The European Union’s Competition Directorate’s 2009 Communication on the application of state aid rules to Public Service Broadcasting: principles, consultation and recommendations for the new media environment

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Word Count: 7653 (including references and notes)

Abstract

This paper will discuss the European Union’s (EU) regulations concerning Member States’ Public Service Broadcasters (PSB), with reference to state aid and competition policy. This review will consider many of the concerns which have been raised in the current phase of globalization concerning the questions of neo-liberal policy formation in relation to matters of the public interest and the common good. Therefore, it utilizes the construct of the ‘hollowing out of the state’ to consider how these measures relate to questions concerning the competitive fairness of the PSBs’ entrance into the information markets wherein the divisions between public subsidies and new technologies have become conspicuous. In particular it seeks to explain the key factors which have shaped the 2009 EU Broadcasting Communication concerning the operation of state aids by PSBs in new media markets. The EU has developed a significant set of recommendations to affect a supranational regulatory framework which will define the future scope and ability of PSBs to access the on-line realm. Moreover, by focusing on the Communication, this analysis draws attention to the market/public dichotomy which has continued to shape the Commission’s approach and the impact its measures will have on the ecology of the European communications markets.

Key words: European Union, Hollowing Out, Competition, state aid, public service broadcasting, proportionate.

Introduction

This paper will discuss the European Union’s (EU) regulations concerning Member States’ Public Service Broadcasters (PSB), with reference to state aid and competition policy. This review will consider many of the concerns which have been raised in the current phase of
globalization concerning the questions of neo-liberal policy formation in relation to matters of the public interest. It will consider how these measures relate to questions concerning the competitive fairness of the PSBs’ entrance into the information markets wherein the divisions between public subsidies and new technologies have become conspicuous. The Commission has commented that clearly defined forms of public commitments must be applied by PSBs to show how such a service will benefit the public without unfairly distorting the market-place. Most especially, any proposal for a new media service should demonstrate how it will pursue social, cultural and democratic obligations for the common good.

The EU Competition Directorate has licensed PSBs in accordance with the protocol of the 1997 Amsterdam Treaty which enabled them to receive public subsidies as long as they did not distort national media markets. The Commission’s state aid measures were further established by the European Court of Justice’s (ECJ) 2003 Altmark judgment which defined the compensation levels that enterprises could receive in exchange for carrying out public service obligations. Subsequently, state aid cases concerning European PSBs highlighted questions about funding and compensation.

Therefore, this analysis will discuss how the EU’s employment of neo-liberal principles has conflicted with normative public objectives to deliver communications services. It contends that state aids are problematic as they cannot encompass the wider social and democratic implications of broadcasting because ‘competition law … [cannot] … grasp more complex operations of cultural … power which … media pluralism has traditionally sought to address.’ Hardy (2001: 15) This analysis of the Competition Directorate will consider its role with
reference to ‘the notion [that] media diversity is crucial to democratic systems ... and should be at the core of any European action.’ Iosifidis (2007b: 520)

More recently, these principles have defined the recommendations within the EU Competition Directorate’s 2009 Broadcasting Communication concerning state aid rules in the new media environment. Thus, commercial operators are concerned that PSBs may enjoy unfair competitive advantages through their employment of public subsidies to enhance their on-line activities. Conversely, some national governments have argued that a PSB presence is required in the on-line realm due to the problems associated with market failure and the need to protect democratic rights.

To this end, this paper will focus on the debate and outcomes between public and commercial players during the 2008-9 policy process which has led to the EU’s Competition Directorate’s revision of the EU 2001 Broadcasting Communication. The first section of this analysis considers the context for reforming the Communication with regard to new services, market opportunities and changes within the role of governance of communications services. It assesses the Directorate’s approach to the regulation of audiovisual services and the modernization of the rules by placing them within the framework of the ‘hollowing out the state.’ Rhodes (1994) This has occurred hand-in-hand with supra-nationalism as the EU operates as a ‘network state’ to define governance for the interests of global capital, management and information. Castells (2000) This marketization of the international regulatory state has led to an approach within the European Commission (EC) which places the principles of competition and enterprise, above the public interests of cultural diversity and citizen representation.
Secondly, this analysis will consider how the neo-liberal principles of economic competitiveness have come into collision with the maintenance of the traditions of European PSBs. It will outline how the issues of public subsidy contrasted with notions of free enterprise and became especially critical in the Competition Directorate’s approach to state aid funding for PSBs in defining critical limitations to stem market distortions. Therefore, it will outline the growing involvement of the Directorate in the audio-visual sector with reference to PSBs from the inauguration of the 1997 Amsterdam Protocol to the 2001 EU Broadcasting Communication to the impact of the European Court of Justice’s (ECJ) Altmark Judgment on public enterprises.

