



Competition Rules OK! OK?

When the Treaty of Rome enshrined competition as the organising principle of an integrated and borderless European economy in 1956, the stage was set for the present drive towards globalisation. The British Film Institute's Richard Collins considers whether Europe's public service broadcasters are sufficiently prepared to survive the competitive onslaught.

Technological change and globalisation are making media and markets converge. In consequence, many suppose that market failure in broadcasting has been, if not completely redressed, substantially mitigated. What rules should govern media markets from here on in? Competition rules is usually the answer. But this answer just sets new questions. Not least, what happens to the old media during transition? What happens if (when) markets don't work well enough? Does competition always produce socially beneficial outcomes?

The consequences of liberalisation for media and communications are the subject of an international seminar series organised by the British Film Institute and the Centre des Études des Médias of Université Laval Quebec. The most recent, on public service broadcasting (PSB) and competition policy, took place in London in October (the first, on world trade liberalisation and its impact on media and communications was held in Quebec in March).

In Europe, the impact of competition policy on public service broadcasting is particularly controversial. Integration of European markets means that the European Treaty, and notably its strong anti-trust, anti-state aid and pro competition provisions, applies ever more widely and deeply as Europe continues its teleological progress towards the "ever closer union" enshrined in the Treaty.

These are not exclusively European pre-occupations. North America has the Free Trade Agreement (NAFTA); Australasia the Closer Economic Relationship just as Europe has the European Union. As national markets become more closely associated, if not wholly integrated, so general, non-nationally specific, rules are needed for trade and commerce. The norms of open markets and competition are becoming generalised - not least in new mandates for public service broadcasters. The most recent UK Government enquiry, The Review of the Future Funding of the BBC chaired by Gavyn Davies, mandated the BBC "to accelerate the growth of its commercial services" and observers of the New Zealand experiment in marketising the delivery of broadcasting services will need no reminding of the impact of market and competition norms.

Have broadcasting markets changed so much that public service broadcasting is no longer required? Can competition satisfy the public interest? Or has technological change simply exported market failure to new media - eg the web - which therefore require a public service presence? Will public service broadcasting always be necessary - and if so how will we know how much is necessary? And if public broadcasting and public service broadcasters are needed, how are they to be accommodated within what increasingly seems to be the only general system of regulatory principles available - competition law and policy?

Not only do we need to know what constitutes a well functioning broadcasting market to answer these questions - an issue so wearily familiar that I won't rehearse the arguments - but also what constitutes public service broadcasting. How is this protean concept and even more fuzzy practice to

be defined with sufficient precision for the relevant issues to be justiciable?

These questions have been posed, albeit for the most part implicitly, in a succession of national and pan-European cases in recent years. Several adverse judgments have been entered against the European public service broadcasters' "club", the European Broadcasting Union (EBU), for anti-competitive behaviour (notably in connection with its long established practices of collective acquisition of programme rights on behalf of its members); the Portuguese Government's subventions to the Portuguese public service broadcaster RTP were challenged as illegitimate state aids (RTP was exonerated, but on narrow grounds which henceforth may constrain public funding for broadcasting in Europe); the terms on which the BBC's 24 hour news channel was financed and made available to distributors (notably cable companies) were challenged under both EU and UK competition law and so on.

Can competition satisfy the public interest?

Again, the BBC provides an interesting case in. At the time of writing the BBC's News 24 had been cleared by the European Commission but not in the UK. The Commission "approved the financing from State resources of BBC News 24" whereas one UK regulator, the Independent Television Commission (albeit without a regulatory remit for the BBC) has commented "It is hard to see why public money in the form of the licence fee should be used to provide services to a minority of viewers which are already catered for effectively by the commercial sector". PSB is increasingly being judged against the norms of competition law, although ➤

authorities do not always agree on the application of such norms.

