

1. Introductory remarks

Ensuring the good functioning of media and press markets is not only important under competition law, but also vital to meet other core strategic priorities of the EU, notably the EU Democracy Shield initiative which is intended to tackle concerns relating to security policy, information resilience, and disinformation.

Consequently, the serious market impact of public service broadcasters on private and commercial media is not just a sectoral concern, but a matter of political urgency and critical public interest. This impact is not only measured by the number of subscription and advertising sales lost, but also by the new ventures never launched, the innovations never funded, and the journalistic talent never hired because the media market reality is distorted by a subsidised, “free” competitor financed by the state.

This is not an ideological discussion about being for or against public media, or somehow trying to reduce its value in society. On the contrary, private media fully endorse the unique European model of coexistence between private and public media. Rather, this is about the boundaries that should be observed to strike a reasonable balance and basic requirements for competitive neutrality and fairness.

Private media want a regulatory environment that establishes a clear, proportionate, and sustainable balance between the public service remit and the commercial interests of private media, ensuring that the general public interest is protected by the entire media sector, not just the part which is owned and operated by the state. This is necessary to protect the rights of citizens to receive and impart information, and enable the exercise of such rights.

Too many PSBs across Europe have taken a path of uncontrolled expansion and remit creep with profound consequences for the sustainability of commercial publishers, as PSBs can routinely ignore their original, technologically defined mandates. Public service mandates were conceived to fill gaps in radio and television broadcasting, but were never intended to create state-funded, public service newspapers that compete directly with the commercial press.

If the center of gravity in the news and press markets is allowed to shift overwhelmingly towards the state-funded sector, then media pluralism is not genuinely strengthened but merely concentrated. This completely contradicts the rationale for financing public broadcasters with state resources and, at the same time, directly undermines the commercial basis for independent private media to compete fairly in a free market economy framework.

2. Market and technological developments

Publishers are squeezed between public broadcasters that supply free content, with access to vast and often unchecked state resources that dwarf those of commercial publishers, and tech giants that monopolise advertising markets globally. In addition, tech giants also exploit the

NEWS MEDIA EUROPE

intellectual property of press publishers without authorisation, to build services based on artificial intelligence that compete directly with press products.

And so the Broadcasting Communication cannot be considered adequate to fully address the scale and complexity of media market and technological developments that have occurred since its adoption in 2009. In particular, the shift to digital platforms and the accompanying crisis in commercial news publishing.

While the 2009 Communication attempted to introduce safeguards for commercial media such as the ex-ante test for significant new services, they proved to be too conservative and ineffective, notably due to the pace at which technology has evolved since.

In practice, the main focus of the Communication is clearly the convergence of traditional audiovisual and audio markets, whereas issues concerning text-based media remain largely unclear and ambiguous, and essentially relegated to a single footnote.

This is neither appropriate nor desirable, since this creates a framework that lacks accountability and which PSBs can consequently exploit to justify their uncontrolled expansion into neighbouring markets, in which they were never intended to directly compete.

This legal uncertainty is not merely theoretical. It has given rise to concrete State aid complaints concerning the large-scale production of text-based news by public service broadcasters, e.g. the Danish case filed in 2021 (SA.61387 – State aid for the online activities of the Danish public service broadcaster).

The current digital landscape, which is characterised by dominant platforms, requires commercial media to distribute their content on such services to reach digital audiences. It is critical that PSBs do not undermine the development of core commercial markets for the press in digital advertising, commercial subscriptions and content licensing, whether licensing covers the direct display of content or use cases linked to artificial intelligence.

The current practice of PSBs making their content freely available to platforms causes distortions at two interconnected levels. First, a direct market distortion happens when PSBs publish free content that competes with private commercial media offerings. For example, a study conducted by [Kantar Group in the spring of 2023](#)¹ shows that free news alternatives, including DR, is the primary reason why Danes do not buy a subscription to a news media. 48 % of people who do not subscribe to news media cited free alternatives, including DR, as the main reason for not paying for news.

Second, a further distortion and structural devaluation follows as PSBs also remove the incentive for platforms to negotiate and compete for commercial licenses, since they can secure

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<https://danskemedier.dk/aktuelt/nye-tal-fra-danske-medier-unge-foelger-aktivt-med-i-samfundet-og-vil-ge-ne-betale-for-kvalitet-i-nyhedsindhold/>

NEWS MEDIA EUROPE

free content, which dramatically reduces the value or pay for content, thereby undermining the licensing market for the entire commercial press sector.

