
Joint Contribution

by ARD and ZDF to the Public Services Intergroup's
Monti-Kroes Package Assessment Questionnaire

Answers to the Questionnaire

1) Knowledge

- **Do you know the Community rules on State aid (Altmark judgement, Monti-Kroes package)?**

Yes, ARD and ZDF are familiar with the Community rules on State aid, in particular the Altmark judgement and the Monti-Kroes package, although the latter applies only partially to public service broadcasters.

- **How did you learn about these rules? (from the European Commission, national authorities, etc.)**

ARD and ZDF have closely followed the developments within the relevant institutions of the European Union on State aid and SGEI and were thus early on informed about the abovementioned rules.

- **Do you deem the provided information to be sufficient?**

As regards ARD and ZDF, the information provided – especially by the European Commission – has to a large extent been sufficient. Nevertheless, we would like to point out that a lot of effort from our side goes into following the respective legislative and judicial action, and that we are well aware that a significant number



of providers of SGEI are not in a position to guarantee a comparable level of monitoring. Since these providers rely on information from the European Commission and national authorities, all efforts to improve the respective flow of information, are highly welcome.

- **Does the Monti-Kroes package seem clear and easily applicable to you?**

As Public Service Broadcasting is for the most part exempted from the Monti-Kroes package, ARD and ZDF do not feel that it is their position to comment on this question.

- **Did you manage to identify the concerned services (SSGI, SGEI)?**

While the European Commission as well as the Court of First Instance and the European Court of Justice have consistently considered Public Service Broadcasting as a Service of General Economic Interest (SGEI), the fact that the European Commission itself clearly states that “Public service broadcasting, although having a clear economic relevance, is not comparable to a public service in any other economic sector.” (*Communication from the Commission on the application of State aid rules to public service broadcasting, OJ 2009, C 257/1, paras 9 to 11.*) gives an indication that the broad field of public services does not lend itself easily to generalised definitions. Just as Public service broadcasting justly deserves to be covered by sector specific regulation, due to its special role for democratic, social and cultural needs of each society and for the need to preserve media pluralism, other public service sectors will clearly find it difficult to unambiguously subsume their services under the definition of SSGEI or SGEI.

2) Application: situation and difficulties on the ground

- **Has the introduction of the Monti-Kroes package created any problems/difficulties? If so, which ones?**

Since ARD/ZDF are for the most part exempted from the Monti-Kroes package, the main difficulties lie within the application of the Altmark criteria. As regards Public service broadcasting, the Commission has taken several decisions based on the Altmark judgement. In all of these cases, it denied that the second and fourth criteria were fulfilled. For suggestions how these problems/difficulties could be rectified see our answers to section 3 “Future Developments”.

- **Have you ever been denied an act of entrustment by a public authority? If so, what where the reasons?**

No, ARD and ZDF have never been denied an act of entrustment. This, however, is also due to the specificity of Public Service Broadcasting. Since ARD and ZDF have been created and continue to exist only to provide their audiences with Public Service



Broadcasting services, the entrustment with our remit lies at the very heart of our existence. Thus, the entrustment as such has so not been questioned, while the issue of the scope of our remit is and has been for the last years a continuous matter of public and political debate in Germany as well as in Brussels. Nevertheless, ARD and ZDF believe that sufficient legal certainty for public service broadcasting is given now with the adoption of the Communication on the application of State aid rules to public service broadcasting (2009/C 257/01) and the Commission's Decision of April 24th 2007 (C (2007) 1761 FINAL).

- **Have you ever had to provide your services without an act of entrustment?**

No.

- **Are the only exceptions considered within the Monti-Kroes package (i.e. € 30 m in aid/turnover of € 100m) relevant?**

Indeed, Article 2 (1a) of the Commission Decision 2005/842/EC exempts undertakings with an average turnover before tax of less than EUR 100 million during the two financial years preceding the assignment of the service of general economic interest and compensation for the service in question of less than EUR 30 million from the obligation to notify an aid, as the aid shall be considered compatible with the common market. However, with licence fee financing in Germany considerably exceeding this sum, the exception has no relevance for ARD and ZDF.

