

# European Commission media policy and its pro-market inclination: The revised 2009 Communication on State Aid to PSBs and its restraining effect on PSB online

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## Abstract

This article explores the most recent policy-making of the European Commission that is shaping the online expansion of public service broadcasters. This process culminated in the renewal of the Communication on State Aid to Public Service Broadcasters (PSBs). The article argues that, whereas until 2002, the Commission was supportive of new media initiatives by PSBs, the more recent reasoning – substantiated in Communication 2009 – reveals a more restrictive approach towards PSB online. Communication 2009 sets a higher barrier to PSBs' ventures in the new media by requiring stricter controls on PSBs' expansion through a new 'ex ante test'. The article concludes by highlighting the increasing weight of private broadcasters and publishers on EU policy-making.

## Keywords

Europe related issues, international communication, policy and law (media systems), public service broadcasting, theory of communication/culture

This article investigates the recent policy-making of the European Commission regarding PSB online activities and assesses its influence on national policies on PSB online. It first reviews the most important decisions on state aid concerning PSB online, and subsequently discusses the newly adopted Communication on State Aid to Public Service Broadcasters (PSBs) (hereafter Communication 2009).

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As the appraisal of the most important state aid decisions taken by the Commission will reveal, while until 2002, the European Commission showed an enabling attitude towards PSBs' traditional broadcasting offering, it later developed a more restrictive approach towards the online expansion of PSBs, when complaints from commercial competitors escalated. Issued on 2 July 2009, Communication 2009 sets a higher barrier to PSBs' ventures in the new media. Whereas Communication 2001 (European Commission, 2001) was supportive of new media initiatives by PSBs, the later document requires stricter controls on PSBs' expansion by imposing the burden of an 'ex ante test'.

## The European framework of PSB online

Since 1996, through several resolutions, European institutions have reaffirmed the importance of PSB developing online media services. In particular, the EU has claimed that the development of new media is necessary for the fulfilment of PSBs' remit.<sup>1</sup> Also, the EU has seen online media initiatives as essential tools for the achievement of social cohesion as part of the knowledge-based economy to be built in Europe.<sup>2</sup> More importantly, in 2001, the European Commission issued one of the most significant documents regarding PSB: the 2001 Communication on the Application of State Aid to Public Service Broadcasters, which clarifies the principles of the Protocol to the Treaty of 1997. In this document, the Commission reaffirms the need for PSBs to expand online:

The public service remit might include certain services that are not 'programmes' in the traditional sense, such as on-line information services, to the extent that while taking into account the development and diversification of activities in the digital age they are addressing the same democratic, social and cultural need of the society in question. (European Commission, 2001: para. 34)<sup>3</sup>

Furthermore, following the ratification of the Lisbon Treaty on 1 December 2009, the role of public services (SGI) has been boosted by the European Charter of Fundamental Rights (EU Charter, 2000)<sup>4</sup> and by a series of principles contained in a Protocol on SGI that reiterates the fundamental role of public services to fulfil the values of the European Community (Protocol on SGI, 2007).

Despite the determination of PSBs' remit in Europe is still a prerogative of the member states (Harrison and Woods, 2001; Levy, 1999; Prosser, 2005), each member of the Union is constrained by European competition policy, and more precisely by state aid rules, contained in articles 106 and 107 of the Treaty on the functioning of the European Community.<sup>5</sup> Article 107§1 EC defines state aid as: 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.<sup>6</sup> However, the Treaty indicates cases where national aids are allowed such as 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest'<sup>7</sup> or, in the case of providers of Services of General Interest (SGEIs), in accordance with article 106§2 EC.<sup>8</sup> In current practice, judicial decisions taken by the European

Court of Justice<sup>9</sup> and European Commission determinations show that that the assessment of state aid takes place mainly on the basis of article 106§2 EC rather than 107§3 EC. With its 2001 Communication (European Commission, 2001), the Commission clarified the conditions under which the state aid for public service broadcasters is legitimate.<sup>10</sup> Importantly, ‘the role of the Commission is limited to checking for manifest error’ (European Commission, 2001: para. 36). Yet, the definition of the remit would be ‘in manifest error if it included activities that could not reasonably be considered to *meet the democratic, social and cultural needs of each society*’ (European Commission, 2001: para. 36).

