Center On Strategies For Public And Civil Entrepreneurs

Public Broadcasting Remit

European Legal and Regulatory Framework

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Executive summary

This study on the EU legal framework of national public service broadcasting systems, was carried out as part of a bigger assignment by the Public Broadcast Association of the Netherlands.

- There is no template for public service remits in European law and Member States have the discretion to design their public service remits as they desire.

- European law frames the public service remit as an exception to rules on state aid. Negative effects of public broadcasting remits on intra-community trade are only allowed to the extent that the infringements are necessary and proportional.

- The current Dutch Public Broadcasting Remit contains elements that are at odds with the proportionality aspect:
    - Limiting public broadcasting to non-commercial parties seems to be incongruent with the long-term trend towards liberalization inherent in European law and policy
    - The current concession system applicable to public broadcasting is illogical and inconsistent, leaving it vulnerable to future developments

- The WTO GATS developments do not now and are unlikely to have in the future an impact on Public service Broadcasting

1. Public Broadcasting Remit (EU stipulations)

Presented here are the various stipulations from European Law regarding the Public Broadcasting Remit. Historically, EU Member States have been quick to secure the position of their public broadcasting systems in view of expanding European law, thus providing shelter for the systems that developed over decades. European law has allowed Public Broadcasting Remits to exist, but over time a number of prerequisites, limits and standards have developed to minimize the potential negative impact public broadcasting remits might have on fair competition.

The elements of the public service remit as defined by European legislation and regulations are outlined below:

Purpose of Public Broadcasting

Considering the fact that public service broadcasting, in view of its cultural, social and democratic functions, which it discharges for the common good, has a vital significance for ensuring:

- Democracy
- Pluralism
- Social cohesion
- Cultural diversity
- Linguistic diversity

The broadcast media play a central role in the functioning of modern democratic societies, in particular in the development and transmission of social values. Therefore, the broadcasting sector has, since its inception, been subject to specific regulation in the general interest.

This regulation has been based on common values, such as:

- Freedom of expression
- The right of reply
- Protection of copyright
- Protection of minors and of human dignity
- Consumer protection

Design of the Public Broadcasting System

1. Each member state has the competence to determine the remit for public broadcasting as well as its funding.
2. The service in question must be a service of general economic interest and clearly defined as such by the Member State (definition)
3. The Member State must explicitly entrust an undertaking with the provision of that service (entrustment).
4. Public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole.
5. It is legitimate for public service broadcasting to seek to reach wide audiences. >>(note that wide audiences are a prerogative but not precondition)
6. Stressing that the increased diversification of the programmes on offer in the new media environment reinforces the importance of the comprehensive mission of public service broadcasters

Prerequisites (if not met it is not considered to be public service broadcasting)

1. The fulfillment of the public service broadcasting's mission must continue to benefit from technological progress;
2. Broad public access, without discrimination and on the basis of equal opportunities, to various channels and services
3. According to the definition of the public service remit by the Member States, public service broadcasting has an important role in bringing to the public the benefits of the new audiovisual and information services and the new technologies;
4. The ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced, including the development and diversification of activities in the digital age
5. The application of the competition rules of the EU must obstruct the performance of the particular tasks assigned to the undertaking
6. The exemption from competition rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test).

Funding of Public Broadcasting System

1. State funding of the public broadcasting organization is allowed
2. Funding is allowed but only for the fulfillment of the public service remit as conferred, defined and organized by each Member State (prerogative, as

determined by member states). This takes into account other direct or indirect revenues derived from the public service mission.

3. Insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account; (proportionality, as determined by the Commission/court)
4. The question of the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. Therefore, whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot normally be viewed as part of the public service remit.
5. The obligation of separation of accounts does not apply to public service broadcasters whose activities are limited to the provision of services of general economic interest and which do not operate activities outside the scope of those services.

