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Key issues to understand the controversy surrounding the economic support of Spanish public television

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RESUMEN: El régimen jurídico de la televisión en España continúa siendo motivo de controversia. En la actualidad, la Comisión examina la polémica financiación de RTVE, aprobada en septiembre de 2009, y su compatibiliad con el Derecho Comunitario. Sin embargo, al importante problema de la financiación de la televisión pública subyace otro, más amplio, que afecta al régimen jurídico de la televisión en general: su definición, atribución de funciones, organización y control. Este estudio pretende enmarcar el debate puntual sobre la financiación de la televisión pública en algunas cuestiones de fondo que afectan a la regulación televisiva en España.

Palabras clave: televisión pública española, financiación, servicios de interés económico general (SGEIS), servicio público de radiodifusión, Comisión Europea.

ABSTRACT: The legal status of television in Spain is still controversial. Currently, the Commission is reviewing the polemic financing of RTVE, adopted in September 2009, and its compatibility with Community law. However, in addition to the important issue of financing of the public television lies another, more extensive, affecting the legal status of television in general: its definition, assignation of functions, organization and control. This study seeks to frame this debate about the financing of public television in some substantive issues that affect television regulation in Spain.

Keywords: Spanish public television; general economic interest services; public service broadcasting; European Commission.

In December 2009, the European Commission opened an inquiry to study the compatibility of the new model for financing RTVE, which had been in force since 1 September (BOE of 31.08.2009, pp. 74003-74015), with the European regulations. The current model, which eliminates advertising, envisages that RTVE will obtain 3% of the income of open private television channels, 1.5% of that of subscription channels and 0.9% of that of telecommunications operators. It also includes 80% of the revenue from the use of the public radio-electric domain, up to a maximum of 330 million Euro.

Although the existence of this inquiry does not mean in itself that the model is illegal, and despite the fact that the Competition Commission has expressly referred to the fact that "there is no objection to eliminating advertising from public television", the Commission has expressed doubts as to "whether the new taxes on television and telecommunications operators' activities are compatible with European laws". However, the Spanish president's office has assured the public that it is fully convinced that the Spanish model is in line with the European provisions. These circumstances, which await a definitive resolution, call for a rigorous general review in order to define the normative framework that should guide the political decisions which affect the financing of Spanish public television, and to clear up the doubts that currently surround the legality of the system established by the RTVE Finance Act (*Ley de financiación de RTVE*). The letter sent by the Commission providing information about the causes and procedure for the inquiry offers some guidelines that could shed light on this issue.

1. The legal context that protects the exceptional financing of RTVE, that of services of special economic interest (SSEI)

As a starting point, it is essential to adopt as an irreversible fact, but sometimes of blurry boundaries, the competence of the Community institutions in the audiovisual field. European development from a monetary union into a political and cultural union and, above all, the economic growth in the television market have dispelled doubts about the possibility that the EU institutions should get involved in the management of the television market. So today, the European audiovisual policy provides the framework in which domestic regulations must operate and any debate on the legal framework for television must start from the guidelines taken in it. Community Justice has played a leading role in the development of European audiovisual policy. In fact, the content of some judgments of the Court of Justice, as the Altmark case, have become part of the legal framework for television; this case, referring to the financing of public service obligations in state aid and to the funding requirements that must fulfill in order not to infringe the Community rules[1].

[1] In this Judgment it was questioned whether subsidies to balance the deficit incurred in the provision of public services (in this case, passenger transport at local) were subject to the prohibitions in Article 87.1 of theTreaty establishing the European Community, European Court, Judgment of the Court, of 24 July 2003, Case C-280/00, *Altmark Trans GmbH, Regierungspräsidium Magdeburg / Nahverkehrsgesellschaft Altmark GmbH*. Rec. 2003, p. I-7747 ff.

Having taken the European competition on television, firstly, the European Commission Charter specifies that "RTVE is a company that has been entrusted with a public service mission of special economic interest (SSEI)". Given that this concept is proper to the community legal regime and that, until the General Law on Audiovisual Communication[2] 7/2010, of 31 March was approved, it did not refer to Spanish audiovisual legislation, an explanation will make the controversy on the financing of Spanish public television more comprehensible, and will place it within the broader context for debate which affects the regulation of the Spanish and European audiovisual market.