## European Commission’s decision on state aid to PSBs’ new media activities

In order to understand the recent developments of EC policy that led to the adoption of Communication 2009, it is important to review and assess the most important state aid decision taken by the Commission regarding PSBs’ new media activities. The appraisal of European decision-making regarding PSB has not been uniform in the literature. For Prosser (2005) the Commission is willing to ‘grant a very considerable degree of latitude to Member States in defining the public service remit of broadcasters, so long as the definition falls within what appears to be a broad concept of meeting the “*democratic, social and cultural needs of each society*” ’ (Prosser, 2005: 222). Likewise, Humphreys (2007) affirms how ‘in its decision making so far, the Commission has plainly been generally supportive of public service broadcasting’ (Humphreys, 2007: 109). Other authors like Scharpf (1999), Harcourt (2005), Michalis (2007) and Katsirea (2008) question Prosser’s and Humphreys’ optimism and are extremely critical of the progressive ‘marketization’ of the European Commission’s policy-making on PSB.

Both arguments, although apparently contradictory, are valid as long as they refer to different time periods in the recent history of the Commission policy-making on PSB online. I acknowledge that, at the beginning of its activity, the European Commission had an enabling attitude towards the PSB traditional broadcasting offer (Humphreys, 2007) and has exerted a paramount role in guaranteeing lawfulness and transparency of PSB’s funding system (Brevini, 2012). Yet, after 2002, a clear shift can be detected towards new media and specifically towards the online expansion of PSBs, as complaints from commercial competitors have escalated.

In fact, until 2003, the Commission had decided on state aid in a way that was consistent with a technology-neutral approach and was also fully respectful of the wide discretion of member states in defining the remit. For example, in its decision on BBC 24-hour news channels (European Commission, 1999), the Commission stated that ‘the public service nature of a service cannot be judged on the basis of the distribution platform’ (European Commission, 1999: para. 57). It added that once a government has defined a certain service as a ‘public service’ (thereby referring to the service of general economic interest of article 106 (2)) ‘such service remains a public service regardless of the delivery platform’ (European Commission, 1999: para. 57). This reasoning demonstrates a positive attitude towards the expansion of PSB into new media and recognizes member states’ right to define the remit of PSB as the Amsterdam Protocol requires.

The same line is followed by the Commission's decision of 22 May 2002 (European Commission, 2002) concerning the funding of nine BBC digital channels. In this decision, the Commission reaffirmed that 'Public service broadcasters can develop and diversify their activities in the digital age, as long as they are addressing the same democratic social and cultural needs of the society' (European Commission, 2002: para. 27).

## European Commission's changing attitude towards online media

While up until 2002, the Commission advocated the expansion of PSB online, its decisions regarding the BBC Digital Curriculum (European Commission, 2003) signalled a paradigmatic shift in EU PSB policy (Katsirea, 2008; Michalis, 2007; Wiedermann, 2004).

In the BBC Curriculum decision, the Commission had to evaluate the public funding for a new service by the BBC that provided an e-learning internet tool offered free to schools and students. The Commission evaluated whether the new initiative could be seen as an 'ancillary service' inside the BBC's traditional provision. However, the Commission's view was that the BBC's educational remit was limited to the traditional broadcasting offer and did not extend to the new online educational initiative.<sup>11</sup> In this decision, the Commission elaborated on three new criteria that would guide future EC policies on PSB online and severely restrict member states' competence to define the online remit of PSB. Therefore, for the first time, the control of the manifest error of the Commission went far beyond its limit.