Third, this paper will consider how the Competition Directorate has hardened its stance in relation to the application of state aid and outlines the debate which accompanied its definition of the measures associated within the 2009 EU Broadcasting Communication concerning the operation of state aids by PSBs in new media markets. This analysis will consider how the EU has developed a significant set of recommendations to affect a supranational regulatory framework which will define the future scope and ability of PSBs to access the on-line realm. Moreover, by focusing on the Communication, this analysis draws attention to the market/public dichotomy which has continued to shape the Commission's approach and the impact its measures will have on the ecology of the European communications markets.

From governing to governance: Competition Policy in the converging communications environment and its relationship with Public Service Broadcasting

The EC’s utilization of Competition policy in the audiovisual sector may be understood to reflect the changes resulting from a process of ‘government to governance’ which has been identified by political scientists in the last two decades. In particular, there has been a crisis within the role of the nation state as there has been an on-going privatization of public monopolies, deregulation of
market economics and increasing reliance on private solutions to welfare provision. These changes have been exacerbated by technological reforms to modern information and communication systems, in which the previous determinants of time, space and geography have imploded, thereby allowing for the international flow of finance and resources. In effect, there has been a collapse of national forms of sovereignty in which the role of government has been transformed from one of policy initiation to the management of resources to facilitate the global exchange of capital.

This process has been associated with the changes which affecting national forms of policy-making since the collapse of Keynesian consensus and rise of a market-driven regulatory state within modern European governments. In one variation, it has been described as ‘the hollowing out of the state’ Rhodes (1994) as power has been ‘hollowed down’ or devolved from central government to a myriad of subsidiary bodies, regulators and quangos so the ‘state [has become] much more fragmented and diversified.’ Gamble (2000) This has meant there has been a collapse in unity and coherence wherein the lines of accountability have become muddied and the state’s ability to formulate policy has been substantially reduced.

Paul Smith has shown how this ‘hollowing out of the state’ detrimentally affected the UK Government’s Digital Television policy in the 1990s, resulting in its failure to facilitate new forms of digital terrestrial services (DTT) for public consumption, thereby enabling Rupert Murdoch’s BSkyB to enhance its monopolistic power in subscription based satellite digital markets (DST). Smith (1999; 2004) This failure to affect control over the digital television systems occurred due to the marketization of broadcasting, public choice ideologies, the collapse of national regulation and the growing power of supranational governmental and regulatory actors:
Overall, since the 1980s, there has been a shift from a mode of governance based on direct state intervention, supported by power to tax and spend, to one characterised by rule making and the extension delegation of powers to institutions operating at arms length from government. The ‘regulatory state’ involves the establishment of new forms of control and accountability. If policy makers wish to control or influence regulatory agencies operating at an ‘arms-length’, they must do by contractual arrangements. In effect, government by regulation, as the introduction of digital television in the UK illustrates, is government by proxy. Smith (1999)

In particular, Smith was most concerned with how such ‘hollowing down’ had led to UK governments and economic regulators perceiving their role to be the facilitation of market opportunities for digital providers, rather than conceive such services as a *public good*. In turn, such a privatization and deregulation of communications markets has allowed commercial interests to lobby for the rights of competition over any social or cultural justification of information and knowledge. Smith (1999)

Conversely, the ‘hollowing out’ process has simultaneously evidenced ‘hollowing-up’ in which power has been seen to flow upwards from the nation state to supranational tiers of authority. Such de-nationalization has resulted from the cessation of national sovereignty to the wider cause of European economic and political integration. This transformation of sovereignty conforms to Manual Castells’ conception of the EU as a ‘network state’ in which the Euro-polity is characterised by a complex network of European, national and sub-national institutions. These bodies have been involved in a convoluted combination of federal, supranational and
intergovernmental arrangements which are ‘organised around global networks of capital, management and information.’ Castells (2000: 502)

