

***European Union's policy on the application of state aid rules
to public service broadcasting***

KEY WORDS

European Union, Communication of the Commission, public service broadcasting, state aid, competition policy

ABSTRACT

The 2001 Communication from the Commission on the application of state aid rules to public service broadcasting (has first set out the framework governing state funding of public broadcasting. In the meantime, technological changes have fundamentally altered the broadcasting and audiovisual markets. There has been a multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand. The 2009 Communication from the Commission consolidates the Commission's case practice in the field of state aid in a future-oriented manner, based on the comments received in public consultations. It clarifies the principles followed by the Commission in the application of the Treaty on the functioning of the European Union to public funding of audiovisual services in the broadcasting sector, taking into account recent market and legal developments.

In European Union's policy on public service media there is conflict between economic goals resulting from, on the one hand, a common market, free market rules and common cultural goals and, on the other, national interests of different member countries. The source of the tension lies in the dual model of European broadcasters and a conflict of interest between public and private broadcasters. According to commercial broadcasters, as manifested in their complaints to the European Commission, the equilibrium on the electronic media market is disrupted because public media make use of both public funds and commercial profits¹. As the European Commission states, in 2009 public service broadcasters in member countries received over 22 mln Euro in the form of subscriptions or direct public aid which means that they are the third largest, aside from agriculture and transport, beneficiary of aid in the EU².

¹ See http://ec.europa.eu/competition/state_aid; www.acte.be/EPUB/easnet.

² *Pomoc państwa: Komisja zmienia zasady dotyczące finansowania nadawców publicznych przez państwo*, IP/09/1072, <http://europa/rapid/pressReleasesAction>.

On October 27, 2009 was announced the new Commission's Communication on the application on state aid rules to public service broadcasting³. It is part of a longer regulation process with references to legal regulation which went into effect on December 1, 2009 with the Lisbon Treaty⁴, the Commission strategy on public aid from 2005⁵ and the new Audiovisual Media Services Directive from 2007⁶.

Previous such Communication was put out in 2001⁷ and it for the first time delineated the conditions for financing public broadcasters by the state⁸. It served as the basis for establishing the decision process in the this area⁹ and resulted in the passing of over 20 decisions on public media financing.

The new Communication was preceded by extensive public consultations between 2008–2009, as a result of which the Commission received 121 answers¹⁰ which then became the subject of the Commission's and experts from member countries discussion. The stances presented by representatives of public and private broadcasters during work on the Communication were, not surprisingly, quite the opposite¹¹. After a very critical reaction by numerous member countries as well as public broadcasters regarding the first draft of the document prepared by the General Management of Competition matters, changes were made to the project. The communication takes into consideration Commission practices regarding future state aid based on comments received during the public consultations. It specifies the regulations which the Commission followed regarding implementation of art. 106 and 107 of the Treaty on EU functioning (TfUE) regarding public financing of audiovisual services in the broadcasting sector, taking into consideration the newest changes on the market and in

³ OJ C 257/1, 27.10.2009 (Text with European Economic Area relevance).

⁴ M. Feintuck, M. Varney, *Regulating Media Markets: the Need for Subsidiarity and Clarity of Principle*, [w:] *The European Union Legal Order after Lisbon*, ed. P. Brinkshaw, M. Varney, The Hague 2010.

⁵ State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005–2010, COM(2005) 107 final, SEC (2005) 795.

⁶ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332/27, 18.12.2007. See W. Kołodziejczyk, P. Stępa, „Stare” i „nowe” media. Dyrektywa „O audiowizualnych usługach medialnych” jako próba odpowiedzi na wyzwania rynkowe i technologiczne, „Studia Medioznawcze” 2008, No. 1, p. 12.

⁷ Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320/5, 15.11.2001.

⁸ Pt. 17 of the Communication states that “the existence of State aid will have to be assessed on a case by case basis, and depends also on the specific nature of the funding”. Cf. J. Skrzypczak, *Finansowanie telewizji publicznej a prawo UE*, „Za Ekranem” 2004, No. 6, p. 14–15.

⁹ Cf. U. Soltész, *Tighter State Aid Rules for Public TV Channels*, “Journal of European Competition Law & Practice” 2010, No. 1, p. 32.

¹⁰ http://ec.europa.eu/competition/state_aid/reform/archive.

¹¹ See *The 2009 Broadcasting Communication*, by L. Repa et al., “Competition Policy Newsletter” 2009, No. 3, p. 11, http://ec.europa.eu/competition/publications/cpn/2009_3_2.pdf [accessed: 30.10.2010].

legislation. As interpreted in the communication, “audiovisual services” include linear and non-linear broadcasting of audio and audiovisual content as well as related services such as network text information services. Such understanding of “audiovisual services” needs to be differentiated from a broader concept of “audiovisual media services” defined in the directive on audiovisual media services. At the same time, it was emphasized that the announcement does not infringe internal market rules and basic freedoms in the area of radio and television.