The three principles developed by the European Commission's reasoning are certainly consistent with market-failure and non-technology-neutral logic. First, a new PSB online offering has to be 'closely associated' with television and radio services,<sup>12</sup> which means that, while radio and TV constitute the foundation of the remit, online services need to be 'closely associated' with the 'core offer' to be admissible. Second, the online offer has to be 'distinctive from and complementary to services provided by the commercial sector' (European Commission, 2003: para. 41). Third, the online offering has to be clearly delineated in advance, for commercial competitors to plan their activities (Ridinger, 2009).<sup>13</sup> These criteria conflict with previous decisions by the European Commission<sup>14</sup> and clearly restrict member states' capability to determine their PSB's remit.

This line has been further developed by the Commission, with its decision regarding the Dutch PSB, NOB.<sup>15</sup> As Wiedermann (2004) highlighted, already from the wording of the formal opening of the procedure against NOB, the Commission:

... reversed the burden of proof. It said that a Member state can only be said not to have committed a manifest error in including online services in the public service remit under Article 86(2) if the Member state can prove that: there is a need for these services and that they are of a special character i.e. they are not also offered by commercial providers. (Wiedermann, 2004: 9)

In fact, in the letter of 3 February 2004 that initiated the procedure (European Commission, 2004b), the Commission underlines once again the difference of treatment between

broadcasting and new media activities of PSB, clearly abandoning technological neutrality. Para. 84 stated:

The Commission points out that the case-law of the Commission differentiates greatly between broadcasting services and information society services. The range/scope of the broadcasting communication is defined by the broadcasting service and includes in principle no services of the information society. Although the Broadcasting Communication does not exclude all internet activities from the public broadcaster of their application/use, this does not mean that all new media services delivered by public service fall within the application/use as broadcast communication. Similar to the illustrated BBC Digital Curriculum, similar services can only be judged on the basis of broadcast communication if they stay closely related to broadcasting services. (European Commission, 2004b: para. 84, my translation)

The Commission therefore criticized NOB for its definition of new media activities. According to the Commission, the provision of SMS and I-mode was vague, thus leading to uncertainties for the competitors. Furthermore, the provision of these services was considered to be outside the PSB remit (Donders and Pauwels, 2008). Once more, this conclusion demonstrates the Commission's move away from technological neutrality to a pro-market inclination. As a consequence, in 2008, a new Media Act (Mediawet 2008) was passed in the Netherlands, where new services, including pay services, will be subject to 'a prior evaluation' before being entrusted to PSBs, thus anticipating the requirement of Communication 2009 (European Commission, 2010).<sup>16</sup>

Further evidence of a significant change in the policy of the EU towards new media can be inferred from the case of the Danish TV2 (European Commission, 2004a). As Mortensen (2006) explains in detail, in Denmark the prospective sale and privatization of TV2 has been stopped due to a series of Commission decisions and lawsuits regarding unlawful state aid to TV2. Interestingly, in explaining the attitude of the Commission towards the new media, the decision of 19 May 2004 (European Commission, 2004a), after stating that the entrustment of the public service task was correct, stated:

The Commission acknowledges that TV2's internet pages that are limited to informing the user about its public service television programmes fall within its public service broadcasting task. There is therefore no manifest error in treating the operation of these pages as covered by the public service task. In contrast, TV2's commercial internet service should be regarded as a purely commercial activity, as it offers interactive products on individual demand like games or chat rooms, which do not differ from similar commercial products. Since such services do not address the democratic, social and cultural needs of society they cannot constitute services of general economic interest under Article 86(2) of the EC Treaty. Indeed, the Danish authorities considered these activities to fall outside the scope of TV2's public service. (European Commission, 2004a: paras 91–92)<sup>17</sup>

The criteria for the definition of PSB online services elaborated in this decision reiterate those affirmed in the BBC Curriculum case. Moreover, the decisions regarding the German licence fee system (European Commission, 2007) and the Flemish and the Irish PSB (European Commission, 2008a, 2008b) confirm the Commission's more restrictive position towards PSB online activities. With regard to the German PSBs, ZDF and ADF have been the subject of an investigation that entailed an agreement between the German

government and the Commission on the future financial regime of the PSBs (European Commission, 2007). In this procedure, the Commission made several important observations regarding the scope of PSB in the new media.

