State Aid to Public Service Broadcasting in Croatia – Or the Way We Are

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In light of the Croatian accession to the EU, which is planned for 1 July 2013, and after some five years of harmonization of its legislative framework with the EU State aid rules, this article indicates the main State aid issues that had to be addressed in the public service broadcasting sector.

The main concerns that have been raised relate to the process of adjustment of the Croatian Radio-Television Act, in other words, the operation of the national public service broadcaster (HRT) to the State aid rules applicable in other Member States. In this respect it was necessary to include in the Croatian legislation the mechanisms that ensure that State aid which is granted to the public service broadcaster in the form of licence fee satisfy the relevant criteria, in order to escape the general ban on State aid and ensure proper functioning of HRT. To that end, the article discusses how the criteria, such as the proper definition of public remit, entrustment and supervision, financial control, proportionality and overcompensation, introduction of new services, the share of sports, competition concerns and sanctions, public value and market economy investor principle in commercial activities, have been introduced in the new 2010 Croatian Radio-Television Act on the basis of the EU practice.

The article deals with the difficulties encountered in this process and points particularly to the complex enforcement matters. Finally, it studies the outcomes and calls for assessment of the effects in future.

1. Introduction

Croatia formally closed the accession negotiations with the European Union on 30 June 2011 after more than five years of harmonization of its competition and State aid rules. In a transition country with a strong political legacy of State-run command economy, legal options for granting and monitoring State aid have been particularly aimed at minimizing the State intervention relating to the allocation of resources in the common market. The commitments undertaken by the Republic of Croatia under the Stabilization and Association Agreement (SAA),1 which entered into force in 2005, involved the establishment of a transparent and effective State aid regime, an operationally independent authority entrusted with the power to authorise and monitor State aid – the Croatian Competition Agency (CCA) –, and a credible enforcement record until Croatia becomes an EU Member State, when these powers will be assumed by the European Commission.

Eight years after the introduction of the first Croatian 2003 State Aid Act,2 the Regulation on State aid,3 the revised 2005 State Aid Act,4 the necessary bylaws and the revised Regulation on State aid,5 all relevant EU State aid rules have today become automatically applicable and as such ensure the full harmonization of the Croatian State aid rules with the EU acquis.

However, apart from the formal, legal change concerning the State aid rules, there has been a more much difficult one to perform: an almost surgical cut into the roots of the traditional financing models reserved for certain undertakings and sectors, in this particular case, that of public service broadcasting. Notably, the two benchmarks set by the European Commission, which had to be fulfilled before the negotiations in this chapter could be closed, were the restructuring of the Croatian shipbuilding industry and the harmonisation of the Croatian Radio-Television Act. The latter had to define the operation and financing of the national

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1 Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States (hereafter SAA) (OG, International treaties, 14/01).
3 OG 121/2003.
4 OG 140/2005.
5 OG 50/2006.
public service broadcaster in line with the EU State aid rules.

In spite of the evident progress and a gradual shift in the minds of the policy makers, the adjustment of the Croatian legal framework in the area of public service broadcasting was rather long and painstaking. It took almost two years of involvement of all stakeholders (ministries, regulators, private broadcasters) to put in place a legislative basis which would comply with the EU competition and State aid rules. The authority sin qua non in this process and the main driving force towards achieving the standards comparable to those applicable in the EU has been the Croatian Competition Agency. Not only did it introduce the changes but it also facilitated the growing awareness for the necessity of State aid control, the obligation to notify aid schemes and, what is currently gaining importance, its enforcement and effective use, avoiding the negative consequences of granting unlawful aid contrary to the rules and having to execute unwanted and painful recoveries.

This article addresses the key issues of the public service broadcasting regulatory framework and traces down the process of adjustment of the Croatian Radio-Television Act to the State aid rules applicable in the EU. It describes in detail how the EU law and practice was applied in the harmonisation process, underlines the main difficulties in this revision, highlights the remaining concerns and comments on the outcomes.

Each part of the analysis deals with the main competition concerns in this area, i.e. the concepts which had to be introduced in the Croatian legislation, such as the State aid character of the licence fee, the definition of public service remit, entrustment and supervision, financial control, principles of proportionality and overcompensation, introduction of new services, rules for sports, sanctions for illegal use of State aid and involvement in commercial activities. The article describes how the relevant proposals were introduced in the former Croatian Radio-Television Act, but also challenges the outlook and possible effects of the new regime in the Croatian public service broadcasting sector.

