schiffahrts AF v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993] ECR I-887 and Case C-181/91, *Kirshamer-Hack v Sidal* [1993] ECR I-6185.

<sup>10</sup> L. Garzaniti: *Telecommunications, Broadcasting and the Internet: EU Competition Law & Regulation* –2nd Edition. Thomson Sweet&Maxwell, 2003, p. 343. This division of the criteria has been made somewhat differently by S. Coppieters in ‘The Financing of Public Service Broadcasting’, Biondi, Eeckhout, and Flynn (editors), 2004: *The Law of State Aid in the European Union*, Oxford University Press, p. 269. She divides the components into (i) aid provided by the state or in any way funded through state resources (ii) aid favouring certain undertakings or products (iii) aid distorting or threatening to distort competition and (iv) aid adversely affecting trade between the Member States. Materially the divisions into four different criteria are naturally the same, but I have chosen to use the one of Garzaniti, since it appears to be clearer.

even if a private business collects the revenue directly from individuals.<sup>11</sup> Moreover, compensation mechanisms that are used in order to reimburse undertakings entrusted with public service obligations that come with an extra cost can be regarded as a use of state resources.<sup>12</sup>

A problem with the definition of state resources is that it is sometimes hard to draw the line between state resources and transfer of private resources from one undertaking to another. A measure can include transfer of state resources, but it might just mean a redistribution of funds directly between undertakings, depending on the origin of the fund and the level of state intervention.<sup>13</sup> It can also be difficult to assess which resources actually derive from the state and which income derives from commercial activities and if this can not be established, there is a risk that the receiving public service broadcasters allow state finance to leach over and subsidise their commercial activities. Thus, when assessing whether certain revenue derives from state resources or commercial income, it is important to have mechanisms in order to separate the public service activities that a broadcaster carries out from their commercial services. The amended *Transparency Directive*, applying to the audiovisual sector, has developed a framework for the relations between the different revenue sources and how to separate them.<sup>14</sup> The directive's two central purposes are to guarantee transparency in the financial relations between the state and the public undertakings, ensuring that these are proportionate to the public service remit and to ensure transparency and a clear division, including separate accounting systems between the different activities of the public undertakings in terms of public and non-public service activities.

### 3.1.2 Conferral of an Economic Advantage

In order to constitute state aid, a measure must confer some sort of economic advantage on the receiving undertaking. If the funding is not more than a compensation for extra costs incurred by public services performed by the undertaking, there will be no real advantage and the measure can fall outside the scope of Article 87(1) and thus does not classify as state aid. This so called “compensation approach” to funding measures has been applied in the recent judgement in *Ferring*, which will be discussed in more

---

<sup>11</sup> See *BBC News 24* concerning funding of a channel from licence fee revenues and Commission Decision N-631/2001, *BBC Licence Fee*, published at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-2001/n631-01.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2001/n631-01.pdf), concerning the use of increased licence fee to fund nine new digital channels.

<sup>12</sup> For example, the Universal Service Directive (Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services) allows Member States to establish mechanisms to compensate undertakings with universal service obligations for their additional costs incurred in performing such services and these mechanisms may be use of state resources.

<sup>13</sup> L. Garzaniti, p. 346.

<sup>14</sup> Commission Directive 2000/52 amending Directive 80/723 on transparency in the financial relations between the Member States and State enterprises, [2000] OJ L193/75. (“The Transparency Directive”)

detail in section 6.<sup>15</sup> Moreover, a measure can avoid classification as state aid if it satisfies the “market economy investor test”, developed by the Commission and the Court of Justice.<sup>16</sup> This means that if the state has given an economic advantage that the undertaking would not have obtained under normal market conditions, the measure can constitute state aid.<sup>17</sup> If, on the other hand, a reasonable private investor, who expects return on the investment within a reasonable period of time, would have undertaken the financial transaction under the same conditions, the transaction is considered to represent reasonable economic conduct and therefore does not constitute state aid.<sup>18</sup> Thus, when a Member State makes available funds to an undertaking which would normally not be provided by a private investor applying ordinary commercial criteria and disregarding for instance social or political considerations, it grants state aid.<sup>19</sup>

The private investor principle plays an important role in the broadcasting sector, but it can be difficult to determinate if financial support from a particular state, which after the liberalisation of the sector has remained a shareholder in the receiving broadcasting undertaking, would be given by a reasonable private investor. Therefore, a careful economic analysis of the financing under the prevailing circumstances must be carried out in order to determine if the measure constitutes state aid.<sup>20</sup>

### 3.1.3 Specificity

Apart from being granted by the state and conferring an economic advantage on the undertaking, a measure must be *specific* in order to classify as state aid within the meaning of Article 87(1). This means that particular undertakings or the production of particular goods or services must be favoured; general measures that do not confer advantages on certain specific companies or a certain sector are not state aid.<sup>21</sup> This condition of specificity can be at issue when a state imposes a burden, for instance a tax, and subsequently provides exemptions from the tax to certain companies or sectors.<sup>22</sup> When a tax exemption is granted only to one sector of the economy it usually constitutes state aid and for that reason comes within the scope of Article 87(1). However, if a certain sector requires specific rules

---

<sup>15</sup> Case C-53/00, *Ferring SA v Agence Centrale des Organismes de Sécurité Sociale (ACOSS)* [2001] ECR I-9067.

<sup>16</sup> See for instance Commission Communication to the Member States, OJ 1993 C307/3 and the 2001 Commission Communication at para. 17.

<sup>17</sup> R. Plender, p. 8.

<sup>18</sup> L. Garzaniti, p. 348.

<sup>19</sup> Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, [1994] ECR I-4103, para 28. (AG Jacobs)

<sup>20</sup> See for instance *BBC News 24* where BBC license fee revenues were used to fund a new news-channel. This conferred an advantage on BBC, since it did not have to compete for revenue in the advertising market. The market economy investor test was not met, since a private investor would not have invested in BBC News 24 because it could not make a profit due to absence of advertising and charges (para. 73-74 of the case).

<sup>21</sup> L. Garzaniti, p. 348 and R. Plender, p. 21.

<sup>22</sup> For instance, the situation of tax exemption was at hand in *Ferring*. The criterion of specificity was however not a problem here.

due to its nature, the tax exemption will be seen as a general measure and thus fall outside the scope of Article 87(1).<sup>23</sup>

### **3.1.4 Distortion or Risk of Distortion of Competition, Affecting Trade between Member States**

The last criterion a measure must fulfil in order to constitute state aid under Article 87(1), is to distort or threaten to distort competition, thereby affecting trade between Member States. This criterion is interpreted broadly. As for the effect on trade, it is enough that a measure is *capable* of affecting trade between Member States at the present time or in the future. No actual effect on trade is required. For instance, if the receiving undertaking is capable of competing on an international market trade will be seen as affected.<sup>24</sup> It is therefore difficult to exclude a measure from the scope of Article 87(1) on the basis that it does not affect competition and trade between Member States. Even if funding would be given to an undertaking that only broadcast at a local level, the measure can come within the scope of Article 87(1), since the broadcasting activities will reduce the number of consumer watching other programmes. This means that competition will be affected, for example when it comes to competing for advertising revenues.<sup>25</sup>

As for distortion of competition, almost all financing state measures will distort or threaten to distort competition, even if there is only potential competition. The wording of the provision implies that no actual distortion of competition is required; the risk or threat is enough. Even if the Member State only funds undertakings operating within its territory, this can prevent companies from other Member States from offering their services at the same price as the funded national undertaking. This means that if the service at hand also could be provided by other undertakings – national or foreign- than the aided one, Article 87(1) will normally apply.<sup>26</sup> However, as we shall see, Article 86(2) provides for derogation and the evaluation of the distortion of competition and the effects on trade in the common market under this provision seem to be more tolerating. The impact of state aid measures on competition will be further discussed in the following.

---

<sup>23</sup> See Case C-387/92, *Banco Exterior de Espana v Commission* [1994] I ECR 877 and Case C-173/73, *Italy v Commission* [1974] ECR 709.

<sup>24</sup> Case C-730/79, *Philip Morris v Commission* [1980] ECR 2871.

<sup>25</sup> See Case N 548/2001, *Belgian aid in favour of local television in the French Community*, p.4, published at:

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie\\_2002.htm](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie_2002.htm).

<sup>26</sup> L. Garzaniti, p. 351.



### 3.2 Investigation –Existing or New Aid?

Article 88 lays down rules governing the procedure applicable to the Commission's state aid investigations. Since Article 87 is addressed directly to the Member States and not to the undertakings, state aid investigation takes place exclusively between the Commission and the Member States. An investigation is initiated on the basis of notification of an ad hoc aid or aid scheme submitted by the Member States. In the absence of such a notification the Commission can begin investigation on the basis of information received through the press or from complaints, usually made by competitors.<sup>27</sup>

The EC Treaty makes a distinction between existing state aid and new state aid. Different paragraphs of Article 88, dealing with procedure and the Commission's review and investigation obligations, are applied depending on which kind of aid is at hand. The distinction is important since, naturally, funded undertakings can only be obliged to repay illegal *new* aid and not aid that was paid pursuant to a legal obligation undertaken before the Member State that granted the funding joined the European Community.

Firstly, a few comments on existing aid will be put forward. The Member States have funded public service broadcasters for a long time and thus, many of the funding systems are existing aid within the meaning of Article 88(1). Existing aid includes all aid, whether aid schemes or individual aid, which existed prior to the entry into force of the Treaty in respective Member State. It also includes aid that did not constitute aid when it was put into effect, but subsequently became aid due to the evolution of the common market without having been altered by the Member State.<sup>28</sup> Existing aid shall be kept under constant review by the Commission in cooperation with the Member States according to Article 88(1). The Commission shall also propose appropriate measures required by the progressive development or by the functioning of the common market to the Member States. According to case law, they must verify whether or not the legal framework under which the aid is granted has changed since its introduction.<sup>29</sup>

As for new aid, a Member State that plans to grant or alter aid must inform the Commission in sufficient time in order to enable it to submit its comments, according to Article 88(3). If the Commission finds that the plans are not compatible with the common market having regard to Article 87, it shall initiate the procedure laid down in Article 88(2). The concerned Member State must wait to put the measure into effect until the procedure has resulted in a final decision. If the Commission finds that the aid is incompatible with the common market, the Member State shall abolish or alter the aid in question.

---

<sup>27</sup> L. Garzaniti, p. 353.

<sup>28</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (12) Article 1(b)(i) and Article 1(b)(v).

<sup>29</sup> Case-C44/93, *Namur-Les Assurances du Crédit SA v Office National du Dueroire and the Belgian State* [1994] ECR I-3829.

### 3.3 Derogations

As has been mentioned, a measure which is classified as state aid under Article 87(1) can under certain circumstances be considered compatible with the common market and thus be exempted from the prohibition. Out of the derogations laid down in Article 87, the one of (3)(d), relating to promotion of culture, is the only one likely to be applicable to state aid in the broadcasting sector. Another possibility of derogating from the state aid rules is that of Article 86(2), relating to undertakings entrusted with the operation of services of general economic interest. This provision states that undertakings entrusted with the operation of services of general economic interest shall be subject to the competition rules only insofar as their application does not obstruct the performance of their task. In accordance with Article 16, the term “public service” as of the interpretative Amsterdam Protocol has to be intended as referring to the term “service of general economic interest” used in Article 86(2).<sup>30</sup> The derogations will be more carefully analysed in section 5.

### 3.4 The Amsterdam Protocol

Even though the EC Treaty contains rules on state aid, these rules have turned out not to give enough guidance in the field of public service broadcasting. Therefore, an interpretative protocol on the subject was added to the Amsterdam Treaty.<sup>31</sup> The Amsterdam Protocol is a component of the EC Treaty and thus binding on the Member States.<sup>32</sup> It recognizes that public service broadcasting plays an important role in maintaining pluralism in the media and in fulfilling certain social, cultural and democratic needs. The Protocol also deals with the Member States’ competence to provide for financing of public service broadcasting. Such funding shall be granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State. It may not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest. Basically, this means that funding of public service broadcasting does not qualify as state aid in the sense of the Treaty where the financing is granted merely in order to *enable* broadcasters to carry out the public service remit conferred upon them by the Member States.

However, the Amsterdam Protocol did not clarify all issues in the area. For example, questions arose about entertaining programmes

---

<sup>30</sup> The 2001 Commission Communication, para. 9.

<sup>31</sup> S. Coppieters, p. 266.

<sup>32</sup> Protocol on the system of public broadcasting in the Member States, attached to the Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain acts, signed in Amsterdam on October 2, 1997, OJ 1997 C340/109.

possibly being regarded as falling within the public service remit and complaints from private broadcasters kept coming. Thus, there was a need for further clarification in the field. This came in 2001 when the Commission issued its communication on the application of state aid rules to public service broadcasting.

### **3.5 The 2001 Commission Communication**

As we have seen, even though the Amsterdam Protocol was added to the Treaty, neither the Member States, nor the private broadcasters were satisfied. The area needed to be further elucidated and there was a need for practical guidelines in order to implement the principles of the Amsterdam Protocol. Thus, in 2001 the Commission issued a Communication on the application of state aid rules to public service broadcasting.<sup>33</sup> The Communication deals with the legal context and the applicability of Article 87(1) and the derogation possibilities in Article 87(2)-(3) and Article 86(2), for which the proportionality of the measure is essential. The substantive part of the Communication deals with the application of Article 86(2), but it also describes the position of public service broadcasting and emphasises its central role in the functioning of modern democratic societies. Moreover, it confirms the competence of the Member States to define the public service broadcasting remit and accepts a wide definition of this concept. It also emphasises that public broadcasters should be able to keep pace with technological developments. The Communication's wide definition of "public service broadcasting" seems to reflect a change in the Commission's attitude, since it earlier had confined its interpretation of the concept to cultural, educational and news programmes, excluding sports and entertainment programmes. This issue of definition is however still not clarified and it will be further discussed in section 5.

Even though aiming for legal certainty in the area of public service broadcasting, the Commission in its Communication recognises the need for a case by case approach, due to the flexibility needed in the sector. There have been doubts about the relevance of the Communication after the judgement in *Ferring*, but this issue will be discussed later and probably the substantive part will remain unchanged.

---

<sup>33</sup> Commission of the European Communities, *Communication on the application of state aid rules to public service broadcasting*, [2001] OJ C320/04.