First, it expressed concerns about the absence in the German framework of a:

... sufficiently clear definition and adequate entrustment of the public service remit (in particular as regards new media activities and additional digital channels), excluding activities which would be regarded as 'manifest errors' (in particular as regards the inclusion of commercial activities as well as mobile services). (European Commission, 2007: para. 75)

Moreover,

... a general authorization of public service broadcasters to offer such loosely defined new media services and the resulting lack of predictability for third parties bears the risk that other market operators are discouraged to develop and offer such new media services. (European Commission, 2007: para. 230)

This consideration clearly underlines that the Commission applies a different approach when old and new media are concerned. It also highlights the necessity for PSBs to clearly indicate which new media offering they will be developing.

Additionally, in this decision (European Commission, 2007), the Commission explains that online services should contain 'specific features' which should be different from those already offered by the market (para. 232). PSB online services should also display an 'added value' (para. 362), given that their 'specific contribution to the democratic, social and cultural needs is not always evident' (para. 231). Thus, once again, a strong market-failure approach is manifest.

Whereas in one section of the document's decision, the Commission proclaims to adhere to the principle of technological neutrality,<sup>18</sup> it contradicts itself by commanding a much stricter control on PSB's online activities.

As with Holland, the Commission has once again reaffirmed a non-technology-neutral and market-oriented approach when deciding on the public funding of the Flemish PSB provider VTR<sup>19</sup> (European Commission, 2008a) and the Irish PSBs RTÉ and TG4 (European Commission, 2008b).

The Commission explicitly required VTR to conduct an *ex ante* control on new services in a way that coincides with the requirements of the Communication 2009 that was under discussion at the time (European Commission, 2008a). In a similar vein, the decision on Irish PSBs also demands the same type of controls on the new media activities of their PSBs RTÉ and TG4 (European Commission, 2008b).<sup>20</sup> Again, the salient feature of the proposed amendments by the Irish government following the Commission's decision is the introduction of a public value test and a market impact assessment for any significant new activities (European Commission, 2008b).

This overview shows how the Commission has gradually subjected PSB online and new media activities to stricter controls. These controls, moving beyond a 'check for manifest error' (European Commission, 2001), clearly meet the objectives of the commercial operators that demanded the curtailing of PSB activities, specifically on the internet (European Commission, 2008d). As explained by the Commission in a

document that contains the summary of the replies to the open consultation preceding the new Communication:

Private broadcasters, newspaper publishers and private operators in general are in favour of an in depth review which would restrict or, at least, set clear boundaries on the possibility for public service broadcasters to offer new media services. (European Commission, 2008d)

## The new Communication 2009

In July 2009, the European Commission replaced the Communication 2001 on state aid to PSB with a new Communication. In the words of Neelie Kroes, the European Commissioner for Competition Policy who promoted the Communication, this instrument was needed to ‘consolidate our existing case practice’ and take ‘full account of the new media environment’ (European Commission, 2008c: 2). Under the commissioner’s own admission, Communication 2009 has been triggered by numerous complaints by PBSs’ commercial competitors:

Certain initiatives by public broadcasters have led their commercial competitors to complain in increasing numbers to the Commission. And in recent years these complaints have spread beyond the broadcasting sector. For instance, newspaper publishers and other private content providers fear that State aid may be used excessively to fund on-line activities of public service broadcasters. (European Commission, 2008c: 2)