Primary law does not give a systematic definition of what its considers services of general economic interest (henceforth SGEIs); however, the interpretation and application of the articles in the Treaty on the Functioning of the European Union, (henceforth TFEU) which regulate the functioning of such activities, identify those activities such as TV services which belong to said category. This is because, loyal as it is to its liberalizing economic principles, community law does not explicitly regulate public service as a legal construction, and, thus, although it does include a reference to certain "obligations inherent in the concept of a public service" (Art. 93 TFEU), in practice, it is considered an exceptional situation within which the legal protection and exceptional regime must be appropriately justified and must form part of the regime foreseen for those activities classified as SGEIs.

In line with this approach, Art. 106.2 (TFEU) states, "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them (…)". That is to say, this article includes the normal subjugation of all companies which offer a SGEI to the market laws. Nevertheless, coincident with this general rule, it ascribes specific missions or special interests to the offer of this type of services, and therefore, contemplates the possibility of an exception when those missions cannot be carried out within the framework of the rule.

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[2] The General Law on Audiovisual Communication 7/2010, of 31 March, uses this legal concept in Article 43.2, in reference to the public service of audiovisual communication, and states: "The general interest economic services for radio, television, connected and interactive audiovisual communication belonging to the state shall not admit any form of commercial audiovisual communication or the broadcasting of audiovisual contents in systems of conditional access, without detriment to the exceptions which its specific regulations for financing establish".

As regards the possible application of an exceptional regime to companies that offer a SGEI, Art. 14 TFEU recognises that "given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions (…)". This article was introduced by the Amsterdam Treaty (TCE Art. 16) in order to balance the Community application of the market laws and so that the Member States could guarantee the continuity of certain national public services.

Apart from these two articles, we must underline the incorporation to the EU acquis of Protocol 26, annex to the TEU and TFEU, which recognises that: "The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

a) the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;

b) the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

c) a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights".

In the same line, the EU Charter on Fundamental Rights, in Article 36 "recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union".

An in-depth reading of Articles 106 and 14 of the TFEU, the incorporation of Protocol 26 and the significance of Article 36 of the EU Charter on Fundamental Rights explain this complicated conceptual development, and, at times like this, the controversial application of the category of SGEIs to certain activities over the last ten years. The reality of the situation is that an initial theory, especially conceived by the European Commission, championing the greatest possible market liberalization and the satisfaction of public interest as a norm through free enterprise (proper to an essentially economic Union), has developed into a proposal, defended by the European Parliament, which attempts to conciliate or, at times, subordinate the aims of liberalization and economic deregulation to the continued offer of services considered essential. These have traditionally been called public services and, in offering

them, the European Member States have played a starring role through public companies (a correct perspective for an attempted political, social and cultural union, which, for the moment, has not been fully successful).

In short, primary law accepts that the services known as SGEIs, due to what they offer: play a prominent role both nationally and in the Community; entail the fulfilment of several general interest or public service missions corresponding to a series of values common to the Union; must submit, as a general norm, to market laws; and may be the object of a properly justified exceptional regime directed towards guaranteeing the fulfilment of the exceptional missions with which they are entrusted. However, although the TFEU establishes these missions as the basis for the legal organizing of the SGEIs, it has been the European institutions, both the Commission in different texts and the decisions of the European Court of Justice, which have aided in the development of said category and the application of the general principles that govern the functioning of these services in specific activities.

Since the mid-90's, the creation of a stable legal framework for the SGEI category has been considered one of the most challenging within European politics on the subject of the free offer of services. The first representative records of this task date back to 1996, with the Communication from the Commission Services of general interest in Europe (COM (1996) 443 final) and more recently, in the Green Paper on Services of General Interest (COM (2003) 270 final, of 21 May 2003) and the White Paper with the same title (COM (2004) 374 final, of 12 May 2004).

Considering that this is the normative framework applicable to television, it must be specified that the European texts broadly define SGEIs as: "…commercial services of general economic utility, on which the public authorities therefore impose specific public-service obligations" (COM (2003) 270 final, point 17, p. 7). Consequently, the European Commission has stated that, "services of general economic interest (SGEIs) are different from ordinary services in that public authorities consider that they need to be provided even where the market is not sufficiently profitable for the supply of such services" (COM (2000) 580 final, point 14). Accordingly, a commercial dimension and the presence of general interest are the bases that permit the identification of an SGEI. This dual dimension, commercial and of public service, means that the development of this category has been complicated by a difficult attempt to harmonise the various means of satisfying general interest without hampering the Single Market.