In the area of modern communications, these developments have been most profoundly experienced within the globalization of information and audio-visual services, as technological convergence, economic opportunity and public-choice ideologies have undermined normative public regulations governing broadcasting and telecommunications services. With regard to the European television economy, the Competition Directorate guarantees the unity of the internal market so that companies can compete on a level playing field in all Member States. It seeks to avoid the monopolization of markets by preventing firms from sharing markets via protective agreements which would enable them maximise their profits and impede development. Competition rulings are designed to correct market failures by making rulings concerning: mergers or concentrations; state aids wherein public subsidies unfairly distort the market; and abuses of dominant positions. For instance, they should stem any unfair monopolization of a market by a public or private enterprise.

In applying these measures to the audio-visual sector, the Competition Directorate has become an active player in intervening in the European television markets. Wheeler (2001: 3) One of the constant themes underpinning the EU’s policy responses has been the liberalization of the rules governing Europe’s television industries with a marginal consideration of the maintenance of public service objectives. While the Commission has been concerned with content regulation, it has utilized economic or structural forms of regulation to intervene over cultural matters. Consequently, the EU has been concerned with the issues surrounding media concentration and public subsidies to ensure fair competition. Within this context, the EC
Competition Directorate has sought to encourage market efficiency in the audio-visual sector to support growth and technical innovation.

Therefore, the Directorate’s neoliberal approach has led to questions about its ability to enhance pluralism. Competition policy has ignored the ‘cultural’ diversity of content as it cannot recognise citizens’ rights and identities. This is because the Directorate does not conceive communications as anything more than a private exchange of goods between suppliers and customers. Therefore, state aid remains ‘the area where there is ... the greatest potential for conflict between the policies adopted by national governments and the way in which [the Competition Directorate] might interpret the competition provisions of the EC treaties.’ Levy (1999: 97) In many respects this reflects that:

… the internal market is hostile to public service broadcasting … [as when] … seen from the vantage point of the neo-classical economic theory underpinning the EEC Treaty, public service broadcasting is aberrant and offensive. Collins (1999: 162)

**State aid with regard to PSBs**

The state aid mechanism is activated if a Member State has distorted competitive trade by favouring certain undertakings that are incompatible with the common market. However, exemptions exist, as state aids which have a social character are compatible with the internal market. With regard to the audio-visual sector, the Commission has sought to prevent the implementation of anti-competitive agreements and the abuse of dominant market positions by public service providers by restricting the unfair provision of services or any overcompensation of funds.
The 1997 Protocol of Amsterdam was designed to rectify any market distortion created by subsidies on the competitive balance between public and commercial broadcasters. The commercial channels in Spain, France, Germany, Italy and Denmark had complained about their PSB’s dual forms of funding (licence fees and advertising) which they claimed gave the PSBs an unfair advantage. The protocol rectified any unfairness between competitive gain and the maintenance of pluralistic services through the public service tradition. It stipulated that national governments were free to determine the method of PSB funding as long as it did not distort competitive trading for the common interest. Papathanassopoulos (2002: 72) The Protocol attempted to find the appropriate balance between a strong European competition policy and the maintenance of public broadcasting:

We need balanced solutions able at the same time to respect two important points. The first is the basic function of Public Service Broadcasting Services in most of the EU Member States. This fact has been recognised in the 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. EU (1998)

In 1998, the Competition Directorate attempted to place stricter limits on PSBs by prohibiting state aids when subsidies, alongside advertising revenues, exceeded the costs of meeting public service obligations. Papathanassopoulos (2002: 72) And the principles of economic competitiveness as against PSBs values were reiterated in the Directorate’s internal discussion document on the application of articles 90, paragraph 2, 92 and 93 of the EC Treaty in the Broadcasting sector. This was produced by then Competition Commissioner Karel Van Miert
(1995-1999) to define general guidelines on state aid and contended that while the public funding of PSBs was within the competences of Member States, its implementation could not go against the EC as the guardian of free enterprise. The Directorate accepted the double forms of funding from subsidies and advertising, but under strict limitations. For instance, it would be forbidden to allocate public monies to pay for entertainment or sports programming and PSBs would only be able to compete for advertising markets through firms or channels which were not in receipt of public funding.