# 4 How does State Aid Distort Competition?

State funding can distort competition in various ways, affecting –at least potentially- trade between Member States. As we have seen, it is enough that a measure threatens to distort competition in order to fulfil the criterion of Article 87(1) and even if a Member State only funds undertakings operating within its territory, it can have the effect of preventing companies based in other Member States from offering their services at the same price as the funded national undertaking.

To simplify the problem, it can initially be said that state funding that puts the beneficiary undertaking in a better market position than its competitors, threatens to distort competition. State aid can also lead to productive efficiency loss, since it helps inefficient companies to survive. Furthermore it is argued that even funding that merely constitutes compensation for extra costs induced by public service obligations distorts competition, unless the obligations would have a negative effect on the market supply of services of general economic interest if they were not compensated for.<sup>34</sup> The issue of compensation is discussed more thoroughly in section 6.

In the broadcasting sector, commercial undertakings have argued that state funding of public service broadcasters can distort competition in various ways, particularly through over-funding, cross-subsidisation and market foreclosure. In order to illustrate such competition concerns of private broadcasters and to give a background for the following chapters, the two important Commission decisions of *Kinderkanal/Phoenix* and *BBC News 24* concerning state aid granted to public broadcasters, will be presented at the end of this section after an overview of the different negative effects that state aid can have on competition.

## 4.1 Productive Efficiency Loss

It is clear from the wording of the EC Treaty that both Article 81 and Article 87 seek to protect competition. Article 81 contains a prohibition of agreements, decisions and concerted practices between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition. The antitrust analysis under this provision takes the consumer welfare perspective and it focuses on market definition and market power, i.e. the ability to raise prices or reduce output.

---

<sup>34</sup> See P. Nicolaidis, 'Compensation for public service obligations: the floodgates of state aid', *ECLR* 2003, 24 (11), p. 568-572.

The state aid provision of Article 87, on the other hand, is not concerned with these kinds of harmful market outcomes, since state funding is unlikely to lead to increased prices or restriction of output. Conversely, state aid helps companies to keep prices down. The competition risk of state aid is instead that it helps inefficient companies to compete with more efficient ones, meaning that goods and services will not be produced at the lowest cost possible. When inefficient undertakings survive, competition will be distorted through productive efficiency loss. However, by funding public service broadcasters, the state wants to promote for example cultural aspects or compensate for costs incurred in carrying out a public service obligation and thus, efficiency is not the aim of the measure. Yet, from an economic point of view the society's wealth is wasted. As for consumer welfare, state aid only has an indirect negative impact, since it does not occur at the output stage in the form of higher prices, but rather on the input stage of the production chain. The economic detriment to the society's wealth here takes place indirectly through taxation or licence payments, which funds potentially inefficient high cost production for the subsidized goods or service.<sup>35</sup>

## 4.2 Over-Funding

Over-funding means that the state grants more financial assistance to an undertaking than is strictly necessary in order for it to provide a public service. In the broadcasting sector this distorts competition by enabling the over-funded company to dominate the purchase of attractive programme rights, such as sporting events and films or, if the state funded broadcaster also receives income from advertising, by enabling it to undercut competitors by reducing its advertising rates. One concern in this context is that it is difficult to find a satisfactory test of measuring whether or not the funding is more than necessary in order to cover costs for carrying out the public service. Even when there is no identifiable revenue from the public service obligation, the receiving undertaking may actually benefit from it, because consumers perceive its services being of a higher quality and consequently the demand for them may be boosted. Therefore, the compensation a company receives from the state may in fact exceed the cost or loss of providing the public service in question.<sup>36</sup> This discussion indicates that over-funding can be hard to detect.

---

<sup>35</sup> C. Ahlborn and C. Berg: 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules', Biondi, Eeckhout, and Flynn (editors), 2004: *The Law of State Aid in the European Union*, Oxford University Press, p.48 and p. 58.

<sup>36</sup> P. Nicolaidis, p. 567-572.

### 4.3 Cross-Subsidisation

If an undertaking is over-funded as described above, there will be a risk of cross-subsidisation. Cross-subsidisation means that public funds may spill over from the receiving public service undertaking into other non-public service commercial activities carried out by the same undertaking or by its associated companies. If an undertaking receives funding for performing certain public services and this undertaking also operates in another market, there is a risk that it allows its inefficiency to increase in the market where it receives subsidy, while becoming more competitive in the other market by allocating its fixed costs to the market where its activities are funded.<sup>37</sup>

Lately, several public service broadcasters throughout the Community have involved themselves in commercial activities such as cable or satellite services, internet services and the publication of books and magazines in order to maintain their revenue stream. These activities are often strictly commercial and if the broadcaster is funded by the state for carrying out public service obligations, these subsidies may filter over to such commercial activities of the broadcaster or its associated undertakings and thus distort competition in the relevant markets. The *Transparency Directive*, as mentioned above, deals with this issue, requiring separate accounting systems being kept in order to separate public service activities from commercial ones.<sup>38</sup>

### 4.4 Market Foreclosure

Market foreclosure is another negative effect that state aid can have on competition. Sometimes the very existence of state funded public service undertakings can prevent further market development or even drive other operators out of the business. It might namely be uneconomic for these other un-aided operators to develop new services. For example, in the broadcasting sector, many public service broadcasters has started to develop additional thematic channels and new internet sites and through the state funds, they can do this without having to solely depend on advertising revenues. This makes it harder for other undertakings to enter these new markets and to compete in them, since it would be uneconomic to do so. This naturally prevents the development of new markets.<sup>39</sup>

An attractive solution to this problem for the commercial broadcasters could be to impose a ban on receipt of advertising revenues by public service broadcasters, since this would at least leave competition for such income undistorted in the new markets. Moreover, a redefinition of public service provision to exclude the transmission of the most popular genres such as film and sports programmes could benefit commercial

---

<sup>37</sup> For a more detailed economic analysis on this, see P. Nicolaidis, p. 568-572.

<sup>38</sup> See the Transparency Directive, Article 1(2).

<sup>39</sup> See *Kinderkanal/Phoenix* and *BBC News 24*.

broadcasters wanting to introduce for example new specialist channels.<sup>40</sup> However, if this approach were to be followed, the public broadcasting sector would be very much a rump service, solely dependent on state resources.

## 4.5 Complaints on State Aid

The Commission has decided two important cases concerning the introduction of new thematic channels; *Kinderkanal/Phoenix* and *BBC News 24*. These funding situations were brought before the Commission by private broadcasters. In the context of this chapter, the presentation of the cases will focus on the complaints alleging that the state funding in question amounted to illegal state aid, distorting competition in various ways. Classification of a measure as state aid will be briefly presented here, but the important aspects of derogation possibilities that were addressed in the decisions will be more thoroughly dealt with in section 5, where Treaty-based exemptions from the state aid rules are discussed.

### 4.5.1 *Kinderkanal/Phoenix*

In 1997 several private broadcasters filed a complaint against the Federal Republic of Germany, alleging that the state aid rules of the EC Treaty were infringed by illegal granting of incompatible state aid to two public broadcasters for the operation of two specialist channels; *Kinderkanal* and *Phoenix*. These channels were advertising-free and thus did not receive any commercial income. Instead they were funded entirely by broadcasting receiver fees. *Kinderkanal* offered children's programmes that included a high share of information and were free of violence and advertising, while *Phoenix* was an event and documentation channel, delivering information about politics and society, promoting democratic debate and European integration. The alleged state aid that the channels received was said to be granted in the form of transfer of funds from the broadcasting receiver fee and in the form of preferential access to the cable network.

The complainant argued that the public funding through the receiver fees favoured the public broadcasters and consequently constituted state aid. Only if the funding merely compensated for extra costs of the public broadcasters, it should avoid the classification as state aid, since the funding in that case would not put them in a better competitive position compared to their competitors. The complainant considered that the funding distorted competition and affected trade within the Community. Therefore it was argued that the financing constituted illegal and incompatible state aid under Article 87. The complainant subsequently argued that the derogation in Article 86(2) did not apply, since the programme contents delivered by *Kinderkanal* and *Phoenix* would also be offered by private operators and

---

<sup>40</sup> See discussion by R. Craufurd Smith, p.4-5.

thus, no general economic interest could be seen in a service already provided by the market. The complainant considered the channels not to constitute such basic services that could be reconciled with services of general economic interest.<sup>41</sup> This issue of the definition of public services will be further analysed in section 5, but in the context of distortions of competition it can be noted that the argumentation alleging that the funding constituted state aid shows that the private broadcasters were concerned about over-funding of the channels at hand; something that would put these channels in a comparably advantaged position and possibly lead to cross-subsidisation and market foreclosure.

In its decision the Commission held that the broadcasting receiver fee constituted state funds within the meaning of Article 87(1). Since these funds were only available for public broadcasting operators and not for private ones, the public broadcasting corporations were considered to be favoured when compared to their private competitors. Since the compensation for providing the public services was not fixed as a result of the operation of the market, it could not avoid classification as state aid. However, the financing was accepted under Article 86(2), since the conditions of this provision were held to be fulfilled. The Commission considered itself competent to assess the question of whether or not the special interest channels could be understood as services of general interest, but it recognized that the Member States retained the prerogative to define a service of general interest. Since the thematic channels were officially entrusted by the German authorities with the provision of a specific service, and since these kind of advertising-free channels would not exist without state aid, the funding –conforming to the criterion of proportionality- was exempted under Article 86(2).

The second competition question of the case related to the privileged access to the cable network that *Kinderkanal* and *Phoenix* enjoyed. The complainant alleged that this constituted illegal state aid, since the priority access favoured the two channels, pushing other private programmes out of the cable network. This seriously affected the viability of the private broadcasters because they depended on advertising income and thus on audience. By not being granted the same access to the network they would reach less viewers. The complainant considered competition to be distorted and trade affected.<sup>42</sup>

The Commission rejected this argument and considered the granting of access to the cable network not to constitute state aid within the meaning of Article 87(1), even if it conferred a competitive advantage compared to competitors by giving access to a larger number of potential viewers. The criterion of “transfer of state resources” was namely not fulfilled, since there was no financial advantage conveyed by the state and since there was no advantage that was not also enjoyed by other broadcasters transmitting over the cable network.<sup>43</sup>

---

<sup>41</sup> *Kinderkanal/Phoenix*, para. 21-22.

<sup>42</sup> *Ibid.* para. 23.

<sup>43</sup> *Ibid.* para. 36-39.



It can be noted that in its application of Article 86(2) in *Kinderkanal/Phoenix*, the Commission had to balance between the concerns of distortion of competition and the common interest. In doing so it expressed that even where state financing would lead to economic difficulties for competitors, such effects were to be accepted under Article 86(2) in the present context in order to ensure delivering of services of general economic interest. The Commission stated that Article 86(2) accepts a certain effect on competition and trade as a consequence of ensuring the supply of public services. Moreover, it declared that even though the development of trade was affected in the case of *Kinderkanal/Phoenix*, it was not affected to an extent contrary to the interest of the Community.<sup>44</sup>

It is thus clear from this decision that the Commission accepts some distortions of competition, if such distortions are necessary in order to ensure public service programming to be provided. Even if state aid distorts competition it can consequently be granted exemption and the private operators will in such cases have to accept some competitive disadvantages compared to undertakings entrusted with public service obligations.

#### **4.5.2 BBC News 24**

The *BBC News 24* decision addressed a similar situation as the one at hand in *Kinderkanal/Phoenix*. A public service broadcaster, *BBC*, had introduced a new specialized channel, *BBC News 24*, transmitting news. This channel was in direct competition with other special interest channels also dedicated to news. The commercial broadcaster *BSkyB*, alleged that the funding of *BBC News 24* by license fee constituted state aid within the meaning of Article 87, since it conferred a competitive advantage over the existing commercial channels and thus distorted competition. *BSkyB* also claimed that the funding affected trade between Member States, since it hindered the potential development of commercial news channels. In this argumentation a concern about distortions of competition, particularly market foreclosure can be perceived.

The Commission agreed with the complainant that the funding from licence fee constituted state aid. However it went on to assess whether this aid could be exempted, again focussing on the derogation of services of general interest in Article 86(2). The complainant had argued that the aid did not qualify for exemption under Article 86(2), since the channel was an ancillary service and hence not part of the public service tasks as defined by the authorities. Moreover, the complainant had pointed out that an important part of the license agreement in question was to provide a universal geographic service, but that *BBC News 24* failed to reach a majority of the UK households and thus should not be exempted.<sup>45</sup> However, the Commission did not agree with *BSkyB* on this point. Again, it stated that it was for the Member States to define the remit of services of general interest, particularly in the broadcasting sector, pursuant to the Amsterdam

---

<sup>44</sup> *Kinderkanal/Phoenix*, para. 69.

<sup>45</sup> *BBC News 24*, para. 44 and 59.

Protocol.<sup>46</sup> Consequently, the Commission restricted its role into judging on the proportionality of the funding and ensuring that the funding did not affect trade contrary to the common interest, making sure that the Member State's definition of service of general economic interest did not go beyond the Community notion of the concept.<sup>47</sup> The Commission thus rejected the complainant's point that the channel did not fall under the public service remit. As for the universality of the service, the Commission held that it was sufficient that *BBC News 24* attempted to reach as many households as possible.

Finally, and illustrative for the problem of distortion of competition, the Commission addressed the issue of proportionality and once more it acknowledged that some distortions of the market, having an impact on the development of trade, had to be accepted as a consequence of the provision of service of general interest. It stated that the specialist news channel, provided free of charge and with no advertising, would not have been provided without the aid in question and that its introduction enriched the choice of UK consumers. Even though the launching of *BBC News 24* had a significant impact on the broadcasting market, reducing the market shares of other operators, the effects on competition and trade were held not to be excessive. The *development* of competition and trade in the sector was namely considered not to be precluded. Thus, again the Commission confirmed that distortions of competition can be accepted as a consequence of safeguarding the supply of public services.

In conclusion, it seems like only if the distortions of competition and trade caused by state funding of public services are more serious and if they change the structure of the market, threatening to preclude its development, competition concerns will be put before public service interests. Naturally, this is a situation not very much appreciated by commercial broadcasters. The Member States on the other hand, have been entrusted a significant role in defining the public service remit of broadcasting.

---

<sup>46</sup> *ibid.* para. 42.

<sup>47</sup> *BBC News 24*, para. 48-49.