In addition to this general definition, the Commission has laid down a series of criteria that allow the identification of public interest that differentiates the SGEIs from ordinary services, specifically: the obligation to offer a universal service; a guarantee of continuity of the activity; the need to main-

tain access to the service; and the special protection of consumer and user rights to said service[3]. These identifying criteria, specific to the SGEIs, may be satisfied either by means of a free enterprise regime or an exceptional regime which has been properly justified in accordance with what is established in Art. 106.2 and 14 of the TFEU.

Despite the fact that the legal framework affecting these activities has its origin and development in the Community and that the Commission supervises the proper functioning, particularly in reference to finance, of the SGEIs within the rules of the Single Market[4], the Member States have, in theory, the main responsibility of identifying, organizing and controlling those activities termed SGEIs. This approach can be seen in Protocol 26 which recognises the essential role and the broad discretion, not only of national authorities, but also of regional and local ones, in reference to the organization and offer of the SGEIs. This important role of national authorities is logical as the social requirements of the Member States, although having some things in common, differ on the basis of their social, political, economic or cultural needs, and so, as the Commission states: "It is above all the responsibility of public authorities at the appropriate local, regional or national level and in full transparency to define the missions of services of general interest and the way they will be fulfilled. The Community will ensure in the application of the Treaty rules and with the instruments at its disposal that the performance of such services, in terms of quality and prices, responds best to the needs of their users and of citizens at large" (COM (2000) 580 final). The EU Parliament has also declared that "the principle of subsidiarity recommends leaving to Member States the primary responsibility for defining the public services, determining the requirements imposed on operators in terms of range, level and quality and their special rights and the legal instruments needed for doing so, choosing the operators, funding the service and adopting a method of regulation" (A4-0357/97, OJ C 014 of 19 January 1998, p. 0074).

Nevertheless, history has shown that the identification and definition of activities as SGEIs has been due to the joint labour of national and Community institutions, with the latter playing a special role, and, as is the case for television, under European pressure or demands to harmonise these activities, which are somewhat unreasonably protected by internal legislation, with Eu-

[3] These requisites expressly considered as "obligations of public service of general economic interest", COM (2003) 270 final, point 28, p. 76 and COM (2004) 374 final, point 2.1, p. 4.
[4] Following the procedure established by Article 108 TFEU, which was set in motion by the case of the financing of RTVE.

ropean economic freedom. The fact that television services are considered SGEIS began with the EU Court of Justice in the mid-70's; however, this was not reflected in the Commission and Parliament texts until the mid-90's. This delay was partially due to the late start of TV market liberalization in the Member States, and partially to the minimal political intention for intervention in an area of special interest for national authorities as is public television. In any case, the principal documents referring to the category of SGEIs include broadcasting[5]. In the year 2000 the Commission had already declared that, in spite of national reserves on these markets, "at present, the television and radio sector is liberalised at Community level", although it recognised the right of the Member States to decide, under Community supervision, whether they wish to establish a public service broadcasting system, "to define and organise the public service remit and its financing" (COM (2000) 580 final, p. 35). And this is the current situation. The Spanish government, within the regime set up for the SGEIs, is responsible for defining what public service remit they assign to RTVE and for justifying the exceptionality of its financing. On the other hand, the Community authorities guarantee that this financing corresponds to what was expressed previously by the TFEU.

2. Definition of the public service mission: an indispensable requirement prior to the adoption of exceptional measures in the functioning of the SGEIs. The case of public service television in Spain

The Commission, in accordance with the above-mentioned normative framework, refers, in the Letter addressed to the Spanish authorities, to the definition of the public service mission as approved in Law 17/2006, of 5 June, radio and television of state entitlement, modified by Law 8/2009, of 28 August, on the financing of the *Corporación de Radio y Televisión Española* and completed by Law 7/2010, of 31 March, *General de Comunicación Audiovisual*. This definition is an indispensable prerequisite for the analysis of the legal problems facing RTVE financing, because, as a general rule, community Law originates in the subjugation of all companies which offer audiovisual services, such as SGEIs, to the market laws.

Although the Member States have a primary role in the identification and definition of public service missions, the Community institutions, when refe-

5 COM (1996) 443 final, points 51 to 53, p. 9; COM (2003) 270 final, point 32, section 2, p. 11; COM (2004) 374 final, Annex 3, p. 30.

rring to the identifying criteria laid down by the Commission, have indicated the following as common public service obligations for SGEIs:

1) ***Universal service***[6]: as the central point of public service missions it is considered that "It establishes the right of everyone to certain services considered as essential and imposes obligations on service providers to offer defined services according to defined conditions, including complete territorial coverage and at an affordable price" (COM (2004) 374 final, p. 8). The Community institutions have emphasised both the flexibility and the evolving character of a term which must be adapted to the circumstances of the sector to which it is applied.