The need to come up with a new communication was as a result of changes which took place in European systems in the area of radio and television. Doing away with public media monopoly, the entrance of new players onto the market and rapid technological growth resulted in great changes in the sector of electronic media competition¹². In European countries, with a few exceptions, traditionally both radio and television were active in a monopolist system, mainly as a result of limited access to broadcasting frequencies and general limitations on access to the market. However, in the 1970s technological development forced many member countries to allow new commercial broadcasters onto the market¹³. Despite this, state authorities were of the opinion that public radio and television need to stay¹⁴ in order to provide a broad and accessible programme offer and to meet those needs which may not be so attractive to commercial broadcasters. It was about the realization of media policy goals which otherwise would not necessarily be met in an optimal way¹⁵. This was confirmed in the interpretation protocol on public radio and television systems in member countries, an annex to the European Community Treaty, known as the Amsterdam Protocol¹⁶.

Growing competition combined with the existence of broadcasters financed by the state resulted in controversy over fair market practices, which private broadcasters pointed out to the Commission¹⁷. Complaints regarded mainly art. 86 and 87 of the WE Treaty (now, since Lisbon Treaty going into effect, art. 106 and 107 TfUE)¹⁸.

¹² See *High-definition Set-top Boxes and Chipsets: The European Market*, London 2007, p. 43. Cf. *Video on-demand and catch-up TV: a Report by the European Audiovisual Observatory and the Direction du développement des medias (DDM) with the collaboration of NPA Council*, Strasbourg 2009, p. 12.

¹³ See *Digital Television*, Strasbourg 2010, p. 12.

¹⁴ Cf. K. Jakubowicz, *Media publiczne: początek końca czy nowy początek*, Warszawa 2007, p. 56.

¹⁵ See K. Williams, *Media w Europie*, Warszawa 2008, p. 65.

¹⁶ Protocol on the system of public broadcasting in the member states, [in:] Treaty of Amsterdam amending the treaty on European Union, the treaties establishing the European Communities and certain related acts, www.krrit.gov.pl/bip/Portals/1/Documents/Protokol%20on%20the%20system.pdf.

¹⁷ See J. Middletown, *The Effectiveness of Audiovisual Regulation inside the European Union: the Television Without Frontiers Directive and Cultural Protectionism*, “Denver Journal of International Law and Policy” 2003, No. 4, p. 609.

¹⁸ See *Traktat z Lizbony. Traktat o Unii Europejskiej. Traktat o funkcjonowaniu Unii Europejskiej. Teksty skonsolidowane*, Warszawa 2009, p. 104–105.

In the 2001 Communication, the Commission delineated for the first time “borderline conditions” for financing public broadcasters by member states. Based on that, it later on passed over 20 decisions regarding public broadcasters financing¹⁹. Since then, however, Communication requirements have not been able to keep up with rapid technological changes which in the first decade of the 21st century have resulted in widespread change on the broadcasting and audiovisual markets. First of all, there has been an increase in the number of distribution platforms and new technologies, such as digital TV, IPTV, mobile TV and VOD²⁰. This has resulted in the broadening of markets for potential competition, new services and new players. Traditional broadcasters, both public and commercial, need to deal now with competition from “new media” such as network operators and Internet services²¹. Moreover, technological development has also resulted in the creation of new media services such as *online* news services²², non-linear services and on-demand services. It was followed by a process of convergence of audiovisual services and greater opportunities of consumers to access numerous services via one platform or device, or access to one service via numerous platforms and devices²³. Both, public and private broadcasters compete for auditoriums by differentiating their activity, by making new distribution platforms available and by broadening their range of services²⁴. It is no wonder then that functioning in such difficult market conditions next to public broadcasters financed and supported by public funds has resulted in an increased amount of broadcaster complaints²⁵. Essential became then the creation of new regulation, the analysed here Communication of the Commission from 2009.

It should be noted that since the announcement of the Communication in 2001 until the passing of the new Communication in 2009 there have also been numerous changes in legal regulation which also influence the radio and television markets. In 2003, in the Altmark

¹⁹ See: A. Bavasso, D. Long, *The Application of Competition Law in the Communications and Media Sector: A Survey of Recent Cases*, “Journal of European Competition Law & Practice” 2010, No. 3, p. 234.

²⁰ See: *Mobile Broadcasting: Technological Developments, Market Opportunities Regulations and Policy*, Luxembourg 2006, p. 36.

²¹ See M. Filiciak, *Internet – społeczne meta medium*, [in:] *Media audiowizualne: Podręcznik akademicki*, ed. W. Godzic, with A. Drzał-Sierocka, Warszawa 2010, p. 121.

