Claim on the state aid for the Hungarian public service media providers

I. Standard information

Name of EU country and national, regional or local authority or authorities
Hungary
Duna Médiaszolgáltató Zártkörűen Működő Részvénytársaság (Duna Media Service Provider Private Limited Company); Médiaszolgáltatás-támogató és Vagyonkezelő Alap (Media Service Support and Asset Management Fund)

Specific national measure(s) concerned
Act CLXXXV of 2010 on Media Services and on the Mass Media

Union laws concerned
Article 107 TFEU

II. Object of the claim

The Media Act (Act CLXXXV of 2010 on Media Services and on the Mass Media, Mttv.), which was adopted in 2010 and entered into effect on 1 January 2011, laid down a new regulation scheme for the funding of public service media. Parliament substantially amended the funding rules and the entire public service media institutional structure with the Act CVII of 2014; the new rules became effective on 1 July 2015.

The European Commission's Communication No. 2009/C 257/01 on the application of State aid rules to public service broadcasting (hereinafter Communication) sets out numerous criteria for state aid to public service media. Our assessment is that the Hungarian regulations do not comply with a substantial portion of these requirements.

As far as the amount of state aid is concerned, the Hungarian regulations do not contain guarantees for levels of funding commensurate with the public service responsibilities that the public service media discharge. The way in which state aid is used is not transparent, and there are no safeguards in place to ensure its independent and effective review. There are neither social nor market impact assessments in place prior to launching new public media services.

III. Foundation of the complaint

1. Funding of public service media

Hungarian State pays a public service contribution each year based on the number of households using equipment suitable for receiving linear audiovisual media services. The amount of the public service contribution in 2012, based on a calculation taking into account four million Hungarian households each contributing a monthly amount of 1350 HUF, was overall 64.8 billion HUF. With Act C of 2015, the central budget has set the level of public service contribution at 69.861 billion HUF for 2016 (exchange rate on 01.08.2016: 315.24 HUF=1 EUR). Compared to the state aid in 2010 (45 billion HUF), the current funding is 55% higher.

The determination of the amount was not preceded by an analysis of public service responsibilities and a genuine assessment of funding needs. Since the law establishes the amount itself and does not provide a procedure for its regular review, there will be no opportunity to conduct such analyses and reviews in the future either.

Moreover, the practice of allocating ad hoc state aid of single programs continues to persist (e.g. Government Decree No. 1564/2013. (VIII. 16.); Government Decree No. 1425/2014. (VII. 28.)).

A wide variety of tax reliefs provide another form of state aid. According to the Media Act, the MTVA is exempt from paying fees for using public roads; Duna Médiaszolgáltató Zrt is exempt from duties and corporate taxes; under the terms of the Act on Value Added Tax, the MTVA and Duna Médiaszolgáltató Zrt. are subject to favourable VAT rules.

State advertising is another source of state support. Based on the list prices of Kantar Media, 13.8% of state advertising in 2015 were placed with public service media outlets. If we look at expenditures for the media sector overall, 20.9% of the state funds expended in the television market went to public service channels. In the radio market, 41.9% of state advertising went to public service stations. 29.1% of the total advertising revenue received by Kossuth Rádió were from state advertising, while in the case of Petőfi Rádió this ratio was 20.8%. In the meanwhile, Klubrádió did not receive any state advertising. There are no transparent principles governing the distribution of state advertising, neither in law nor in any other binding legal instruments.

Hungarian public service media also receive a share of total market advertising spending. The total airtime they may allocate to broadcasting advertisements is 4 minutes less per hour than commercial providers; in 2014, the total revenue of public service media from this source amounted to 3.4 billion HUF.

2. Supervising the fulfilment of the public service obligations

The CEO of the Duna Médiaszolgáltató Zrt is obligated to report to two bodies, the Public Service Corporation and the Public Service Board.

The CEO’s reports to the Public Service Corporation does not address issues of financial management.

Reports submitted to the Public Service Board contain data on financial management, and by approving the report the Board simultaneously approves the public service media's financial balance and revenue statement. The law fails to specify what happens when the Board fails to approve the report, and the reports are not available on the website of either the Board or individual public service media providers. Further, the media law provides that Board must offer prior approval before public service media providers conclude contracts whose financial value exceeds a legally established threshold value.

The key entity in the entire system of public service institutions is the Media Service Support and Asset Management Fund (Médiaszolgáltatás-támogató és Vagyonkezelő Alap, hereinafter: ‘Fund’, MTVA) that exercises all ownership rights and obligations associated with public service media assets, including the production and support of public service programs. The MTVA, which uses public funds to conduct its operations, is not subject to the Board's oversight, and its CEO has no reporting obligations towards the latter.

MTVA's management authority is the Media Council. However, pursuant to the law it is the institution that decides whether the prevailing system of public media services will be expanded by new channels and/or new services and, moreover, the president of the Media Council appoints the MTVA's CEO, while he/she also nominates the CEO of public service media provider.

3. Transparency of funding

The law also regulates how the funds available are distributed between individual public service media providers and various public service functions. This is the responsibility of the Public Service Fiscal Council. The media law originally provided that the Public Service Fiscal Council had the authority to decide on the distribution of funds between the public service media providers. Since July 2015, this Council has only received a right of comment with regard to the proposals developed and adopted by the Fund. Indeed, the media service provider's interests always prevail, for a potential objecting vote by the delegate of the State Audit Office will always be in the minority.