# 5 How can the Member States Avoid the State Aid Rules?

In order to protect their public service broadcasting the Member States have sought to escape the state aid rules of the EC Treaty. The consequences of finding aid incompatible with the common market under Article 87(1) are namely significant. Apart from the state being prevented from providing the aid in the future, the granted funding may have to be repaid, if it is not aid that existed prior to the state joining the European Community. This would naturally be a heavy burden on the funded broadcasters.

In order to avoid conflict with Article 87(1) the Member States can use different strategies. They can challenge the applicability of the provision, arguing that the Community institutions should adopt a restrictive interpretation of its scope, or they can organise their funding schemes in a way that will avoid contravening the article. There are also Treaty-based exemptions to the state aid rules. These strategies and their efficacy will be discussed below.

## 5.1 Challenging the Applicability of Article 87(1)

One way for the Member States to try to take funding of public service broadcasting outside the scope of the state aid rules is to argue that Article 87(1) is not applicable to the funding measures at all. There are different ways in which they can motivate this argument, but the possibilities of successfully doing so have until recently been small. The argument that public service broadcasting is not economic in nature has, as we shall see, not been very successful. On the other hand, it seems to be possible to escape application of Article 87(1) on the ground that the funding in question merely constitutes compensation for extra costs incurred on the receiving undertakings by their public service obligations. This escape route has been given high relevance since the recent *Ferring* judgement. The consequences of this last approach and the possibilities of using it in the future will be discussed in more detail in section 6.

### 5.1.1 Public Service Broadcasting not Economic in Nature

One approach that the Member States could use in order to avoid the state aid rules is to argue that public service broadcasting is not economic in nature and thus not caught by the EC Treaty provisions on the internal market and on competition. It is possible to argue that instead of having economic reasons, the provision of public service broadcasting is built around an ethos of solidarity, since all television viewers usually pay the same licence fee, regardless of how expensive or cheap it is to broadcast to

them and regardless of if they watch cheap or expensive programmes or if they do watch any public service programmes at all. This “solidarity approach” has been a successful way of escaping the EC Treaty rules in cases concerning education and social security schemes.<sup>48</sup> However, the broadcasting sector is highly competitive and even public service broadcasters which rely entirely on state funding, without receiving income from advertising, engage in commercial activities such as the sale and purchase of programme rights. Only activities that are completely not profit-orientated and do not mean to engage in industrial or commercial activities, escape the Community competition and internal market rules. As a consequence, the many commercial activities of the public service broadcasters, which can be hard to separate from the non-commercial ones, will be subject to these rules.<sup>49</sup> Thus, it is difficult to argue with success that public service broadcasting is not economic in nature.

Moreover, public service broadcasters do not avoid being classified as “undertakings” within the meaning of Community law.<sup>50</sup> This term has been defined as “every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.<sup>51</sup> Thus, it seems like funding of public service broadcasting can not escape Article 87(1) on the ground that public service broadcasting is not economic in nature. The commercial activities of the public service broadcasters and the fact that they classify as undertakings means that the area is economic in nature.

### 5.1.2 Funding Merely Constitutes Compensation

Since the argument that public service broadcasting is not economic in nature seems less successful, the Member States can instead try to escape application of Article 87(1) by establishing that the funding constitutes payment for a reciprocal public service. In cases where a broadcaster receives payment for performing a service that is not competitive, the

---

<sup>48</sup> In Case 263/86, *Belgium v Humbel* [1988] ECR 5365, the Court of Justice held that in establishing a national education system, Member States did not seek to engage in gainful activity but rather to fulfil their duties to the population in the social, cultural and educational fields. Moreover, in Joined Cases C-151/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon* and *Daniel Pistre v Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans* [1993] ECR I-637, the Court emphasised the social objectives underpinning the provision of certain social security schemes and concluded that they did not carry out economic activities, due to *inter alia* the strong element of solidarity among the participants.

<sup>49</sup> See European Commission: *Communication on services of general interest in Europe* COM(2000), 580 final at para 30. The Communication mentions non-economic activities of for instance organisations like trade unions, political parties, churches and religious societies, consumer associations, charities and aid organisations as examples of what can be excluded from the EC Treaty common market and competition rules.

<sup>50</sup> The broadcasters in *Kinderkanal/Phoenix* and *BBC News 24* were classified as undertakings by the Commission.

<sup>51</sup> Case C-67/96, *Albany International BV v Stichting Bedrijfspensioen fonds Textielindustrie* [1999] ECR I-5751, para. 77.

payment does not necessarily constitute a financial advantage. This argument has been put forward in several cases during the last decades and the Community has been somewhat inconsistent in its approach to it. In the mid-1990s, this “compensation-argument” was submitted by Member States and in *SIC*, a case concerning financing of public television, the Commission adopted the compensation approach, reasoning that payment for universal coverage and religious or artistic programmes did not represent a financial advantage, since these activities were non-competitive.<sup>52</sup> However, the Court of First Instance annulled the decision, holding that state finance must be considered as aid where it constitutes an economic advantage that the broadcaster could not have obtained under normal market conditions. The fact that a reciprocal service was provided for the payment was not itself sufficient for the funding to escape Article 87(1) and the funding thus classified as state aid within the meaning of this provision.<sup>53</sup> This line of reasoning was followed in several subsequent cases.<sup>54</sup> However, this “state aid approach” has to be reassessed in the light of the European Court of Justice’s ruling in *Ferring*. This judgement seems to re-open the possibility for the Member States to bring funding measures outside the scope of Article 87(1) on the ground that they merely constitute compensation for public service obligations. Even though the case does not concern the broadcasting sector, it should be possible to apply its principles there. The decision runs directly counter to the one in *SIC*, since it means that compensation that an undertaking receives from a state for discharging public service obligations does not constitute state aid within the meaning of Article 87(1) as long as it corresponds to the additional cost incurred by these public service obligations. The compensation argument thus seems to represent an escape-route for the Member States. However, as will be shown later, it can be difficult to prove that a funding measure does not exceed mere compensation for the extra cost -if there actually is any extra cost at all- of providing a public service. Thus, even if the compensation approach seems to be an easy way out of the scope of Article 87(1), the argument might not just be enough to avoid application of the provision. As will be shown later, the recent judgement in *Altmark Trans* has limited the Member States’ possibilities to apply the compensation approach.<sup>55</sup> A more detailed discussion of the *Ferring* decision, of its impact and of its pros and cons and of *Altmark Trans*, will be presented in section 6.

## 5.2 Structuring Public Service Provision to Avoid Conflict with Article 87(1)

Instead of challenging the applicability of Article 87(1), the Member States can structure their public services to avoid any conflict with the state aid

---

<sup>52</sup> See the Commission Decision NN-141/95, *SIC* [1997] OJ C67/10.

<sup>53</sup> Case T-46/97, *SIC v Commission* [2000] 3 CMLR 987.

<sup>54</sup> *Kinderkanal/Phoenix and BBC News 24*.

<sup>55</sup> Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

rules. This can be a useful strategy when a Member State suspects that the argument that public service broadcasting is not economic in nature will not be accepted or when it is doubtful that the funding only amounts to compensation for carrying out a public service. As will be shown, there are various ways in which the Member States can structure their public service provision.

### **5.2.1 Allocating Frequencies and Awarding Operating Licences**

In order to avoid the state aid rules the Member States could of course refrain from financing public service broadcasting at all, leaving it to rely solely on advertising incomes, but a less drastic way of avoiding conflict could be to allocate frequencies, grant network access or award operating licences in order to extract public service commitments from domestic broadcasters. This would mean that supply of public service broadcasts would be secured without involving state financing at all, since transmitting public service programmes would be a precondition for the very use of certain operating space or for obtaining an operating license. However, broadcasters not providing public service programmes would probably oppose to this, since access to networks or reception of operating licence means access to a larger number of potential viewers, giving a competitive advantage when competing for advertising revenues. This would be a serious problem in situations where both public service broadcasters and non-public service broadcasters rely on income from advertising and the strategy thus does not seem to be a good solution.<sup>56</sup>

### **5.2.2 Commercial Funding**

Alternatively, public service broadcasters could be required to rely solely on commercial funding such as subscription income instead of state support. This solution would have the positive consequence that viewers would not be forced to pay for a whole package of services, including programming they did not watch; instead they would only have to pay for services they actually wanted. However, state funding in this area has the intention of protecting broadcasters from commercial pressure created by reliance on subscription or advertising revenues. If commercial funding would be the solution, this could threaten the Member State's own assessment within its own territory of in which way to secure the supply of a certain service and what quality that service should have. Thus, letting the public service broadcasters rely on commercial funding seems like an unappealing option

---

<sup>56</sup> See the Commission's discussion *Kinderkanal/Phoenix* at para. 36-38. The granting of access to cable network was not regarded as state aid within the meaning of Article 87(1), but it was admitted that such access conferred a competitive advantage on the favoured undertaking compared to its competitors. The complaining commercial broadcasters had wanted the privileged access to be classified as state aid and they expressed concerns about being disadvantaged in the competition for advertising income.

for the Member States. Nor would the commercial broadcasters be satisfied with this strategy, since the adoption of it would mean that they would be exposed to even more strong competition for advertising and sponsorship revenues from the already well established public broadcasters.<sup>57</sup>

### 5.2.3 Open Competition

Another way of structuring public services in order to avoid conflict with Article 87(1) could be to award financial assistance only after having held an open competition. This strategy is closely connected to the compensation argument described above, since it means that financial assistance for providing public services will be awarded to the company that can provide the service in question for the lowest price. This would have the positive effect of minimising the risk of over-compensation. This open competition approach has been expressed by the Court of Justice in its recent *Altmark Trans* judgement, that was mentioned before, as an element in the assessment of whether compensation represents an advantage or not. The approach was approved by the Commission even before the *Ferring* case, when it in its *Kinderkanal/Phoenix* decision expressed that where compensation for services was fixed as a result of open competition, it would not be considered as state aid. When market forces decide which undertaking will be selected, which will be the case when all firms have the same chance to offer their services, stipulating what payment they would require and when the selection is done according to objective and justified criteria, the funding will escape Article 87(1).<sup>58</sup>

Adopting this open competition approach could have major impact on the structure of public service broadcasting in Europe. Several Member States have only one or two “institutional” public service broadcasters that have developed a certain public service ethos. Using an open competition procedure could lead to this ethos being set aside, since cost considerations would have to dominate. This could mean lowering of standards. Moreover, large amounts of the public money previously granted to these institutional public service broadcasters could be spent in preparing the tender. Another risk of entrusting public service broadcasting obligations only after having held an open competition procedure, is that different broadcasters could be selected for different contractual periods. To regularly alter providers of public service broadcasting could mean that each provider would have less commitment and focus and that there would be no consistency. Thus, always holding open competition before entrusting a broadcaster with public service obligations and subsequently finance this broadcaster, does not seem like the most attractive solution to the Member States. However, this approach has been favoured by the Community and it

---

<sup>57</sup> See for example R. Craufurd Smith, p. 5-6.

<sup>58</sup> See *Kinderkanal/Phoenix*.

would have the positive effect of increasing competition. A discussion of recent case law pointing in this direction will be put forward in section 6.<sup>59</sup>

#### 5.2.4 Financing Entirely out of Public Funds

A final way to structure funding of public service broadcasting in order not to contravene the state aid rules of the EC Treaty is to let the entire payment for the services be made out of public funds, meaning that the state financed undertakings would not engage in competition for advertising or subscription income at all. When looking at Commission decisions, it seems like the Commission considers this strategy of funding public service broadcasting solely out of public funds, such as licence fees, to be lawful.<sup>60</sup> Furthermore, even though the proposal has been considered controversial, the Commission's Competition Directorate General has suggested that since broadcasters solely funded by the state would not be competing directly for advertising revenues, distortion of the market would be reduced to an acceptable level.<sup>61</sup> Financing the activities of a restricted number of designated public service broadcasters entirely out of public funds would also be welcomed by the commercial broadcasters, since competition for advertising and subscription income would be reserved for their sector.

However, adopting this alternative would require a radical restructuring of the broadcasting sectors in many Member States and for that reason it would be very expensive. Moreover, it would curtail the Member State's freedom to regulate their audiovisual sectors. Some Member States, namely the UK, Belgium, Finland, Sweden and Denmark, still have public service broadcasters that are solely funded by the state, but the majority of public broadcasters in the Community receive income from both public and commercial sources. The cost of replacing these commercial revenues, such as advertising income, with public ones would be great and therefore it seems to be an unattractive option to the Member States. Rather, the Member States will probably want the dual funding system that is commonly practiced to be considered legitimate under the state aid rules.<sup>62</sup> This dual funding is not per se against Community law, but competition in the relevant market, e.g. advertising and acquisition and sale of programmes, must remain unaffected to an extent not contrary to the Community interest.<sup>63</sup>

Even if the Member States would choose to shift to a system of solely state funding of public service broadcasters, there is no guarantee that such a system would comply with Community law. Market distortions

---

<sup>59</sup> A similar approach has been expressed by the Commission in its *Communication on services of general interest in Europe* (2000), however in this context as a basis for concluding that the requirements in Article 86(2) have been met.

<sup>60</sup> See *Kinderkanal/Phoenix* and *BBC News 24*.

<sup>61</sup> Directorate-General for Competition of the European Commission, internal discussion paper '*Application of Articles 90, paragraph 2, 92 and 93 of the EC Treaty in the broadcasting sector*' (mimeo, 1998).

<sup>62</sup> See R. Craufurd Smith, p. 5.

<sup>63</sup> See the *Communication on Services of General Interest in Europe*, at 36.



could still occur, for example in the form of over-funding, leading to competition distortion in the bidding for attractive programming or cross-subsidisation of commercial activities. Moreover, for instance an introduction of a new state funded station may have major repercussions for existing commercial broadcasters, leading to market foreclosure. These concerns are illustrated by the fact that the Commission in its *Kinderkanal/Phoenix* and *BBC News 24* decisions did not regard the circumstance that the public broadcasters were funded entirely by the state as *in itself* excluding the application of Article 87(1). Instead, the Commission undertook a careful examination of the impact of the new channels on the existing market. Therefore, even if funding of public service broadcasters entirely out of public funds is unlikely to contravene the Community rules, it is not excluded that they may in certain cases do so.