²² Cf. Analysis on the development of webcasting: T. Kowalski, *Między twórczością a biznesem. Wprowadzenie do zarządzania w mediach i rozrywce*, Warszawa 2008, p. 268.

²³ See: M. Drożdż, *Konwergencja mediów – tendencje, modele i konsekwencje*, „Studia Medioznawcze” 2008, No. 3, p. 87.

²⁴ See: V. A.-M. Wiedemann, *Public Service Broadcasting, State Aid and Internet: Emerging EU Law*, “European State Aid Law Quarterly” 2004, No. 4, p. 596.

²⁵ See: N. Tigchelaar, *State Aid to Public Broadcasting – Revisited: An Overview of the Commission’s Practice*, “European State Aid Law Quarterly” 2003, No. 2, p. 172. Judgment of the Court of 24 July 2003. Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht, Case C-280/00.

judgement²⁶, the European Court of Justice delineated the conditions in which compensation for providing public services is not considered state aid. In 2005, the Commission passed a new decision²⁷ and ramifications²⁸ regarding state aid in the form of compensation for providing public services. In 2007, the Commission passed, “supplementary document to the communication on a common market in XXI century Europe. Services provided for the general public, including general interest public services: new European obligation”²⁹. That same year, amended was the “Television without Frontiers” Directive from 1989 and passed was the above mentioned The Audiovisual Media Services Directive broadening the range of EU audiovisual regulation to include new media services³⁰.

Communication from 2009 is an extensive document whose detailed analysis would exceed the size of this article. Hence, the subject of this study will only be on issues imperative to indicate the role and influence of this document. All quotations not marked otherwise come from this Communication and correspond to numbering included in its structure.

Public service broadcasting in European Union’s policy

The Communication emphasizes that public radio and television, even though they possess an economic aspect, is not comparable to any other public service. Public media, as a result of their broad access to a large percentage of the population, by broadcasting information and content shape public opinion and enrich public debate (pt. 9). In general, for a large part of society radio and television are the main source of information. In this context, it is imperative that radio and television are independent (pt 10), in accordance with the basic right to freedom of opinion, as stated in art. 11 of EU Charter of Fundamental Rights³¹ as well as in art. 10 of

²⁶ Judgment of the Court of 24 July 2003. *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* Oberbundesanwalt beim Bundesverwaltungsgericht, Case C-280/00, Rec I-7747. Cf. A. Koenig, A. Haratsch, *The Licence-Free-Based Financing of Public Service Broadcasting in Germany after the Altmark Trans Judgment*, “European State Aid Law Quarterly” 2003, No. 2, p. 569.

²⁷ Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p. 67.

²⁸ Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4.

²⁹ COM(2007) final version.

³⁰ See A. Jaskiernia, *Wspólnotowa dyrektywa o audiowizualnych usługach medialnych – ekspozycja homogeniczności czy komplementarności*, [in:] *Europa homogeniczna czy komplementarna – recepta na zjednoczenie*, ed. R. Stefański, A. Zamojski, Toruń–Kielce 2009, p. 159.

³¹ OJ C 364, 18.12.2000, p. 1.

the European Convention on Human Rights, which is a fundamental democratic value and a human right guaranteed by European judiciary³².

Treaty on EU functioning acknowledges the importance of public services³³, which is particularly visible in art. 106 sec. 2. In the Amsterdam Protocol it states that, “the system of public radio and television in member states is directly tied to democratic, social and cultural needs of each society and to the need to maintain media plurality”³⁴. It is also noted that the treaty’s regulation, “does not infringe member state competence in the area of financing public radio and television, as long as the funds are allotted to broadcasters in order to carry out tasks part of their public mission, as delineated in their organizational ramifications, as long as the financing does not influence trade relations and competition within the Union and as long as it is not in conflict with common interests, taking into consideration regulation resulting from public mission”³⁵.

The significance of public radio and television in public, democratic and cultural life of the EU was confirmed in a Council resolution on public radio and television. It stated that, “Availability of wide public access without discrimination and based on the rule of equal chance to different channels and services is a condition necessary in order to meet public broadcasting obligations”. It was also indicated that public radio must “make use of technological development”, to give society “a chance to take advantage of new audiovisual and information services as well as new technologies” and to take action “in order to develop and diversify activity in the digital era”. It also must be able to “continuously offer a wide range of programmes in accordance with the mission delineated by member states and direct the offer to the entire society; in this context public broadcasters must strive to reach wide audiences with their offer”³⁶.