Funding in case of broadcasters operating in both public and commercial markets

1. The Member States have been required by Directive 80/723/EEC to take the measures necessary to ensure in the case of any undertaking granted special or exclusive rights or entrusted with the operation of a service of general economic interest and receiving State aid in any form whatsoever and which carries out other activities, that is to say, non-public service activities that:
    a. The internal accounts corresponding to different activities, i. e. public service and non-public service activities, are separate;
    a. All costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles;
    b. The cost-accounting principles according to which separate accounts are maintained are clearly established.
2. On the expenditure side, costs specific to the non-public service activity should be clearly identified.
3. In addition, whenever the same resources, personnel, equipment, fixed installation etc. are used to perform public service and non-public service tasks, their costs should be allocated on the basis of the difference in the firm's total costs with and without non-public service activities[1].

[1] The above implies that costs that are entirely attributable to public service activities, while benefiting also commercial activities, need not be apportioned between the two and can be entirely allocated to public service. This could be the case, for example, with the production costs of a programme, which is shown as part of the public service remit but is also sold to other broadcasters. The main example, however, would be that of audience, which is generated both to fulfill the public service remit and to sell advertising space. It is considered that a full distribution of these costs between the two activities risks being arbitrary and not meaningful. However, cost allocation from the point of view of transparency of accounts should not be confused with cost recovery in the definition of pricing policies.

4. On the revenue side, broadcasting operators should give a detailed account of the sources and amount of all income accruing from the performance of non-public service activities.
5. The net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the state aid.

Allowed content of remit (member state choice- design variables):

- The task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered,
- 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

Disallowed content of remit:

- Activities that could not reasonably be considered to meet the democratic, social and cultural needs of each society. That would normally be the position in the case of e-commerce, for example. In this context, it must be recalled that the public service remit describes the services offered to the public in the general interest.

2. *European system*

The European system for broadcasting builds on the treaty obligations regarding fair competition and a prohibition of state aid.

The reasoning is as follows[2]:

1. State aid rules are applicable to public broadcasting because:
    a. It concerns an economic activity
    b. It affects intra-community trade. Examples:
        i. Acquisition and sale of programme rights;
        ii. Advertising, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries;
        iii. The ownership structure of commercial broadcasters may extend to more than one Member State;
        iv. State aid favors in most cases only certain broadcasters and may thereby distort competition.
2. Although state aid rules are applicable, the is room for a derogation based on the general interest involved with public broadcasting (in essence, public broadcasting is a service of general economic interest)
3. The derogation on the state aid rules has to be applied restrictively as it is an exception to the normal state aid rules
4. The derogation is only applicable to public broadcasting as long as the state aid is necessary to provide the service
5. The amount of state aid can not be higher than what is minimally necessary to cover net costs of public service obligations
6. Also, the derogation is only valid if the negative effects on intra-community trade are outweighed by the public benefit
7. The European Commission has the competence to check proportionality etc. on a case by case basis

Essentially there is no particular European "design" for public broadcasting systems. The system is aimed to protect the mission of public broadcasting rather than the way it is effectuated. One option that is prohibited though is the redesigning of systems such that the result would be to move away from liberalized markets, such as the reinstating of state companies or pure state monopolies where a more liberal set-up had been the case before. The EC treaty provides grounds to appeal such a decision, most likely on the basis of Article 10 in conjunction with articles 86 and 82[3] (dominant position) although other appeal options are available as well depending on the particular implementation of the decision (e.g. usage of article 49 concerning freedom of services in conjunction with articles 10 and 86 of the EC treaty).

Any future changes in the Dutch public Broadcasting remit would have to be checked against the reasoning above to see if changes are compliant with European law.

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[2] Art. 86 EC Treaty, (2001/C 320/04), CoJ EC 24 July 2003,Case C-280/00 (Altmark Trans)
[3] See also Case 267/86 (Van Eyke v. NV ASPA)

3. European Policy Developments

Introduction

The European Union has now single policy framework regarding public broadcasting. There are a number of policy areas that are of relevance to public sector broadcasting, ranging from opening up countries to foreign broadcasters ("TV without frontiers" directive), to detailed policies regarding electronic data communication.