### **5.3 Treaty-Based Exemptions in Article 87**

Instead of trying to restructure their schemes of financing public service broadcasting, or arguing that Article 87(1) is not applicable to the funding measure in question, the Member States have the possibility to rely on the derogations provided for in the EC Treaty. Even if a funding measure classifies as state aid, some types of aid, listed in paragraphs 2 and 3 of Article 87, can namely be considered compatible with the common market and are thus not prohibited. Article 87(2) concerns aid paid to consumers or to make good damages by natural disasters and is clearly inapplicable to state funding in the broadcasting sector. Most of the derogation possibilities of Article 87(3) are likewise inappropriate for the broadcasting sector, but the one of 87(3)(d), concerning promotion of culture and heritage conservation, can possibly be applied to the area. Moreover, Article 86(2) that will be discussed in subsection 5.4, provides for derogation for services of general economic interest and this provision is the one most frequently and successfully relied on when it comes to state funding of public service broadcasting. It is to be kept in mind that when it comes to derogation from the EC state aid rules, national policy interests are not enough; the broadcasting service must fall within Article 87(3) or 86(2) in order for the funding to be exempted from the prohibition. Since these provisions are derogations from the fundamental rules, the starting-point is that they should be interpreted strictly. To begin with, the derogation possibility in Article 87(3)(d), which seems to be applicable in the broadcasting sector will be analysed.

Article 87(3)(d) provides for exemption from the state aid rules when a measure promotes culture. When dealing with the concept of “culture”, some attention should firstly be paid to Article 151, introduced by the Maastricht Treaty. This provision declares that the Community is to contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity. Moreover, it states that the Community shall take cultural aspects into account in its action under other provisions of the EC Treaty and it also excludes harmonisation in the

cultural field. Thus, Article 151 emphasises national diversity and the subsidiary nature of Community intervention. Even though the provision does not deprive the Commission of any power that it holds to ensure compliance with the competition and state aid rules, it seems to imply that these powers should be exercised with caution where they impact on domestic policy in the cultural domain. However, it is questionable if the term “culture” has the same meaning in Article 151 as it does in Article 87(3)(d), but if that is the case, the principles of diversity and subsidiarity, set out in the former provision definitely should apply also to the latter.<sup>64</sup>

Article 87(3)(d) states that aid granted in order to promote culture and heritage conservation may be considered compatible with the common market, where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest. This seems to be an exemption applicable in the broadcasting sector, at least to the extent that the broadcasting activities can be classified as cultural. However, the problem is that there is no definition of the term “culture” in the EC Treaty and since Article 87(3)(d) constitutes a derogation, it should be interpreted strictly.<sup>65</sup> Even though derogations from fundamental rules normally are given a strict interpretation, some Community documents want to give the concept of culture a broader scope. The Commission has namely expressed that in order to reflect the rapidly developing society, the interpretation should no longer be restricted to “highbrow” culture such as fine arts, music, dance and literature. It has recognised the need to let the term comprise also popular culture, mass-produced culture and everyday culture. Moreover, the Commission has expressed that the new information and communication technologies, which give scope for new areas of culture, offer considerable opportunities for mutual understanding, cultural dialogue, transmission of ideas and information on cultural output.<sup>66</sup> The audiovisual industry has been referred to as a cultural industry *par excellence*, since it has major influence on what citizens know, believe and feel and since it plays a crucial role in the transmission, development and construction of cultural identities.<sup>67</sup> This implies that the interpretation of the concept of culture in the sense of Article 87(3)(d) can be wider, and if this understanding of the term is correct, public service broadcasting should come within its scope, since television is an important medium reflecting cultural practices and making it possible to explore new cultural phenomena.

Thus, having assumed that the term culture in Article 87(3)(d) probably includes the larger part of the activities of public service broadcasters, it is surprising that the Commission in its

---

<sup>64</sup> The 2001 Commission Communication refers to Article 151 under the title ‘The Legal Context’ as a possible compatibility clause. The provision is also mentioned in para. 26 of the Communication.

<sup>65</sup> See *Philip Morris v Commission*.

<sup>66</sup> European Commission, *Communication to the European Parliament, the Council and the Committee of the Regions: First European Community Framework Programme in Support of Culture (2000-2004)*, COM (1998) 226 final at 3-4.

<sup>67</sup> European Commission, *Communication on Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age*, COM (1999) 657, final at 8.

*Kinderkanal/Phoenix* decision held that the concept should be limited to a generally accepted sense and that it should not be extended beyond this.<sup>68</sup> The approach of the Commission is clearly inconsistent. Here it seems like the Commission wanted to distance itself from the broad interpretation just described, focussing on highbrow culture instead. Neither *Kinderkanal*, nor *Phoenix* was concerned with fine arts; instead the channels offered children's and current affairs programming and they were both held to fall outside the scope of Article 87(3)(d).

The inconsistency in the Commission's approach is somewhat illustrating of the problem of applying the culture-based derogation to the broadcasting sector. An aid measure only qualifies for exemption under Article 87(3)(d) if its purpose is exclusively to promote culture. Since most public broadcasters have very general public service obligations, including cultural, educational and informative programming, it is difficult to bring them within the scope of the derogation. Benefiting from the exemption seems to be possible only when the funding is provided exclusively for the cultural aspects. This approach and the decision in *Kinderkanal/Phoenix* have been criticised since, on the basis of Community law, it should be for the Member States to determine what falls within their own cultural policies, including media pluralism and that the Commissions should simply consider if the aid measure in question affects trade and competition to an extent contrary to the Community interest.<sup>69</sup> This is an illustrative example of how the Member States' interests often clash with Community interests in the field of state aid.

As we have seen, the Commission itself is inconsistent in its approach on how to interpret the term culture. A possible explanation for this could be that the Commission is divided into separate Directorates-Generals focusing on different issues. The Directorate-General for Education and Culture, working with shaping cultural policy for the Community, is likely to have a different standpoint than the Competition Directorate-General and thus, tensions within the Commission itself can be found in the area.

Another example of the Commission's inconsistency can be revealed when examining other cases, not directly concerning broadcasting. The interpretation of Article 87(3)(d) then namely seems to be more expansive than the *Kinderkanal/Phoenix* decision implies. A more tolerating approach can be seen when looking at the Commission's view of state aid for national film and audiovisual industries; sectors that can be related to the broadcasting area. The Commission has namely approved aid for the Irish film industry in support of amongst other things documentaries that were of particular Irish interest and significance.<sup>70</sup> Here, the Commission's reasoning took national interests, including history and social practices into

---

<sup>68</sup> *Kinderkanal/Phoenix*, para. 4.

<sup>69</sup> L. Garzaniti, p. 352.

<sup>70</sup> Decision N 237/2000, Ireland: extension of aid schemes to film and TV production, SG(2000) D/107013, published at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-2000/n237-00.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2000/n237-00.pdf). See also Council Resolution of the 12 February 2001 on national aid to the film and audiovisual industries [2001] OJ C73/3.

account when defining the term culture. Following this interpretation should mean that state aid supporting programming including such aspects, has the possibility to benefit from the derogation in Article 87(3)(d).

Before concluding, it is important to stress that giving Article 87(3)(d) a very broad interpretation would lead to a situation where the Member States could argue that almost any activity would constitute a manifestation of popular culture, mass-produced culture or everyday culture as earlier expressed by the Commission. Therefore the stricter interpretation seems to be preferred by the Commission. The more narrow interpretation given to the term in the *Kinderkanal/Phoenix* decision and also confirmed in the 2001 Commission Communication, makes Article 87(3)(d) more manageable. The provision can probably be used where a broadcaster offers a service focussing on more traditional arts, such as literature, music, painting and dance, or when it provides information on a country's history and social practices. However, the derogation in Article 87(3)(d) seems inapplicable to other kinds of programming. The Commission has recently expressed that unless a Member State provides for separate definition and separate funding of state aid to promote culture alone, such aid cannot generally be approved under Article 87(3)(d).<sup>71</sup> Separating funding of cultural programmes from funding of other programmes can be difficult when making an evaluation of the legality of state aid granted to a public service broadcaster. This means that Article 87(3)(d) is not the ultimate provision to rely on when trying to legitimise state funding, considering that most public broadcasters offer a wide range of programming, of which far from all are of artistic or national interest as opposed to, for instance educational or political interest. It is to keep in mind that the Court of Justice has ultimate authority to interpret the Treaty and as for the scope of Article 87(3)(d) there has not been clear guidance yet. However, bearing in mind the discussion above, it seems to be easier for the Member States to rely on Article 86(2) instead when trying to legitimise state aid under the Treaty based derogations.

## **5.4 Treaty-Based Exemption in Article 86(2): Services of General Economic Interest**

Relying on Article 86(2) seem to be the best way for the Member States to escape the prohibition laid down in Article 87(1). The provision provides for derogation possibility from the state aid rules. It states that undertakings entrusted with services of general economic interest shall be subject to the EC Treaty rules, in particular the competition rules, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular task that is assigned to them. Moreover, the

---

<sup>71</sup> 2001 Commission Communication 2001, para. 27.

development of trade must not be affected to such an extent as would be contrary to the interests of the Community. Community criteria and not national considerations will here be determining. When assessing whether these conditions are met or not in cases concerning the broadcasting sector, the Commission has to take account of the Amsterdam Protocol. In the analysis of Article 86(2), the definition of services of general economic interest, i.e. the public service remit, entrustment and supervision and the proportionality test are important elements.<sup>72</sup> A discussion of the different criteria that have to be fulfilled in order for the derogation to be applied will now be presented, beginning with a short note on entrustment and supervision.

### 5.4.1 Entrustment

The derogation in Article 86(2) is only applicable to state aid granted to undertakings that are *entrusted* with a public service remit. The Commission has stated that this entrustment shall be formally made, for example by legislation, contract or terms of reference. Moreover, the entrusted public service must actually be performed as provided for in the formal agreement and in order to ensure this, an authority or an appointed body should monitor the application. Without indications from such a body, it would be difficult for the Commission to evaluate the situation under Article 86(2) and thus no exemption under the provision could be given. Arranging this supervision mechanism of the fulfilment of the public service obligations lies within the competence of the Member States, but it is of importance that the body assigned to carry out the task of supervision is independent from the entrusted undertaking.<sup>73</sup> Thus, a precondition for a Member State to bring a funding measure within the derogation laid down in Article 86(2) is to officially entrust a broadcaster with a certain public service remit and to make sure the entrusted broadcaster actually supplies the entrusted service.

### 5.4.2 Definition

According to Article 86(2), only public service broadcasting that falls within the concept of “services of general economic interest” will benefit from the derogation. Thus, the meaning of this concept has to be defined. It is difficult to establish exactly which are the activities that can be considered as services of general economic interest, but the concept seems to cover key services that in a modern society are generally regarded as essential for a socially acceptable standard of living.<sup>74</sup> For example, basic utilities such as water, gas and electricity that are subjected to rate regulation and obligations of universal coverage and key communications

---

<sup>72</sup> See the 2001 Commission Communication and S. Coppieters, p. 271.

<sup>73</sup> 2001 Commission Communication, para. 40-43.

<sup>74</sup> D. Edwards and M. Hoskins, ‘Article 90: Deregulation and EC Law. Reflections Arising From the XVI FIDE Conference’ (1995) 32 *CMLR*. 157 at 168-9.

and transport services are likely to fall under the concept.<sup>75</sup> Naturally, it is the Court of Justice that has the ultimate authority for interpreting the notion. The Court has held that services of general economic interest covers services that are operated on behalf of all users in a Member State, irrespective of the specific situations or the degree of economic profitability of each individual operation.<sup>76</sup> As for public service broadcasting, the Court of First Instance has held that the criteria just mentioned are reflected in the mission of providing varied programming including cultural, educational, scientific and minority programmes without any commercial appeal and to cover the entire national population irrespective of the costs.<sup>77</sup> Thus, it seems like public service broadcasters that are under an obligation to provide a universal service and varied programming, including programmes that would not be commercially viable, will be regarded as offering services of general economic interest within the meaning of Article 86(2).<sup>78</sup> Moreover, it is clear from the *Kinderkanal/Phoenix* decision that thematic channels may constitute services of economic interest. It may also be the case that in practice it is not required that a service is universal, as long as making it universal is a necessary objective. For example, at the time of the Commission's investigation of *BBC News 24*, the channel only reached about 10% of the UK homes, but the Commission considered that it was enough that *BBC* was committed to extending its coverage to the whole population as soon as possible, in order for the station's activities to be classified as services of general economic interest.<sup>79</sup> Consequently, financing of broadcasting services that fulfil the criteria discussed above will benefit from the derogation and financing of services that fail to fulfil these criteria will not.

A sensitive question is who will be given the competence to decide the remit of the concept. Obviously there can be a conflict between national concerns and Community interests when determining whether or not a service can be classified as a service of general economic interest. The national courts cannot rule on the compatibility of aid with the common market, but they can try to rely on Article 86(2) when the Commission is investigating aid under Article 87. When assessing the situation under the Article 86(2) derogation it is, according to Article 86(3), for the Commission to ensure that the provision is properly applied and consequently, the Commission will make the interpretation at this stage, even though it is for the Court of Justice to ultimately interpret the phrase "service of general economic interest". Thus, looking at the wording of Article 86, it seems like the Commission has sole competence to make the interpretation. However, Member States are probably very reluctant to

---

<sup>75</sup> R. Lane, *EC Competition Law*, London, Longman, 2000, at 231.

<sup>76</sup> Case C-320/91, *Corbeau* [1993] ECR I-2533, para. 15.

<sup>77</sup> Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision SA, Reti Televisive Italiane SpA, Gestevisión Telecinco SA and Antena 3 de Televisión v Commission* [1996] ECR II-649, para 116.

<sup>78</sup> In Case 155/73, *Italy v Sacchi* [1974] ECR 409 at para. 15, the Court of Justice also accepted that certain broadcast services might fall within the scope of Article 86(2), but the reasons for this were not explained.

<sup>79</sup> *BBC News 24* para. 59-60.

giving the Community institutions such ultimate authority to determine exactly which broadcasting activities they can finance, since this is a matter of complex social and cultural issues that may be better handled on a national level.

A more attractive option for the Member States would be to declare that the Amsterdam Protocol requires that the concept of “services of general economic interest” in Article 86(2) is interpreted to cover any broadcast service which a Member State designates as having a public service remit.<sup>80</sup> This understanding seems to accord with the wording of the Protocol, but it disaccords with the ultimate interpretative authority of the Court of Justice under Article 220. Moreover, if it means that the Member States are completely free to determine which services that fall within Article 86(2), abuse of the exemption would be possible.<sup>81</sup> Apart from the risk of abuse, this interpretation would also have the unwanted consequence to create inequalities between the different Member States. Maybe most importantly it would deprive the Community of the control of Article 86(2). Thus, the Community institutions have at least partly rejected this latter nationalistic approach and lately, as will be shown, the Commission has tried to find a balance between Community and Member State competence in the area.