³² Judgment of the Court of Justice, ERT/DEP, Case C-260/89 (18 June 1991), Rec. I-2925. Cf. A. Jaskiernia, *Wolność słowa jako wartość w systemie aksjologicznym Rady Europy*, “Prawa Człowieka – Humanistyczne Zeszyty Naukowe” Vol. 8 (200), p. 41.

³³ See J. Chalmers, *The Reconstitution of European Public Spheres*, “European Law Journal” 2003, No. 2, p. 131.

³⁴ Public broadcasters are created by the legislation in order to carry out specific goals and requirements. As a result of EU policy regarding protection of competition and public aid for public broadcasters, the autonomous regulation model has been transformed into a controlled model. See: K. Jakubowicz, *Polityka medialna a media elektroniczne*, Warszawa 2008, p. 160–161.

³⁵ I. Nitsche, *Broadcasting in the European Union: the Role of Public Interest in Competition Analysis*, The Hague 2001, p. 187.

³⁶ Resolution 1999/C 30/01 of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ C 30, 5.2.1999, p. 1. Cf. E. Stasiak-Jazukiewicz, *Polityka medialna Unii Europejskiej*, Warszawa 2005, p. 42.

In the 2008 resolution on concentration and pluralism in the the media European Union, the European Parliament recommended “the creation and implementation of regulation regarding state aid to public and civic media enabling them to carry out their functions in a dynamically changing environment, guaranteeing at the same time that public media in a transparent and responsible manner carry out the functions delineated to them by member states without abusing public funds for political or economic reasons”³⁷.

For EU policy, imperative is also the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005³⁸, ratified by the Council and as a result part of EU law. In light of the Convention’s decision, each state can “adopt means in order to protect and propagate diversity of cultural forms on its territory”. These means, as indicated in art. 6 sec. 1, can include “means to increase media diversity via public mass media”.

For EU policy, vital are also Council of Europe documents, especially Committee of Ministers Recommendation on media pluralism and media diversity of media content³⁹, as well as public service media mission in information society⁴⁰. A more in-depth analysis of Council of Europe achievements in this sphere, however, exceeds the size of this article⁴¹.

EU policy regarding state aid to public radio and television takes into consideration many various aspects⁴². The Maastricht Treaty introduced art. 151 [presently art. 167 TfUE] on culture and art. 87 sec. 3 let. d [presently art. 107 TfUE] on aid in the proliferation of culture. The Maastricht Treaty also takes into consideration art. 16 [presently art. 14 TfUE] on services rendered in general economic interest⁴³. It particularly regards TfUE regulation on competition, especially with regard to services rendered in general economic interest. Meanwhile, the Amsterdam Protocol is the only direct community legal basis for the

³⁷ European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253 (INI).

³⁸ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, approved by the Council Decision 2006/515/WE of 18 May 2006.

³⁹ Recommendation CM/Rec(2007)2E of the Committee of Ministers to member states on media pluralism and diversity of media content. Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.

⁴⁰ Recommendation CM/Rec(2007)3E of the Committee of Ministers to member states on the remit of public service media in the information society. Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies.

⁴¹ Cf. A. Jaskiernia, *Rada Europy a problemy mediów masowych*, Warszawa 2002, p. 165 and on; A. Richter, *The influence of the Council of Europe and other European institutions of the media law system in post-Soviet states*, “Central European Journal of Communication” 2009, No. 2, p. 15.

⁴² See: K. Doktorowicz, *Zasady polityki audiowizualnej Unii Europejskiej*, [in:] *Radio i telewizja: Informacja, kultura, polityka*, ed. W. Dudek, Katowice 2000, p. 144.

⁴³ See A. J. Harcourt, *The European Union and the Regulation of Media Markets*, Manchester–New York 2005, p. 39.

existence and delineation of public broadcasters functioning in member states⁴⁴. In the Protocol, the EU acknowledges the specificity of public broadcasters directly tied to democratic, social and cultural needs of European societies and the necessity to finance them in the “scope of public service”.

Audiovisual media services are coordinated on the European level via the directive on audiovisual media services⁴⁵. Requirements regarding financial transparency have been delineated in the directive on transparency⁴⁶. The above regulation is interpreted by EU Court of Justice and the Court of First Instance. Imperative here are also Commission communications.

The concept of state aid in the EU and public media financing

Public service broadcasters are generally financed from the state budget and/or from subscription fees. In some cases, the state can provide capital, subsidize or remit public broadcaster debt⁴⁷. Such financial operations are usually carried out by public organs and regard the transfer of public funds. State financing of public broadcasters influences trade relations between member states because, “When aid provided by the state or from public means results in strengthening of a company competitive on the EU market, it can be said that such aid influences trade on that market”⁴⁸. Such situations take place when rights to programmes are bought and sold, which happens frequently in international trade. In case of public broadcasters that have a license to sell air time, advertising has transborder influence, especially in areas homogenous in terms of language but divided by state borderlines. It should also be noted that services via the Internet usually have global scope (pt. 22)⁴⁹.