II. Public service broadcasting in Croatia

There is one public service broadcaster in Croatia – the Croatian Radio-Television (Hrvatska Radiotelevizija; HRT). Seven commercial broadcasters have national concessions, twenty one are regional and local TV broadcasters, and there are more than 160 radio stations, three of them national and eight regional financed through State resources, the rest are commercial, mostly community radios.

The liberalization of the traditionally State-owned Croatian broadcasting market started in the early 2000 when the first private broadcaster entered this market – Nova TV, which was followed by a second entry, that of RTL televizija in 2004. Today, these two, owned by big private corporations, may be considered genuine rivals of the public service broadcaster HRT – on the basis of their availability, general programme schemes, editorial independence and viewer ratings. HRT broadcasts at the moment two general programmes (HTV 1 and HTV 2) and one satellite programme for the Croats living abroad. In 2011, Nova TV introduced its new entertainment programme Doma TV, whereas RTL televizija started broadcasting RTL 2 entertainment and RTL plus. National concessions have been also granted to CMC (Croatian Music Channel), Kapital Network (prevailing news and economy channel), Sportska televizija (sports channel) etc.

A couple of years later, the new competitors – private broadcasting operators who invested a great deal of money in infrastructure and staff – are starting to reap the benefits of their investments: they produce programmes that raise their audience measurement figures, they sell advertising space (which had once been the prerogative of the national public service broadcaster), buy sports rights (which only some years ago had also been reserved for HRT) and, what is more, raise the awareness of the audiences concerning the dual financing and public remit of HRT programmes. The market undoubtedly opened and the dominance of one State-owned public service broadcaster whose performance has been predominantly based on the licence fee income and advertising income has been seriously challenged. Moreover, the entrants offer certain programmes that raise their viewer ratings beyond expectation, even concerning the prime time programmes, such as the central TV’s evening news which, according to the ratings of Nielsen Audience Measurement reported by the press and specialised web portals, lost the long held number one position on the viewers’ list. Regardless of the fact how these measurements are taken or how...
shares are calculated, it is undeniable that all the above mentioned aspects resulted in a raising interest of the public concerning the funding of HRT, its spending and the quality of its programmes.

In the process of adjustment of the Croatian laws to the relevant European rules, a scrutiny had to be carried out at the national level, as it has been the case with the public service broadcasters throughout the EU. In the Croatian case, the relatively new matter posed extreme challenges not only to the Croatian Competition Agency, but also, and first of all, to law and policy-makers, economic operators, the judiciary and the whole community.

The State aid rules applicable to the public service broadcasting sector in the EU equally have to be complied with by Croatia during the accession period. This is based on the provision contained in the SAA which quotes that, “all cases contrary to competition and other economic provisions thereof must be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles...[...]86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions”.

These clear provisions of the signed agreement and the adopted decisions in the broadcasting sector of the Member States have been the last frontier for all those whose understanding of the possible solutions in this area might have been different.

Indeed, the 2003 Croatian Radio-Television Act lacked a precise definition and a proper entrustment of the public service mandate, in particular as regards new media activities. Although based on a dual financing of the national public service broadcaster — Hrvatska radiotelevizija (HRT), which includes the licence fee and the revenues from commercial activities, it did not provide adequate safeguards against overcompensation. In addition, it did not respect the market principles in commercial activities, and it lacked transparency in the financial relations between the aid grantor and the undertaking which is entrusted with the discharge of the services of general economic interest in the broadcasting sector. In other words, not until the new Croatian Radio-Television Act was adopted in 2010 did Croatia fulfil the EU standards in this area, which, consequently, remained one of the most important benchmarks set by the European Commission for the opening and closing of the EU accession negotiations in Chapter 8: Competition policy. What is described here is a rather long harmonisation process based exclusively and concentrated solely on the non-compliance with the EU State aid rules applicable to State financing of the public service broadcaster — Croatian Radio-Television.

III. State funding of Croatian Radio Television (HRT)

Unsurprisingly enough, and reflecting very much the same situation of the EU broadcasting market in the last decade, an increasing number of complaints had been made as early as in 2008 by private operators (RTL, novaTV) as regards the public financing of the Croatian public service broadcaster — Hrvatska radiotelevizija (HRT). The complaints made by private operators were (and still are) directed at two main issues.