As early as two decades ago, the Court of Justice favoured a consistent Community interpretation not leaving too much space for Member State appreciation in *Commission v Belgium*, where it rejected the submission that it was for each Member State to determine which activities that fell within the public service exemption.<sup>82</sup> However, recognising that there should be some room for national discretion, the Commission has more recently indicated that those broadcasting services which the Member States consider to be public services will also be considered services of general economic interest within Article 86(2), unless such categorisation can be shown to be in some way aberrant or unreasonable.<sup>83</sup> This approach is confirmed in the 2001 Commission Communication, which recognises that definition of the public service mandate falls within the competence of the Member States and even though account must be taken of the Community concept of services of general economic interest, a wide definition must be given when it comes to broadcasting, due to the specific nature of the sector. The Communication then moves on to also recognising the Commission’s competence to verify that the Member States respect the Treaty provisions.<sup>84</sup> Thus, a balance between Member State and Community competence when it comes to defining services of general economic interest is struck by a degree of Community oversight being

---

<sup>80</sup> See R. Craufurd Smith, p. 5.

<sup>81</sup> See discussion in J.L Buendia Sierra: *Exclusive Rights and State Monopolies under EC Law*, Oxford University Press, 1999, p.280-281.

<sup>82</sup> See Case 149/79, *Commission v Belgium* [1980] ECR 3881 at para. 11. The case concerned Article 39 (then Article 48) on free movement of workers and the determination of the essential features of public service employment.

<sup>83</sup> See Commission 2000 Communication on *Services of General Interest in Europe* para. 22 and *BBC News 24* at para. 47-49 and *Kinderkanal/Phoenix* at para. 49.

<sup>84</sup> 2001 Commission Communication, para. 32-39.

maintained, while primary responsibility for determining the nature and scope of the public sector is left to the Member States. This balanced approach seems to be in accordance with the general ethos of the EC Treaty and particularly with the Amsterdam Protocol. As discussed above, the Protocol indicates how the “services of general interest-criterion” of Article 86(2) should be interpreted, namely with due reference to Member State discretion as to the scope of public broadcasting services on their territories. Adopting this balanced approach means that this margin of appreciation, granted by the Protocol, can be left to the Member States without depriving the Community of final control and oversight.

The Commission’s role is to check the Member State’s definition for *manifest error*. In order to carry out this control and decide whether a broadcasting service falls within Article 86(2) or not, the Commission will take account of if it helps to meet democratic, social and cultural needs for the society and if it helps to preserve media pluralism.<sup>85</sup> These criteria are derived from the introduction to the Amsterdam Protocol and if the broadcasting service in question meet any of them, it will be classified as a service of general economic interest within Article 86(2). Since the criteria are abstract in nature they leave quite a vast space for the Member States to organise and fund their public broadcasting sectors. The decisions of *Kinderkanal/Phoenix* and *BBC News 24* are illustrative of this. The Commission concluded in both cases that the Member States had not abused their competence to define the public service remit. The non-violent, information-orientated children’s programming and the news programmes and information on political and social issues were seen as meeting social and democratic objectives. Moreover, the fact that there was no advertising contributed to the insulation of the broadcasters from commercial pressure, enhancing media pluralism.<sup>86</sup>

It is questionable whether this generous approach will be upheld when it comes to state funding for transmission of sport events and entertainment shows. A discussion paper from the Commission’s Competition Directorate that attempted to clarify the situation on state funding of public service broadcasting dealt with this issue. It took the point that if a broadcaster received mixed revenue resource, the Commission would require the funding Member State to make a clear definition and typology of the public service obligations. As for sport and entertainment programmes transmitted by dual-funded broadcasters, the paper suggested that these kinds of programmes would fall outside the service of general interest definition, since they did not fulfil any democratic, social or cultural needs of society, nor did they preserve media pluralism.<sup>87</sup> However the

---

<sup>85</sup> 2001 Commission Communication, para 36.

<sup>86</sup> See *Kinderkanal/Phoenix* at para. 7 and *BBC News 24* at paras. 47-49.

<sup>87</sup> Directorate-General for Competition of the European Commission, internal discussion paper “*Application of Articles 90, paragraph 2, 92 and 93 of the EC Treaty in the broadcasting sector*” (mimeo, 1998). However, certain sport events of major importance and certain entertainment programmes subject to specific public service obligations could legitimately be supported by the state, according to the paper. For example, transmission of events of national importance as defined in the Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in



discussion paper was highly contested by the Member States and the Directorate General for Education and Culture and subsequently it was withdrawn. Criticism of the paper's principles has been put forward, saying that by excluding sport and entertainment programming from the service of general interest remit and thus attempting to define public service broadcasting in terms of programme strands, the Commission made an extremely specific definition of public service broadcasting. This term should not only be understood quantitatively, but account should also be taken of the fact that television activity is a central activity, guided by normative notions about the quality of the relationship between the democratic system and the communication structures. The Member States were further very critical to the fact that the discussion paper prohibited mixed funded broadcasters from using public resources in the areas of entertainment and sport, while broadcasters receiving income exclusively from state resources could operate in these areas, but they opposed even more to the fact that their own right to define the public service remit would be circumscribed if the principles of the paper were adopted.<sup>88</sup>

Good quality and innovative entertainment programmes has been central for public service broadcasting from its inception and Member States often consider entertainment programmes as included in the public service mission and want to maintain competence in this area.<sup>89</sup> The European Parliament has also been in favour of including a wide range of quality programmes in all genres in the public service remit and furthermore, the *Television Without Frontiers Directive* acknowledges the importance of public access to key sporting events by authorising the Member States to ensure their availability on free-to-air television.<sup>90</sup> Neither does the Amsterdam Protocol seem to restrict the Member States' possibilities to bring the transmission of sport and entertainment programmes within the public service remit. The approach of the discussion paper of excluding both entertainment and sport programmes from the public service remit thus seem very restrictive in comparison, and there are clearly arguments in favour of letting sport and entertainment programmes come within the public service remit.

The Competition Directorate's argument that entertainment and sport programming do not meet the democratic, social or cultural needs of society is questionable. Besides reflecting society and its diverse aspects, many entertainment programmes, such as drama and comedy shows, both reinforces and questions social attitudes and practices and moreover, many

---

Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23, as amended by directive 97/36/EC [1997] OJ L 202, "the Television Without Frontiers Directive", should be included in the definition.

<sup>88</sup> See D. Ward; State aid or band aid? 'An evaluation of the European Commission's approach to public service broadcasting', *Media, Culture & Society*, Vol. 25. 2003, p. 254-246.

<sup>89</sup> See discussion of E.M. Barendt, *Broadcasting Law, A Comparative Study* (Oxford, 1995) p. 58.

<sup>90</sup> European Parliament, *Resolution on the Role of Public Service Television in a Multi-media Society*, OJ No. C 320, 1996, p. 180 and the Television Without Frontiers Directive Article 3a.

of them are also informative. As for sport programming, several sport events are important to many people who, by watching a game on TV, will have a shared experience of this. Thus, it might be more accurate to say that these programmes do come within the public service remit and therefore classify as services of general economic interest as defined by the Commission in *Kinderkanal/Phoenix* and *BBC News 24*, since they actually do meet social and cultural needs of society.

Another argument in favour of letting entertainment and sport programmes come within the definition of services of general economic interest is that access to these kind of recreation facilities are as important for many people as access to more cultural activities. Making an artificial division between culture and entertainment may disadvantage those who prefer to watch a game of football or a comedy show from watching more highbrow culture programmes and therefore, the first category of programmes should not be excluded from the public service remit.<sup>91</sup> The Commission seem to be receptive of such ideas since it in its 2001 Communication has stated that public service broadcasting should be given a wide definition of public services.<sup>92</sup> However, if a too wide definition is given to the concept, it risks becoming meaningless.

Naturally, there is the aspect of private broadcasters' unwillingness to accept public funding when it comes to such profitable entertainment programmes as films and important sport games. Rights to such programmes are the key drivers behind the development of commercial broadcasting and thus, private broadcasters are unwilling to accept that a public broadcaster, receiving mixed funding, can compete in the area. However, precluding the public service broadcasters from transmitting sport and entertainment programmes would undermine public acceptance of licence fees and other forms of state support, since the programming remit would change significantly.<sup>93</sup>

### **5.4.3 Obstruction of Performance of General Interest Services**

A further condition for Article 86(2) to be applicable is that the performance of the service of general economic interest in question would be obstructed if the state aid rules applied. Assessing whether this is the case or not involves a test of necessity and one of proportionality. The Member States have to show that aid provided for a general interest service is necessary for its performance and also that it is proportionate to the costs involved, precluding the funded broadcaster from cross-subsidisation.<sup>94</sup> Clear and transparent accounting mechanisms will have to be used in this investigation, separating public services and non public services accounts.

---

<sup>91</sup> R. Craufurd Smith, p. 17.

<sup>92</sup> See the 2001 Commission Communication, para. 33.

<sup>93</sup> R. Craufurd Smith, p. 17.

<sup>94</sup> R. Craufurd Smith, p.18.

Such transparency requirements are laid down in the *Transparency Directive*, which has been discussed above.

The necessity test does not require the Member States to prove that removal of the aid in question would threaten the recipient undertaking's viability, merely that without the aid the undertaking would not be able to perform its particular task. Neither do the Member States have to prove that there were no other measures they could have taken to ensure provision of the public service without infringement of the competition rules.<sup>95</sup> Looking at the *Kinderkanal/Phoenix* and *BBC News 24* decisions, it seems like state funding of public services will be considered necessary where the service in question is unlikely to be available on commercial stations. The channels at hand were prohibited from carrying advertising and thus, without state aid they would cease to operate. Moreover, the Commission noted that services comparable to the ones performed by these channels offered free of charge and without advertising would not be provided by the commercial sector and thus the state funding was necessary in order for them to carry out their tasks.<sup>96</sup> However, where a public service broadcaster receives mixed funding, it can be harder to find the difference between that undertaking and competing commercial channels. Here, there will be a question of whether the broadcaster can finance the public service out of advertising income.

In order to satisfy the test of proportionality, the Member States will have to establish that its financial support does not exceed the cost of providing the specified service. It is hereby important to clearly identify which activities fall within the public service remit and which are their related costs. When carrying out the test, the Commission starts from the consideration that the state funding is normally necessary for the undertaking to carry out its public service duties, taking into account other direct or indirect revenues derived from the public service mission. The net benefit that non-public service activities derive from the public service activity will also be taken into account when assessing the proportionality of the aid.<sup>97</sup> It can of course be difficult to establish the real cost of meeting the public service obligations and without a functioning analytical accounting system, there is a risk that the public service broadcasters will allow state finance to spill over and subsidise commercial activities or that they will misuse state funding in order to undermine competition by selling below market prices. However, the *Transparency Directive* addresses this problem by requiring companies which offer both services of general economic interest and commercial services to maintain separate internal accounts.<sup>98</sup>

When it comes to assessing whether non public services derive benefits from the public service activities of the undertaking, it has been put forward that there is no objective means of splitting some of the public service mission cost and the non-public service activity costs between both

---

<sup>95</sup> See Case C-157/94, *Commission v. Netherlands* [1997] ECR I-5699, para 52-58.

<sup>96</sup> *Kinderkanal/Phoenix* at para. 56-63 *BBC News 24* at para. 73-74.

<sup>97</sup> See the 2001 Commission Communication para. 57.

<sup>98</sup> See the *Transparency Directive* Article 1(2).

activities in the accounts. Revenues from sale of programmes and advertising time are non-public service revenues that should be taken into account, but revenues from other non-public service activities from which no direct financial benefits can be derived for the public service mission, should not be taken into account when assessing the proportionality of the aid. For instance, the revenues that a broadcaster generates through commercial use of its name by applying its brand or logo to all kinds of products are purely commercial, but combining these purely commercial revenues with public funds to cover the public service mission would imply indirect interference in the commercial opportunities open to public service broadcasters and this is something that the Commission does not have authority to do. It is also doubtful if an intervention of this kind would promote fair competition between public service broadcasters and commercial ones.<sup>99</sup>

Finally, when assessing the proportionality of the aid, the Commission may consider whether the system as a whole might also have the positive effect of maintaining an alternative source of supply in some relevant markets. However, such an effect has to be balanced against negative effects of the aid such as other operators being prevented from entering the markets, thereby allowing a more oligopolistic market structure or leading to possible anti-competitive behaviour of public service operators in the relevant markets.<sup>100</sup> At last it can be mentioned that the Commission will also take into account the difficulty that smaller Member States may have in collecting the funds needed to finance public service broadcasting when making the assessment.<sup>101</sup>

#### 5.4.4 Affecting Trade

Apart from fulfilling the criterion of “service of general economic interest” and showing that the aid at hand is necessary and proportionate, a Member State that wants to rely on Article 86(2) must establish that the funding does not affect trade contrary to the interests of the Community. The Commission has been generous at this point, indicating that certain inconveniences for competitors will have to be tolerated when it comes to funding of services of general economic interest and that the impact on trade will only be problematic where the *development* of trade is excessively affected.<sup>102</sup> State aid should not have the consequence of driving existing firms out of the market or preventing new ones from starting up, thereby excessively impeding development of trade, but reduced market shares for the commercial operators can be tolerated, provided that these operators still manage to stay in the market.<sup>103</sup> The Commission has stated that the analysis of the effects on trade of state aid to public service broadcasters under Article 86(2) will have to be made on a case by case basis, since each

---

<sup>99</sup> See S. Coppieters, p. 274.

<sup>100</sup> 2001 Commission Communication, para. 61.

<sup>101</sup> *ibid.* at para. 62.

<sup>102</sup> *BBC News 24* at para. 93.

<sup>103</sup> *ibid.* at para. 100.

specific situation has its own characteristics and effects.<sup>104</sup> It seems like in many cases state aid will not be considered as having a too serious effects on trade. Thus, also when it comes to the criterion of affecting trade, the Member States have the possibility to show that their funding measures, even if having negative effects for the funded broadcasters' competitors, do not excessively affect trade contrary to the interests of the Community.

---

<sup>104</sup> 2001 Commission Communication, para. 60.

