The European Union Policy, Pluralism and Public Service Broadcasting

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Introduction

The relationship of European Union policy and Public Broadcasting Services could be summarized as a historic dilemma without a clear answer. The balance between a strong European competition policy and Public Broadcasting survival has still to be found. Perhaps the text cited below explains the Gordian knot faced by European Union.

“We need balanced solutions able at the same time to respect two important points. The first is the basic function of Public Broadcasting Services in the most of EU Member States. This fact has been recognised recently in Amsterdam Treaty with the Public Broadcasting Protocol. The second is that European integration is based on free market and equal competition. The future of the dual European TV system depends on how we can be able to combine these two apparently incompatible principles”
(The digital age: European Audiovisual Policy. Report from the high level group on audiovisual Policy, 1998)

The Treaties perspective

From its birth, the European television was limited, managed and controlled by Member States, Luxembourg excluded. The European Court of Justice (ECJ) had to deal with this issue for the first time in 1974 with de Sacchi sentence¹. One of the questions submitted to the Court in this case was whether the state funded television was in opposition with the free market community regulation. The EJC accepted in its decision the existence of State funded TV, because the article 86 was not directly against it. On the other hand, the Court recalled that they were submitted to the normal competition rules, as long as they are not an obstacle as far as the accomplishment of their specific mission entrusted by State is concerned. In short, the case ‘Sacchi’ laid down two important points. First, the existence of Public Broadcasting Services is not forbidden by the Treaties; second, they are not exempt from the competition law, except if this endangers the specific mission conferred by State.

The ambiguity is clear if an analysis of European Community Treaty (ECT) articles cited by the ‘Sacchi’ sentence is made. The 86.1 article of ECT states: “In the case of public undertakings

¹ Sentence of European Court of Justice (ECJ). 30.4.1974 - As. C-155/73, Italia vs. G. Sacchi .
and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89 [competition rules]."

The second section of this article follows the same directions, but it contains a useful clause for the arguments to support Public Services, and therefore Public Broadcasting Services: Art. 86.2. "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

These articles are the key tools used in the discussion about the pertinence of public television in a free market. They show how it exists a intentional ambiguity. It allows an interpretation of EU Treaties in accordance with the economic and social situation of the moment. In fact, this duality between competition and public services is present along the debate, and the dilemma is still to be resolved 25 years later. The protocol on the system of public broadcasting added in the Amsterdam Treaty (1997) repeats the same balance. Next sections describe the milestone of this process.

A geographical limited problem

Until the eighties, the main of European commercial televisions were supposed to carry out the burden of proof to defend their right to life. In the nineties, their action changed and is addressed against the most annoying competitors: the Public Broadcasting Services. In fact, the private operators complained specially about the South-European Public Television (France, Portugal, Italy and Spain). They compete with them for the same advertising without any limitation as the BBC or the German Public Broadcasting Services (cf. Table 1).

<table>
<thead>
<tr>
<th>Funding</th>
<th>Public Broadcasting Services</th>
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<tr>
<td>Licence fee</td>
<td>BBC (United Kingdom)</td>
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<td>DR (Denmark)</td>
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<td>VRT (Belgium)</td>
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<td>YLE (Finland)</td>
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<td>SVT (Sweden)</td>
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<td>Licence fee and advertising</td>
<td>ZDF (Germany) Advertising allowed only before 20h and 20 minutes by day</td>
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<td>ARD (Germany) Advertising allowed only before 20h and 20 minutes by day</td>
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<td>RTE (Eire)</td>
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<td>NOS and Broadcasting Assoc. (Netherlands)</td>
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<td>ORF (Austria)</td>
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<td>TV2 (Denmark)</td>
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Table 1. The funding of Public Broadcasting Services
Public Funding, licence fee and advertising

France TV (France)

RAI (Italy)

RTBF (Belgium)

Advertising and public funding

RTP (Portugal)

Advertising and state debt

RTVE (Spain)

Advertising and tax over electricity bill

ERT (Greece)


The first ally of commercial operators was the European Court of Justice. After the Sacchi case, in 1991 had to pass judgement about the Greece Public Broadcasting Services monopoly. According to ERT ruling\(^2\), the Member States broadcasting regulation had to be in accordance with the freedom of speech as stated in the article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR)\(^3\).