First, there was a question of public financing of the national public service broadcaster’s (HRT) programmes which were assumed to fall under its public remit and its engagement in commercial activities. Second, there had been plans announced by HRT in respect of the establishment of new, separate programmes, which would have been reserved for the broadcasting of sports and entertainment and financed from unspecified resources. Third, there was a very contentious licence fee and the question of whether it constituted State aid giving an economic advantage to HRT compared to other operators in the market. Third, there was a very contentious licence fee and the question of whether it constituted State aid giving an economic advantage to HRT compared to other operators in the market. Finally, the press operators also complained in particular about the competition from the traditionally press-like services offered by HRT, for example advertisements, which, allegedly, bid out the market by depressing the price of TV advertising which had (and undoubtedly still has) spill-over effects on the press publishers advertising market.

Furthermore, the State audit reports on the financial operation of HRT revealed, according to the media reports at the time, that the public service broadcaster cooked the books for 2008 while, allegedly, offering huge advertisement discounts (up to 90%), leading to the foreclosure of the pri-
vate broadcasters and the press from the market and cutting their revenues.9

All these issues triggered the changes which apparently had to be introduced in the Croatian public service broadcasting regime. It must be noted here that, in addition, all existing EU rules covering public service broadcasting had been accordingly transposed in the Croatian legislation.9 Consequently, a new Croatian Radio-Television Act had to be drafted and sent to the relevant authorities for revision.10 The analysis regarding the compliance with the relevant EU State aid rules was carried out by the CCA experts11 who, in line with the SAA, also used the principles and criteria set in the relevant Commission decisions on State aid to public service broadcasting, particularly in the case of the Austrian ORF public service broadcaster,12 concentrating on the competition issues which were not addressed or were only partly addressed by the proposed draft of the new Croatian Radio-Television Act.13

IV. Revision of the Croatian Radio-Television Act

1. State aid character of the licence fee

Most of the concerns raised in the case of HRT have been similar to those addressed by the Commission in similar matters at the EU level. First, and this had been fiercely contested both by the Member States, especially Germany,14 and their Croatian counterparts alike, it was undoubtedly clear from the EU practice that licence fee revenues, as a principle, constitute State aid. As early as in December 2008, namely, long before the proposed draft of the Croatian Radio-Television Act was brought up for discussion in the Spring of 2010, the CCA issued its opinion on (i) the financing of public broadcasters and licence fee which possibly constitutes State aid, and (ii) the plans announced by HRT regarding the opening of new thematic programmes. In its opinion, the CCA stated that although a licence fee is imposed by law and fixed by a legislative act (similar to taxes and other contributions) paid to the public broadcaster (HRT), the non-payment of which is subject to sanctions. This was in compliance with the decision of the European Commission in the Irish RTÉ and TG4 case, given that the measure in question constitutes a compulsory levy imposed by law and the revenues from the levy are under the control of the State.15

In addition, it was evident that revenues from licence fees have been used to cover the operating costs of HRT. Consequently, the CCA held the view that in this particular case, a selective economic advantage was given to HRT, given that commercial

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9 These data have never been published by HRT. However, the author makes the reference here to one of the many national daily press articles, e.g. Izdavački Revizija dokaz kako je HRT sustavno uništavao druge medije. In: Vecernji list [Zagreb, Croatia], 7 April 2010, p. 4.
12 The Croatian Competition Agency issues a “preliminary binding opinion” on laws containing State aid, in other words, prior to the adoption of these laws by the Croatian Parliament.
operators in the market do not receive it and base their business operations exclusively on the revenues gained under the market conditions.

Taking into account that it was not evident from the submitted data and legal acts of HRT to determine which television or radio programmes and contents were financed through the licence fee, the CCA assumed that the public financing covered the entire broadcasting of HRT, not only the particular programmes. "This automatically puts the competing undertakings – commercial broadcasters – into a less favourable position within the meaning of competition and State aid rules" – stated the CCA in its opinion.18

In compliance with the above mentioned decision in the Irish case,19 the CCA generally considered that State financing of public service broadcasters was liable to distort competition and affect trade between Member States given the international trade in programmes and programme rights, the cross-border effects of advertising and because the ownership structure of private competitors may extend over several Member States.

Consequently, the television licence fee money used to finance public service broadcasting constitutes State aid, involves an economic advantage to the recipient – HRT, and therefore strengthens its position in the relevant market compared to other broadcasters which finance their activities based on commercial revenues only.

Finally, after more than a year of the public and political debate, the monthly licence fee (calculated as 1.5 % of the average net income of the employed in the Republic of Croatia), which must be paid by any TV or radio owner in accordance with the Croatian law, was generally recognized as constituting State aid.