A consultation process involving public and private stakeholders was initiated in January 2008. The first public consultation – held from 10 January 2008 to 10 March 2008 – enquired whether the stakeholders felt that there was a need for a new Communication. There were 121 replies from commercial and public stakeholders to reach Brussels<sup>21</sup> and, despite the opposition of member states and PSBs, the Commission decided to go ahead with the updating process. After drawing up a first draft, another public consultation was opened (from 5 November 2008 to 15 January 2009). On the basis of 90 submissions<sup>22</sup> and a meeting with experts from the member states on 5 December 2008, the Commission elaborated a second draft. Another public consultation on this new draft – from 7 April to 8 May 2009 – received 70 replies.<sup>23</sup> On 2 July 2009, the updated Broadcasting Communication was adopted and took effect on 27 October. Communication 2009 clearly reflects the reasoning adopted by the Commission in the decisions regarding new media that I outlined earlier in the discussion. Following the non-technology-neutral approach that we have seen developing since 2002, the Communication sets a higher obstacle for public broadcasters’ entry into new media ventures by demanding an ‘added value’ for these new services. In fact, according to article 48 of Communication 2009:

A manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society. (European Commission, 2009b)

Therefore, when venturing online, PSBs will have to demonstrate the ‘added value’ compared to the offering of their commercial rivals, thus forcing member states to adopt

a market-failure line when defining their remit online. This *ex ante* test has to be carried out before the launch of each new service. Article 88 explains:

In order to ensure that the public funding of significant new audiovisual services does not distort trade and competition to an extent contrary to the common interest, Member States shall assess, based on the outcome of the open consultation, the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service. In assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives. (European Commission, 2009b)

Evidently – as acknowledged by the Commission (European Commission, 2008d) – both private sector broadcasters and publishers have pushed the case for keeping PSB out of potentially profit-making new media projects. On the opposite side, member states and public broadcasters have battled to keep their autonomy in defining the remit of PSB. They have called for the principle of subsidiarity as defined by the Amsterdam Protocol of 1997.<sup>24</sup>

The solution adopted by the last version of Communication 2009 has been labelled as a compromise. Certainly, the requirement for an *ex ante* assessment of each new service with all the details included in the draft would have restricted even further the choices of member states to design the most appropriate mechanism of assessment.<sup>25</sup> However, the *ex ante* test introduced by Communication 2009 constitutes a big change in terms of the European framework and its influence on PSBs. As we have seen, the obligation of a prior assessment on all member states and PSBs for the definition of the public service remit goes way beyond the control for manifest error.

Not surprisingly, the private competitors have been very enthusiastic about Communication 2009. For example, the director of the European Publisher Council (EPC), Angela Mills Wade has commented that:

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. (EMB, 2009)

Moreover, the director general of the Association of Commercial Television Europe (ACT), Ross Biggam, has congratulated the Commission ‘for having come up with a balanced and workable text’ (EMB, 2009).

## The *ex ante* test

The necessity for an *ex ante* test was made more explicit after the decision on the Dutch PSB (European Commission, 2006). In fact, this assessment conforms to the new criteria developed by the Commission since 2002. PSB online is legitimate if it shows: ‘distinctiveness’ from the market, ‘added public value’ compared to the commercial offers and ‘predictability’ for commercial competitors. Once again, the test confirms that the expansion of PSB online has to be treated differently from broadcasting and certainly in a more restrictive way.



Evidently, the reasons for this policy shift have to be found in the willingness to placate the continuous complaints of the commercial competitors, especially publishers of online press (European Commission, 2008d) as explained by Commission officials:

This test at the national level (i.e.: by a national body rather than the Commission) addresses the legitimate concern of commercial media, including the print media, that public broadcasters might use public money to offer new online services which are not remotely similar to a TV or radio broadcast, which do not add any clear value for society and which considerably distort competition. In several Member States, the debate focused on the question whether broadcasters could start using public service compensation to finance a kind of 'electronic online press. (Repa et al., 2009: 8)

The first decision to apply Communication 2009 came on 28 October 2009 and involved the financial regime of Austria's public service broadcaster ORF (European Commission, 2009b). The Commission's main remarks concerned the unclear definition of the public service remit with particular reference to ORF's online activities. Notably, according to previous ORF law, only 'online services and teletext which are connected with broadcast programmes as part of the service provision remit and serve to fulfil the programme remit'<sup>26</sup> were to be regarded as part of the PSB's offer (European Commission, 2009a: para. 29). Despite this limitation, the Commission considered 'the remit for online services and for special interest channels was too unspecific' (European Commission, 2009a: para. 83).