Despite the Directorate’s attempts to introduce draft guidelines for state aids, the Member States’ view remained that complaints against PSBs should, under the principles of subsidiarity, be placed exclusively under their competence and to exert further pressure on the Commission needed to be considered on a case-by-case basis. In effect, an impasse occurred as the Competition Directorate’s guidelines were blocked and it was forced to deal with unresolved reports. Consequently, in February 1999, the Commission opened formal state aid procedures regarding of the dual funded PSBs within Italy, France and Spain and found their collection of advertising revenues did not unfairly distort the national markets.

On 15 November 2001, the Directorate published its ‘Communication on the application of state aid rules to public service broadcasting’ to further clarify its approach on state aid rules governing PSBs. EU (2001) This was designed to stem the impasse between Member States and the Commission, and indicated a stronger resolve by the Directorate’s new commissioner Mario Monti (1999-2004) to effect general guidelines to overcome the Member States’ desire to keep state aid cases within their purview. It enabled states to be *priori* free to define PSB objectives
according to preference and need, but under much stricter definitions of democratic, social and cultural practice.\footnote{As the EU Commissioner for Internal Market, Financial Services and Financial Integration, Taxation and Customs, Monti had overseen the failed draft Directive on Media Concentration in 1996. This failure inadvertently led to the Competition Directorate seeking greater intervention in the European Audio-visual market place in relation to mergers, state aid, and the collective sale of programming rights. For further details, see Wheeler (2004).} It included:

- Member States can define the extent of the public service and how it is financed and organised.
- The Commission called for transparency to assess the proportionality of state funding and possible abusive practices.
- Member States were asked whenever such transparency is lacking to establish a precise definition of the public service remit, to formally entrust it to one or more operators through an official act and to have an appropriate authority monitor its fulfilment.
- The Commission would only intervene in cases where there is a distortion of competition arising from the aid which cannot be justified with the need to perform the public service.

Wheeler (2001: 6)

As the commercial organizations increased the complaints claiming that PSBs enjoyed an unfair competitive advantage through their greater capacity to invest in programming and services, the EC argued that public financing must be proportional to the range of programming and services to be included in the public service remit. The launch of digital services by PSBs also led to complaints by private rivals. Although, the Directorate ruled had largely ruled in favour of these channels (e.g. the two German thematic channels Kinderkanal and Phoenix, run by Arbeitsgemeinschaft der Rundfunkstalern Deutschlands (ARD) and the Zweites Deutsches
Fernsehen (ZDF) public operations (Aid no: NN70/98. European Union 1999b) and rejected, on the grounds of cultural exemption, a complaint from BSkyB that licence fee funding of the supply of BBC News 24 to cable television viewers was an abuse of European laws on state aids. European Union (1999) it was mindful of the need for greater transparency to stem potential abuses. Moreover, the commercial broadcasters’ complaints received greater receptiveness due to a legal judgment which had major implications for all types of enterprises which received compensation from public subsidies.

**The European Court of Justice (ECJ): the 2003 Altmark Judgment and fall out for PSBs**

The Altmark judgment referred to a state aid case against a public transport bus service in Stendal, a rural district in Germany. In 1994, the district council awarded the Altmark bus company with franchises which were accompanied by subsidies to offset the costs incurred due to its public service mission. However, a competing firm NGVA claimed that such subsidies contravened the EU’s rules governing state aids. Ultimately, the case was sent from the German Supreme Administrative Court to the ECJ.