Two years later, the Human Rights European Court decreed the illegality of national regulations on Public Broadcasting Services with the ECPHR, if there were no adequate means to make the individual participation possible\(^4\).

From both sentences, it could be deduced the ECJ would not allowed today a television monopoly as it existed in the main part of Europe in sixties and seventies. In the middle of the nineties, the commercial operators found a second ally in the European Commission. With the Competition Commissioner, the Belgian Karel Van Miert, Brussels started to question certain aspects of public television. The Commission acknowledged the legitimacy of general interest objectives, which justify the existence of these monopolies (EC, 1996a, 2000). At the same time, it considered the means traditionally used to achieve these objectives as inadequate with regard to the technological evolution, the interests of consumers and the competitive exigencies of European industry (EC, 1996b:51). Therefore, the Competition DG tried to find new instruments able to guarantee them in a new environment. Yet, this liberal policy clashed against important political and legal problems.

\(^2\) Sentence of European Court of Justice (ECJ, 18.6.1991, As. C-260/89, ERT.

\(^3\) Article 10 – Freedom of expression. “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”.

\(^4\) Sentence of European Court of Human Rights, 24.11.1993 Invormationsverein Lentia and others vs. Austria.
First, the Community regulation is neutral regarding the public or private profile of the enterprises. This is the sense of the 295 article of the EC. “This Treaty shall in no way prejudice the rules in Member States governing the system of property [public or private] ownership. At the same time the Treaties point that both kinds of enterprises have to be submitted to competition principles, as appears in the article 4 of the EC Treaty.

For the purposes set out in Article 2, the activities of the Member States and the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein, the adoption of an economic policy which is based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

On the other hand, the Member States were reluctant to leave their Public Broadcasting to the competition regulation. They claim the existence of certain type of public televisions with a position of privilege in a competitive market because of cultural reasons. Therefore, the existence of funding compensation sufficient to develop their mission had to be admitted.

The European Commission agreed with the Member States as for the principle of public funding of television. Nevertheless, there was a problem with the simultaneous financing from advertising market. Brussels had no doubt to consider the public subsides for Public Broadcasting Services as a compensation for the public services obligations imposed by States. Thus, they were not considered as a public aid in the sense of article 87 of ECT. They were allowed as general guidelines because they were considered as a mean to promote culture through the accomplishment of certain service public obligations (Pons, 1996: 8-9).

The fact that the public funding of televisions was considered as a state aid avoided the necessity to make a risky cultural balance and to extend the process.

Otherwise, as finally happened in 1998, the European Commission would have had to do complex analyse based on the exceptions of the article 87 of ECT. This article forbids the state aid, which distorts or threatens to distort competition, insofar as it affects trade between Member States. To this general thrust, there are three exceptions without conditions, and other five more discretionary, one of them is based on culture.

**The Commercial broadcasters claims**

In a first phase, the commercial broadcasters started to denounce the most advertising funding oriented Public Broadcasting Services to the Commission since 1992. They alleged the double PBS funding as incompatible with the EC Treaties. The birth of digital multichannel television opened a new battlefield. The most respected PBS, as BBC and German PBS, were reported to the Commission by their news theme channels. The main formal complaints are detailed below:

- MEDIASET vs. RAI
- TF1 vs. France 2, France 3
- BSkyB vs. BBC (24 hours news channel)
• VPRT (German Association of Commercial TV) vs. PHOENIX (Parliamentary channel) and vs. KINDERKANAL (children's channel). Both were developed by ARD and ZDF
• Tele 5 vs. RTVE and regional Televisions.

These complaints obliged the Commission to get involved. As we have seen, there were scarcely any problems with the PBS based exclusively on public funding. The difficulty remained on the field of the public broadcasters with advertising sources, which were difficult to conciliate with the EU competition rules. It was necessary to state when a public service was provided, and to establish what are the costs attributable to it. But overall it implied serious problems from a political point of view: who –Commission or Member States– were competent to define what –public service– and how - apply the competition rules.