2) ***The quality of the service***: although establishing parameters for quality is a complex task, whether it corresponds to the private sector or to public administration, the necessity of reaching socially acceptable quality levels can in itself justify a series of public service obligations by means of specific regulations. Although there is no consensus on a general definition of quality, it is associated with issues such as proper territorial coverage, continuity of the service, financial transparency, the affordability of the service and protection of consumer or user rights.

3) ***Protection of consumers and users***, particularly of groups such as minors.

In accordance with these criteria, the European texts refer to the concept of public service objectively, as: "specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met (…).These obligations can be applied at Community, national or regional level" (COM (2003) 270 final, p. 8).

The national authorities, taking these general criteria into account, have a leading role in public service missions for each sector and, in accordance with this responsibility, may take decisions at a national, regional or local level, provided they bear in mind the Community concept of SGEIs.

In the case of television, Law 17/2006, of 5 June, on radio and television of state entitlement, assigns the term public service to those activities entrusted to the RTVE corporation and, thus, in Article 2 describes this service as: "essential for the community and cohesion of democratic societies"; whose functions cover:

– "the production of contents and the edition and broadcasting or generalist and thematic channels, in the national and international areas,

[6] Cases of the EU court of Justice Courbau and Almelo, in 1993 and 1994, were decisive for the development and application of this concept by derived Community law.

together with the offer of related or interactive services";
– "satisfying the information, cultural, educational and entertainment needs of Spanish society";
– "extending its cultural identity and diversity";
– "promoting the information society";
– and "upholding pluralism, participation and the other constitutional values, guaranteeing access of significant social and political groups by means of universal coverage, meaning the greatest possible coverage of the country".

This definition, in agreement with the general parameters for public service usually attributed to SGEIs, is completed in Article 3 of the same national law with a long list of specific functions for which RTVE is responsible. These include:

– a guarantee of objective, accurate and plural information;
– provision for debate and the free expression of opinions;
– promotion of the right to media access;
– offer of access to the various programme types and institutional, social, cultural and sporting events of general interest (curiously, the subsequent list of general interest events included in Law 17/2010, *General de Comunicación Audiovisual*, refers exclusively to sporting events);
– support for the integration of minorities;
– assurance of the maximum continuity and geographical and social coverage with the commitment to offer quality, diversity, innovation and the demands of ethics;
– safeguarding the rights of minors.

On the other hand, Law 8/2009, of 28 August, on the financing of the *Corporación de Radio y Televisión Española*, in Article 9 (Chapter V), without detriment to the preceding laws, adds another lengthy list of "additional obligations for public service" which are also the responsibility of RTVE, and include, among others, the following missions:

– incorporation into its programmes of "interactive services with access for political, trade union and social groups";
– information on parliamentary debates and live broadcasting of "those sessions of special public interest";
– broadcasting of electoral programmes and debates;
– screening on the children's channel, on weekdays between 17.00 and 21.00 local time, and at weekends and on public holidays between 9.00 and 21.00 local time, of at least 30% of programming suitable for children between the ages of 4 and 12.

And Law 7/2010, of 31 March, *General de Comunicación Audiovisual*, also contributes to the definition of public service audiovisual communication when it states that: "public service audiovisual communication is an essential service of general economic interest" and in Article 40 stipulates that is mission is:

– to broadcast contents that promote constitutional principles and values;
– to contribute to the formation of a plural public opinion;
– to make cultural and linguistic diversity well-known;
– to spread knowledge and art, with particular emphasis on the promotion of audiovisual culture;
– to attend to those individuals and social groups who are not addressed by most programming.

Moreover, the *Ley General Audiovisual* requires said mission to include "the production, edition and broadcasting of a set of radio, television and information channels in line with varied and balanced programming for all types of audience, covering all genres, which will satisfy the demands for information, culture, education and entertainment of society and preserve pluralism in the media" (Art. 41).

This series of general public service obligations and the modification or permanent addition to the original list only two years after its approval are proof of the difficulty, or perhaps, the impossibility of giving a precise, stable definition of a series of missions which are the exclusive responsibility of the public bodies, or of differentiating between the services offered by those channels which assume these obligations and the other commercial channels (FERRELL LOWE G. & BARDOEL J.: 2007).