The ECJ judgment (case number C-280/00) provided limits concerning the levels of compensation which could be awarded by Member States to firms in exchange of public service obligations. The Court held that four conditions should be satisfied to ensure such compensation did not confer an unfair competitive advantage:

- The beneficiary has been entrusted with clearly defined public service obligations.
- The compensation must be calculated in advance in an objective and transparent manner.
• The compensation does not exceed the costs incurred in discharging the public service obligations, taking into account that the beneficiary is entitled to make a reasonable profit, and
• The undertaking selected to discharge the public service obligation is chosen pursuant to a public procurement procedure or the level of compensation is determined on what it would cost a well-run undertaking to discharge these obligations. ECJ (2003)

The judgment demonstrated to Member States that state aids rulings would not apply when appropriate competitive tenders and levels of cost were incurred for enterprises carrying out public service obligations. This meant that national governments could organise their public services without having to submit their financing mechanisms for prior Commission scrutiny. However, the ECJ included stringent efficiency tests to ensure that Member States would not favour certain undertakings under the guise of compensating them for the costs incurred in discharging their public service obligations. In effect, the Altmark solution affected a quasi EU regulation on Member States.

The Altmark judgment was unpopular with European PSBs as it meant they had to defend the legality of their funding regimes. And during the post-Altmark era, the Competition Directorate has hardened its stance against PSBs and their anti-competitive effect in terms of market distortion and the ‘fairness’ of the levels of public or commercial compensation paid to PSBs. In Denmark and Holland the Directorate required the repayment of monies received by PSBs which have detrimentally affected opportunities for commercial competitors. In Germany and Ireland the PSBs were subjected to substantial commitments requiring them to define public
service obligations, submitted themselves to independent forms of economic regulation and were required to be responsive to proportionate financial regimes.

**State aid measures in the online world: The 2008 draft EU Broadcasting Communication and the public consultation**

Simultaneously, the EC hardened its approach to state aid measures in relation to the PSBs entrance into new media markets and their use of public subsidies to act as Public Service Media (PSM). In Holland and Germany, the Commission made it apparent that while online information services may be included as public service obligations, online activities such as e-commerce and mobile telephone services would not be considered as a ‘service of general economic interest’ due to the potential profitability and private nature of these communications transactions.

Moreover, with regard to the financing of new media activities, the Commission has commented that clearly defined forms of public commitments have to be applied by PSBs to show how such a service will benefit the public without unfairly distorting the market-place. Most especially, any proposal for a new media service should demonstrate how it will pursue social, cultural and democratic obligations for the common good. For instance, the British Broadcasting Corporation’s (BBC) on-line service has been seen to provide public access to a range of news and information resources. These proposals have to be endorsed by public authorities, although in such a manner that indicates they will not contravene the requirements of state independence and programming autonomy.

These questions have defined the contours of the debate which shaped the recommendations within the Competition Commission’s 2009 Broadcasting Communication
concerning state aids in the new media environment. EU (2009) In its November 2008 draft communication, the EU took an explicitly neo-liberal position by suggesting that there should be a clear distinction for the public service and non-public service activities of publicly-funded media groups. In turn, the Commission referred to the rapidly evolving business models which have affected the audio-visual and new media industries, and argued that PSBs should provide separate accounts for public and commercial arms of their activities. The Competition Directorate contended that several member states had already prevented PSBs from offering paid-for products within their public service remit. The Directorate also maintained that PSB highlights rights to premium Union of European Federations Association’s (UEFA) Champions League football matches and viewers' participation in phone-based game shows were ‘manifestly commercial activities’ which could not be financed by state aid. EU (2008)

The public broadcasters opposed the distinction between new and old media and claimed that they are obliged to provide equitable and universal services to all members of the public. They argued that a PSB presence is required in the on-line realm due to the problems associated with market failure and the need to protect democratic rights. Further, they claimed that new media opportunities should be made available to public providers and compared the switch from analogue to digital services to the expansion from radio to colour television which reformed the audio-visual sector in 1960s and 1970s.

The European Broadcasting Union (EBU), the consortium of European PSBs, argued that such measures may undermine the principles of subsidiarity and suggested that they would lead to the ‘harmonization of PSB regulations.’ When writing to the then Competition Commissioner Neelie Kroes (2004-2010), the EBU Director-General (DG) Jean Réveillon stated that the EU
executive's approach might ‘reduce the scope for member states to grant public service broadcasters a significant role in the information society.’ EurActiv (2009b) Further, the EBU lobbied the EC to give more weight to the views of media experts concerning matters of culture and plurality rather than competition. In particular, it argued that the former Information Society and Media Commissioner Viviane Reding (1999-2010) should play a major role in the legislative process and that the Communication should be the product of both the Competition and Information Society Directorates.