Member States were opposed to any change on the PBS statu quo. The Commission were between the pressures of private broadcasters and the distrust of member states. Its position was not univocal, but in general it preferred a stricter implementation of competition regulation on PBS. The Commission began to see a solution with the report against Portuguese PBS. The competition services of DG IV took a Decision in November 1996. It considered that the state funding of Portuguese PBS, RTP, was a suitable economic compensation for the public services obligations stated by State. In the nutshell, the funding was not a state aid\textsuperscript{5}. The Commission sorted out quickly the Portuguese case because it was relatively simple to solve.

The RTP television had an analytical accounting, which allowed to follow the destination of the state funding. Yet, the Portuguese case drive in a long-term to a dead end. The appeal of the private broadcaster against this Decision was overturned by ECJ in May 2000, The Court obliged the Commission to consider the economic compensations as a state aid. On the other hand, the Portuguese case was relevant because it showed the necessity to promote a separate accounting on the PBS.

**The Amsterdam Protocol**

The pressure over the Commission to solve the complaints was growing in the middle of nineties. As a result, the defenders of PBS began to react. Firstly, the European Parliament issued in 1996 a Resolution, which acknowledged the double source of funding of PBS and the competences of Member States to define what is considered as service public obligations (EP, 1996). More important was the reaction of those states with more problems in their public televisions as Spain, France, Italy and Belgium. The European Council met in Holland in June 1997, and approved the Amsterdam Treaty. One of the protocols to be added to the ECT was referred to the right of Member States to funding their Public Televisions. The protocol on the system of public broadcasting, annexed to the EC Treaty, states “that the system of public broadcasting in the Mem-

\textsuperscript{5} Commission Press Release, IP/96/882, “Financing of portuguese public television not state aid, according to Commission”, 2.11.96.
ber States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”, and therefore: “The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account”.

The protocol was linked with the new article 16 of the ECT, which outlined the importance of general interest services: “Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions”.

The different interpretations about the scope of this new rules were immediate. Karel Van Miert, competition Commissioner, both regulations were not an innovation in the Community law. The Commission and the European Court of Justice had acted always in accordance with these principles. From the Commission point of view, the protocol repeated general principles already consolidated (Van Miert, 1997). On the other hand, it was considered by some experts that the adoption of new protocol decreased success probabilities from the reports of commercial broadcasters against public televisions. The Commission was not able to be insensitive to the interpretation of ECT made by the own Member States (Dibie, 1997 cited by Pérez Gómez, 1997).

The Commission had now less strength to impose a solution to the PBS funding, and it let the inquiries go longer. But the action of European Court of Justice, obliged to reopen the file. The commercial broadcasters had denounced the Commission to EJC because it had not answered the former reports against the PBS. The Court of first Instance condemned the Commission in 1998 and 1999 because it had not adopted the preliminary investigation necessary in order to answer the complain of Tele 5 and TF1 vs. RTVE and France Télévision respectively. The sentence urged the Commission to inquire these complaints briefly and to adopt a final decision, under the final control of ECJ.

As a result of these sentences, the Commission and the Council of Ministers tried to meet an agreement to lay the foundations for a lasting understanding, which could make compatible the competition rules and public state funding of PBS.
The Commission and Member States struggle (1997-2001)

Van Miert and his Directorate presented in September of 1998, an internal discussion document about general guidelines on state aid in broadcasting sector. The document admitted the State role in defining and providing the funding of PBS, but this definition and implementation could not go against the general competences of European Commission as a guardian of the free competition. The DG IV considered it was necessary to establish a general guidelines accepted by States and enterprises. They shall provided transparency, coherence, and security to all players. To be precise, the draft document accepted the double funding, but with strict limitations: it would be forbidden to allocate public funding to pay entertainment or sports programmes; the public televisions only could compete for the advertising market with specific channels or subsidiary firms with no public funding. Moreover, the commercial broadcasters could be able to accomplish interest public objectives and therefore to apply for state aid. This was already present on the Convergence Green paper in 1997 (CE, 1997b: 32).

The Member States reacted with power to this kind of guidelines. They preferred an approach on a case by case basis. They considered the regulation of PBS as an exclusive competence of States. Also, it would be easier for them to exert a larger pressure on individual decisions of the commission than on a public and general rule. The document of the Commission was blocked by States. There was an impasse until the DG IV began to deal with the reports unresolved.