According to the decision:

It was necessary for the public service obligations to be defined more specifically with regard to online services taking into account the existing offer on the market. It should be clear which of the population's needs are supposed to be covered by the broadcasting institutions with their online services and the extent to which these online services, described in greater detail, serve the democratic, social and cultural needs of society. (European Commission, 2009a: para. 83)

As expected, Austria has withdrawn a number of its online offers (European Commission, 2009a: para. 93) and has agreed to create a new media authority to supervise the remit of ORF and to launch a public consultation to test the 'added value' of new services against their market impact. The same pattern has been followed by the decision on the Dutch PSB, arrived at in January 2010 (European Commission, 2010). The European Commission has closed the procedure, after ensuring the adoption of an *ex ante* test accordingly to the principles that are now enshrined in Communication 2009:

The Dutch authorities will ensure that the prior evaluation process will take place in a transparent way. As part of this prior evaluation process interested parties will be consulted and the market effects of new audiovisual services will be assessed and balanced against the benefits of the new service for the Dutch society. (European Commission, 2010)

## Concluding remarks

This study started with an examination of the decisions on state aid by the European Commission that led to the newly adopted Communication 2009. It argued that, whereas until 2002 the Commission was supportive of new media initiatives by PSBs, the more

recent reasoning – substantiated in Communication 2009 – reveals a more restrictive approach towards PSB online. The new document has been strongly advocated by commercial rivals of PSB who filed their complaints in Brussels and demanded stricter controls on PSBs' online expansion.

This recent restrictive attitude seems to contradict the increasing recognition and constitutionalization of the principles of public services in the Lisbon Treaty that was ratified on 1 December 2009. For the first time, all new EU laws will have to be checked for compliance with the Charter of Fundamental Rights, which explicitly recognizes and protects access to services of general economic interest (public services).<sup>27</sup> Likewise, the new Treaty introduces a new legal basis for services of general interest (SGI) and also a series of principles contained in a Protocol that assign a fundamental role to SGI in the European Community. The SGI Protocol, in particular article 1, once again recognizes:

The essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users. (Protocol on SGI, 2009)

This renewed recognition of public services (services of general interest in the words of the Treaty) collides with an assessment of the Commission that is only based on market criteria and that results in a restriction of the remit of PSB online. Moreover, this stricter control seems to contradict both the Amsterdam Protocol on PSB and the Protocol of SGI of the Lisbon Treaty, which assigns the widest discretion to member states to define the scope of PSB.

Surely, as Humphreys (2009) demonstrates, the German and the UK cases show that the increased pro-market inclination of their national policy frameworks has led to stronger controls on PSB online, even independently of the EU's influence (Brevini, 2010a, 2010b). However, the role played by the Commission in fostering a pro-market approach is hard to deny. As explained, the Commission has encouraged the adoption by national authorities of stricter policy towards online PSB in states such as Denmark that had previously presented an enabling framework towards PSB online.<sup>28</sup> Importantly, this new European framework is impacting all other European states that had so far resisted the pressure of commercial operators.

Additionally, the adoption of Communication 2009 is just the last stage in a process of change of the European policy on PSB online that has been developing since 2002. However, it could be argued that a Communication is not an appropriate legal act for imposing such new requirements, which do not already exist under EC law. In particular, articles 107 and 106(2) EC do not expressly require any *ex ante* assessment of new services, and the Commission could not query the compatibility of the aid with competition policy just because no *ex ante* assessment has been carried out by the member states. It could also be argued that the European Commission lacks the competence in deciding on general criteria determining the remit of PSB, and therefore is in breach of the principles of subsidiarity that are once again reiterated by the Lisbon Treaty.