In accordance with old art. 87 sec. 1 TWE [presently art. 107 sec. 1 TFEU], the concept of state aid takes into consideration the following conditions: 1) there must be state

⁴⁴ See K. Jakubowicz, *Unia Europejska a media. Między kulturą a gospodarką*, Warszawa 2010, p. 82.

⁴⁵ OJ L 298/23, 17.10.1989. Cf. K. Doktorowicz, „*Telewizja bez granic*” – europejskie regulacje w dziedzinie komunikowania, [in:] *Międzynarodowe regulacje środków przekazu*, ed. K. Doktorowicz, W. Dudek, Katowice 1992, p. 42; K. Zeidler, *Telewizja bez granic, czyli unijne standardy*, “Gazeta Sądowa” 2003, No. 12, p. 13.

⁴⁶ Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

⁴⁷ Cf. A. Lange, *Comparative analysis of the financing of the public audiovisual sector in the European Union*, Conference “Public media services at the digital age”, Strasbourg 2008; www.obp.coe.int/online-publication/expert.

⁴⁸ Judgments of the Court of Justice: C-730/79 Phillip Morris Holland v Commission of the European Communities [1980] Rec. 2671, pt 11; C-303/88 Italy v Commission [1991] Rec. I-1433, pt 27; C-156/98 Germany v Commission [2000] Rec. I-6857, pt 33.

⁴⁹ See D. Ward, *State Aid or Band Aid? An Evaluation of the European Commission Approach to Public Service Broadcasting*, “Media, Culture and Society” 2003, No. 2, p. 234.

intervention or via state sources, 2) intervention must potentially influence trade between member states, 3) aid must bring benefits to the beneficiary of aid, 4) aid must threaten or disrupt competition. State aid should be assessed in an objective way, taking into consideration EU judicature (pt. 20). Additionally, state intervention results and not its goals should be the deciding element in assessment of state intervention and aid, based on art. 107 TfUE.

The procedure of Commission examination whether aid has been granted in accordance with Community market rules always takes place in specific situations. There are no universal determinants (i.e. amounts, percentages, etc.) rather procedure instruments based on which examination takes place. Determination of advantages takes place based on criteria established in the Altmark case⁵⁰. Compensation as a result of providing public services is not considered state aid if four conditions are met. Firstly, the beneficiary company must provide public services according to clearly defined obligations. Secondly, determinants based on which compensation is allotted must be clearly delineated earlier in a transparent and objective way. Thirdly, the amount of compensation cannot exceed the total amount of expenses needed to perform the public services, taking into consideration appropriate inflow and reasonable profits. Fourthly, in case when a company to supply public services is not chosen in accordance with procedures for providing public orders, which would enable choosing a company that would offer those services for the lowest possible price, the level of compensation is estimated based on an analysis of costs that would be incurred by a well managed company for providing such public services.

If financing does not meet the above conditions, it would be considered selective favouring of a broadcaster and, at the same time, a disruption or a threat of disruption of competitive practices (pt. 24)⁵¹.

Imperative are also resolutions regarding *existing aid* and *new aid*, which were differentiated by Council Directive in 1999⁵². As far as existing aid, it mainly regards subscriptions while new aid can mean both, new financing regulations and short term aid (tax breaks, subsidies, debt remittance, etc.). Member states are obliged to report to the Commission any plans to allocate aid or changes in the form of aid (*ex ante*). The

⁵⁰ See P. Santamato, *Compensation for services of general economic interest: some thoughts on the Altmark ruling*, http://ec.europa.eu/competition/publications/cpn/cpn_2004_1.

⁵¹ Cf. M. Szydło, *Telewizja publiczna we wspólnotowym prawie konkurencji*, "Przegląd Prawa Europejskiego" 2003, No. 3, p. 51.

⁵² Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ. L 83, 27.03.1999.

Commission will then examine it and in the mean time it cannot become effective (suspension rule). The introduction of new kind of financing or another form of support without the Commission's approval is automatically considered illegal.

The Commission examines whether: 1) the original way of financing of public broadcasters is existent; 2) new changes do not influence original means (character of aid, source of financing, aid goals, beneficiaries or their activities), or whether they are of strictly formal or administrative character; 3) in case later changes are significant, can they be separated from the original means, which will allow separate assessment, if not it means that it is considered new type of aid (pt. 31).