- **Have these thresholds had a direct impact on the organization and the operation of your services?**

No.

- **How do you calculate the “reasonable profit” (4th condition of the Altmark judgement)? Are there national rules in place in your country to deal with the notion of reasonable profit?**

As regards the element of “reasonable profit”, Public service broadcasting is treated stricter than other SGEIs, as it is not allowed to realise any profit.

In its Communication on the application of State aid rules to public service broadcasting (2009/C 257/01) the Commission states explicitly in paragraph 72:

“Undertakings receiving compensation for the performance of a public service task may, in general, enjoy a reasonable profit. This profit consists of a rate of return on own capital that takes account of the risk, or absence of risk, incurred by the undertaking. In the broadcasting sector the public service mission is often carried out by broadcasters that are not profit oriented or that do not have to remunerate the capital employed and do not perform any other activity than the provision of the public service. The Commission considers that in these situations, it is not reasonable to include a profit element in the amount of compensation for the fulfilment of the public service mission.”



- **To avoid the aid being considered State aid, it is necessary for the organization receiving the aid to show that it functions like a “typical undertaking, well run” or that it is chosen pursuant to a public procurement procedure (Altmark judgement). Did the first case perhaps apply to your organization? If so, how did you prove that it functioned like a typical, well run undertaking?**

Public service broadcasting services do not lend themselves to public tender procedures. To provide a genuine high quality service that covers all aspects of the broadcasting remit, as they currently apply to ARD and ZDF, it is indispensable to entrust such services on a continuous basis to the same organization. No alternative procedure will allow the formation of the necessary staff and build-up of experience and resources. Thus, ARD and ZDF have been measured by the European Commission against the second alternative of the 4th Altmark criterion. However, until now it was not possible, to convince the European Commission that Public Service broadcasting functions like a “typical undertaking, well run”. The European Commission has failed to accept, that it is hardly possible to identify an average public service broadcasting cooperation in Germany to serve as an efficient undertaking comparator. Regarding the provision of services of general economic interest, as in the case of public service broadcasters it is often not possible to make a real comparison with a typical well-run undertaking that is fully exposed to competitive pressure (and hence cost pressures) and has a similarly wide variety of programme offerings. Securing such services within the wide spectrum of the public service remit (i.e. including offerings of programmes that do not appeal to the masses but are cost-intensive and of a high quality standard) is largely unique to public services, or at least not paralleled by private broadcasters. Therefore it is very doubtful whether it would be feasible to apply the fourth *Altmark Trans* requirement to public service broadcasters.

- **Did your local authority proceed directly to a public procurement procedure? Do you think the procedure had been adjusted (to the new rules)?/the procedure was the right one? [it depends o”procedure adaptée/adapté] If not, why? What kind of difficulties did the procedure pose to your organization?**

Does not apply.

- **Is the potential impact of the service on the market and on trade between Member States an element to be taken into consideration when applying the rules? Do you identify a local market (with an impact on competitors) for your activity? On which basis?**

Does not apply.

- **Do you think that the not-for-profit-nature of certain organizations providing SSGEI is taken into consideration by the State aid rules? Why? And how could the situation evolve?**

Does not apply.



- **Have you ever had to repay an “over-compensation”? Did it have an impact on your operating budget?**

No. While the Commission considers the financing of ARD and ZDF by licence fee a State aid in regard to Article 107 (1) TFEU, it has also stated, that such an aid is considered existing aid which is - according to Article 106 (2) TFEU - compatible with the common market, as long as Germany guarantees to comply with the appropriate measures set down in the Commission’s Decision of April 24th 2007 (C (2007) 1761 FINAL).

- **Is there a systematic checking for the aid granted to your organization?**

Yes, ARD and ZDF are controlled regularly and comprehensively by independent bodies.

In Germany, according to § 1 (1) of the Interstate Treaty on Broadcasting Funding an independent body called the Commission for the Assessment of Financial Requirements (KEF) is responsible for assessing the amount of money needed to compensate Public service broadcasters for the public service obligation they are entrusted with. According to § 2 (3) of the Treaty, the KEF is entitled to test whether the financial assistance demanded by Public service broadcasters under § 1 (1) of the Treaty complies with the principles of efficiency and thrift (Effizienz und Wirtschaftlichkeit). The German legal framework thus provides clear, objective and transparent criteria on the basis of which the costs are calculated by the Public service broadcaster and then reaffirmed by the KEF on the basis that the conditions set in advance are fulfilled by the Public service broadcaster.