Furthermore, Communication 2009 seems to conflict with the decision taken by the Court of First Instance (now the General Court) in October 2008 regarding Danish broadcaster TV2 that explained:

- The mission of Public Broadcaster can be broad and should be defined in relation to the needs of society and not in relation to the market.
- Member states can draw up a broad definition of public broadcasting delivered through 'television, radio, internet and the like'.
- There is no need to take account of the activities of the commercial operators for the purpose of defining PSB's remit. (Court of First Instance, 2008)

Thus, it can be argued that member states could decide not to apply Communication 2009 without incurring any charge from the Commission.

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## Notes

1. The European Parliament stressed in July and September 1996 that PSB is crucial 'for the development of an information society for all, ensuring the largest possible number of citizens benefit from the potential offered by new services' (European Parliament, 1996a) and that PSB should take a 'lead in the development of new services' (European Parliament, 1996b). In its 1999 Resolution, the Council backed the Parliament's view, stating that 'Public service broadcasting has an important role in bringing to the public the benefits of the new audio-visual and information services and the new technologies', emphasizing that the 'fulfilment of the Public Service Broadcasting's mission must continue to benefit from technological progress' and 'it is legitimate for public service broadcasting to seek to reach wide audiences' (European Council, 1999). Recently, the European Parliament (2004) has once again underlined that PSB should evolve in the new information society to include new digital and online services that are crucial to achieve its remit.
2. 'Every citizen must be equipped with the skills needed to live and work in this new information society. Different means must prevent info-exclusion' (European Council, 2000).
3. See European Commission (2001), Communication on the Application of State Aid Rules to Public Service Broadcasting (2001/C320/04), OJ C 320, 15 November 2001.
4. Under the Treaty of Lisbon, the EU Charter of Fundamental Rights (EU Charter, 2000) is legally binding. The Charter explicitly recognizes and protects access to service of general economic interest (public services).
5. The numbering has changed after the entry into force of the new Lisbon Treaty of 1 December 2009. According to the old numbering of the Treaty establishing the European Community these articles were 86 and 87.
6. See article 107§1 of the Treaty on the Functioning of the European Community.
7. See article 107§3 of the Treaty on the Functioning of the European Community.
8. According to article 106§2, 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.'
9. See, among the others, the Altmark Decision Case C-280/00.
10. Prosser (2005: 217) explains in detail the conditions posed by the Commission: first 'the service in question must be a service of general economic interest and clearly defined as such by the Member States'. Second, 'The public service remit is entrusted to the broadcaster

by means of an official act'. Third, 'the funding of public service broadcasting must meet a proportionality test'.