Following two freedom of information requests to access the Public Service Fiscal Council’s agenda, it emerged that the Council’s documents did not contain information on the methods and basis of the program cost calculations or on the aspects of programming. Several documents featured the same graphs and tables and, moreover, these had no titles that would have shown what data they actually present and what period they apply to. The background documents mainly provide information about the audience shares of the public service channels and programme minutes by genre. The few financial tables and detailed tables of by the minute broadcasting time did not feature the same system of categories, which makes it impossible to calculate the average costs of individual genres. There was no information on the activity of the news agency and on the online services. It also emerged from the documents that the delegates of the State Audit Office criticized the deficient information repeatedly but they also voted for the acceptance of the resolution. It is readily apparent that the funding is conducted in a matrix system of sorts, where the costs allocated for the production of shows are not all disbursed from the MTVA's budget but also from external sources of state funding.

4. Overcompensation, financial supervision mechanisms

Neither the media law nor other publicly accessible documents contain any regulations concerning these issues.

5. Launching new services

The selection of public service channels is continuously expanding with new radio and television channels. With one exception of m3, these are all must carry channels that have to be broadcast for free; moreover, the law provides that they must be ranked first in the channel sequence.

The Media Act provides that the Media Council decides about launching new channels. The Media Council has refused a freedom of information request on the documentation of the assessments of technological, economic, financial and media policy considerations.

Since 2012, the Media Council has been using this particular competence for comprehensively transforming the radio market in a non-transparent manner. Following the bankruptcy of a nationally broadcasting commercial channel, it assigned the set of frequencies previously used by this radio – which had been used by private radios ever since the liberalisation of the radio market in 1997 – to public service media providers, some to improve the coverage area of Kossuth Rádió, and other to launch a new station (Dankó Rádió, which broadcasts traditional Hungarian melodies). The implications of these decisions for the market went beyond their direct impact on the system of public service institutions: Market sources claim that the service provider, which is now in a monopoly position in the national commercial radio market – and also plays a key role in the sale of local radios' advertising time – has attained a dominant position in influencing prices in the radio advertising market.

Based on the definition in the law before 1 July 2015, online services were not even included in the definition of public media services. Up to that the point their public service functions and the procedures for their creation, as well as their entire legal status, were unclear. Neither on-demand media services nor other online/“new media” services are referred to in the annual decisions of the Media Council on its supervision of the public media system. Though the effective regulation has extended the notion of public service to "media contents that are accessibly online", their functions and further legal conditions are still unclear.

An amendment from 2014 added to the Hungarian Media Act a chapter entitled “Strategic Plan of the Public Service Media and the Measurement of Public Service Value”. This law requires the assessment of already existing services, and no consequences are attached to the outcome of such an appraisal. Pursuant to the Act, the public service media provider is obliged to examine and review the public service nature and value of its services as well as their impact on the diversity of the media market.

6. Further market distorting effects

The total advertising revenue of the entire Hungarian television market is roughly 50 billion HUF (according to data provided by the Hungarian Advertising Federation), while experts in the industry estimate that the revenue from cable fees amounts to around 30 billion HUF, though the sector has no precise data about this. In 2015 the total state aid for public service media – including the central government's assumption of the debt of the public service media – amounted to 117.77 billion HUF, which is 147% of the total private market revenue (parts of which we only have estimates for). Without the debt transfer, total state aid amounted to 87% of the value of private media market.

Public service media press reports suggest that in the future advertising time will be sold with the involvement of a sales house (Atmedia) that sells PSB advertising airtime together with the airtime of certain commercial media providers. The market players involved in the sales house will be at an advantage over their competitors in terms of selling their own advertising airtime because several channels with a greater joint share of the audience can offer advertisers better value and can reach certain target groups more effectively. Data published on Atmedia’s own homepage show that there has been a significant increase in the share of advertisements sold in the context of cooperations between private and public broadcasters.

The market-distorting impact of the new sports channel is especially striking. The MTVA has purchased the broadcasting rights of several major sports events. In October 2015 the state-owned only digital broadcaster Antenna Hungaria removed two popular sports channels from its package. Meanwhile, the MTVA's sports channel is available for free.

The overall viewership of public service channels increased to 17,3% in 2016Q1 as compared to 14.8% in 2015Q1.

The market-distorting impact is also apparent in the public service media's choice of where and for how much it advertises its own brand and shows. A freedom of information request has revealed that the MTVA spent 506.7 million in total on advertisements in commercial media in 2015.

IV. Relevance of the Charter of Fundamental Rights

In a situation when the funding of public service media fails to satisfy the Commission Communication’s criteria of the transparency and the monitoring of the use of public funds by an independent organisation, as well as when the business decisions of public service media have a direct influence on the situation of market competitors then there is a significant risk that Article 11 of the Charter of Fundamental Rights on press freedom is being violated. Lacking transparency in funding and a violation of independent monitoring makes public service media vulnerable to political influence. There is a significant risk that in such a funding system editorial decisions will adapt to the prevailing political expectations. And in a situation when the public service media provider makes business decisions - for example in choosing a sales house - that improve the market positions of certain market players while they have a detrimental impact on the market positions of others, then they effectively manipulate the pluralism of the media selection in the media system overall by the influencing the chances of the media outlets to reach the audience. In other words, when the funding of public service media is not mindful of considerations related to market competition, then freedom and pluralism of the media cannot be fully respected. So, in the case of the financing of public media, the application of Article 107 TEFU has a direct consequence on the implementation of Article 11 of the Charter of Fundamental Rights.

Budapest, 9th May 2016