It's not just in Europe that technologies have changed markets. Though perhaps it is in Europe most of all that a systematic attempt has been made to formulate (and apply) rules across a series of national jurisdictions. The common rules devised for a common European market derive from the European Treaty, based on the 1956 Treaty of Rome. The implications for a global economy which, albeit haltingly and unevenly, is becoming integrated need no spelling out.

In Europe, a series of cases have been heard, a limited amount of case law has been established but as yet there are no clear guidelines. However, public service broadcasting is now measured against a normative template which requires it to be more closely defined and constrains behaviour in ways that are unlikely to have been envisaged by the progenitors of either public service broadcasting or of competition law and policy. In spite of (because of) this, the public exploration of these issues has been conducted as a strident dialogue of the deaf. Competition wonks have incanted the mantras of neo-classical economics and ideologues of public service broadcasting have invoked their own sanctified rhetorics. Reincarnations of Adam Smith have talked past the deaf ears of latter day John Reiths and simulacra of Jurgen Habermas. But magically this October, on the proverbially neutral ground of that most sweetly reasonable of all states, the London High Commission of Canada, hostile tongues were stilled and ears were opened.

What were the arguments rehearsed by the thirty or so policy makers, academics, regulators and broadcasters who together supped on this caviar of policy wonkery? First, it's important to recognise that the public broadcasters were on the back foot. The dominant paradigm was not theirs. One PSB strategy was to argue that broadcasting was, and should be, organised as a dual system made up of incommensurable elements - commercial and public - and that the

norms of competition and the market applied only to one part, (and not the public part!), of the dual system. The European Union seems in some sense to have adopted this model by adding a protocol, the Amsterdam Protocol, protecting public service broadcasting to the European Treaty. Yet, rather than abolishing the problem, the Amsterdam Protocol only restates it. If a public service broadcaster, let's say the BBC, is to accelerate its commercial activities how can it be exempted from competition regulation? If there is a dual system clearly public service broadcasting is in both parts of it. Thus, public service broadcasting needs to be defined clearly so all know which parts of a dual system are off limits to competition law.

The German public service broadcaster, ZDF has sponsored the most comprehensive attempt to do just this (see, in German alas, <http://zdf.msnbc.de/modules/gutachen/funktionsauftrag.pdf>). ZDF defined public service broadcasting's character as:

- an island of credibility in fragmented markets
- its capacity to guarantee participation by all
- providing independent credible information
- offering a comprehensive national perspective
- speaking for the nation to those outside
- guaranteeing quality
- redressing the deficiencies of commercial provision
- guaranteeing cultural identity
- encouraging national production
- driving innovation.

But again, the problem is restated rather than resolved. For any specific instance of a putatively public service broadcasting service must still be evaluated, case by case, against both the ZDF criteria and also against tests of authenticity, proportionality and reasonableness. One proponent of public service broadcasting advocated a biennial public self-evaluation of performance by public service broadcasters.

The difficulties, and to acknowledge difficulty is not to suggest that there is

an easy alternative, of the ZDF model were incisively probed in consideration of some specific cases - notably those of Canada and New Zealand. What, for example, did it mean to claim that choice in New Zealand had increased but diversity had declined? What has greater legitimacy, a broadcaster's self-evaluation or an audience's evaluation of a broadcaster's role and performance? And if broadcasters were to evaluate themselves how were audiences to evaluate them? Perhaps through instruments, such as that described by one Canadian participant, where viewers and listeners attributed a notional cash value to public broadcasting services. Interestingly, those polled in Canada valued most, but not all, public broadcasting services above current levels of Canadian Federal Government expenditure.

The seminar reached no conclusions. No easy conclusions are to be had.

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But the event justified itself. More light than heat was generated in this closed forum than in the public quasi-gladiatorial encounters that have made up recent exchanges between advocates of competition and public service. Debate moved on but hasn't terminated. Public service broadcasters still face the bowling, their dual system defence has been found to be flawed, more work's needed to refine arguments and produce tight definitions if broadcasters are to survive an unblunted competitive attack. <

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