Assessment of state aid compliance in order to support culture

Compensation for radio and television is generally assessed based on art. 106 sec. 2 TfUE, however applied can also be exceptions outlined in art. 107 sec. 3 TfUE [old art. 87 sec. 3 TWE], if certain conditions are met. Art.107 sec. 3 let. d) TfUE enables the Commission to accept aid allotted for the support of culture if such aid does not change the conditions of trade relations and competition within the Community contrary to common interests. It is the Commission's job to make decisions as far as putting this regulation into practice in the same way as the other exceptions, as outlined in art. 107 sec. 3 TfUE. These regulations are to be strictly followed. The Commission is of the opinion that exceptions regarding culture are acceptable only in cases where the culture product can be clearly identified⁵³. The Commission states that the concept of culture must regard the content and type of a given product, not the medium or its distribution⁵⁴. The Commission stresses that member state educational and democratic needs must be separated from the promotion of culture, as outlined in art. 107 sec. 3 let. d)⁵⁵. Imperative here is also the context of art. 167 TfUE [old art. 151 TWE] which states in sec. 1 that EU "makes a contribution toward the development of European countries' cultures". The Union, as stated in sec.2, "supports through its activity cooperation between member states and, when necessary, supplements and aids their activity." It predominantly regards, "artistic and literary creativity, also in the audiovisual

⁵³ For example, Commission Decisions in cases: NN 88/98 Financing of a 24-hour advertising free news channel with licence fee by the BBC, OJ C 78, 18.3.2000; NN 70/98 State aid to public broadcasting channels Kinderkanal and Phoenix, OJ C 238, 21.8.1999.

⁵⁴ For example, Commission Decision N 458/2004, State aid for Espacio Editorial Andaluza Holding sl., OJ C 131, 29.5.2005.

⁵⁵ Commission Decision NN 70/98 State aid to public broadcasting channels Kinderkanal and Phoenix, OJ C 238, 21.8.1999, p. 3.

area”. This is the only regulation which directly mentions audiovisual media functioning in the existing treaties⁵⁶.

Assessment of state aid compliance and services rendered in the general economic interest

According to art. 106 sec. 2 TFEU [old art. 86 sec. 2 TWE], “companies obliged to manage services of general economic interest (SGEI)⁵⁷ or of treasury monopoly character are subject to the Treaty, especially regarding competition regulations, within boundaries in which their application does not legally or factually infringe the tasks they are obliged to carry out. The development of trade cannot be violated in a way that is contrary to EU interests”⁵⁸.

In this case, maintained is the Tribunal’s judicature. It states that art. 106 sec. 2 TFEU is an exception and, in consequence, is requires strict interpretation. Necessary in this case is the meeting of all three conditions: 1) the service rendered must be of general economic interest and specifically defined as such by a member state (definition)⁵⁹; 2) the company must be legally bound by a member state to render a service (obligation)⁶⁰; 3) application of the included in the Treaty competition regulation (in this case a ban on using state aid) must hinder carrying out tasks assigned to the company, while deviation from the regulation cannot influence the development of trade contrary to EU interests (proportionality criterion)⁶¹.

In case of public radio and television, this approach requires adjustment in light of interpretation of the Amsterdam Protocol which relates to ‘the mission of public service which was delineated, organized and entrusted by a member state’ (definition and obligation) and provides for the possibility of deviation from Treaty regulation regarding the financing of public radio and television “in scope in which such financing is allotted to broadcasting organizations so that they can perform the mission of providing public service [...] and in scope in which such financing does not influence trade relations and competition in the EU contrary to common interests, taking into consideration the necessity of carrying out public services” (proportionality).

⁵⁶ See K. Jakubowicz, *Unia Europejska a media: Między gospodarką a kulturą*, Warszawa 2010, p. 62–63.

⁵⁷ Community framework for State aid in the form of public service compensation, OJ 297, 29.11.2005, p. 4–7.

⁵⁸ C. Mik, *Media masowe w europejskim prawie wspólnotowym*, Toruń 1999, p. 530.

⁵⁹ Judgment of the Court of Justice in the Case 172/80, Zuechner v. Bayerische Vereinsbank AG in case 172/80 [1981] 2021.

⁶⁰ Judgment of the Court of Justice C-242/95 GT-Link A/S v De Danske Statsbaner (DSB) [1997] 4449.

⁶¹ Judgment of the Court of Justice C-159/94 EDF-Link [1997] 4449, [1997] Rec. I-5815.

The Commission, as the treaty's guardian⁶², needs to assess, based on evidence provided by member states, whether such criteria are met. If the Commission decides that allotted aid infringes EU law, it can demand vindication of such aid. The subject which received such aid would have to return it with interest⁶³.