# 6 State Aid or Not? Different Approaches to Financing

The Commission and the Community Courts have taken different approaches when dealing with complaints concerning state funding. In some cases the funding has initially been classified as state aid that subsequently may be exempted under one of the Treaty based derogations discussed above. This so called “state aid approach”, where a funding measure is held to constitute state aid and thereafter examined under the derogation provisions, has been used expressively or implicitly in several earlier cases, which will be discussed in the following. However, recently the Court of Justice and the Court of First Instance seem to have adopted what can be referred to as the “compensation approach”. According to its principles, funding that merely constitutes compensation for the performance of a public service does not classify as state aid at all. The issue of whether state funding can be said to merely constitute compensation or not has been discussed above in subsection 5.1.2 and in this chapter the question will be further elaborated in the context of recent case law.

Under both approaches, the most important question is whether the state funding exceeds what is necessary in order to give an appropriate remuneration for, or to offset the extra costs caused by the general interest obligations. However, the outcomes of adopting one or the other approaches are different. When a funding measure is considered not to constitute state aid under the compensation approach, it falls completely outside the scope of the state aid rules and for that reason need not to be notified to the Commission in the same way as a measure that has been classified as state aid under the state aid approach must be. The consequences of following the different approaches will be dealt with in the following. Depending on which approach is adopted, it will be more or less easy for the Member States to avoid Community intervention in the funding of public service broadcasting. The Member States would probably prefer the compensation approach, since it means that many of their funding measures can avoid Community scrutiny, while competing commercial broadcasters may prefer the state aid approach allowing more Community control.

## 6.1 The State Aid Approach

The state aid approach has traditionally been favoured by the Community Courts and the Commission. This approach means that a funding measure is classified as state aid within the meaning of Article 87(1), even if it only offsets the extra costs of public service tasks. Classifying a funding measure as state aid means that the other Treaty rules relating to state aid will come into play. Thus, the funding measure at hand may subsequently be justified

under one of the Treaty derogations, particularly under Article 86(2) if the conditions are fulfilled and if the funding complies with the principle of proportionality.<sup>105</sup> As we have seen, it has been expressed by the Court of First Instance and the Court of Justice that there are no distinctions among causes or aims defined in relation to the effect on competition; it is simply the case that if one undertaking is placed in a more favourable financial situation due to a state measure, the measure in question constitutes state aid.<sup>106</sup> The fact that the funding is intended to cover the extra costs incurred by the public service obligation is however taken into account when evaluating the possibility of the measure to be exempted from the competition rules under Article 86(2), but for its classification as state aid it is enough that it gives an advantage. When having classified a measure as state aid, apart from the possible application of the provisions providing for exemption, the rules of notification laid down in Article 88 will also apply.

### 6.1.1 Case Law of the State Aid Approach

In the mid 1990-s, the Court of First Instance took the state aid approach in a number of rulings following the Court of Justice's reasoning in *Banco Exterior de España* where the funding at hand was considered to be state aid.<sup>107</sup> This was in contradiction to the earlier expressed view of the Commission, namely that funding which was mere compensation for the additional burden of performing public services did not constitute aid. In *FFSA* the Court of First Instance again followed the state aid approach and held, contrary to the Commission, that certain tax concessions granted to the French postal service in order to offset its public service obligations did classify as state aid.<sup>108</sup> However, the measure was held to be compatible with the common market and thus granted exemption under Article 86(2), since there were no concerns of cross-subsidisation, at least not as long as the aid remained lower than the extra cost generated by the public service obligation.

As for the broadcasting sector, the Court of First Instance held in its judgement in *SIC*, in line with *FFSA* and again contrary to the Commission's decision, that the financing measure at hand constituted state aid.<sup>109</sup> The case concerned financing of public television and since the state finance constituted an economic advantage that the broadcaster could not have obtained under normal market conditions, it was considered to be aid and thus fall within the scope of Article 87(1). The fact that a reciprocal service was provided for the payment was not in itself sufficient to take the arrangement outside Article 87(1). The Court of First Instance again emphasised that Article 87(1) does not distinguish between measures of

---

<sup>105</sup> See AG Jacobs in Case C-126/01, *GEMO*, April 30, 2002. (not yet reported in ECR).

<sup>106</sup> See for example as for CFI Case T-106/95, *FFSA and others/Commission* [1997] ECR II-229 and as for the ECJ Case C-387/92, *Banco Exterior de España* [1994] ECR I-877.

<sup>107</sup> In *Banco Exterior de España*, a tax exemption classified as state aid since it was held to place the undertaking in a more favourable position than other taxpayers.

<sup>108</sup> Case T-106/95, *FFSA and others/Commission* [1997] ECR II-229.

<sup>109</sup> Case T-46/97, *SIC v Commission* [2000] 3 CMLR 987.

state intervention by reference to their causes or aims, but instead they must be defined in relation to their effects, meaning that the concept of aid is an *objective* one, the test being whether a state measure confers an actual advantage on the undertaking or not. According to this case, the fact that a financial advantage is granted in order to compensate for extra costs incurred by public service obligations only represents the purpose of the measure, but it does not impinge on its effects. Thus, the compensation aspect does not relate to the objective status of the funding and a financing measure can classify as aid even if its aim is to compensate the receiving undertaking for public service costs.

As we have seen, the Commission followed this reasoning presented by the Court of First Instance and classified the measures in *Kinderkanal/Phoenix* and *BBC News 24* as state aid, however subsequently justified under Article 86(2). Thus, both the Commission and the Court of First Instance have long favoured a reasoning starting by first classifying a funding measure as state aid and thereafter examine it under the derogation provisions.

However, this state aid approach seems to have been abandoned lately by the Court of Justice in favour of the so called compensation approach. As will be shown, the *Ferring* ruling reversed the case law described above, but before discussing this judgement and the probable shift to the compensation approach, a brief presentation on the consequences of adopting the state aid approach will be given.

### **6.1.2 Consequences of the State Aid Approach**

Classifying a funding measure as state aid under the state aid approach will naturally have the very important consequence of that all Treaty rules governing the area will be applicable. It means that new aid measures have to be notified in advance to the Commission under Article 88(3) and that the aid can be justified under the exemptions laid down in Article 87(2) and (3) and in Article 86(2). Moreover Article 86(3), under which the Commission can adopt decisions or directives in order to ensure the correct application of Article 86(2), will be applicable, ensuring Community control of state funding of public services. Thus, the state aid approach means that the Community, pursuing its goal of the single market, will be able to control the Member States' funding measures and that the Member States, if they want to be granted exemption for their funding measures, have to make sure that the aid promotes one of the interests laid down in Article 87(2) or (3) or, when it is a matter of funding services of general economic interests, that the criteria in Article 86(2) are fulfilled.

## **6.2 The Compensation Approach**

As we have seen, the state aid approach has been used in the past, but lately it seems like the case law has altered, favouring the compensation approach.



This approach means that funding measures can, to the extent they constitute compensation for public service obligations, completely escape the EC Treaty rules. In the recent *Ferring* ruling the Court of Justice abandoned the state aid approach, holding that aid exists only if, and to the extent that, the economic advantage that a state grants to an undertaking in order to finance services of general economic interest, exceeds appropriate remuneration for the cost of providing the service. If the funding constitutes mere compensation for the extra costs incurred by the public service obligation, it does not classify as state aid at all and thus escapes the EC Treaty rules. This reasoning is in line with older decisions like *ABDHU* and the Commissions initial decision in *SIC*.<sup>110</sup>

### **6.2.1 Case Law of the Compensation approach: The Ferring-Ruling**

The *Ferring* case concerned a special tax that France had imposed on the sale by pharmaceutical laboratories of their products direct to pharmacies. Wholesale distributors of medicinal products were exempt from the tax, since they were subject to specific public service obligations, namely to maintain a sufficient range of medicines in order to meet the needs of the area they served and to provide speedy delivery throughout that area. According to the Court of Justice, the exemption from tax could potentially amount to state aid if it conferred an advantage on the wholesalers through the use of state resources. However, this was not the case. Since the tax on direct sales imposed on pharmaceutical laboratories corresponded to the additional cost actually incurred by the wholesale distributors in discharging their public service obligations, the Court of Justice regarded the tax exemption granted to these wholesale distributors as compensation for the service they provided and hence not state aid within the meaning of Article 87(1). No real advantage was given to the wholesale distributors, but the tax exemption only had the effect of putting them on an equal competitive footing with the laboratories.<sup>111</sup> Thus, *Ferring* means that if funding granted by the state does not exceed an actual additional cost incurred by public service obligations, it will completely avoid application of the state aid rules.

### **6.2.2 Consequences of the Ferring-Ruling**

If the *Ferring* decision is applied in the broadcasting sector it will greatly assist Member States wishing to justify existing support schemes. However, the decision has been subject to much criticism and its application may have

---

<sup>110</sup> Case 240/83, *Procureur de la République v Association de défense des brûleurs d'huiles usages* [1985] ECR 531. In this case the Court of Justice accepted that payments made by the French state to companies for the collection and disposal of waste oils amounted to consideration for the services which they performed. Thus, the funding fell outside Article 87(1).

<sup>111</sup> *Ferring* at para. 27.

negative consequences, above all that it deprives the Community of control of funding measures. This can be to the detriment of the single market.

Community control of state aid is ensured through different state aid provisions in the EC Treaty. Firstly new aid must, as we have seen in the forgoing, be notified to the Commission under Article 88(3). However, *Ferring* provides for an escape route from Article 88(3), since proportional financial assistance is not classified as aid within the meaning of Article 87(1) and thus not subject to Article 88 at all. Consequently, the compensation approach undermines the possibilities of Community control and diminishes its surveillance role in reviewing measures for financing public services.

Adopting the *Ferring*-approach would mean that not only Article 88 would be neglected but moreover, there would be no need to justify the compensating aid under any of the exemptions provided for in Article 87(2) and (3) or in Article 86(2). This results in negating the function and relevance of these provisions, especially of Article 86(2), depriving the Community of control of state funding of services of general interest. The Commission would not be able to assess whether the service at hand in reality constituted a service of general economic interest, nor whether the service had in fact been entrusted to the undertaking concerned, if it could not assess the situation under Article 86(2). Furthermore, the compensation approach precludes the Commission from considering whether there is an appropriate balance between the interests of the Member States and the operation of the market; a proportionality evaluation the Commission otherwise is competent to make according to Article 86(2).<sup>112</sup> The compensation approach of *Ferring* seems to deprive Article 86(2) of any practical purpose when payment is made for discharging public services, since a legitimate measure that merely constitutes compensation will fall outside the scope of Article 87(1) and consequently avoid the competition rules, while a measure that is disproportionate will be unjustifiable, since overcompensation cannot be exempted under Article 86(2).<sup>113</sup> Adopting the principles of *Ferring* also means that there will be no scope for the Commission to adopt decisions or directives under Article 86(3) in order to ensure the correct application of Article 86(2).

Another criticism of the *Ferring*-decision is that its reasoning blurs the conceptual distinction between the issue of characterization of a state measure as aid and the issue of justification of the measure.<sup>114</sup> The method of first classifying a measure as state aid under Article 87(1) and then examine it under the derogations seems more clear than only assessing if it constitutes compensation or not. By following the compensation

---

<sup>112</sup> See AG Jacobs in *GEMO*.

<sup>113</sup> C. Rizza, 'The Financial Assistance Granted by Member States to Undertakings Entrusted with the Operation of a Service of General Economic Interest' Biondi, Eeckhout, and Flynn (editors), 2004: *The Law of State Aid in the European Union*, Oxford University Press, p. 73.

<sup>114</sup> See A.G Léger in *Altmark Trans*.

approach, the Court of Justice allowed Article 86(2) to “invade” Article 87(1) and thus confused the structure of rule and exemption.<sup>115</sup>

Furthermore, there is criticism of the test of “necessary equivalence” between the value of the State measure and the extra costs incurred by public service obligations that the Court of Justice used in *Ferring*. The Court said that if there is such a necessary equivalence, the favoured undertaking will not be enjoying any real advantage, because the only effect of the funding measure will be to put it on an equal competitive footing with its competitors.<sup>116</sup> It is questionable if this test of necessary equivalence is enough for the assessment of whether the performance of the service should be disturbed by application of the state aid control rules. The criticism mainly implies that it is not possible to evaluate if an undertaking is actually forced to perform a service, or if it would perform this service anyway without compensation from the state, due to competition. To assess whether the grant of state funding to public service providers fulfils the necessity and proportionality requirements of Article 86(2), in accordance with the compensation approach laid down in *Ferring* would be very difficult. This can be illustrated by the following: If a public service that a certain undertaking is under obligation to provide would not be provided if the state did not give compensation for it, or if the supply of the service would fall to a socially unaccepted level without compensation from the state, such state compensation should naturally be legitimate. However, even where such a public service obligation is prescribed by law, it might not be the case that the entrusted undertaking has actually been forced to engage in the providing of the public service at hand. It might as well be the case that the undertaking would have provided the same service voluntarily, without state funding, as a part of their competitive strategy and in that case, the compensation given by the state would not be necessary. To evaluate whether the service would be provided without compensation or not would be very difficult.<sup>117</sup> Thus, even if a funding measure is said to constitute merely compensation for the extra cost of producing a public service and especially when it is compensation for starting to produce a new public service, it might distort competition between the funded undertaking and other undertakings that offer similar services. Allowing such compensation measures could also have the negative effect that undertakings which are inefficient would receive proportionally larger subsidies.

### 6.2.3 Application to the Broadcasting Sector

As we have seen, *Ferring* has been much criticised, but if its principles are followed the judgment may have impact on the financing of public service broadcasting. It namely seems like *Ferring* can be applicable to the broadcasting sector, due to the public service obligation connection. The

---

<sup>115</sup> N. Lindner, ‘The Impact of the Decision of the European Court of Justice in *Ferring* on European State Aid Law’, *European Public Law*, Volume 9, Issue 3, 2003, p. 361.

<sup>116</sup> *Ferring*, para 27.