Given the fact that the individual Member States have great discretion in designing the organization and funding of their public broadcasting systems, the absence of a single European vision on public broadcasting is not surprising. Instead, the EU has attempted to regulate and guide these systems, mainly to minimize the negative effects on intra-community trade while acknowledging the necessity and legitimacy of public broadcasting systems.

Media pluralism: measures to ensure media pluralism typically limit maximum holdings in media companies and prevent cumulative control or participation in several media companies at the same time. The aim is to protect freedom of expression and to ensure that the media reflect a spectrum of views and opinions. The Commission's Green Paper on services of general interest of May 2003 noted that protection of media pluralism is primarily a task for the Member States. At present, European legislation does not contain any provisions in this area. However, a number of Community law instruments contribute directly or indirectly to the aim of preserving media pluralism. This is the case of Community competition law and certain provisions of the "television without frontiers" Directive (in particular through its provisions on the promotion of European works, and of works by independent producers).

Electronic communications networks and services: in 1999 the Commission launched a major review of the existing telecommunications law with a view to making the sector more competitive and more in line with technological progress and the requirements of the market. This resulted in the adoption of a new regulatory framework for electronic communications in 2002, to be applied as of July 2003. The directive on electronic commerce, adopted in 2000, harmonizes certain aspects enabling information society services to benefit fully from internal market principles.

Consumer protection: like other economic sectors, the audiovisual sector is subject to Community rules governing consumer protection. These include notably the general provisions on false and misleading advertising , as well as the recent proposal for a framework directive on unfair business-to-consumer commercial practices.

GATS: on audiovisual services, the European Community and its Member States have not made commitments and have taken exemptions to the most favored nation clause in the last multilateral trade negotiations round (the "Uruguay Round"). Thus the EU benefits from room to maneuver which secures the possibility both of maintaining

existing national and Community measures but also to further develop national and Community policies and instruments, in response to developments in the sector.

As the Commission has pointed out in the Green Paper on services of General interest, the Community commitments made in the context of the World Trade Organization (WTO) or in the context of bilateral agreements, have been fully consistent with the internal market rules applying to these services and have not, to date, led to problems for the organization, provision and financing of services of general interest in practice. The same applies to new commitments being offered in the framework of present negotiations.

Continued consistency can be expected between the internal Community regulatory framework and the obligations accepted by the Community and its Member States in the framework of international trade arrangements, in particular the WTO. There is a strong expectation that international trade agreements should not go beyond the positions agreed within the European Union, especially because the European legal and regulatory regime is of much greater depth and interdependencies than international trade arrangements.
The impact of the GATS on public broadcasting is therefore none existent and is unlikely to have an impact at a later stage.

Development of the framework for Service of General (Economic) Interest: An interesting recent development concerns the development of the concept of the services of general interest (SGI) within the context of European free trade regulations. In 2003 a green paper was presented by the European Commission and subsequent opinions by stakeholders have resulted in a white paper on this topic. This concept would entail public services that are not economic in nature, yet are carried out by actors other than the government.

However, this concept is *not* relevant to the public broadcasting issue. Public broadcasting has long been determined to be a Service of General *Economic* Interest (SGEI). The system as outlined in the previous chapter is applicable to public broadcasting services as they are essentially economic in nature:

"The principle of the Member States' autonomy to make policy choices regarding services of general economic interest equally applies with regard to financing the latter. Indeed, Member States enjoy a wide margin of discretion when deciding whether and in what way to finance the provision of services of general economic interest. The financing mechanisms applied by Member States include direct financial support through the State budget, special or exclusive rights, and contributions by market participants, tariff averaging and solidarity-based financing. As a general rule, Member States can choose which financing mechanism is used. In the absence of Community harmonization, the main limit to this discretion is the requirement that such financing mechanism must not distort competition within the common market. It is for the Commission, as the guardian of the Treaty, to ensure that this rule is respected to the benefit of taxpayers and the economy at large."