2. Definition of public service remit

The key question here was whether public financing of public service broadcasting (which constitutes State aid) could be brought in line with Article 86(2) of the EC Treaty [Article 106 (2) TFEU]20 and escape prohibition. To that end, the public service remit must be clearly defined and entrusted to a public service operator on the basis of a formal act of entrustment.21 In the case of HRT, the public remit, especially for online services and for special interest channels, was too unspecific. It was not clear from the proposed draft of the new Croatian Radio-Television Act which of the population’s needs were supposed to be covered by HRT (in other words, it did not specify the tasks such as: to guarantee the free and comprehensive formation of individual opinion, to represent the economic, cultural or ideological interests of the society, to report objectively and impartially, to preserve media plurality, to allow regional opinions and interests to be heard so as to provide information on and strengthen the identity of individual regions, to supply the citizens with information, cultural and educational content and entertainment through a comprehensive and balanced programme offer and to guarantee high programme quality).22

However, the proposed draft provided for the conclusion of a subsequent Contract between HRT and the Croatian government, which would specify the remit missing in the proposed draft, and would explicitly not include activities that reasonably cannot be considered to meet the “democratic, social and cultural needs of the society”23 (such as the sale of advertising space in order to obtain revenue, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising).

With regard to principle of proportionality, where new services must be assessed in advance before they are put on the market, and where such services must involve public consultations with all stakeholders, the proposed draft alone, without any further binding legal act, risks not to fulfill the basic public value test (or the so called Drei-Stufen-Test). It means that, first, the offer must meet the democratic, social and cultural needs of the society.

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18 See fn. 15.
19 See fn. 17.
21 Broadcasting Communication, paras. 44-49.
23 Amsterdam Protocol on the system of public broadcasting in the member states annexed to the EC Treaty (1997), according to which “the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”.

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Second, it must contribute to editorial quality, and third, the costs must be balanced against the benefits. Third parties and experts must be included in the assessment of the market impact which also must be considered. Finally, the assessment must be reviewed by the legal supervisory authority.\(^{24}\) The opinion of the CCA was that such a test, particularly concerning the introduction of new services and programmes, had to be included in the proposed draft.

3. Entrustment and supervision

Although the fulfilment of the public service remit had been entrusted to HRT, the supervision of the public service remit, particularly regarding the "new significant services"\(^{25}\) was inadequate. First, the proposed draft did not specify the areas of control and the control mechanisms. Generally, such control had to be entrusted to a body which is independent from the management of the undertaking entrusted with public service broadcasting (such as the BBC Trust and Ofcom or KEF in the German case).\(^{26}\) Second, it was not clear how HRT’s failure to fulfil the public remit could be detected and what would be the consequences. It was unclear to what extent the "control of the legality of operation and financial operation" of HRT would be performed by the Supervisory Board of HRT and/or shared by the Council for Electronic Media or even by the Programme Council of HRT. Although the Council for Electronic Media was considered adequate given that it is external and independent from HRT, the question remained whether this authority would be equipped with adequate resources and staff and empowered to impose sanctions on HRT in case of infringements.

4. Financial control

Another form of supervision had to be introduced and that was the control of the fee, in other words, of how the remuneration was to be calculated on the basis of the net costs and verified every 5 years. This would have been again regulated in detail by the future Contract between HRT and the Croatian government. What raised even more serious concerns, however, was that the Supervisory Board of HRT had a mandate of determining the monthly licence fee and allowable reserves after the opinion thereof had been issued by the Council for the Electronic Media. Moreover, it was not clear what regulator would carry out an \textit{ex post} control and how conflict of interest in this area should be avoided. Altogether, it was doubtful if in this area sufficient independent supervision would take place. What is more, the checks to cover the question of possible overcompensation had been entrusted to the Supervisory Board of HRT. Needless to say, the principle of "independent, external, regular and effective"\(^{27}\) control was not established on the basis of the proposed draft of the Croatian Radio-Television Act. Here are meant both \textit{ex-ante} and the \textit{ex-post} control i.e. the control of the overall budget, the mechanisms to monitor overcompensation and possible repayments.\(^{28}\) It was to be seen if and how the mentioned Contract between HRT and the Croatian government would solve these issues, and what is more important, how this new regime would be implemented in practice.

However, the most sensitive control had to cover the potential losses arising from commercial activities which had been inadmissibly cross-subsidized by the licence fee. Although the proposed draft of the Croatian Radio-Television Act provided for the permissible reserves of 10% of the annual budgeted expenses, it only vaguely defined that the "control of financial affairs of HRT will be carried out by an internal audit service and report thereof to the Supervisory Board of HRT."\(^{29}\) This was unacceptable from the perspective of the relevant EU practice. The control of principles of proportionality, transparency and overcompensation in any form must be carried out by an independent public authority, the members of which must effectively

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\(^{25}\) Commission decision on Aid E 2/2008 (fn. 12), paras. 137 and 177.