<sup>117</sup> P. Nicolaidis, Distortive Effects of Compensatory Aid Measures: A Note on the Economics of the *Ferring* Judgement, *ECLR*, 23(6), 2002, p.313.

wholesale distributors in *Ferring* were required to offer a range of medicines and to ensure their availability throughout a certain territory; a task comparable to how public service broadcasters are required to offer a range of programmes on a universal basis. However, some discrepancy can be seen in that the pharmaceutical laboratories did not have to incur the costs associated with public service provision and that the tax was specifically designed to prevent them from gaining a competitive advantage. In the broadcasting sector on the other hand, certain commercial broadcasters are required to offer similar services to those provided by state funded public service broadcasters. Therefore, it is harder to see aid in this sector as merely putting the state assisted and the commercial operators “on an equal competitive footing”.<sup>118</sup> Even though there are a few inconsistencies between the situation in *Ferring* and the financing of public service broadcasting, the Commission has applied the findings of *Ferring* when addressing state funding of the *BBC*, so there should be enough connection for the principles to be relevant also for public service broadcasting.<sup>119</sup>

As we have seen in the foregoing, the definition of services of general economic interest is a key factor when it comes to funding of public service broadcasting, since certain types of programmes fall within the scope and others do not and since the definition is uncertain. *Ferring* does not clarify what scope for defining public service obligations the Member States enjoy, but the judgement greatly assists Member States wishing to justify existing support schemes since they can take the arrangements outside the state aid rules. In order to do this, the Member States still have to establish that the compensation does not exceed the actual cost of the public service. This means that programming obligations will have to be specified with some precision and that a mechanism for establishing the real costs is used. Consequently, even if *Ferring* means a change in the approach to state aid taken by the Community, much of the Commission’s reasoning in the 2001 Communication on the application of state aid rules to public service broadcasting will still be relevant.

### **6.3 Post Ferring: Altmark Trans –a Compromise?**

As has been shown, the Commission and the Courts have been somewhat ambivalent in adopting one or the other of the state aid or the compensation approaches over time. None of the approaches seem to be completely

---

<sup>118</sup> The expression was used in *Ferring* at para. 27.

<sup>119</sup> The UK had notified new digital television services that were to be run by the *BBC* since the licence fee funding the project could be considered as state aid, but the Commission followed the *Ferring* approach, stating that since the funding did not go beyond the necessary costs, there was no real advantage and therefore the measures did not qualify as state aid. Letter of 22 May 2002 regarding state aid No. N 631/2001, published at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie/n631-01.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie/n631-01.pdf).

satisfying and the recent *Ferring* judgement has, as we saw, been subject to much criticism. It is open to discussion if there is another satisfactory way to solve the issues of state aid to public service providers. The question is if it is possible to find a compromise that would satisfy the Member States and the need for public services on the one hand and, on the other hand, not distort competition to the detriment of unaided undertakings and the common market. A solution would be welcomed in the broadcasting sector, but it seems difficult to find a satisfactory one.

There have been suggestions on how to find a compromise between the interests and for instance, a number of Advocates Generals have put forward opinions dealing with the issue in different cases. Advocate General Jacobs' suggested in his opinion in *GEMO*, a case involving a French law imposing a public service for the collection and disposal of animal carcasses from slaughterhouses, carried out by private disposal undertakings remunerated by the state, that a distinction should be drawn between two categories of cases. Where there is a direct and manifest link between the state funds and a clearly defined general interest obligation, the principles of *Ferring* should apply and the measure should be regarded as compensation and thus not state aid. Where on the other hand, the link between the state measure and the obligation is not direct or manifest or where the general interest obligation is not clearly defined, the state aid approach would be preferable.<sup>120</sup> In the broadcasting sector this would probably mean that in order to avoid classification as state aid, there would have to be an exact definition of which programmes do constitute public services and the Member States would have to make sure that the funding only compensated for extra costs incurred by these.

The solution of favouring such a differentiated compensation approach seem to have some support.<sup>121</sup> However, there are also arguments supporting the view that competition still can be distorted if this approach is applied and that the only objective benchmark is obtained from open and competitive selection procedures that allow all potential providers to submit their bids for performing a public service.<sup>122</sup> This last opinion seems to be in line with the recent *Altmark Trans*-judgement.

### 6.3.1 Altmark Trans

The *Altmark Trans* case settled several questions on the application of state aid rules to compensation granted to undertakings entrusted with the operation of services of general economic interest.<sup>123</sup> The judgement seems to be an attempt to find a reasonable compromise between the state aid approach and the compensation approach discussed above. The case

---

<sup>120</sup> See A.G. in *GEMO*.

<sup>121</sup> K. Bacon; 'The Concept of State Aid: The Developing Jurisprudence in the European and UK Courts', *ECLR* 2/2003 p. 57.

<sup>122</sup> P. Nicolaidis; 'Compensation for Public Service Obligations: The Floodgates of State Aid', *ECLR* 2003 p. 566. This view is also supported by N. Lindner, p. 360. He argues that there should be an advertising for the grant.

<sup>123</sup> Case C-280/00 *Altmark Trans* [2003].

concerned the licensing of regional bus transport services and provision of public subsidies for those services, that were granted since they could not operate profitably on the basis of operating income.

In accordance with *Ferring*, the Court of Justice said that there is no real financial advantage when a state measure constitutes compensation for discharging public service obligations and consequently if this is the case, the funding is not caught by Article 87(1). Naturally, the funding must not exceed the actual cost of discharging the public service. Thus, in order for the compensation not to constitute an advantage and consequently fall under the state aid rules, the Court of Justice specified four conditions that must be satisfied. The development of these conditions was a step forward towards a more clear application of the EC Treaty rules to state funding of public services.

The first condition that must be fulfilled in order for the situation to escape the state aid rules is that the recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined. Secondly, the parameters on the basis of which the compensation is calculated must be established both in advance and in an objective and transparent manner. Thirdly, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Fourthly, where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined by a comparison with an analysis of the costs that a typical company in the sector would incur, taking into account its revenues and a reasonable profit from discharging the obligations.<sup>124</sup> The second and the fourth criterion are the novelties, while the other two have been implicitly applied also in the earlier cases.

As a matter of form, the *Ferring* principles were upheld in *Altmark Trans*, but the Court of Justice here went further, attempting to address the earlier described criticism of *Ferring* by developing criteria in order to make sure that the compensation approach is only used in clear-cut cases. These four conditions indicate that allocation of public service obligations through open bid procedures is the policy preferred by the Court of Justice and this has also been a solution preferred by several authors and Advocate Generals.<sup>125</sup>

### 6.3.2 Consequences of *Altmark Trans*

The outcome of *Altmark Trans* means that it will be more difficult for the Member States to bring their financing measures outside the EC state aid rules than *Ferring* implied. The public authorities cannot simply grant funding to any undertaking on which they have imposed public service obligations, but all four criteria developed in *Altmark Trans* must be

---

<sup>124</sup> *Altmark Trans* para. 89-93.

<sup>125</sup> See for example P. Nicolaidis, p. 572.

fulfilled in order for the compensation approach to apply. It is even doubtful if the arrangement in *Ferring* itself would have met all these criteria.<sup>126</sup>

The novel condition of requiring that the terms of compensation must be set beforehand in an objective and transparent manner, will most likely strengthen competition since it will force the beneficiary undertakings to assume at least part of the risk of their operations. This means that they will not allow themselves to be inefficient in the way they could have been, if they knew that the state would compensate them even if they let their costs increase. The fact that the conditions of compensation are determined *ex ante* should thus prevent beneficiary operators from passing all their commercial risk to the state at the expense of competitors.<sup>127</sup>

The most important consequence of *Altmark Trans* may be the condition that a public bid procedure must forego state funding of public services in order for the funding to escape the state aid rules. Hopefully this will diminish the number of complaints from competing companies and increase the efficiency of the public service providers, since they in the future must benchmark their performance against that of an efficient company. However, some unclear points still remain. The fourth criterion namely establishes that when the funded company is not chosen in a public procurement procedure, its costs for discharging the public service obligations shall be compared with the costs that a “typical undertaking” would incur. In practice there can be a problem of interpreting what exactly the Court of Justice means by the expression “typical undertaking”. This can be especially hard to establish in cases concerning industries where there are usually only a few competitors and can therefore be a problem in the broadcasting sector. Difficulties can also arise if the costs of the beneficiary undertaking vary and are in some years lower and in some years higher than those of potential competitors. It will then become necessary to establish a benchmark time period in order to make a comparison, but the question is how long that period should be. This ambiguity of the benchmark defined by the Court of Justice in terms of a “typical undertaking” which is “well run and adequately provided” probably means that the Member States do not have to deviate significantly from their current funding practices.<sup>128</sup> However, as discussed in subsection 5.2.3, they might be worried that always holding an open bid procedure before entrusting a broadcaster with public service obligations, will encroach upon the quality of the programming which will be offered.

The *Altmark Trans* judgement is in many ways legislative in nature, since it imposes specific requirements on the Member States and since it indicates possible solutions for the Community institutions when they are assessing possible state aid situations. The judgement gives the Court the chance to address the question of the relationship between Article 86(2) and state aid. However, it is not clear how Article 86(2) shall be used

---

<sup>126</sup> Biondi, Eeckhout, and Flynn (editors), 2004: *The Law of State Aid in the European Union*, Oxford University Press, p. xvi.

<sup>127</sup> P. Nicolaidis, p. 574.

<sup>128</sup> *ibid.* p. 574.

in cases where state support does not fulfil the *Altmark Trans* test. Neither is it clear from the case whether the Court considers that there is a limit to the scope of what can be characterized as public services.<sup>129</sup> Thus, there are several uncertainties left in the area, both relating to the actual criteria that were established in *Altmark Trans* and also relating to the application of Article 86(2). What is clear, on the other hand, is that the *Altmark Trans* judgement will make it more difficult for Member States to grant unlimited amounts of aid and to cover the costs of undertakings discharging public service obligations irrespective of the efficiency of competitors, even if the fact that the ambiguity of term “typical undertaking” seems to leave some extra space for the Member States’ funding measures to avoid the state aid classification.

---

<sup>129</sup> Biondi, Eeckhout, and Flynn (editors), p. xvi.



## 7 Analysis

When analysing the issue of state funding of public service broadcasting and the state aid rules of the EC Treaty, it is important to keep in mind that there are three stake holders in the area; the Member States, the commercial broadcasters and the Community. The interests of these actors must thus be balanced against each other and I will therefore try to approach the problems from their different perspectives.

We have seen that even if the EC Treaty contains a prohibition on granting state aid which distorts or threatens to distort competition, affecting trade between the Member States, there are several ways for the Member States to escape this prohibition when funding their public service broadcasters. Apart from the Treaty-based derogation possibilities, of which Article 86(2) seems to be of most importance in the broadcasting sector, there are also other ways for the Member States to organise their funding systems in order not to contravene Article 87(1). When doing this it is desirable to find a solution that satisfies both the Member States and the commercial broadcasters which are in competition with the funded public service undertakings. The commercial broadcasters are worried, since there have been indications from the Community institutions that they in their interpretation of the Treaty rules will accept some distortions to competition, especially when it comes to financing of services of general economic interest, including public service broadcasting. They are also worried because the Community institutions have not been too stringent on the Member States when deciding on the proportionality of such funding.

Apart from the competition aspect, there is a need to balance the interest of the Member States of retaining control and some autonomy in a field sensible to national concerns and of the interest of the Community to control funding measures and protect the functioning of the common market. As has been shown, the Community institutions have in their interpretation of the state aid rules left the Member States quite a wide competence, especially when it comes to defining services of general economic interest, where they have restricted themselves to only check for manifest error. Apart from having been given a wide margin of discretion when it comes to defining the public service remit of broadcasting, the Member States also have the possibility to completely escape the EC state aid regulation by ensuring that funding merely amounts to compensation for extra costs incurred by public service obligations. It thus seems like the Member States still retain a certain degree of sovereignty in the area of state funding of public service broadcasting; something that they intended to ensure through the Amsterdam Protocol.

However, even though the Community institutions have been sensitive to Member State concerns, the fact still remains that the Member States have to conform to EC regulation when granting funding that is classified as state aid. In order to preserve some autonomy in the field of state funding of public service broadcasting, the Member States want to retain the competence to decide which services that come within the remit

of services of general economic interest and thus can be granted exemption under Article 86(2). Even though the Member States have been given an important role here, the Commission has, as we have seen, considered itself competent to assess whether the Member States in making the definition have abused their power under the Amsterdam Protocol by checking for manifest error. This means that there is a risk that Member State classification of certain types of programmes, for instance sport and entertainment programmes, as falling within the public service remit will not be accepted by the Community institutions and consequently they will be held not to be eligible for exemption under Article 86(2). This can be to the detriment of the functioning of public service broadcasting, since such programmes are very important to many people and since they are also of economic significance. Another aspect that may worry the Member States is that the Community institutions, when deciding cases of state funding, have taken interest in whether public service channels are different from those offered by the commercial sector. In *Kinderkanal/Phoenix* and *BBC News 24*, the channels were held to be distinctive since they were free from advertising. If it is the case that the public service has to be different from commercial services in order to be granted exemption, there will not be much space left for state funding, since many broadcasters, both commercial and public service ones, offer similar services.

Thus, even though the Amsterdam Protocol recognises the Member States' competence to finance public service broadcasting as conferred, defined and organised by them, it does not give the Member States full protection from EC intervention in the area. The Member States can still not be sure if a funding measure will classify for derogation. This will depend on how the Community institutions chose to interpret the public service remit and to what extent detriment to competition and effect on trade will be allowed. As for latter, the Community institutions seem to have adopted a generous attitude, but they have also stated that there will be evaluation of the facts in each case. It is clear that when it comes to interpretation of the public service remit there is still a great deal of uncertainty. The Member States probably want a clearer signal that also sport and entertainment programmes will be included in the definition. Perhaps if the Directorate-General for Education and Culture had more responsibility than the Competition Directorate-General for questions concerning state aid, a policy more sensitive to Member State interests would be adopted, but such a policy would naturally not be welcomed by the commercial broadcasters.

A more drastic way of securing exemption for Member State funding of public service broadcasting would be to introduce a new sentence to the derogation in Article 87(3)(d), establishing that state aid to broadcasters promotes culture and thus may be exempted if compatible with the common market. However, this is an option that commercial broadcasters would strongly oppose to and probably not even all Member States would find it attractive. Some Member States may want to maintain a great extent of European Community control in the broadcasting sector since they are not only concerned about their public service broadcasters, but also want to promote the development of the commercial ones in order

to enable them to survive in a globalised market where there is high pressure from international competition.