The EBU’s arguments were supported by the European Parliament’s (EP) Culture and Education Committee which held a public hearing on the consultation process on the 5 March 2009. First, there was a general consensus that Commissioner Reding should be involved in the review. In turn, Reding argued the Commission would have to weigh the needs to uphold the principles of the ‘public good’ as against the values of competition. Second, the Greek Socialist MEP Katerina Batzeli, who chaired the committee, commented that the definition of public broadcasting remained a matter for Member States and contended that PSBs required public subsidies to provide authoritative programming which remained independent from market forces. European Parliament (2009)

Finally, Pere-Oriol Costa, a professor of political communication at the Universitat Autònoma de Barcelona, criticised the commercial operators’ market-driven practices which he claimed had eroded the level of quality media content. He argued that financial pressures had led to private television companies providing shorter news bulletins which invariably focused on prurient stories over hard news. He also contended that the public had been done a disservice through the extensive growth of interactive quizzes which were devised to raise revenues from
viewers. Costa stated that the draft communication was part of a concerted campaign to undermine public television:

Neoliberal campaigns and private broadcast companies have attacked the image of public broadcasters. Publicly-funded television chains should be innovative and embrace new media technology such as citizen journalism. They must use all means necessary to communicate – television, web pages and telephones. EurActiv (2009c)

Conversely, the commercial operators believed that PSBs enjoyed an unfair competitive advantage through their employment of public subsidies to enhance their on-line activities. As on-line opportunities have exponentially expanded and new revenue streams have been sought out, the number of complaints sent to the Competition Commission from independently funded media companies had correspondingly increased. Private companies alleged that PSBs were operating beyond their remits and violated state aid rulings as they cross-subsidised their new media ventures with public money. Therefore, commercial operators sought to establish a clear differentiation between the traditional models of state-supported broadcasting and the next generation of media.

The commercial lobby complained that the EP’s Culture and Education Committee had allowed the debate to be dominated by public broadcasters and there had been a lack of representation of the relevant commercial players. This coalition of media enterprises implored the Competition Directorate to resist those pressures drawn from national culture ministers ‘to derail the sensible proposals on state aid to public broadcasters.’ EuroActiv (2009c) The private media companies had welcomed the draft communication as a ‘step forward’, but after the
Parliamentary hearing feared it could be watered down in light of the evidence presented by Member State governments and national broadcasters.

This grouping which included the Association of Television in Europe (ACT), the European Publishers Council (EPC), the German Association of Commercial Radio and Telecommunications Providers (VPRT), the European Newspaper Publishers' Association (ENPA), and the European Radio Association (AER) estimated that the €22 billion per annum received in state aid by PSBs gave the public broadcasters an unfair tactical advantage in the online environment. EurActiv (2009a) Similarly, this view was echoed by the ACT in an individual position paper which warned that the global financial crisis should not allow for a loosening of state aid rules. It also argued that the Commission’s proposal was merely a ‘modest improvement’ on the existing text and required clarification on several points, including the definition and scope of public broadcasting.

Moreover, the ACT DG Ross Biggam maintained that there is considerable value in fostering a thriving private sector to encourage media pluralism and pointed to the fact that it was commercial operators who had pioneered 24-hour news services. He said it was ‘disingenuous’ for public broadcasters to accuse private companies of seeking to monopolise digital media and dismissed Member States claims that the Commission was attempting to harmonise the rules in providing a more detailed broadcast communication. He added that the draft communication had acknowledged the principle of subsidiarity on forty separate occasions. EurActiv (2009c)

Accordingly, the European Publishers Council (EPC) in a letter to Philip Lowe, DG of the Commission’s competition arm, stressed that Internet publishing was not simply an extension of the public service broadcasting role:
The European Publishers Council has been following the increasing tendency of public broadcasters to migrate to the Internet, becoming in many cases, publicly funded newspaper and magazine online publishers, in direct competition with our own web-based services. EurActiv (2009c)

It contended that PSB activities on the Internet were not analogous to their pioneering role in conventional broadcasting.