\(^{26}\) Commission decision on Aid E 3/2005 (fn. 14), paras. 253-258.


be independent from HRT (in the German case it was the Court of Auditors, ORF had to appoint an independent board of auditors – Prüfungskommission). In addition, this authority should verify financial statements of HRT on a yearly basis for compliance with the rules on cost separation, building reserves and the pursuit of commercial activities.

5. Proportionality and overcompensation

Although it established the principle of proportionality (net costs), provided for a separation of accounts as regards public service activities and non-public activities, the proposed draft failed to demonstrate that the overcompensation would be used for the purpose of financing public service activities only. In other words, it had not been established how the surpluses would be used, either the overcompensation of the public service remit or from the acquisition of premium sports rights. It was not clear whether any of the surpluses should be recovered at the end of a financing period (5 years) or paid to the account of the Fund for the promotion of pluralism and diversity (which receives 3% of the public remit), or transferred on a blocked bank account, which was the principle used in the Austrian ORF case.

6. New services

The internet shapes our everyday life. It changes the economy, the society, our habits and expectations. In the same way it redesigns the role of public service broadcasters on the world map of global providers. Consequently, it modifies the remit of the public service broadcasters, although the press and private broadcasters may object given the declining trends in their readership or viewer ratings, not to forget the advertising revenues involved.

The scope and objects of any new services, programmes, or platforms, in order to be financed from the licence fee, must be ex ante defined by law, following the same Amsterdam protocol principles, i.e. a public value test and sector based impact, as described particularly in the Irish case. In the Austrian ORF case, the Commission states that ORF will be obliged to prepare a concept for each new service with a precise description of the planned offer and a justification of why it seems suitable for implementing the public service remit. An explanation was needed regarding the target audience, the financing of the offer, the anticipated impact of the offer on competition in the relevant market as well as the diversity offered by the programme concerned for viewers, listeners and users. In other words, it must be ensured that "the public funding of significant new audiovisual services does not distort trade and competition". Although the text of the proposed draft of the new Croatian Radio-Television Act provided for a similar wording, it remained unclear which services would be covered under what conditions by the public service remit in the production of internet sites, teletext etc. It failed to define in more details that information about HRT’s current radio, television and other public service programmes including information about HRT itself, daily news overviews in text and image including supplementary audio and audiovisual elements etc., which must not exceed daily news overviews which is similar in design and content to newspapers or magazines distributed on the internet, may be defined as public remit services and as such would not fall under the obligation of previous assessment and public consultation. What is more, it did not define the activities which remain purely commercial. It failed to explicitly specify "the black list of online activities" which are not part of the public service remit and may therefore not be financed with licence fee – such as ring tones, real estate and job postings, classified directories, search engines, SMS services etc. Although questioned by some authors, the assessment of services that come together with technological development involves a kind of quantitative and qualitative control. This control does not mean intervention by the Commission, which would jeopardise the independence of the Member State in deciding on the public

33 Commission decision on Aid E 2/2008 (fn. 12), paras. 201 and 203.
34 See Soltész (fn. 16), p. 34 – 35.
remit and scope of programmes that may be financed from public resources, but flexibility in any particular case where prior assessment is needed. By establishing ‘white’ and ‘black’ lists of programmes, legal certainty is given to all the parties, particularly the monitoring authorities. In any event, as stated by the Commission in the Austrian ORF case, adequate mechanisms had to be established to ensure that the public financing of online services and other new significant audiovisual activities does not create disproportionate distortions of competition and affect cross-border trade.

7. Sports

Sports broadcasts can definitely be a part of the public service mission providing a balanced and varied programme. In line with the mentioned EU practice the inclusion of sports programmes into the public service remit is not assessed as manifestly excessive if the overall share of sports as part of the public service broadcasters’ programme does not exceed on average 10% of broadcast time. However, the acquisition of exclusive sports rights with public money remains permissible for public service broadcasters if this is necessary for the fulfilment of their public service obligation, otherwise they must be offered to third parties for sublicensing. If this had remained unregulated, it would have put HRT in the position to regularly outbid its competitors and therefore to “buy up” the market in premium sports rights if this was not justified as part of a balanced overall programme. The proposed draft initially did not contain such provisions in spite of the fact that sports broadcasting business raises most competition concerns, which may lead to most serious infringements. Consequently, the proposed draft also failed to provide for a supervisory body in this area and, naturally, there had been no sanctions foreseen for such infringements. As regards the alleged plans of HRT to establish a new, predominantly sports programme at the time of these adjustments, it had been advised that the relevant State aid rules in this area would provide for a clear distinction between the premium sports and minority sports. In accordance with the Commission’s decision on the ORF case, where a special sports programme has been established, such a new programme must include so called minority sports, inform, encourage interest in active sport, promote less-known sports, report on regional sport events, raise awareness of health-related sports aspects etc., thus excluding commercial activities.