4. Dutch system

The Dutch Media law has a number of peculiarities, which are illogical and place it at odds with the spirit of the European law and regulations concerning public broadcasting, possibly resulting in a clash in the future.

1. Limiting public broadcasting to non-commercial parties is incongruent with the long-term trend towards liberalization inherent in European law and policy.

The Dutch Media Law describes in great detail which broadcasting organizations can become a public broadcaster.

> **Artikel 14**
> 1. Een omroepvereniging is een vereniging die voldoet aan de volgende eisen:
>   a. de vereniging heeft volledige rechtsbevoegdheid;
>   b. de vereniging stelt zich blijkens haar statuten uitsluitend, althans hoofdzakelijk ten doel, ter uitvoering van de taak van de publieke omroep, bedoeld in artikel 13c, op landelijk niveau een programma voor algemene omroep te verzorgen en alle activiteiten met betrekking tot programmaverzorging en uitzending te verrichten die daartoe nodig zijn;
>   c. de vereniging stelt zich blijkens haar statuten ten doel in haar programma een bepaalde, in de statuten aangeduide, maatschappelijke, culturele of godsdienstige dan wel geestelijke stroming te vertegenwoordigen en zich in haar programma te richten op de bevrediging van in het volk levende maatschappelijke, culturele of godsdienstige dan wel geestelijke behoeften.

The Dutch Media law implicitly excludes commercial broadcasters from becoming public broadcasters. Commercial broadcasters will find it hard to comply with the requirements pertaining to their statutes especially article 14.1.c which concerns the representation of a societal, cultural, religious or ideological views in society. These are incompatible with a pure profit motive. Note that foreign organizations are also permitted as public broadcasting organizations as long as they meet the stipulations of the law. The system in the United Kingdom allows the entry of commercial broadcasters in the public broadcasting domain, which shows that public broadcasting can indeed be rendered by commercial parties.

This article essentially also effectuates that public broadcasters can not enter the commercial market as this would be outside their organizational mandate (uitsluitend/hoofdzakelijk uitvoering publieke omroep). Thus the Medialaw creates a system where public and private broadcasting remain separate worlds not only by implicitly prohibiting certain activities but also by regulating the identity and character of the broadcasters in each field. Such a black and white approach is not required by European law as it is the determination of whether a service, activity or output is justified under the public broadcasting remit which counts (a public broadcaster can provide services that go beyond the remit which are then not exempt

from competition rules, whilst delivering others that are covered by the remit and thus are provided more leeway[4]).

The system as a whole is closed shop. By banking solely on internal representation of the public broadcasting associations, the Dutch system contains a strong element of input control. Although there are theoretical reasons for choosing internal over than external representation, the choice is hard-coded in the law, creating a discriminatory element borne of choice rather than necessity. European law, as mentioned in the previous sections, is focused primarily on output, framing exceptions, such as the public service remits, as derogations from applicable laws, which need to be limited in their negative effects on intra-community trade. EU supervision on which infringements are allowed and which are not, is output focused.

From a European point the Dutch government is in its right to design the system as it pleases but its focus on input control and the inclusion of discriminatory elements place it at odds with the trend in European policy and law which steadily moves towards greater liberalization.

The restrictions regarding the character of the organizations eligible to become public broadcasting associations are not strict prerequisites for effectuating the ultimate purpose of public broadcasting, namely programs contributing to social cohesion, pluriformity etc. As such, the restriction could end up being labeled disproportional in its effect on intra-community trade, especially when combined with systemic changes that would reduce public broadcasters to mere program producers. The current justification of the public service remit design hinges on this aspect which is not likely to pass a thorough proportionality test. Moreover, the current system severely restrains the behavior of the public broadcasters in their commercial activities.

2. The concession system applicable to public broadcasting is illogical and inconsistent

The Dutch Government has opted for the introduction of a concession system for the entirety of public broadcasting.