The first issues that were dealt with by the EU Court of Justice on this matter already reflected this difficulty. Then, the European Commission justified the exceptional measures applied to public television stations as the "obligation to provide varied programming including cultural, educational, scientific and minority programmes without any commercial appeal and to cover the entire national population irrespective of the costs"[7]. For varied reasons, (either democratic or technological), the Community institutions

[7] *Cf.* Decision 93/403/CEE, of 11 June 1993, on the procedure for application of Art. 85.3 of the Treaty, OJ L 179, p. 23. In reference to this: Decision, Metropole télévision SA, a private generalist TV channel in France in Case T-528/93; Reti Televisive Italiane SpA, an Italian society in Case T542/93; Gestevisión Telecinco, a Spanish society in Case T-543/93 and Antena 3 Televisión, a Spanish society in Case T-546/93. On the functioning of the channels which belong to the EBU, cfr. also the Sentence of the General Court, of 24 January 1992, Case T-44/90, Rec., p. II-00001 ff.

have accepted, not without problems and opposition, the legitimacy of the privileged position granted to public channels on the European market as guarantors of the fulfilment of these public service missions. However, this privilege, although accepted or tolerated, is not without limits.

3. The controversial question of the financing of public service television, or, to be more exact, of public broadcasting authorities

The Commission Communication on the application of the norms for state-funded aid for public service broadcasting[8], published in 2001 and updated in September 2009[9] is a document of reference for the study of the controversial financing of RTVE. The Letter sent by the Commission to the Spanish government makes an explicit reference to this document, in its 2001 version, as the framework for the evaluation of what had occurred in the case of Spain.

As the text states, the application of the rules on state aid to public service broadcasting brings together a large number of different elements, and, thus, the objective of the text is to lay down the criteria which the Commission must follow when applying said regime (sections applicable to SGEIs, specifically Articles 107 and 106.2 of the TFEU) to public service broadcasting. The existence of this document is proof in itself of the specifics this activity entails and, therefore, of the legal difficulties and the political reserves that appear when it comes to the strict application of economic freedoms to this type of activities. It is enough to say that between 2001 and 2009 the European institutions took more than 20 different decisions on the financing of public service broadcasting. (2009/C 257/01, point 4).

The Commission Communication, when facing the tricky issue of the financing of public service broadcasting, takes as a starting point that this type of services, "although having a clear economic relevance, is not comparable to a public service in any other economic sector" as "There is no other service that at the same time has access to such a wide sector of the population, provides it with so much information and content, and by doing so conveys and

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[8] Communication from the Commission on the application of State aid rules to public service broadcasting. (2001/C 320/04). Official Journal n° C 320 of 15 November 2001, pp. 0005-0011.

[9] Communication from the Commission on the application of State aid rules to public service broadcasting. (Text from effects of the EEE). (2009/C 257/01), OJ C 257 of 27 October 2009, pp. 0001-0014.

influences both individual and public opinion". "Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population", and, "ultimately ensures that all citizens participate to a fair degree in public life" (2001/C 320/04, points 6 and 7; 2009/C 257/01, points 9 and 10). For these reasons, it is clear that public televisions, as trustees of public service obligations, have the responsibility to satisfy the needs and obligations of public interest which, otherwise, would not necessarily be satisfied to the optimum degree.

That is to say, on paper, it appears that taking the role of television services in society into account, there is no doubt about the need to protect certain television services, or related characteristics (protection of minors, technical quality, pluralism, broadcasting of general interest events) from possible market shortcomings or errors. Television is entrusted, due to the type of services it offers, with a series of public service or general interest missions which must be guaranteed, and therefore, television services are classified as SGEIs. The achievement of these missions demands a guarantee of the economic viability of the service, so Community Law provides for the possibility of exceptional financing for the achievement of such missions. In order for this exceptional financing, provided for in Art. 106.2 TFEU and expressly recognised specifically in its application to the TV market, not to be considered aid that is incompatible with the Treaty rules, it must fulfil three basic requisites:

A) The service under consideration must be an SGEI and be clearly defined as such by the Member State: definition (Sentence in Case 172/80, Zuechner, Rec. 1981, p. 2021).

B) The company under consideration must have been explicitly entrusted with said service by the Member State: mission (Sentence in Case C-242/95, GT-Link, Rec. 1997, p. 4449).