To this end, the commercial lobby appeared to have the ear of the Competition Commissioner Kroes. As the German MEP Helga Trüpel noted, Kroes had not participated in the European Parliament’s public hearing on the issue, ‘It's not a good sign that DG Competition is not here ... We cannot allow the competition directorate to do all the running on this.’ EurActiv (2009c) Her comments proved prescient as Kroes dismissed many of the cultural and pluralist contentsions made by the EBU and EP Cultural and Education Committee in favour of supporting the commercial lobby’s arguments for greater competition. Although a number of compromises would be negotiated with regard to issues of Member States oversight, Kroes argued that, as the media markets had dramatically changed since the 2001 legislation, the situation had become untenable to the private media companies. Therefore, the Competition Directorate demanded and solely delivered (rather than jointly with the Information and Society Directorate) an updated communication despite the European PSBs’ uniform hostility to changing to the existing legal framework.
The 2009 Communication on the application of state aid rules to Public Service Broadcasting

On 2 July 2009, the EC adopted the new Communication on state aid for the funding of PSBs to replace the 2001 Communication. Its aim was to provide a clear framework through which to enable PSBs to develop their high-quality services on a range of platforms including the Internet. Further, the EU intended that the legislation would establish legal certainties between the public and private activities of media organizations in the on-line realm. The PSBs would have to operate within clear remits and the Communication required for a stronger definition of PSB activities as defined by Member States:

The definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not. EU (2009: 13)

The Communication made it explicit that the EC’s role remained limited to checking for any ‘manifest error’ accorded to public broadcaster, which would refer to any activity that could not reasonably be considered to meet the ‘democratic, social and cultural needs of each society.’ Such practices would include the ability for PSBs to develop services which employed forms of advertising, e-commerce, tele-shopping, premium rate numbers in prize games, sponsorship or merchandising. In this respect, the EU intended to ensure an increased level of financial transparency to evaluate the overall impact of publicly funded new media services. Moreover, as the Competition Directorate required European citizens and stakeholders to give their views in
public consultations before the new PSB services would become available, audience members and content producers would benefit from a more proportionate use of public funding.

To sustain this more precise definition of appropriate PSB activities in the on-line era to ensure market fairness, the Communication proposed a number of major reforms:

- the ex-ante control of significant new services launched by PSBs (balancing the market impact of such new services with their public value)
- greater clarifications concerning the inclusion of pay services in the public service remit
- more effective control of overcompensation and supervision of the public service mission on the national level, and
- an increased amount of financial flexibility for PSBs. EurActiv (2009d)

The most controversial of these measures referred to the requirement that PSBs should demonstrate that they are not distorting media markets before they launch Internet or mobile phone services. Ex-ante tests would be employed by each Member State (who remain at liberty to work out how they will operate these tests and in the cases of Germany and Britain by internal governing bodies rather than external regulators) to examine whether the service enables there to be an appropriate balance between social needs and fair competition. Humphreys (2009) In this manner, the Competition Directorate intended to affect a more transparent system which would ensure that no substantial form of PSB cross-subsidization commercial services occurs through the usage of public monies.

This recommendation, however, is expected to lead to lengthy series of battles between PSBs and commercial players concerning how and by whom the ex-ante tests will be applied.
Moreover, despite the negotiations in Germany and Britain, private sector media groups have stated that they will require economic regulators and external bodies, such as OfCom in Britain, to have significant role in balancing the public value requirements against market opportunities. For instance, Angela Mills Wade, Executive Director of the EPC said:

For the private media companies the introduction of ex-ante scrutiny for new ventures which can play havoc with our online and mobile services and the need for an independent control body are the most important milestones, which will help to prevent future distortion of competition in the market. To be truly effective though, and in line with the Amsterdam Protocol control bodies should be independent from the management of the public service broadcaster. EurActiv (2009d)

Further, the Competition Directorate commented that all interested stakeholders would be able to participate in a consultation process as part of an ex-ante test. However, concerns have been raised that such practices would stymie innovation in the public sector.