To prevent this systemic harm to the media ecosystem, EU State Aid rules must impose a general requirement on PSBs to only engage with online platforms by making their content available on commercial, market-based terms, thereby ensuring that the collective interests and long-term viability of the commercial media sector are not compromised.

3. Definition of audiovisual services

The definition used by the 2009 Communication is unclear and ambiguous when it comes to the provision of text-based content. The main reason for this is that it is defined in footnote 8, which only contains a vague reference to "... other neighbouring services such as online text-based information services" in a framework intended for broadcasting.

By bundling other neighbouring services such as "online text-based information services" in the same category as audio and audiovisual content, the Communication makes it unclear if it is within the scope of the communication for public funding to support services that are not a broadcasting service. This means that PSBs are using state aid to produce and distribute free text-based content at scale and claim that this is legitimate.

Yet, asking that private media demonstrate the negative market impact of state-funded media with an open-ended public service remit sets an impossible and circular standard. The immense scale of state resources is an inherent structural market distortion and the difficulty in proving this impact does not negate its existence, but rather illustrates the legal inadequacy of the current framework in protecting competition and plurality in media markets.

The active participation of PSBs in online written news markets today represents a major, disruptive state-financed intervention in the commercial news market at a time when the press industry faces immense financial and market struggles.

For this reason, a modern and inclusive definition of audiovisual services should clearly exclude all non-ancillary text-based content explicitly. The scope should be limited to services where the dominant content element is clearly audio or audiovisual, and text should only be included where it is strictly necessary. In other words, written content should be a written representation of a concrete audiovisual item to which the text-based content directly relates.

The only real alternative would be to treat text services as a separate category of state aid, whereby they would be distinguished from the main broadcasting activities and subjected to a stricter and distinct market assessment under EU state aid rules compared to the general PSB remit, acknowledging their direct and disproportionate competitive impact on the commercial press and journalism.

NEWS MEDIA EUROPE

4. The role of public broadcasters

The Broadcasting Communication fails to provide sufficiently clear and restrictive boundaries in its description of the role of public broadcasters, which are necessary to protect the wider media ecosystem from unfair competition.

The recognition that PSBs should “benefit from technological progress” and be able to engage in a “diversification of activities in the digital age” should not justify an uncontrolled expansion into text-based services that compete directly with commercial publishers and their editorial services. The Amsterdam Protocol clearly establishes that the framework is intended to facilitate public service broadcasting, not public service newspapers or media at large.

This approach is rooted in the constitutional traditions of the Member States, which often recognise the uniquely important role of the press and the need for the state to avoid any form of intervention thereof, even if at arm’s length, in the interest of democracy and of protecting the EU’s social market economy. This is critical to ensure that there is robust commercial media in the EU and diverse journalism available to citizens.

A departure from the current broadcasting-centered framework cannot be justified with the need to keep up with technological progress, and would mark such a fundamental shift that it would require a treaty level change to the Amsterdam Protocol.

A good description of the role of PSBs should emphasise that the services of PSBs are justified primarily to address genuine market failures that compromise democratic, social, or cultural needs. In practice, this means that content creation should avoid the mass production of general interest news text that is already supplied by commercial publishers, and instead focus clearly on areas that are not adequately served on a commercial basis.

Crucially, the Broadcasting Communication should mandate rigorous, ex-ante market assessments for any significant new PSB digital offering, ensuring the absence of market failure is definitively established before public funds are allocated.

5. Relationship with the European Media Freedom Act (EMFA)

The Communication needs to be interpreted and enforced consistently with the EMFA, which aims to protect the editorial independence and pluralism of media service providers in the internal market for media services. As such, the EMFA seeks to equally protect all types of media service providers regardless of their specific activities, including press publishers.

Therefore, a strong operational distinction between public broadcasting and media service providers must be made, since the latter provide a much wider set of services than PSBs. This is essential to avoid a mission and remit creep of PSBs that could legitimise their market participation with public funding across many types of media format.

NEWS MEDIA EUROPE

This is very important because it would also run counter to the state objectives of the EMFA, which is to strengthen the internal market for media services and to ensure a level playing field for all commercial media providers, with no distinction between the different types of market participants.

The EMFA also mandates under Article 5 that PSBs should have “stable funding” as a measure to protect them against political interference. The EU’s state aid rules must not allow the notion of stable funding to justify the uncontrolled expansion of PSBs beyond their main public broadcasting activities in a way that directly undermines the interests of other media service providers under the EMFA.