8. Competition concerns and sanctions

The provisions regarding the HRT’s behaviour towards its commercial subsidiaries as well as towards third parties were not clearly defined in the proposed draft of the new Croatian Radio-Television Act. In its opinion, the CCA stressed that HRT would have to be prohibited to sell advertising time and space below the market value and that it could not be permitted to purchase premium sports rights above the market price using its privileged financial position. What is more, should the media regulator find, in the course of its control activities, that there are indications that HRT has engaged in anticompetitive behaviour in the sense of Article 82 of the EC Treaty [102 TFEU], it would have to notify the Croatian Competition Agency thereof. In accordance with the EU practice, the proceedings according to Article 82 of the EC Treaty [102 TFEU] regulating abuse of a dominant position take precedence over the proceedings of the authority regarding other distortions of competition resulting from a disproportionate use of State aid. Competition rules in this area are merciless: any improper use of public funds must be sanctioned by recovery of these funds and other sanctions (such as administrative penalty).

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36 Commission decision on Aid E 2/2008 (fn. 12), paras. 181-191.
37 Commission decision on Aid E 2/2008 (fn. 12), paras. 87, 91, 95 and 147.
39 Commission decision on Aid E 2/2008 (fn. 12), paras. 87, 97 and 175.
40 Dias/Antoniadis, Increased transparency and efficiency in public service broadcasting. Recent cases in Spain and Germany, Competition Policy Newsletter, 2007, p. 69.
41 Commission decision on Aid E 2/2008 (fn. 12), paras. 194 – 196.
42 Commission decision on Aid E 2/2008 (fn. 12), para. 225.
9. Commercial activities – transparency, proportionality and MEIP

Commercial activities in the provision of broadcasting activities deserve special attention, particularly in the context in which all broadcasting operators, public and private, try to increase viewer ratings with an objective to attract undertakings to advertise their products and services in particular programmes. This usually leads to spillover effects of licence fee revenues to the neighbouring markets. In practice, it also means that a public service broadcaster, taking into account that its licence fee revenues can cut down the price of its advertising services, offer a lower price of advertising space and time to undertakings than private operators who must cover all their costs exclusively by advertising revenues.

On the basis of the latest available profit and loss account and the data on State aid, the total revenues of HRT in the last year, although indicating a slightly falling trend, amounted to some €215 million. About €162 million thereof have been derived from licence fee attributions and the rest would be assumed to constitute commercial revenues. Given that no other detailed statements or accounts of HRT have been officially available, it cannot be clearly specified for the purpose of this article what services of the public service broadcaster are being financed through licence fees alone and what services may in this sense be considered purely commercial activities.

Public service broadcasters who have decided on a so-called dual financing are allowed to engage in commercial activities as long as these activities are performed according to the market economy investor principle (MEIP) and the arms length principle from the public service remit. In general, a public service broadcaster ought to be financed through annual contributions limited to the net public service costs (plus a reasonable profit margin) as determined based on separate accounts. This means transparency – a clear separation of accounts for public service and other usually commercial activities, subject to ex post control. In other words, if a public service broadcaster would wish to engage in purely commercial activities, it could do so but under the market principles. In the best scenario, the commercial activities would be carried out by a commercial subsidiary of the public service broadcaster, whereby this relationship must be at arm’s length. All investments of a public service broadcaster into other activities must respect the MEIP, i.e. by checking whether a private operator would carry out the same transactions under the same terms in similar circumstances.

Any possible overcompensation exceeding the 10% threshold may only be used to compensate for financing deficits which are exclusively related to the public service mission. No cross-subsidisation of commercial activities is allowed. Any possible surpluses arising from commercial activities may only be used for the financing of public services activities. Needless to say, a public service broadcaster is obligated to report annually on the use of its public funding.