The European Commission made public in November 1998 the formal inquiry of Spanish, French and Italian PBS. The 3rd February 1999, the Commission required Spanish, Italian and French Governments to provide the financial data of their PBS from 1992 to 1997. The Member States reacted before this new attack of the Commission and two days later, the 5th February, the Council of Ministers agreed on a formal resolution shielding the Public Television.

The Commission force began to go down as internal and juridical problems came up. Firstly, it was the resignation of Santer Commission and the entry of Prodi’s team in September 1999. At the same time, the Audiovisual Directorate General (DG X) presented a new document made by a high group of experts, which attempted to be a third way to deal with the PBS funding. The report, titled “The digital age European Audiovisual Policy”, acknowledged the States role to define which services are to be considered as public services and which aren’t. The High Level group suggested only public funding for the service public activities and therefore two different accountings were absolutely necessary: one for commercial activities and other for public services activities. In fact, the point was to remove the financial advantage of PBS when enter in competition

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with the commercial broadcasters. The European Audiovisual Conference in Birmingham in April 1998 was a new event used by commercial broadcasters to put stronger pressure on the public televisions. Rupert Murdoch, main owner of BSkyB and News International, strongly attacked public television, to be precise BBC: “...if unhealthy concentration does exist today, it exists not in the private sector but with state broadcasting. In the UK no one challenges the power of the BBC, nor other countries their own state broadcasters. ...The BBC is by far and away the biggest media owner in the UK. With the combination of its £2 billion annual guaranteed income from a compulsory poll tax and vast commercial freedom there is absolutely no chance of its being driven out of business by satellite broadcasters or anybody else” (Murdoch, 1998)

With the new Commission, the competition services were assigned to Mario Monti, the former Internal Market Commissioner. The audiovisual portfolio was given to Viviane Reding, a former Member of European Parliament. The new Commissioners and the French Presidency of EU in the second part of the year 2000 helped to build up smooth and constructive talks between Commission and Member States. The PBS file was still burning, but the States recovered a certain degree of power over Brussels. A group of events from May 2000 contributed to change the former balance.

The Commission published in May 2000 a Decision which excluded the possibility of imposing the European antitrust regulation to Eurovision system of sport rights acquisitions, one of the last advantages of PBS in Europe. The exemption will be effective until 2005 and it was approved because the European Broadcasting Union agreed to set up a reasonable access system to its sports exclusive images.

At the end of July 2000, a Conference about the Public Television Future took place in Lille (France). It was an event organised by the French EU Presidency, and the Culture Ministers of Member States met there in a informal meeting. The discussions led to a conclusion: it was necessary to reinforce the legal security of PBS with new measures. It was clear that the Amsterdam Protocol had had a low effect to deter the Commission initiatives.

The same month of July, the Commission approved a modification of the Transparency Directive. It imposed the obligation to separate accounting for companies which operate, on the one hand, services of general economic interest and receive compensation in form of payments or special or exclusive rights and which, on the other hand, are also active in normal commercial operations. The Directive, which came into force at the end of July 2000, stated that the obligation to operate separate internal accounts “will not apply to cases where the compensation payments have

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been fixed by means of an open and transparent procedure, and to undertakings with an annual total net turnover of less than 40 million Euro.\(^9\)

The Public Broadcasting Services are affected by the Transparency Directive as long as they have also activities outside the scope of its public service obligation. According to the Commission, the Directive tried to clarify and to make easier the discussion about the proportionality of PBS funding in the Amsterdam Protocol framework.

The European Commission published in September 2000 a Communication about the services of general interest. It had a more favourable approach to arguments of Member States supporting the Public Broadcasting Services. There was a special section about public radio and television. The document stated that there is no objection to a double financing system of PBS, as long as it doesn’t affect the competition on markets in a way opposed to common good. The Communication stated the freedom of States to define their public service and their funding, but stressed the importance of its transparency and proportionality (CE, 2000).