C) The application of the Treaty competition rules (in this specific case, the ban on state aid) must be an obstacle to the achievement of the specific tasks assigned to the company and the exception to said rules must not affect the development of trade to an extent that damages the interests of the Community: proportionality criterion (Sentence in Case C-159/94, EDF and GDF, Rec. 1997, p. I-5815).

These considerations are a specification of some of the requirements laid down in the Altmark Judgment so state funding for the performance of public service is not contradictory with the TFEU.

As the 2001 version of the Communication specified, it corresponds to the Commission, as the guardian of the Treaty, to verify the fulfilment of these criteria (2001/C 320/04, points 29 and 30). Nevertheless, the 2009 version, immediately after explaining said criteria emphasises the obligation to adapt this formula, in view of the interpretative provisions of the Amsterdam

Protocol, which refers to the "public service remit as conferred, defined and organised by each Member State (definition and entrustment)" and provides for a derogation from the Treaty rules in the case of the funding of public service broadcasting "in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit [...] and [...] does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account (proportionality)".

A) The first requisite for the justification of an exceptional economic regime lies in the definition of the mission to be guaranteed. As has been explained in the preceding section, this definition is mainly the responsibility of the Member States bearing in mind the SGEI concept and the criteria developed by the Community institutions. Taking into account what is stated above, it is here that we find the first problems in its application to TV activities. Defining implies drawing boundaries, delimiting the meaning of something is such a way as to differentiate this something from others. Thus the Oxford English Dictionary gives the following meanings of the term "define": 1. state or describe exactly the nature, scope, or meaning of (something); 2. mark out the boundary or limits of (something).

However, the definition of public service television contained in Spanish legislation is so broad or general that it would be impossible not to attribute many of its characteristics to the activities offered by private channels which, in principle, do not receive the definition of a public service mission and do not have recourse to exceptional measures. The obligation to satisfy information, cultural or entertainment needs; the mission to broadcast contents that promote constitutional values and principles; or protection of the rights of minors are demands that are common to all television services. However, they are an integral part of the definition of public service broadcasting.

These problems are also present in some of the approaches of the European text, both in the 2001 and the 2009 version, which states that, "the definition of the public service remit must be as precise as possible", or "It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not", or "Clear identification of the activities covered by the public service remit is also important […] so that the authorities […] can effectively monitor compliance"[10] and simultaneously recognises the legitimacy of a qualitative definition "entrusting a given broadcaster with the task

[10] 2001/C 320/04, points 37 and 39; 2009/C 257/01, points 45 and 46.

of providing a wide range of balanced and varied programming"[11]. Furthermore it states that said definition must also reflect "the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms"[12]; or assume that the commercial operators also contribute to satisfying public service missions "to the extent that they contribute to pluralism, enrich cultural and political debate and widen the choice of programmes"[13].

The Commission includes these problems in its document and accepts that, in the case of television, although the public service definition should be made taking into account the Community concept of SGEIs, "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)", [now section 2 of article 106]. "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"[14]. Thus, with this broad and general definition of public service television, the Community institution clearly validates the existence of European public television channels and their role as guarantors of public service missions. However, this definition also has its limits. With reference to said limits, the gwork of the Commission simply controls obvious errors, such as the inclusion in this definition of activities which cannot reasonably be considered as satisfying the democratic, social or cultural needs of a society, e.g. e-commerce, commercial advertising, the use of special telephone numbers in games with prizes, or telemarketing.

This approach is based on Community jurisprudence, which, in its rulings, has corroborated the possibility of including quality generalist programming within the concept of public service broadcasting, and, more specifically, has applied the obligation of guaranteeing universal television service of good quality both from a technological perspective and in reference to programming[15].

11 2001/C 320/04, points 33 and 34; 2009/C 257/01, point 47.
12 2001/C 320/04, point 34; 2009/C 257/01, point 47.
13 2001/C 320/04, point 14; 2009/C 257/01, point 16.
14 2001/C 320/04, point 33.
15 Cfr. among others, Sentence in Case T-442/03, SIC/Commission, Rec. 2008, Section 201; sentences in the accumulated cases T-309/04, T- 317/04, T-329/04, T-336/04 TV2/ Denmark/ Commission, Rec. 2008, sections 122 to 124. Nonetheless, this approach can be found in

B) As a second step for the justification of additional financing of public service broadcasting, Community Law demands that said missions must have been expressly assigned to a particular operator by means of an official instrument (for example, legislation, contract or specifications). In Spain, this assignment is carried out through Law 17/2006, of 5 June, on radio and television of state entitlement, by which: 1. The *Corporación de Radio y Televisión Española, S.A. (Corporación RTVE)* is entrusted with the management of public service radio and television within the terms laid down by this Law, to be exercised directly by the subsidiary societies of the Corporation which provide radio and television services. This attribution is specified by means of Framework Programmes (*Mandatos-Marco*) through which the Parliament specifies the objectives of the public service function entrusted to RTVE for 9-year periods. Said objectives are developed every three years through programme-contracts agreed by the Government and the RTVE Corporation.