In practice, the Commission has had no objections to dual financing. While Member States are free to choose the means of financing of the public service broadcasting, the Commission has to verify that the State funding does not affect competition in the common market in a disproportionate manner. Thus, HRT could cover start-up expenses for launching commercial activities which are associated with the public service mandate with commercial income from the activities related to the public service mandate, but these investments would have to obey the principle of market economy investor. A surplus from such commercial activities would have to be used to finance the public service mandate.

The proposed draft of the new Croatian Radio-Television Act did not regulate this issue, nor did it provide for any prior assessment or sanctions in the EU accession period.

What is more, whether the existing nine-minute-advertising-per-hour-of-programme clause would be kept or whether it should be regularly digressive (to six minutes per hour after the first year of the application of the new Croatian Radio-Television Act) and eventually amount to four minutes per hour, had been one of the most extensively discussed and fiercely challenged issues of that time. No wonder, given the competition concerns involved, and particularly taking into account the latest State audit report in accordance to which HRT undercut the price of advertising whereby the discount on total revenue from advertising amount-
ed to €12 million or 24.4% of the total commercial revenue.\textsuperscript{45}

In the light of the latest EU developments in this area, there are apparently no straightforward answers and optimal solutions. Strengthening of the role of public service broadcasters on one hand, and eliminating the risks of anticompetitive effects on the other, by abolishing advertising and other commercial activities and replacing this source of their revenue with new fiscal measures, may not yield favourable results.\textsuperscript{46}

However, upholding both quality programmes and viewer ratings is possible, as shown by the examples of Finland and the UK (in accordance to the data available on the Finnish public service broadcaster website, YLE’s share of daily television viewing was 43.7% in 2009). These two examples underline the very mission of a public service broadcaster: to deliver public value to the benefit of the nation as a whole, and to the individuals who pay for the licence fee ensuring value for money and high quality, innovative programmes.

V. New Croatian Radio-Television Act
– outcome and outlook

The new, revised Croatian Radio-Television Act entered into force on 8 December 2010.\textsuperscript{47} The Croatian Competition Agency and the European Commission approved it under the aid measures proposed under the interim procedure for existing aid. In other words, the new legislative framework satisfies the relevant criteria, particularly regarding (i) the proper entrustment with the public service mandate, (ii) clear criteria for determining the compensation and overcompensation – separation of the accounts for public service and commercial activities, (iii) establishment of independent national supervisory mechanisms, (iv) limitation of public funds to the net costs of public service discharge, and (v) the respect of market economy investor principle (MEIP) in the public broadcaster’s commercial activities.

On 6 March 2011, HRT and the Government of the Republic of Croatia concluded an Interim Contract which further regulates the commitments of HRT under the new Croatian Radio-Television Act.\textsuperscript{48} The Interim Contract (which will be in force until 1 January 2013) regulates in more detail the part of the HRT’s mandate relating to the content of the programmes, their objectives and duration.

Under the Interim Contract, HRT is committed to broadcast four national TV programmes – two general programmes and two specialized programmes, none of which is a specialized sports programme. Additionally, HRT will broadcast one international TV programme. It will design a number of new on-line services (such as its own HRT site, HRT news, HRT sports, HRT music, HRT youth, on-line radios etc.) which will be established in line with the relevant provisions of the Croatian Radio-Television Act. The public value test has been included in the text of the Interim Contract together with the “black list” of programmes which cannot be considered to fall under the public remit of HRT, which is in its entirety in compliance with the established EU practice in the public service broadcasting sector. However, the Interim Contract neither specifies the costs of any of these new services, nor does it assess the sector based impact or effects on competition. It is not at all clear from the Interim Contract how new media offers will contribute to “editorial competition” or how assessments on the market impact will be carried out.\textsuperscript{49}

The part of the Interim Contract relating to the financing of HRT’s public remit defines the “public service revenue”, which includes the licence fee revenue, commercial revenue which, under the provisions of the Croatian Radio-Television Act may be considered public service revenue, financing from the EU funds and the State budget. Net revenues from commercial activities shall be considered public service revenue.

However, the Interim Contract seems to provide more details on the content of the programmes than on the entrustment and supervision instru-

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\textsuperscript{45} Vanja Sutlić lazirao dobit HRT-a.” Večernji list, [Zagreb, Croatia], 06 April 2010.

\textsuperscript{46} Here is particularly meant the Commission’s view that the charges in France and Spain, which were introduced in order to compensate for the loss of revenue from paid advertising on public TV channels, are incompatible with EU telecoms rules. See the Commission press release IP/10/1211 of 30 September 2010.

\textsuperscript{47} Croatian Radio-Television Act, OG 137/2010.