Concessions allow the delivery of a public service through a third party where a significant part of the operational risk falls to the third party. Concessions are suitable when there are several contenders for the concession, thus allowing the benefits of competition to be introduced in public service provision as well as to provide government with alternatives at the end of the concession duration. Without competition for a concession, the beneficial effects of a concession are greatly diminished and with only one contender, the situation merely results in a private monopoly.

The Government, however, did not choose the concession system in order to open the public broadcasting system or to introduce competition:

[4] (2001/C 320/04)

1. The explanatory note (Memorie van Toelichting-MoT) of the concession law (amendment of the Media law) explains that the reason to choose a concession system was merely to provide the government with more and additional methods to steer and guide public broadcasting, i.e. the only reason was to increase government control over the public broadcaster.
2. The MoT explains that the Dutch Government felt that there was only one possible party (NOS) who could/would provide this service and hence a tender procedure was felt to be superfluous (this admission implies that in case of more than one contender tendering would have occurred with all the implications).
3. The Media law explicitly names the current concession holder NOS. The effect of explicitly naming the concession holder results in the need to amend the current law in order to choose another party and amending the law requires parliamentary review and affirmation.
4. The Council of State (RvS) at the time of the amending of the media law remarked that it didn't understand the government's choice for a concession system, as government had identified the NOS as the only candidate. It would have been more logical if government had given the NOS directly through law the task to arrange for public broadcasting[5].
5. The Media law merely awards the concession but contains no regime concession awarding

The end result is a concession system in name only. As it was never the intent of government to adopt a full-fledged concession system, including competition, it is not surprising that components of such a system are missing, nor that the concession arrangement is unsuitable as it provides government with too much influence on the concession holder (a.o. Article 30c.5 Media law). That said however, there is nothing to prevent third (foreign) parties from expressing their interest in acquiring the concession at the end of the current concession. This is also the moment where European law might come into play if the competitor feels that it is not given a fair chance to challenge the incumbent NOS[6].

The system as it is now is very vulnerable to new developments, be they technical or entrepreneurs.
There is no reason to suggest that NOS, NPS and NOZEMA are the only organizations able to deliver components of public service broadcasting (as can be witnessed in the discussions regarding NOZEMA). Without a solid and legally sound justification and implementation, there is no need to limit or hinder competition as is currently the case.

However, because it is the competence of the individual Member State to design the organization and funding of the public broadcasting and because the European Commission is cautious in checking for infringements of the European law in these areas, potential contradictions or infringements between the broadcasting systems and European law can wait for long to be brought to the surface. Nonetheless, the European Commission has started inquiries in a number of countries, including the Netherlands, signaling greater scrutiny on the part of the European Commission.

[5] The Council of State did not examine the possibility of such a choice vis-à-vis European law.
[6] If this or other scenarios play out depends on a number of variables such as the reaction of the Dutch government/politics, European dimension (as e.g. a foreign contender for the concession) etc.

Annex

Primary sources:

COM (2003) 270 Green paper on services of general interest

COM (2004) 374 White Paper on services of general interest

(2001/C 320/04) Communication from the Commission on the application of State aid rules to public service broadcasting

DIRECTIVE 2002/21/EC: On a common regulatory framework for electronic communications networks and services (Framework Directive)

DIRECTIVE 2002/22/EC: On universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)

DIRECTIVE 98/84/EC: On the legal protection of services based on, or consisting of, conditional access

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

DIRECTIVE (89/552/EEG): on the coordination of certain provisions laid down by law, regulation or administrative action Member States concerning the pursuit of television broadcasting activities

Directive 2000/52/EC Amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings

MEDIAWET (Stb. 1987, 249)

MDW groep: Concessieverlening en aanbesteding 2000

Resolution (1999/C 301/01) concerning public service broadcasting

Treaty of Amsterdam: Protocol on the system of public broadcasting in the Member States