The Commission Communication when dealing with this requisite presumes, perhaps mistakenly, that said mission is necessarily the responsibility of the public corporations, and therefore holds that is not sufficient that a public organization have been formally entrusted with this public service, but also that said service must be offered within the agreed conditions and, for this to occur, a competent authority or organization must control its application with transparency and efficiency. The choice of the means of controlling this fulfilment is an exclusive responsibility of the Member States[16]. The Commission grants such importance to this supervision that it specifies that, if there were a lack of clarity and reliability in the fulfilment of the public service mission, the Commission could not justify the adoption of any exceptional measure applied to its satisfaction.

Thus, together with other factors, the creation of Spanish Audiovisual Media Council and the inclusion, among its responsibilities, of "i) Overseeing the fulfilment of the service mission of those rendering the audiovisual media public service and the suitability of the public funds assigned for this use" (Art. 47.1 i of the *Ley General Audiovisual*).

Although a strict evaluation of the main organizations demands a more thorough analysis, these two requisites and their appearance in Spanish audiovisual legislation force us to consider, firstly, that it might be advisable to definitely admit the impossibility of giving precise legal specifications in such

earlier Sentences, e.g. General Court Sentence, of 10 July 1991, Cases T-69/89, T-70/89 and T-76/89, Rec., p. II-485 ff.

16 2001/C 320/04, points 41 and 42; 2009/C 257/01, point 54.

a way that they would differ from other services (beyond what the offer of universal television service means). And also to consider what public service television is, and recognise that its definition derives from an indispensable requisite for its legal formation which is directly linked to the second requisite: the fact that it is assigned to a specific entity. In fact, the Directorate General for Competition itself expressly recognises that the obligation to define public service is linked to the objective of minimizing the negative repercussions that the state funding of these services may have on the functioning of free enterprise television[17]. Moreover, we should also assume that this assignment, in the case of RTVE in Spain, is merely one option among several, as the nature of the service the public corporation offers is shared with the activity developed by the commercial companies.

An obvious issue, although ignored by politicians and professionals, is that what the Community institutions have defined and developed in their documents as public service broadcasting is not in itself equivalent to the public television concept. Thus, it can be said that the continuance of public operators is open to conjecture, in that elements such as market development and growth or the political juncture may play a fundamental role, while the future of what is called public service broadcasting creates a much more in-depth debate. This does not cast doubt on the continuity of corporate obligations which must be supervised by the corresponding authorities, if possible, independently of the political and commercial powers, as they create citizen rights which must be guaranteed without taking into account the market status, the political juncture and the greater or lesser development of technology from now on. That is to say, although it is legally obligatory and even advisable to define the public service mission and to assign its fulfilment to a specific body in order to justify a subsidiary service and thus allow for the adoption of exceptional financial measures, from a practical perspective, both the definition and the assignment can but be considered somewhat fictional.

C) The third requisite refers to the conditions imposed on the funding of public service broadcasting so that this funding does not break the laws on competition. In this section, the principles of necessity and proportionality are applied in order to study the compatibility of the concession of subsidies for the agreement of public service missions with the market laws.

17 "To minimise the impact of State subsidies on competition, the Commission required that Member States define the scope of the public service and limit the State aid to the actual costs of the public service", at http://ec.europa.eu/competition/sectors/media/overview_en.html. Consulted 30 May 2010.

From a general perspective, the systems for financing television may be divided into two main groups: those with single funding and those with dual funding. This dual financing (from public money and publicity or any other commercial income) has triggered multiple accusations of unfair competition by the commercial corporations, which have frequently been taken to European levels, and the issue of the funding of public service television channels has become the most controversial in both the past and the present of the European audiovisual market. This is because, in the matter of financing, theoretically the Member States are responsible for choosing either one regime or the other, and the Community institutions, the specifically Commission, merely check (in accordance with Art. 106.2 TFEU) that the regime chosen by the national authorities is compatible with the European regulations. In fact, in the last ten years, between 1999 and 2010, the Commission has studied the compatibility of the funding systems in Italy, Portugal, Denmark, France, the Netherlands and Germany, among others. At present, its sights are set on the funding of RTVE[18].