\textsuperscript{49} Repa/Tosics, Commission and Germany agree on better control for the use of State aid in the broadcasting sector, Competition Policy Newsletter, 2009, p. 97.
ments, particularly on how the control of the legality of HRT operations, its financial operations, and most of all the control of spill-over effects of the licence fee and commercial activities will be carried out. Although, under the new Croatian Radio-Television Act, the Council for Electronic Media supervises the implementation of the public remit, the introduction of new services, the establishment of new programmes and the use of the licence fee and other public service revenues on the basis of financial statements which are to be submitted by HRT every six months, on the request of the Council for Electronic Media, it is yet to be seen how the established supervision mechanisms will be implemented in practice, particularly relating to \textit{ex ante} control of significant new services, but, most of all, relating to effective control of overcompensation and supervision of the public service mission at the national level.

The new legislative framework provides for an internal audit of finances regarding to separate accounts and makes the Supervisory Board responsible for the proper implementation, subject to the review of the Council for Electronic Media. Any possible recovery would mean the transfer of the funds concerned to a separate bank account of the Agency for Electronic Media. The level of the licence fee is controlled by the Supervisory Board, subject to prior approval of the Council for Electronic Media. The Council for Electronic Media is also responsible for supervision of competition concerns, such as the price of commercial services offered by HRT and purchase of premium sports rights. In case of infringements in this area the Council for Electronic Media reports to the national competition authority – the Croatian Competition Authority. The Supervisory Board is responsible to the Croatian Parliament for the legality of the operation and financial operation of HRT in the form of annual reports.

The Interim Contract repeats the provision of the new Croatian Radio-Television Act in accordance to which “HRT is permitted to broadcast premium sports events which are of public interest, where the broadcasts of these events may not exceed 10% of the total broadcast time in which sports is part of a varied and balanced programme”\(^{50}\). HRT decides on its own merit on the sports events which are included in the public remit. These provisions may still be arguable from the point of view of the existing EU practice and may raise concerns as to the supervision of such decisions.

Last but not least, advertising, which is, in accordance with the new Croatian Radio-Television Act, permitted on all HRT general programmes, existing and planned, is regulated as follows: the advertisements in all HRT general programmes may not exceed 9 minutes, whereas in the prime time from 18 to 22 hours they may not exceed 4 minutes in an hour of broadcast. In the transition period, until 8 December 2011, HRT is allowed to broadcast 6 advertising minutes from 18 to 22 hours in an hour of broadcast. This does not apply to specialized programmes. Broadcast of feature films may not be interrupted by commercials. Potential infringements are under supervision of the Council for Electronic Media, which is, like in the similar cases of infringements mentioned above, entrusted with administrative mechanisms, to control such practices. Since the new legislative framework entered into force no reports have been submitted by HRT and no infringements have been reported.

VI. Conclusion

Croatia faced a number of challenges on its way to rethinking its State aid policy. It learned that a sound and credible State aid system consists of three fundamental components: first, you must have an appropriate legislative framework, second, you must enforce these rules and provide for possible sanctions and third, there must be a well-equipped institution in charge, whose skills ensure delivery. These components are interrelated and cannot be separated.

In spite of the legislative framework and institutions in place, the example of the adjustment of the Croatian public service broadcasting to the rules applicable in the EU indicate another necessary ingredient of a well-functioning State aid regime: the one that would teach the policy makers and aid providers to establish a well-defined aid scheme on the basis of which legal State aid may be granted. On the other hand, aid beneficiaries, in this particular case the national public service broadcaster, must learn how to get hold of most State money in the way they are entitled by law. Other stakeholders

\(^{50}\) Croatian Radio-Television Act, OG 137/2010, Art. 9, para. 3.
– regulators, public administration, judiciary and other interested parties – must be involved in the creation of programmes of public interest and public value.

This article which particularly addresses the State financing of the Croatian public service broadcaster (HRT) reflected the overall problem where State aid was underregulated and underreported. The comparable practice of the EU Member States which had to undergo similar processes has been of invaluable help on the Croatia’s way to the EU.

Once the timely and complete notification procedure becomes a matter of common behaviour, we can speak of a responsible State aid policy that would be able to redirect the taxpayers’ money towards effective projects which promote Croatian cultural values, strengthen its overall competitiveness, respect its diversity in the European context and encourage the creation of public value and editor independence under the strict State aid rules in the public service broadcasting sector.

Only then it would be possible to monitor the allocation and use of State aid and measure its effects. It would be interesting to check if the “public service revenues” have been used adequately – financing only the specifically predefined objectives, and if they achieved the desired outcomes and created public value.