However, the problem of unresolved denunciations remained opened. The French Presidency urged Commission to find a definitive solution capable of offering a legal security to Member States and enterprises. A few days later, the Monti Cabinet launched a proposal, which was based on a quota system. There would be a maximum percentage of advertising funding for PBS. The threshold of this proposal was lower than expected: the PBS could not have more than 20% of its incomes from advertising. Clearly, the proposal was strongly criticized by the worst affected Member States. The PBS of France, Spain and Italy could disappear with this threshold, since about 50% of its incomes are obtained from advertising market. The proposal was rejected.

**The Communication of November 2001**

As events unfolded along the end of 2000, the Member States position was being recognised by the Commission. The Audiovisual Commissioner, Viviane Reding, stated in January 2001 that it was legal for Member States to run the PBS operations to achieve a mass audience, as long as it was necessary to accomplish the PBS defined objectives. It meant that the Member States could use the new media as internet or thematic channels, provided they were considered as necessary to accomplish the public services entrusted to PBS (Reding, 2001).

Finally, the Commission published in November 2001 a Communication on the application of state aid rules to public service broadcasting (EC, 2001). The Communication clarifies that Member States are a priori free to define the extent of the public service and the way it is financed and organised, according to their preferences, history and needs. This includes a ‘wide’ definition (online services and thematic channels) and the legitimacy to look for mass audiences (entertainment and sport). The definition of the public service remit, however, could not extend to activities that

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could not be reasonably considered able to meet – in the wording of the Amsterdam Protocol – “the
democratic, social and cultural needs of each society”.

The Commission calls for transparency on these aspects in order to assess the proportion-
ality of State Funding and to control possible abusive practices. Member States are asked by Brus-
sels –whenever this is lacking– to establish a precise definition of the public service remit, to for-
mally entrust it to one or more operators through an official act and to have in place an appropriate
authority monitoring its fulfilment. The document clearly establish that the Commission will intervene
in cases where a distortion of competition arising from the aid cannot be justifies with the need to
perform the public service as defined by the Member State and to provide for its funding. As for
Pluralism, the Commission states that it will be took in account because the public aid might also
have the positive effect of maintaining an alternative source of supply in some relevant markets.
But again, there is the other side “it has to be balanced against possible negative effects of the aid,
such as preventing other operators from entering these markets, thereby allowing a more oligopo-
listic market structure, or leading to possible anti-competitive behaviour of public service operators
in the relevant markets” (EC, 2001, 12). Beyond the traditional balance, it seems as if the Commis-
sion let the Member States to define the public service on television as they want, but the monitor-
ing will be carried out by the Commission through the proportionality test, which for the first time in
European competition law will take into account the effects on pluralism. It makes easier a discre-
tional decision in a case by case basis. A victory for Member States and the unresolved denounces.

As Monti stated in a Financial Times article published recently, “The Commission recog-
nises the legitimate objective of public service broadcasting, but balances this with the need to en-
sure that such broadcasters operate within a defined remit and that they do not distort other mar-
kets […] Member states must define what they want from public service broadcasting. Whether this
definition satisfactorily balances the demands of the commercial sector and the needs of the public
service is not for the Commission to judge. It falls within the political responsibility of the member
states, save that the remit has to comply with the general principles of the Amsterdam protocol - the
social and democratic needs of society” (Monti, 2001).

Conclusions

The EU policy about Public Broadcasting Services can be not understood with a dual si-
multaneous process. From an external point of view, the harassment of Public Television by Euro-
pean Commission can be explained as the European expression, still to be changed, of change of
television model. As McQuail explained (1998: 126), the public television services have lost its role
as a model and point of reference of the all system. The commercial television is now the centre.
From an internal point of view, the EU policy on PBS is the reflection of struggle for the political
power between Commission and the Council of Ministers, which is the Member States organ of
representation at EU. The PBS issue is a paradigmatic case of the Commission loss of power. In
my opinion, this issue confirms the thinking of Collins (1994:3) that one of the dynamics of EU
audiovisual policy is the fight between the European institutions, which also implies a deep debate
about the future of EU. The debate between Public Broadcasting Services or commercial broadcasters is a discussion about general interest and competition policy, economic or political priority, liberal or interventionist perspective, market or state leadership (Collins, 1994: 157; Bustamante, 1999b: 28). This dilemma is one of indissoluble features of European construction.
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