It is necessary to clarify for all parties involved that the notion of “adequate, sustainable and predictable financial resources” is a governance safeguard intended to protect the independence of PSBs against budgetary blackmail, not a tool intended to guarantee unconditional public funding. As noted in Recital 31, this provision is about having transparent funding procedures on a multi-year basis.

The same Recital 31 also clearly states that these rules are “without prejudice to application of the Union’s state aid rules”. Therefore, Article 5 of the EMFA cannot override the Communication and justify increases in funding, especially if this is not justified by the proportionality principle where the funding exceeds the net costs and where the funds would serve purposes that fall outside of the defined public remit.

Therefore, the EMFA does not set or assess what is the right level of public funding or the right public service remit in Member States. Consequently, the EMFA cannot be used to justify extensive public funding, which would also run counter to Article 21 of the EMFA which requires that national measures liable to affect media pluralism are duly justified and proportionate, while also reasoned, transparent, objective and non-discriminatory.

6. Definition of the public service remit

The Communication does not provide sufficient guidance about the precise composition of the public remit which contributes to the problem of remit creep. The main reason for this is that it places the burden on national authorities to oversee the distinction between services that can be considered to fall directly under the main broadcasting activity of PSBs and those that do not.

This ambiguity is rooted in Footnote 8 of the Communication, which includes “other neighbouring services such as online text-based information services” under the general notion of “audiovisual services”.

Specifically, it does not clarify how services that can be considered to be genuinely ancillary can be distinguished from those that are not and which do not support the core remit. Similarly, there is a lack of clarity about when a service that is no longer ancillary can qualify as a "significant new service" that can trigger an ex-ante market test to check for proportionality.

NEWS MEDIA EUROPE

From the perspective of commercial publishers, this cumulative vagueness motivates PSBs to extend their text-based news offerings by arguing they are merely ancillary to their overall public service mission and main broadcasting activity, thereby circumventing the stringent market test which was designed to prevent the uncontrolled expansion of PSBs.

In many national markets, PSBs claim that the written content they produce is ancillary to their main broadcasting activities when this is clearly not the case in practice. For example, when minimal audiovisual content serves to justify extensive instances of text-based content, or when the design of the PSB websites artificially inflate the quantity and proportion of audiovisual content, such that text-based content appears to be a marginal or relatively insignificant activity.

Another example of the expansive interpretation of the Broadcasting Communication by PSBs is when PSBs argue that the fact that a given topic has received editorial coverage in the past in its audio (eg. sound) or audiovisual (tv-like eg. moving images) offerings, also justifies additional written content (eg. text-based content) in its online or mobile services.

7. Entrustment

The Communication recognises the autonomy of Member States to define the contents of the public service remit as foreseen under the Amsterdam Protocol. However, this autonomy when combined with the Communication's vague definitions of "audiovisual services" and "neighbouring services" means that the Member States are not sufficiently guided to restrict the scope of entrustment.

The Protocol also stresses, as rightly outlined in the Broadcasting Communication, that state aid should only be permitted "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".

Commercial publishers currently face an entrustment gap, whereby some Member States in practice explicitly entrust and mandate a PSB to provide extensive text-based news as part of its public remit, while creating severe market distortions for commercial publishers.

It is in practice also difficult if not impossible to separate the question of entrustment from that of the ex-ante test for "significant new services", since the definition of the latter is likely to vary as a function of the public service remit initially entrusted and mandated under the Amsterdam Protocol.

If the act of entrustment is too broad, it becomes unfairly and unreasonably difficult for national regulators and the national supervisory bodies of PSBs to argue that a subsequent expansion of text content constitutes a new service rather than an execution of the existing broad entrustment.

The guidance on entrustment should therefore explicitly require Member States to address how the entrusted service relates to the existing commercial offerings of other media service

NEWS MEDIA EUROPE

providers, particularly the private press, to ensure the principle of proportionality is met in the act of entrustment itself. In addition, the guidance should also clearly explain how compliance with this requirement must be monitored.

8. Supervision

The supervisory framework established by the Broadcasting Communication and guidelines is generally insufficient and requires further clarifications and better enforcement mechanisms to meet its objectives. This is because while the structure of supervision is properly addressed in the Communication through ordinary principles of state aid, for example concerning independent supervision, regular and ex-post control, and transparency, these principles have proven difficult to apply in the context of aggressive expansion in non-audiovisual services unrelated to the main broadcasting activities.