As we have seen, the Community retains some control of measures that classify as state aid within the meaning of Article 87(1). A question is whether the commercial broadcasters are satisfied with the way in which the Community institutions have interpreted and applied Article 86(2) in the broadcasting sector and whether the Community's policy on this issue is to the detriment of competition. The commercial broadcasters naturally want the Community institutions to exclude profitable programmes like sport and entertainment from the public service remit. They probably also want the necessity and proportionality tests to be carried out in a way more restrictive to the funding measures, especially in cases where the funded broadcaster receives mixed funding. They may also consider it a problem that the Commission has been so sensitive to national concerns when it comes to services of general economic interest and that it has expressed that some effect on trade and certain inconveniences for competitors have to be tolerated. It thus seems like even if the EC Treaty rules aim to preserve competition, while allowing state aid under certain conditions, their application is very receptive to Member State concerns in sensitive fields, accepting some distortions to competition.

It is not easy to strike the right balance between competition and national interests, but at least the Community institutions should take care to make a careful economic analysis of the funding measures in each individual case. This requires clear transparency mechanisms. What the commercial broadcasters otherwise can hope for, is that the Member States at least will be forced to minimise their aid in order to reduce distortion of competition. This last issue leads to the examination of the impact of the compensation approach of *Ferring* and how its principles were developed in *Altmark Trans*. It might namely be the case that holding an open competition, where the parameters on the basis of which the compensation is calculated are established in advance and in an objective and transparent manner, before granting funding of public service obligations, will minimise the amount of aid and therefore minimise the distortion of competition.

Thus, leaving the discussion of application of Article 86(2) and of the possible, but unlikely, amendment of Article 87(3)(d) we will move on to an analysis of the consequences of the compensation approach, that seems to be the one presently preferred by the European Court of Justice, at least in the modified form of *Altmark Trans*. Initially, it can be said that the main concern here is the removal of Community control that can follow from the method of letting compensation measures completely fall outside application of the state aid rules. It has also been feared that some funding measures that are held to merely amount to compensation for extra costs incurred by public service obligations in reality exceed these extra costs and consequently distort competition. Thus, after the *Ferring* case which was much criticised, the European Court of Justice tried to address the problems of the compensation approach in *Altmark Trans*, developing four conditions that a measure must fulfil in order to escape application of the state aid rules. This test will strengthen competition and make it harder for the Member States to grant unlimited amounts of funding,

especially due to the requirements that the terms of compensation must be set beforehand in an objective and transparent manner and that a public bid procedure must forego state funding.

The introduction of the four conditions in *Altmark Trans* can probably not be considered to invade too much on the Member States' competence to grant funding, when bearing in mind that the compensation approach in itself provides the Member States with an escape route from the state aid rules. However they restrict the possibility of using this escape route. Still, *Altmark Trans* leaves some margin of discretion to the Member States since the term "typical undertaking", that is used as a benchmark when assessing the costs for discharging public services, is not yet clearly defined. Even if the outcome of *Altmark Trans* means that the Member States still have the possibility that in certain cases bring a funding measure outside the state aid rules, the focus on holding an open competition may worry the Member States, since there is a risk of lowering of programme standards when much of the broadcasters' recourses will be spent in preparing the tender. Moreover, if the undertakings selected to provide public services alter over the years, there might be loss of commitment. Thus, the Member States may be a bit more unwilling to and also less capable of taking the now, after *Altmark Trans*, somewhat narrowed escape route that the compensation approach stands for.

As for the competition aspect of the compensation approach and the way in which it has developed, the requirements imposed in *Altmark Trans* on a measure that a Member State want to bring outside the scope of Article 87(1), help to minimise the distortions to competition. The introduction of the four criteria is thus a step forward for the commercial broadcasters. The requirement that the terms of compensation must be set in advance in an objective and transparent manner, will strengthened competition and so will the condition that a public bid procedure must forego state funding. However, even if these criteria help to promote the interests of the commercial broadcasters, those broadcasters still have to face the fact that when a funding measure does not fulfil the conditions and consequently do classify as state aid and therefore come within the EC Treaty rules, those rules still give possibilities of derogation. It is not clear from the *Altmark Trans* judgement how to use Article 86(2) in cases where state funding do not fulfil the requirements, but one idea is that maybe the *Altmark Trans* test could be helpful when evaluating the proportionality and necessity of a measure under Article 86(2).

As has been mentioned, the main concern that followed the *Ferring* judgement was that Community control of state funding would be undermined. In some way *Altmark Trans* has addressed this issue by imposing specified requirements on measures in order for them to fall outside the state aid rules. Thus, the European Court of Justice has restricted the Member States' possibilities to use the compensation approach of *Ferring* and ensured its competence to exercise control over state funding, both when it comes to -following a complaint- deciding whether a particular measure fulfils the *Altmark Trans* test and if not, whether any of the derogation provisions can be applicable. It will be harder for the Member States to simply consider their financing measures as mere compensation for

extra costs incurred by public service obligations and therefore they will have to notify more of their funding under Article 88(3) than *Ferring* implied. Much funding will thus still be subject to Community ex ante control.

To conclude, it can be said that when dealing with EC state aid regulation there is always the problem of how to combine Community oversight, competition protection and Member State autonomy. Maybe this is the reason for the uncertainty that still remain in the area. We have seen that the Community has adopted a wide interpretation of the public service remit, but still the case by case approach that the Commission has expressed that it intends to take, leads to legal uncertainty. Moreover, the Community institutions need to clarify the concepts of *Altmark Trans*. Further guidance and clarification is desirable in order for the Member States to know what they can and cannot lawfully do and therefore it is important to minimise uncertainties. Since the Community institutions have been sensitive to national interests in the field of public service broadcasting, the Member States have reason to be satisfied, but they may still be concerned that the limited review for manifest error when deciding the public service remit may have some bite. However, a certain amount of Community control is something that the Member States have to accept, since some loss of sovereignty lies within the nature of the Community order. When it comes to the important aspect of competition, it can be considered that the application of the state aid rules has not been satisfactory. Probably the commercial broadcasters have most reason to feel dissatisfied since they have not managed to curtail neither the remit of the public service broadcasters, nor their advertising revenues. At least the outcome of *Altmark Trans* was a step forward from *Ferring* for the commercial broadcasters, but still the fact remain that the interpretation of Article 86(2) that has shown to be very sensitive to Member State concerns and less receptive for competition aspects. When making economic analysis in different cases, the Community institutions must take care to use clear transparency mechanisms and try to strike an acceptable balance between the diverging interests. Maybe the Community have to give the competition and economic aspects more weight in the future, since the broadcasting sector is global and subject to rapid development and international pressure.

Finally, it can be said that the most important task for the Community institutions in the area of state aid granted to public service broadcasters, is to clarify the concepts and adopt a more consistent interpretation, sending clear signals to both the Member States and to the commercial broadcasters of what they have to comply with.

# Bibliography

## Literature

- Ahlborn, C. and Berg, C., 2004: 'Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules', Biondi, Eeckhout, and Flynn (editors): *The Law of State Aid in the European Union*, Oxford University Press.
- Barendt, E.M., 1995: *Broadcasting Law, A Comparative Study* Oxford University Press.
- Biondi, A., Eeckhout, P., and Flynn, J. (editors), 2004: *The Law of State Aid in the European Union*, Oxford University Press.
- Coppieters, S., 2004: 'The Financing of Public Service Broadcasting', Biondi, Eeckhout, and Flynn (editors): *The Law of State Aid in the European Union*, Oxford University Press.
- Garzaniti, L., 2003: *Telecommunications, Broadcasting and the Internet: EU Competition Law & Regulation – 2nd Edition*. Thomson Sweet&Maxwell.
- Lane, R., 2000: *EC Competition Law*, London, Longman.
- Plender, R., 2004: 'Definition of Aid', Biondi, Eeckhout, and Flynn (editors): *The Law of State Aid in the European Union*, Oxford University Press.
- Rizza, C., 2004: 'The Financial Assistance Granted by Member States to Undertakings Entrusted with the Operation of a Service of General Economic Interest' Biondi, Eeckhout, and Flynn (editors): *The Law of State Aid in the European Union*, Oxford University Press.
- Sierra, J.L Buendia., 1999: *Exclusive Rights and State Monopolies under EC Law*, Oxford University Press.

## Articles

- Craufurd Smith, R., 2001: 'State Support for Public Service Broadcasting: The Position Under European Community Law'. *Legal Issues of Economic Integration* 28(1):3, 2001.
- Edwards, D. and Hoskins, M., 1995: 'Article 90: Deregulation and EC Law. Reflections Arising From the XVI FIDE Conference' (1995) 32 *Common Market Law Review*, 157.
- Lindner, N., 2003: 'The Impact of the Decision of the European Court of Justice in Ferring on European State Aid Law', *European Public Law*, Volume 9, Issue 3, 2003.
- Nicolaides, P., 2002: Distortive Effects of Compensatory Aid Measures: A Note on the Economics of the Ferring Judgement, *European Competition Law Review*, 23(6), 2002.
- Nicolaides, P., 2003: 'Compensation for public service obligations: the floodgates of state aid', *European Competition Law Review*, 24 (11), 2003.
- Ward, D., 2003: 'State aid or band aid? An evaluation of the European Commission's approach to public service broadcasting', *Media, Culture & Society*, Vol. 25. 2003.

## Background Materials Not Referred to in the Text

- Bartosch, A., 1999: 'The financing of public service broadcasting and E.C. stat aid law: An interim balance', *European Competition Law Review*, 20(4), 1999.
- Biondi, A. and Eeckhout, P., 2004: 'State aid and obstacles to trade' Biondi, Eeckhout, and Flynn (editors): *The Law of State Aid in the European Union*, Oxford University Press.
- Wiedemann, W., 2004: 'Public service broadcasting, state aid, and the internet: Emerging EU Law', *DIFFUSION online*, 2004/47.

## EU Legislation

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

Commission Directive 2000/52 amending Directive 80/723 on transparency in the financial relations between the Member States and State enterprises, [2000] OJ L193/75.

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (12) Article 1(b)(i) and Article 1(b)(v).

Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298/23, as amended by directive 97/36/EC [1997] OJ L 202.

## Commission Communications

Commission of the European Communities: *Communication on Services of General Interest in Europe*, COM (2001), 580 final.

Commission of the European Communities: *Communication on the application of State aid rules to public service broadcasting*, [2001] OJ C320/5.

Commission of the European Communities: *Communication on Principles And Guidelines for the Community's Audiovisual Policy in the Digital Age*, COM (1999), 657 final.

Commission of the European Communities: *Communication to the European Parliament, the Council and the Committee of the Regions: First European Community Framework Programme in Support of Culture (2000-2004)*, COM (1998), 226 final.

Commission of the European Communities: *Communication to the Member States Community Guidelines Applying Articles 87 and 88 of the EC Treaty*, [1993] OJ C307/3.



## **Other EU Materials**

Letter of 22 May 2002 regarding state aid No. N 631/2001, published at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie/n631-01.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie/n631-01.pdf).

Council Resolution of the 12 February 2001 on national aid to the film and audiovisual industries [2001] OJ C73/3.

Directorate-General for Competition of the European Commission, internal discussion paper ‘Application of Articles 90, paragraph 2, 92 and 93 of the EC Treaty in the broadcasting sector’ (mimeo, 1998).

Protocol on the system of public broadcasting in the Member States, attached to the Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain acts, signed in Amsterdam on October 2, 1997, OJ 1997 C340/109.

European Parliament, Resolution on the Role of Public Service Television in a Multi-media Society, OJ No. C 320, 1996.

## **Websites**

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-1998/n088-98.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-1998/n088-98.pdf). (last visited 2006-05-15)

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie\\_2002.htm](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie_2002.htm). (last visited 2006-05-15)

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-2000/n237-00.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2000/n237-00.pdf). (last visited 2006-05-15)

[http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie/n631-01.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie/n631-01.pdf). (last visited 2006-05-15)

# Table of Cases

## Cases before the European Court of Justice and the Court of First Instance

- Case 173/73, *Italy v Commission* [1974] ECR 709.  
Case 155/73, *Italy v Sacchi* [1974] ECR 409.  
Case 61/79, *Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl* [1980] ECR 1205, 1228.  
Case 730/79, *Philip Morris v Commission* [1980] ECR 2871.  
Case 149/79, *Commission v Belgium* [1980] ECR 3881.  
Case 240/83, *Procureur de la République v Association de défense des brûleurs d'huiles usages* [1985] ECR 531.  
Case 263/86, *Belgium v Humbel* [1988] ECR 5365.  
Joined Cases C-72/91 and C-73/91, *Sloman neptun Schiffahrts AF v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993] ECR I-887.  
Joined Cases C-151/91 and C-160/91, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon and Daniel Pistre v Caisse Autonome Nationale de Compensation de l'Assurance Viellesse des Artisans* [1993] ECR I-637.  
Case C-320/91, *Corbeau* [1993] ECR I-2533.  
Case C-181/91, *Kirshamer-Hack v Sidal* [1993] ECR I-6185.  
Case C-387/92, *Banco Exterior de Espana v Commission* [1994] I ECR-877.  
Case C-44/93, *Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State* [1994] ECR I-3829.  
Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, [1994] ECR I-4103.  
Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision SA, Reti Televisive Italiane SpA, Gestevisión Telecino SA and Antena 3 de Televisión v Commission* [1996] ECR II-649116.  
Case T-106/95, *FFSA and others/Commission* [1997] ECR II-229.  
Case C-157/94, *Commission v. Netherlands* [1997] ECR I-5699.  
Case C-6/97, *Italy v Commission* [1999] ECR I-2981.  
Case C-67/96, *Albany International BV v Stichting Bedrijfspensioen fonds Textielindustrie* [1999] ECR I-5751.  
Case T-46/97, *SIC v Commission* [2000] 3 CMLR 987.  
Case C-53/00, *Ferring SA v Agence Centrale des Organismes de Sécurité Sociale (ACOSS)* [2001] ECR I-9067.  
Case C-126/01, *GEMO*, April 30, 2002. (not yet reported in ECR).  
Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

## Cases before the European Commission

Commission Decision NN-141/95, *SIC* [1997] OJ C67/10.

Commission Decision NN 70/98, *Kinderkanal/Phoenix* [1999] OJ C238.

Commission Decision NN C-88/98, *BBC News 24*. published at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-1998/nn088-98.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-1998/nn088-98.pdf).

Decision N 237/2000, *Ireland: extension of aid schemes to film and TV production*, SG(2000) D/107013, published at [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/comp-2000/n237-00.pdf](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/comp-2000/n237-00.pdf).

Case N 548/2001, *Belgian aid in favour of local television in the French Community*, published at: [http://europa.eu.int/comm/secretariat\\_general/sgb/state\\_aids/industrie\\_2002.htm](http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie_2002.htm).