

Ms. Miriam Anati
Open Society Institute
EU Monitoring and Advocacy Program

March 2006

Dear Ms. Anati,

Thank you for giving me this opportunity to respond to the letter by Mr. Pawel Dobrowolski, concerning what he describes as “the biggest threat to the financial stability of public service broadcasting in Poland”. This supposedly springs from the fact that, as he puts it, “the current form of funding of the public service remit in Poland contravenes EU rules and legislation”. This, incidentally and most surprisingly, has all the hallmarks of an indirect complaint to the European Commission.

Let me add that though I work for the National Broadcasting Council of Poland, I am writing this in a personal capacity.

I beg to disagree with Mr. Dobrowolski on most of the points he is making. For the sake of the argument, I will put aside what may be the justified view of many Member States that licence fee funding for public service broadcasters is not State aid at all. If we were to accept this view, then there would be no argument, as Mr. Dobrowolski would not have a leg to stand on.

Definition of the public service remit

First of all, Mr. Dobrowolski claims that “Poland has not defined the public service remit” and refers to the European Commission’s Communication on the application of State aid rules to public service broadcasting (2001/C 320/04), saying that it stipulates “that the government must ‘set out in a formal act a clear remit for public service broadcasting.’”

Let me point out that according to para. 4. of the Communication, it “sets out the principles to be followed by the Commission in the application of Articles 87 and 86(2), of the EC Treaty to State funding of public service broadcasting.” (emphasis added – K.J.). Accordingly, this is a vehicle for the Commission to inform Member States about its own criteria and procedures, not a set of instructions as to what the Member States must do.

Leaving that aside, however, let us look at para. 40: “In order to benefit from the exemption under Article 86(2), the public service remit should be entrusted to one or more undertakings by means of an official act (for example, by legislation, contract or terms of reference” (emphasis added – K.J.). The Polish Broadcasting Act contains a definition of the public service remit that may actually be more detailed and extensive than similar definitions laid out in the broadcasting legislation of other Member States. A considerable number of other pieces of legislation, to mention only Electoral Law, as an example, also impose specific programme or other obligations on public service broadcasters.

Mr. Dobrowolski calls the language of the Broadcasting Act “a statement on what the law considers to be some of the most important elements of public service” and adds: “However, this

is neither a definition, nor a complete list". It is a definition by any standard, and as for "a complete list", one is tempted to ask – a complete list of what? It would be nice to have a complete and exhaustive list of all the programme obligations of public service broadcasters, except that it is impossible to draw up such a list and no one has yet attempted it. Nor, as we will show below, does the Commission expect to see "a complete list".

So, the Polish Broadcasting Act does contain a definition of the remit. However, is this definition "clear" enough to meet what Mr. Dobrowolski describes as the expectations of the European Commission?

First of all, the Commission went over the Polish Broadcasting Act with a fine-tooth comb and did not object to the definition. Secondly, while the Commission does say a number of times in the Communication that "The definition of the public service mandate should be as precise as possible" (para. 37), it also says other things. For example: "a public service mandate encompassing 'a wide range of programming in accordance with its remit', as stated by the Resolution, can in principle be considered as legitimate, as aiming at a balanced and varied programming, capable of preserving a certain level of audience for public broadcasters and, thus, of ensuring the accomplishment of the mandate, i.e. the fulfilment of the democratic, social and cultural needs of the society and the guaranteeing of pluralism." (para. 13; emphases added – K.J.). This is then repeated in para. 33 "given the specific nature of the broadcasting sector, a 'wide' definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity" (emphases added – K.J.).

In a separate document ("Commission clarifies application of State aid rules to Public Service Broadcasting" IP/01/1429 , Brussels, 17 October 2001), the Commission wrote:

"Member States are free to define as public service remit a broad programme spectrum. In other words, the public remit can be defined as providing the public with a balanced and varied programming that also includes, for instance, entertainment and sport. This means that no objections will be raised as to the nature of the programmes included in the public remit. The definition of the public service remit, however, could not extend to activities that could not be reasonably considered to meet in the wording of the Protocol the 'democratic, social and cultural needs of each society'.

The Commission would ask the respect of the following three conditions:

1. The establishment of a clear and precise definition of public service in broadcasting (whatever its content);
2. The formal entrustment of the public service mission to one or more undertakings by means of an official act. It is also necessary that the public service be actually supplied as foreseen in the formal provision between the State and the entrusted undertaking.