In responding to the final draft of the Communication, the EBU President Jean-Paul Philippot argued that as PSBs remain the cornerstone of democratic values that they must be allowed to benefit from the development of digital services. He was concerned that the unique status of PSBs would be endangered by restrictive regulation and urged the EC to create a flexible framework in overseeing Member States ex-ante tests. Elsewhere, private media actors praised the legislation for its balance and workability. More explicitly, ACT DG Biggam acknowledged that while they had been a necessary compromise in the EU policy process, further details over the proportionality of state aid measures for PSBs pursuing market
opportunities would be helpful. He also noted that ‘the real work will now begin with the implementation of the new obligations contained in this text by the Member States.’ EurActiv (2009d)

**Conclusion**

The EU has sought to enhance expansion of television services through the principles of liberalization and harmonization. Wheeler (2004) Simultaneously, the Commission has attempted to redress any undesirable outcomes of an unfettered marketplace. Therefore, an inherent tension in the EU policy process has been evident as neo-liberal values have come into collision with traditional PSB regimes. These divisions have been played out in the Competition Directorate’s issuing of state aids procedures concerning the distortion of markets by PSBs through their receipt of public subsidies.

This article has placed the 2008-9 review of the Competition Directorate’s Broadcasting Communication within the framework of the ‘hollowed-out’ state. The EU’s approach to audio-visual services reflects the dynamics of ‘hollowing up’ in establishing a supranational approach to Competition policy and demonstrates how the Commission has operated as ‘network state’ in which the principles of global capitalism have shaped its marketization of the European television industries. Therefore, the EC has favoured a liberalized approach to audiovisual regulation to enhance technological change and business opportunities. Through such measures the Commission believes it will advance a strong European communications economy by opening up multimedia opportunities, boosting competition and consumer choice, while proclaiming that PSBs must be limited in terms of their opportunities within the new media sectors.
Most especially in the post-Altmark era, the Competition Directorate has hardened its stance against PSBs and their anti-competitive effect in terms of market distortion. Therefore, the former Competition Commissioner Kroes applied state aid notifications with a greater ideological fervour than her predecessors.\(^2\) The use of Competition policy with regard to state aid measures has meant that PSBs have to clearly define their public worth and has hampered their opportunities to engage in commercial activities which are seen to create market distortions.

This attitude has underpinned the EU’s attitude to the application of state aid measures which have been designed to define the PSBs’ activities in on-line environments. The final adoption of the 2009 Broadcast Communication concerning state aid measures for PSB in the new media era has seen the EU taking in an increasingly pro-market position. In particular, Kroes was swayed by the arguments of the private media actors and the resulting legislation has seen a more prescriptive version of regulatory and financial controls being placed on the PSBs.

Despite retaining Member State derogations, the framework has placed tighter definitions on the principles and characteristics of public broadcasting. As the levels of financial transparency have been defined in terms of competition rather than public values, it can be ascertained that PSBs will face greater difficulties in expanding their services and competing with commercial operators. Although the PSB’s internal forms of governance in the German and British cases, such as the BBC Trust, will be in the driving seat to determine what should be defined as the public interest, this provision will be highly contested. Michalis (2009) The commercial lobby still contends that external economic regulators should be independent from the PSBs and it appears that a political battle may occur in terms of implementation. In many

\(^2\) Since the passage of the 2009 Broadcast Communication, Kroes was appointed as the European Commissioner for Digital Agenda (formerly Information Society and Media) and took over from Viviane Reding who has become Commissioner for Justice, Fundamental Rights and Citizenship.
respects, the PSBs face greater dangers in remaining sustainable players and may become increasingly marginalised as a consequence.

Therefore, the Broadcast Communication’s rigid employment of state aid measures fails to take into account the social, cultural and democratic functions of PSBs and the need to protect these areas of opportunity within a communications market which has become increasingly defined by competitive commercial services. Competition policy with regard to state aids does not conceive information and communications rights as a public good. This is an issue of vital concern, since communication must be considered as having a significant social worth as well as being understood as an economic commodity. In effect, the EU’s neo-liberal competition policies may enhance market opportunities, but they do not recognise the cultural complexities of an audiovisual and communications public sphere in which a diverse range of voices are required to encourage representation and aid participation for European citizens. These concerns return attention back to the dichotomy between the Commission’s interventionists and liberalisers and the advancement of the supra-national regulatory state. And they suggest that in regard to supra-national Competition policy it has been neo-liberals who have won the day in establishing EU rulings governing the audiovisual sector.

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