On this matter, a good starting point would be to state that Community legislation is not querying either the legality of state financing of public services or the legality of mixed financing. On the former possibility, as expressed in the Protocol on broadcasting in the Amsterdam Treaty, the "provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and 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 realisation of the remit of that public service shall be taken into account". Among the advantages of this system it has been pointed out that it "shares the burden of financing a public service task among all tax payers. This form of financing does not create a barrier to entry. It is subject to parliamentary control in the Member States as part of the budgetary procedure", COM (2003) 250 final, point 62, section a), p. 58. And, on the latter possibility, "there can be no objection in principle to the choice of a dual financing scheme (combining public funds and advertising revenue) rather than a single funding scheme (solely public funds) as long as competition in the relevant markets (e.g. advertising, acquisition and/or sale of programmes) is not affected to an extent which is contrary to the Community interest" (COM (2000) 580 final, point 5, p. 38).

18 See list at http://ec.europa.eu/competition/sectors/media/decisions_psb.pdf.

This means that the option of eliminating advertising from RTVE is not an obligation deriving from its legal organization in accordance with the planned framework for SGEIs, but is in fact the result of a political decision which causes another type of problem, such as, for example, the economic viability of the body or the excessive financial burden in compensation which is demanded from both private TV channels and telecommunication operators in order to compensate for the drop in income brought about by the elimination of advertising content. In the case of Spain, it should be mentioned the role of negotiations between commercial television broadcasters and the Government in making the decisions that have culminated in the new audiovisual laws, both as regards the financing of PSB as in the content of the new General Audiovisual Law. The deep economic crisis in Spain and the difficulties of commercial broadcasters to succeed in a digital market are the arguments beyond the content of the Law. An irrefutable proof of this is that only telecom operators have complained about the fees provided to compensate for the absence of advertising on the national public television. Without doubt, the pressures of the commercial television sector have gained prominence in the new audiovisual system in Spain.

However, the truth is that, both in the documents developing the SGEI concept and in the Communications in 2001 and 2009 on the financing of public service broadcasting, the Commission prefers public funding as the formula that least warps the free workings of the market. Thus, although in earlier documents the Commission had recognised, among others, the option of creating a fund financed by the market participants which would be used to pay for a universal service as the basic public service mission (COM (2003) 270 final, Annex, point 62 b), p. 58), in the 2009 Communication it focuses on the development of state financing as the least controversial means and that which is best fitted to Community law.

It can even be said that the Commission, in its 2009 Communication, focuses on explaining what the requisites for mixed funding of public TV channels must be, as the main bodies responsible for satisfying public service missions, in order to be compatible with Community law[19]. These requisites can be summed up as: transparency, control and proportionality of the

[19] In the dual financing option, what is applied is the decisions of the Directive regulating financial relations between the States and public corporations, which demands that the companies use analytical accounting that distinguishes between the different activities, the costs and income deriving from each, and the methods of assignation and distribution of costs and income, Directive 2006/111/52/CE, OJ L 318, of 17 November 2006, pp. 17-25.

aid granted. This is because, in accordance with the regime established for SGEIs, mixed funding would appear to be the most suitable and adaptable to the TV markets, Community legislation and, finally, to the economies of the countries. Restrictions, both qualitative and quantitative, of commercial income for public bodies are a different matter.

It may be that the Spanish government, when adopting the new financial regime for RTVE, has avoided some of the issues foreseen or the regulation of SGEIs which can be found, among others, in the judgements of the EU Court of Justice on the subject of the financing of French, Danish or Austrian public television over the last few years. For example, a comparative analysis between the French case, proceed by the Commission, and Spanish, because of the similarities between the two[20], is illustrative in this regard. Sooner or later, we shall see if the Community institutions will give the green light to the option chosen by Spanish legislation, or if, on the contrary, Spain will be forced to correct this legislation in accordance with what is decided by the Community.

[20] The French reform includes the phasing out of advertising on public channels and the introduction of two rates, one on advertising and the other on electronic communications. 0.9% of turnover of telecommunications operators, as well as of Internet access providers will go to the public body. On the other hand, private broadcasters will yield 3% of its advertising revenue.

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