As far as the definition of public mission, the Commission's duty is to verify whether there are no errors in it. It is emphasized that member states must provide a precise enough definition of public mission so that there are no doubts whether any activity of public broadcasters is part of public mission or not. Without such definition of public broadcaster obligations, the Commission would not be able to carry out its tasks, in accordance with art. 86 sec. 2 [presently art. 106 sec. 2 TFEU] and to allow exemption from this regulation (pt. 45). Precise identification of types of activity as part of public mission is also imperative for non-public broadcasters, so that they can appropriately plan their activities. Public mission realization rules should be delineated on a domestic level, that is member states should supervise the activity of their broadcasters to make sure it is in accordance with legal regulations (pt.46).

The Commission also checks whether obligations related to public services are formally transferred and whether there is effective supervision regarding carrying them out. It is not enough to lay on public broadcasters the obligation to render clearly defined public services. It is also necessary to verify that these services are rendered in accordance with formal agreements between the state and the specific broadcaster. Hence, it is advisable that such monitoring is performed by proper organs or committees in a transparent and effective way. The need for such supervision is obvious, especially when broadcasters are imposed certain quality standards. According to the Commission's communication on guidelines and regulations regarding Community audiovisual policy in the digital era⁶⁴, the assessment of quality standards realization does not come under the Commission. It is up to member states to provide proper domestic supervision⁶⁵ (pt. 53).

As far as assessment regarding proportionality, the Commission takes into account the necessary costs of rendering the public service as well as potential excessive compensation.

⁶² See K.M. Witkowska-Chrzczonek, *Pozycja prawna Komisji Europejskiej w systemie instytucjonalnym Wspólnot Europejskich*, Toruń 2008, p. 288.

⁶³ Cf. J. Ligner-Żeromska, *Stanowisko UE w kwestii finansowania nadawców publicznych*, "Biuletyn Informacyjny Krajowej Rady Radiofonii i Telewizji" 2004, No. 1/2.

⁶⁴ COM(1999) 657, final version, part 3(6).

⁶⁵ Judgment of the Court of Justice in Case T-442/03 Sociedade Independente de Comunicação, SA (SIC) v Commission [2008], 212.

The Commission assesses predominantly based on evidence presented by member states. There must be sufficient guarantees that avoided are disproportional results of public financing, excessive compensation and cross subsidies in order to determine that public broadcasters adhere to market rules, i.e. in their commercial activity (pr. 40). Directive 2006/111/WE requires, in art. 4, that member states ensure transparency in companies which were assigned the obligation to render services in general economic interest and which receive compensation for providing public services but also have other types of activity. In such cases, separate accounting needs to be set up for the two types of activity. Real expenses for activity in the sphere of non-public services (i.e. marketing advertising costs) should be accounted for separately. Moreover, costs incurred to develop activity in both, the public and non-public (i.e. digitalization costs) spheres, should be proportionally divided and assigned to each sphere in a sensible way (pr. 66). Possible is a scenario in which all expenses are assigned to activity in the sphere of public services (pt. 67).

Excessive compensation, not necessary in order to render services in general economic interest, is considered illegal state aid and it must be returned (pt 70). Public broadcasters can keep excessive compensation, beyond the net costs of public services (as “reserve for public services”) to a degree necessary to finance their obligations regarding public service. The Commission is of the opinion that necessary to cover expenses and to provide for profit fluctuations is an amount no greater than 10% of public service expenses forecasted in the budget. It should be a rule that over this limit excessive compensation is returned (pt. 73). As an exception, public broadcasters can receive more than 10% of their annual budget for public mission services only in justifiable cases. It is acceptable, however, only when such compensation is allotted for specific one time expenses indispensable to carry out public mission (pt. 74). These types of reserves can be justified by large technological investments (such as digitalization) necessary to realize public mission or for restructuring purposes indispensable to activity. It is up to member states to choose the most effective and proper mechanisms of control and supervision of broadcasters with public mission (pt. 77).

The Communication leaves no doubts regarding whether state aid to public broadcasters can be used in order to diversify their broadcasting services and take advantage of new technology such as *online* services or *pay-per-view* thematic channels. The communication states that such public activity, making use of any platforms and new services is possible provided that Amsterdam Protocol material conditions are met (pt. 84).

The choice of the most appropriate mechanism in order to ensure compliance of new audiovisual services with Amsterdam Protocol resolutions is in the sphere of competence of member states which need to take into account the specificity of their domestic broadcasting systems and the need to guarantee public broadcaster editorial autonomy (pt. 86). In order to guarantee that public financing does not infringe trade and competition in a way contrary to common interests, member states need to assess (test), based on results of open consultations the general influences of new services on the market and their potential influence on “private initiatives” (pt. 88). This assessment is objective when it is prepared by a competent organ, independent of public broadcasters (pt. 89). This new aspect of the Communication is particularly imperative as it is treated as member state obligation to carry out *ex ante* market tests and take them into account when financing from public funds any new audiovisual services. The so called “Amsterdam test” can be critically assessed⁶⁶ because of the possibility of limiting real editorial autonomy of public broadcasters and burdening them with carrying out the test. Member states are made to continually look for an equilibrium between market rules and the financing of “value added” in public broadcasting activity.