Furthermore, systematic financial checking of ARD and ZDF is ensured by independent certified accountants, the German Court of Auditors, the supervisory bodies of ARD and ZDF (Rundfunkrat und Verwaltungsrat) as well as legal supervision.

3) Future Developments

- **Do you believe further clarifications to be necessary? If so, of which kind?**

Yes. For more specific suggestions, see the answer to the following question.

- **Do you think that the rules should be adjusted according to the nature of the service? And to the nature of the organization providing them? If so, how?**

In general, the Altmark criteria should be adapted to the specificity of each SGEI. Recent case-law indicates that the Altmark criteria need to be adapted to the

specificity of public service broadcasting. In this respect, the Commission should carry out a careful analysis to assess the actual fulfilment of Altmark criteria, and not automatically rule out their application to public service broadcasting. It is therefore desirable to work with the Altmark criteria on a sectoral basis and to lay down clear conditions appropriate to each SGEI which would mean that public funding was not to be regarded as State aid.

More specifically, with regard to the second Altmark condition, the Court of First Instance held that the determination of the licence fee income payable to TV2 in the media agreements may be viewed as evidence of objectivity and transparency (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04 paragraph 225). It also held that careful examination of the setting of the amount of the licence fee could lead to the conclusion of compliance with the fourth Altmark condition (judgment of 22 October 2008, TV2/Danmark, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, paragraph 232). In view of this latest case-law from Luxembourg ARD and ZDF believe, that the Commission's approach on the exegesis of the 4th Altmark criterion should be reviewed. This is also backed up by the CFI's judgement in the BUPA case. For a more detailed argument on this specific judgement, see: A. Bartosch, "The Ruling in BUPA – Clarification or Modification of Altmark?" [2008] European State Aid Law Quarterly, 211.

- **Do you think that a better distinction between SGEI (Services of General Economic Interest) and NESGI (Non-Economic Services of General Interest) on the basis of established criteria helps ["would help"] avoid legal uncertainty?**

Does not apply.

- **Do you think that a revision of the exemption thresholds would ensure legal certainty for SSGEI providers? If so, what should be the amounts of the thresholds and/or which criteria should be taken into consideration to calculate the thresholds? If not, should the scope of the exclusion for certain sectors be extended? If so, for which sectors?**

Does not apply.

- **Do you think it is necessary to better define and clarify the situation of SGEI for which the compensation received is not likely to have anticompetitive effects or affect trade between Member States, notably to identify the relevance of Community rules for activities at the local level?**

Firstly, it should be made clear in each Community act that State aid law applies only when the measure has an effect on trade between Member States. Only when the aid has a clear impact on cross-border trade should EU State aid rules apply.

Secondly, for the compensation for SGEI to be contrary to Article 106 II TFEU the development of trade and competition between Member States should be affected to such an extent that it would be contrary to the common interest. There are two ways of clarifying the situation:



- The introduction of de minimis rules, either by reference to the absolute amount of aid, such as the example in the Commission Decision on SGEI, in which case Member State would be exempted from notifying the measure;
- The substantive threshold relating to the distortion of competition which would allow intervention by the Commission which goes beyond checking whether the compensation covers the actual costs of performing SGEI. Intervention in this case is justified only if the aid in question causes significant distortion of competition on the market which in turn disproportionately affects trade between Member States.
- **Is there a necessity for additional specifications to article 107 TFEU concerning indirect distortions to competition to enable local authorities and operators to carry out their activities in accordance with the legal framework on State aid? If so, which ones in your opinion?**

The only workable solution would be to clarify the Altmark criteria and specify under which conditions aid is not qualified as State aid and therefore should not be notified and previously assessed by the Commission.

- **Do you think that with regard to over-compensation the reversal of the burden of proof would reduce the risk faced by operators? How to ease the controlling task of public authorities?**

Does not apply.