In particular, the Communication needs to effectively guide supervisory bodies of PSBs on how to monitor and evaluate the competitive impact of services. In an increasingly complex media environment driven by growing convergence, supervision must evolve beyond simply checking content quantitatively and develop new qualitative methods and scope analysis tools to understand the real impact of PSBs on media markets and citizens.

The current guidance surprisingly does not even require supervisory bodies to even have any form of competition expertise or to actively gather and consider market data from commercial competitors, to assess the impact of PSB activities.

And so while the Communication includes an ex-ante test for new and significant services, to act as a core safeguard against unfair competition, this should remain a tool of last resort. This is because the supervision should in the first place be the internal corrective mechanism of PSBs which ensure that its operations do not disrupt media markets in a way that is against the general public interest. The independent supervisory bodies must have tools to effectively challenge existing and new services of PSBs.

This is even more true since the adoption of the European Media Freedom Act, which elevates the level of protection that the EU legal order should afford to all media service providers and the internal market for media services. As a result, making the supervision of PSBs compliant with non-distortion principles is more critical than ever and the regulatory focus of the Communication should reflect the growing importance attached to pluralism in media markets.

9. Financial transparency

The Communication is generally clear regarding the basic legal requirements for financial transparency which are based on the principles of separate accounting, no cross-subsidisation, cost allocation rules and ex-post control. However, these principles are not consistently applied in the context of the text-based services of PSBs.

NEWS MEDIA EUROPE

The most significant ambiguities arise in the allocation of costs of the digital interfaces and websites of PSBs. PSBs normally operate websites that integrate their main audiovisual and audio broadcasting activities, ancillary content such as short articles, and large volumes of original text-based content that can often be lengthy too. For the latter, the Communication is too general to allow a fair and accurate representation of costs linked to the creation and distribution of text-based content.

This allows PSBs to under-allocate and artificially deflate the costs linked to the creation and distribution of text-based content. Specifically, the share of common costs can be under reported, such as those linked to IT, editorial management and journalists. This allows the text-based services to benefit disproportionately and unfairly from state aid which is otherwise required to be allocated to broadcasting and only to related ancillary activities.

When PSBs were created decades ago, the production of radio and television content was technically complex and highly costly. Since then, the costs linked to the production and distribution of audiovisual content have fallen drastically. This raises questions about whether the level of state funding granted to PSBs reflects these reductions adequately, or an ongoing and repetitive trend of overcompensation.

It is problematic if the public funds allocated to PSBs are not continuously adjusted to the prevailing economic realities of audiovisual production, in particular if such financial surpluses in practice enable the expansion of PSBs in areas far beyond their originally intended public service remit.

10. Diversification of public broadcasting

The Broadcasting Communication does not provide specific guidance on how supervisory bodies should audit the competitive effects of ancillary services that are funded by state aid, and ensure that they are genuinely related. This process cannot take place if there is no adequate financial transparency in the first place, as discussed in the previous section.

While it is legitimate for PSBs to move beyond strict traditional broadcasting only, as outlined in the 2009 Communication, it is necessary that this is accompanied by clear limitations about what kind of diversification is permissible and under what conditions, such that private markets are protected from unreasonable disruption.

The guidance on what constitutes ancillary services that are not related to the main public service broadcasting activities remains poorly defined, and has PSBs in text-based services at the expense of commercial media. The Communication should ensure the prevention of such disproportionate diversification which creates a direct substitute for paid commercial journalism supplied by publishers.

NEWS MEDIA EUROPE

This should be achieved by introducing a presumption that text-based content is not ancillary to the main broadcasting activity, unless PSBs can meet certain criteria that act as a condition to lift that presumption. This is both necessary and justified to control the diversification of PSBs.

These criteria or indicators should reflect the nature and format of the content they produce, to help determine whether content is legitimately ancillary to the main broadcasting activities. This could for example include indicators such as limited article word counts, frequency of updates, reliance on and clear relation to original audiovisual and audio broadcasts, and extent of original reporting. And such indicators should be analysed both quantitatively and qualitatively within the economic and media market context of the media sector in the respective countries.

11. Ex-ante market test

The purpose of the market test for significant new services is a core safeguard against illegitimate diversification and unfair competition that is meant to protect the functioning of and pluralism in media markets. Its role is therefore of paramount importance and needs to be facilitated and strengthened where necessary in the revision of the Broadcasting Communication..