11. Having established that BBC Digital Curriculum did not constitute an 'ancillary service' of the traditional BBC's educational provision, the Commission approved the service under article 106§2 derogation. However, BBC Jam (the actual name of the service launched following the approval) was suspended by the BBC Trust in 2007. Evidently, the Trust's decision can be explained as a precautionary one, given it had not conducted a market impact assessment of the service before its launch. Therefore, the Trust decided to avoid the risk that the service could have been subsequently found in conflict with the European Commission's decision-making.
12. 'The provision of educational material over the internet may be considered to be within the "existing aid" nature of the scheme to the extent that it remains closely associated with the BBC's television and radio services' (European Commission, 2003: para. 36).
13. Para. 43 of the Decision explains that 'The Commission understands that "the commissioning plan" ("the Plan"), which is required to be published at least fifteen months before the launch of the Digital Curriculum service will set out the subjects to be covered during the first five years of the service' (European Commission, 2003) thus guaranteeing the competitors the possibility to plan their strategies accordingly. Michalis (2007: 234) notes that this requirement has been put forward for the first time by the Commission in the Decision regarding BBC's nine digital channels where it stated that the details are important 'for non public-service operators so that they can plan their activities' (European Commission, 2003: para. 36).
14. That is, BBC 24-hour news service (European Commission, 2009b).
15. The Commission initiated a procedure against NOB on 3 February 2004 after receiving complaints against different aspects of the financing regime of NOB. It subsequently divided the assessment into two: the first regarding a 'new aid', that came to an end on 22 June 2006, 'on the *ad hoc* financing of Dutch public service broadcasters' C 2/2004/ (ex NN 170/2003). The second procedure – an existing aid procedure – concerned the financing of the public service broadcasters through annual state payments and the Stimulation Fund (E-5/2005). This second decision arrived on 26 January 2006 (IP/10/52).
16. The European Commission thus closed the procedure as 'The Dutch authorities will ensure that the prior evaluation process will take place in a transparent way. As part of this prior evaluation process interested parties will be consulted and the market effects of new audiovisual services will be assessed and balanced against the benefits of the new service for the Dutch society' (European Commission, 2010; at: [europa.eu/rapid/press-release\\_IP-10-52\\_en.htm](http://europa.eu/rapid/press-release_IP-10-52_en.htm)).
17. It should be noted that in this case, the Danish Act already considered chat rooms and games to be outside the remit of PSB, so here there was actually no need for the Commission to examine further. Wiedermann (2004: 13) rightly observes that 'the fact that the Commission nonetheless examined the question suggests that it was determined to make general observations about "commercial internet activities" with a view to consider other pending state aid cases'.
18. See European Commission (2007: para. 240): 'the Commission does not consider that the determination of a "manifest error" can be based on the mere use of new delivery platforms, where the content is distributed over new platforms under conditions which are identical or similar to those for traditional television broadcasting'.
19. In this case, Belgium was requested to better clarify: 'the definition of the public service remit, especially in relation to new media services, the effective supervision and control of VRT's fulfillment of its public service obligations, as well as the prevention of overcompensation for public service activities' (Tosic et al., 2008: 82).
20. In the Irish case, 'the Commission considered that the funding system which dated from before Ireland's accession to the EU could be considered as existing aid. At the same time, the Commission raised concerns regarding the compatibility of the scheme. The Commission

considered that the definition of the public service remit in particular in fields other than broadcasting was not sufficiently clear. Furthermore, it expressed concern that there were no satisfactory *ex-post* controls to verify whether State funding exceeded the net public service costs (overcompensation), whether commercial activities had unduly benefited from licence fee revenues (cross-subsidization) or whether the public service broadcasters' commercial activities were in line with market principles' (Tosic et al., 2008: 83).

21. [ec.europa.eu/competition/state\\_aid/reform/archive.html#broadcasting](http://ec.europa.eu/competition/state_aid/reform/archive.html#broadcasting).
22. [ec.europa.eu/competition/state\\_aid/reform/archive.html#broadcasting](http://ec.europa.eu/competition/state_aid/reform/archive.html#broadcasting).
23. [ec.europa.eu/competition/consultations/2009\\_broadcasting\\_review/index.html](http://ec.europa.eu/competition/consultations/2009_broadcasting_review/index.html).
24. See the Common position paper of 24 September 2008: 'Main principles for a revision of the Broadcasting Communication of the European Commission', available at: [www.ebu.ch/CMSImages/en/Position%20paper%20BC%20annex%20letter%20to%20Commissioner%20Kroes\\_tcm6-63803.pdf](http://www.ebu.ch/CMSImages/en/Position%20paper%20BC%20annex%20letter%20to%20Commissioner%20Kroes_tcm6-63803.pdf).
25. See the first draft of the Communication (European Commission, 2008e) and specifically articles 59–62.
26. According to the explanations given by the Republic of Austria, there is a connection with broadcast programmes in the case of services which 'accompany' and 'supplement' programmes (European Commission, 2009b: para. 29).
27. Article 36 of the EU Charter of Fundamental Rights affirms that: 'The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.'
28. The case of Denmark is emblematic. The current policy debate for the new agreement between DR, the Danish PSB, and the government, has been highly influenced by Communication 2009. In fact, in September 2009 Carina Christensen (Minister of Culture at the time) announced that the introduction of a market-impact assessment would be put on the agenda during the negotiations for the next media political agreement. Still, the final decision rests on the Danish policy-makers, also in light of the recent change at the head of the Ministry of Culture. For more details see Brevini (2010b).

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