In accordance with the Amsterdam Protocol, public transmitters should not engage in activity which would disrupt competition and which is not indispensable to carry out public mission. This would happen if public broadcasters would obtain the right to content in prime time without offering sublicensing “in a transparent way, at an appropriate moment” (pt. 92). Hence, the Commission makes member states guarantee adherence to the proportionality rule regarding obtaining rights to attractive programmes and regulations on offering sublicensing for unused by public broadcasters content for which they have exclusive rights (pt. 92)⁶⁷.

Public transmitters in their commercial activity need to follow the rules of “absolute competition” (pt. 93). An example of anti-competitive practices could be the price policy of offered promotion services and the temptation to lower the prices for advertising or other non-public services (such as commercial services) below the level in accordance with market rules, with lower profits being supplemented by public funds. Such practices would be negatively assessed as activity which “influences trade and competition within the Community, contrary to common interests” and is considered a violation of the Amsterdam Protocol (pt. 94).

⁶⁶ *The 2009 Broadcasting...*, p. 15; K. Jakubowicz, *Unia...*, p. 146.

⁶⁷ See A. Jaskiernia, *Ewolucja standardów europejskich relacjonowania ważnych wydarzeń przez media elektroniczne*, „*Studia Medioznawcze*” 2007, No. 2, p. 17. Cf. *TV Rights and Sport: Legal Aspects*, ed. I.P. Blackshaw, P. Cornelius, R.C.R. Siekmann, The Hague 2009.

Closing remarks

The new Communication on the application of the state aid rules to public service broadcasting issued by the Commission brings order to this regulation area and is an update which takes into consideration technological development. Public broadcasters will be able to take advantage of new technologies (digital, internet) in their services in order to provide high quality services on all platforms, at the same time not infringing competition at the expense of commercial broadcasters and other media operators. What is visible here is characteristic to EU proceedings, since the introduction of the Amsterdam Protocol, that is acknowledging the role of public transmitters but also “tough” activity in order to protect fair free market practices.

Even though the Communication is criticized by some, mainly proponents of public broadcasters, especially regarding the above mentioned “Amsterdam test”, it is definitely a tool to balance the conflict of interest with which we are dealing here. The Commission’s stance, with regard to the previous 2001 Communication, has been supplemented by various modifying elements (the issue of including paid services in the scope of public broadcasters’ mission, control over excessive compensation of costs and its supervision on the state level, greater public broadcaster financing elasticity), both, as a result of EU judicature as well as experiences gained by the Commission. The Communication systemizes these experiences, granting them homogenous character.

When there is mention of growing EU “hostility” toward public broadcasters, it mainly regards the introduction of tougher rules for public financing via the promotion of market competition criteria in the media sector and limiting public broadcasters taking advantage of their market position⁶⁸. On the other hand, noted should also be the aspect of greater legal assurance regarding which the EU Commissioner on information societies, Viviane Reding, said that it would ensure fair competition between public and private broadcasters. She also added, “One of the Commission’s main goals is to maintain an active internet media market, making sure that public transmitters’ internet offer does not disrupt competition with regard to the press and other services offered via the Internet”⁶⁹.

Without doubt, the Communication has created a more precise basis for fair competition, although we can predict that there will continue to be those of the opinion that

⁶⁸ Cf. M. Wheeler, *The European Union’s Competition Directorate: State Aids and Public Service Broadcasting* [in:] *Reinventing Public Service Communication: European Broadcasters and Beyond*, Basingstoke 2010.

⁶⁹ EurActiv.pl [accessed: 02.07.2009].

the Commission does not appreciate enough the role of public media, by introducing tougher laws and widening the scope of private media activity. The above regulations were positively assessed by commercial broadcasters, although they say that they will closely watch them coming into force⁷⁰.

The Communication has created a general framework regarding public financing of public broadcasters in Europe. It includes many imperative regulations and criteria which need to be individually implemented by member states and domestic transmitters, procedural details and institutional solutions adequate for domestic markets as they come under member state supervision (pt. 54 and pt. 59). Perhaps the “Amsterdam test” will turn out to be a useful tool for public broadcasters in assessment of new services planned and introduced. It is successfully used by the BBC in cooperation with the OFCOM market regulator. Without doubt, the Commission Communication, as a result of evolutionary change, has created an instrument which can influence the coexistence of public and private broadcasters on the media market, while maintaining the desired level of pluralism.

⁷⁰ See *European media business welcomes clarification of rules applying to state aid to public broadcasters*, ACT, State aid & Competition, July 2009, www.acte.be/EPUB/easnet.