In practice, the market test has been insufficient to achieve its purpose because its implementation took place at the discretion of Member States who have typically allowed an excessively restrictive interpretation of what significant new services mean. This means in some cases that PSBs have been permitted to roll out new text-based services on a massive scale without being subject to any form of control, let alone market test.

In some Member States the excessively restrictive interpretation of what constitutes a significant new service has produced outcomes that run counter to Article 21 of the Media Freedom Act (National measures affecting media service providers) as national measures concerning PSBs liable to affect media pluralism were not duly justified and proportionate.

To ensure a better and more consistent application of the market test, the assessment should be conducted or scrutinised by an independent regulatory authority with relevant expertise such as the national competition authority, or the media regulator removing the power from the discretionary control of Member States. In addition, it should be made clear that the market test assessments should not be conducted or controlled by the bodies that are linked to the national PSBs.

Another problem identified earlier is that if the initial act of entrustment is too vague and allows for diversification, then PSBs can argue that subsequent expansions of text-based content are a natural evolution of their existing public service remit, thereby circumventing the ex-ante test designed to protect competition and pluralism in media markets. This is fundamentally a problem of mission creep which the current Broadcasting Communication fails to consider.

NEWS MEDIA EUROPE

To close this loophole, the ex-ante market test must be explicitly required for all new online and other digital activities that compete with commercial media, such as press publishers, regardless of whether PSBs frame them as an organic or natural evolution of their existing public broadcasting services. The test must serve as an absolute, effective gatekeeper to halt unfair media market interventions.

12. Concluding remarks

The Broadcasting Communication is rooted in an audiovisual broadcasting framework, but in too many cases its wording, interpretation and enforcement by Member States does not sufficiently limit PSBs from engaging directly in unfair competition with media services outside that public service broadcasting framework.

This causes significant harm to the functioning of media markets, to private and commercial publishers, and to media pluralism, all of which are core strategic priorities of the EU that deserve special and immediate attention.

This is not about being for or against public broadcasters, but about the boundaries that should be observed to strike a reasonable balance and basic requirements for competitive neutrality and fairness.

The stakes could not be higher since this discussion is fundamentally about the ability of European citizens to receive diverse and trustworthy information.

Private media want clear, proportionate, and sustainable balance between the public remit and commercial interests, ensuring that the general public interest is served and protected by the entire media sector, not just the part which is owned and operated by the state.

To facilitate this, we identify significant room for improvement in several areas of the 2009 Broadcasting Communication:

- **Market and technological developments** have disrupted commercial media markets which are going through major adjustments in how content is financed and produced. It is critical that PSBs do not undermine the development of commercial licensing and subscription markets for press content.
- **Definition of audiovisual services** is unclear and too vague. A modern definition should exclude all non-ancillary text content and be limited to services where the dominant content element is clearly of audio or audiovisual character.
- **Role of public broadcasters** should “benefit from technological progress”, but also recognise that the Amsterdam Protocol clearly establishes a framework intended to facilitate public service broadcasting, not public service newspapers. The Communication should mandate rigorous, ex-ante market assessments for any significant new PSB digital offering before public funds are allocated.
- **Relationship with the European Media Freedom Act** should not legitimise a remit creep of PSBs. The EMFA notion of “adequate, sustainable and predictable financial

NEWS MEDIA EUROPE

resources" is a safeguard for the independence of PSBs against budgetary blackmail, not a funding tool.

- **Definition of public service remit** is unclear and insufficient about the precise composition of the public remit, which contributes to the problem of remit creep as it becomes difficult to distinguish between core and ancillary activities.
- **Entrustment** rules create an entrustment gap as Member States may entrust and mandate PSBs to provide text-based content, thereby fulfilling procedural requirements, while also creating severe market distortions.
- **Supervision** should be strengthened since its principles have proven difficult to apply by supervisory bodies in the context of aggressive expansion of PSBs into text-based services unrelated to the main broadcasting activities.
- **Financial Transparency** is currently insufficient to enable an informed and objective assessment of how PSBs finance their main and ancillary activities. Cost allocation and sharing rules in particular need to be revised.
- **Diversification of public broadcasting** should be better controlled by auditing the competitive effects of ancillary services funded by state aid. A new presumption should be introduced that text-based content is not ancillary to the main broadcasting activity, unless PSBs meet certain conditions agreed in advance.
- **Ex-ante market tests** are of paramount importance to prevent the uncontrolled expansion of PSBs. Market tests are insufficient because they take place at the discretion of Member States who typically allow an excessively restrictive interpretation of significant new services.