To this purpose, it is desirable that a body or authority of the Member State independent from the entrusted undertaking(s) monitor its fulfilment;

3. The limitation of public funding to what is necessary for the fulfilment of the public service mission (proportionality)". (emphases added – K.J.)

Poland has met all these requirements. And the Commission certainly does not really expect to see a "complete list".

Proportionality of State Aid

Mr. Dobrowolski is also concerned that because the public service remit has not, in his view, been defined, "the Polish authorities and state owned broadcasters will find it impossible to prove that the state aid provided to state owned media is proportional to the obligations imposed by fulfilling the public remit".

Given that Polish Television unfortunately derives only about 30 per cent of its revenue from licence fees and most of the remainder from advertising, sponsorship and other commercial activities, and given that the Polish Broadcasting Act contains a "wide" definition of the remit, this problem is at best exaggerated, and probably non-existent.

Let me add that even before formal accession, Polish law introduced separate accounting for the public service and non-public service activities of public service broadcasters in order to implement the Transparency Directive, and this is being implemented in practice under the supervision of the National Broadcasting Council.

All in all, Poland has done more to implement EU requirements as regards the funding of public service broadcasters than many "old" Member States.

Mr. Dobrowolski adds: "In fact, it is widely believed that the scale of public aid to state owned broadcasters exceeds the amounts that would be needed in case of a typical, well-run undertaking, and has resulted in significant distortions in the market." Widely believed by whom? And where is the evidence to support his claim?

Old Aid, New Aid

Another of Mr. Dobrowolski's concerns is that "Poland is providing aid to state owned broadcasters in clear violation of EU rules on state aid. Depending on whether aid to broadcasters is 'old' or 'new' the Commission follows different procedures. ... Poland's license fee is 'new' aid. Poland became an EU member in May 2004 and in June 2005 the Polish parliament passed a law on License Fees."

In reality, the licence fee was introduced in Poland decades ago. Accordingly, when we joined the EU, licence-fee funding for public service broadcasters was "existing aid" and did not need to be notified. The 2005 law was required to remove a deficiency in its legal status (the Constitutional Tribunal found that since the licence fee is a kind of tax, its level should be set in a statute (previously the requirement to pay the licence fee was introduced in the Broadcasting Law

itself, but it delegated the job of setting its level to the National Broadcasting Council). That is what the law on licence fees did, but nothing else changed, so it is misleading to describe the licence fee as “pending aid”, or “new aid”.

True, Mr. Cezary Banasinski, the head of the Office of Competition and Consumer Protection, has long held that State Aid to public service broadcasters should be notified to the Commission. He was of that opinion also when we were formally acceding to the EU in May 2004, and repeated that view with the passage of the 2005 law. However, his opinion was not shared by the government, or by the National Broadcasting Council. He lost the argument.

“Imperilling the financial stability of state owned media.”

Mr. Dobrowolski final concern is that when the Commission looks into this (as it might, now that it has been notified by him of alleged problems in Poland), it “will then be entitled to require that state owned broadcasters return as yet unspecified but possibly large part of this aid to the budget thus imperilling the financial stability of state owned media.” He cites the case of the Danish station TV 2 as “a similar case”. Similar to what? The Commission did order Danish public broadcaster TV2 to pay back excess compensation for public service tasks, but this has nothing to do with notification of State aid or the lack of it.

A New PSB Convert?

Finally, let me say that I am very pleased to see that Mr. Dobrowolski is now so concerned for the financial stability of Polish public service broadcasters. Some 18 months ago, he was the main driving force behind a set of proposals about what to do with PSB in Poland, starting from the idea that the licence fee should be abolished altogether. Together with other members of his “Przejrzyste media” (Transparent Media) group, which was advising the Civic Platform, a liberal political party, on media policy, he was also in favour of privatising Polish Television. He was, however, willing to settle for the privatisation only of its first channel (together with the first channel of Polish public radio). Especially the abolition of the licence fee would have helped the financial stability of Polish Television no end.

Luckily, the Civic Platform did not want to be associated with these ideas and withdrew its support for “Transparent Media” (much as the British Conservative Party disowned the Broadcasting Policy Group it had created, when it discovered that the Group’s report „Beyond the Charter. The BBC after 2006” contained radical neoliberal proposals for the effective dismantling of the BBC).

It almost defies belief to find that Mr. Dobrowolski is now so worried about the financial stability of Polish Television. However, his concern is evident for all to see. So, all I can say in conclusion is that it is time to kill the fatted calf and welcome the prodigal son back to the fold of public service enthusiasts.

Karol Jakubowicz