

The Licence-Fee-Based Financing of Public Service Broadcasting in Germany after the Altmark Trans Judgment*

Christian Koenig and Andreas Haratsch**

In its Altmark Trans judgment of 24 July 2003, the European Court of Justice (ECJ) abided by its Ferring ruling and clarified its details. The judgment provides four qualified requirements that must be cumulatively met by any compensation granted by a Member State or through State resources for providing a service of general economic interest, unless it constitutes State aid within the meaning of Article 87(1) EC. This essay deals with the question whether the German licence-fee-based financing system of public service broadcasting is in accordance with the standards established by the Altmark Trans judgment.

I. The EC Concept of State aid

According to Article 87(1) EC, "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall be, insofar as it affects trade between Member States, incompatible with the common market." However, the idea of economic advantage can be ruled out if an appropriate service is provided in return for financial benefit. Nevertheless, controversial cases have emerged in which an undertaking had been entrusted with provision of services of general economic interest, receiving financial consideration in return. On the one hand, it was argued that

State funding of services of general interest would be tantamount to State aid within the meaning of Article 87(1) EC only if – and to the extent that – the economic advantage it provided exceeded a remuneration appropriate to the performance of the general interest obligations imposed.¹ On the other hand, some felt that State funding granted to an undertaking for the performance of general interest obligations would constitute State aid within the meaning of Article 87(1) EC; this might, however, be justified under Article 86(2) EC in cases where the conditions of that derogation were fulfilled, particularly if the funding complied with the principle of proportionality.²

II. The ECJ's Waste Oil and Ferring rulings

In the case of *Procureur de la République v. ADBHU*, the ECJ had already ruled in 1985 that indemnities to companies entrusted with the collection or disposal of waste oil did not constitute State aid within the meaning of former Article 92 of the EEC Treaty (now Article 87 EC) but were rather to be regarded as consideration for the services performed.³ In contrast, the ruling of the European Court of First Instance (CFI) had stated that Article 86(2) EC should be seen as an exception from Article 87(1) EC.⁴ While Article 87(1) EC was applicable to aid for undertakings entrusted with services of general economic interest, State subsidies could be justified by Article 86(2) EC. However, the ECJ came out against this CFI opinion in its Ferring judgment, linking it with the Waste Oil judgment.⁵ In the Ferring case, the ECJ ruled that an undertaking was not given undue advantage, neither was the legal ambit of Article 87(1) EC affected, if the advantages granted by the State did not exceed the costs resulting from the public service obligations.⁶ In such a case, no justification or examination of State benefits under Article 86(2) EC would be necessary.

III. The ECJ Altmark Trans judgment

This ECJ approach was subsequently criticised, as it sharply reduces the observance of the prevention stan-

* This essay is based upon a legal expertise which the author Koenig furnished on behalf of "Westdeutscher Rundfunk Köln" (West German Broadcasting Cologne).

** Prof. Dr. Christian Koenig, LL.M. (LSE) is Director of the Center for European Integration Studies at the University of Bonn, and Dr. Andreas Haratsch is Scientific Assistant at the Center for European Integration Studies at the University of Bonn, Germany, and Private Lecturer at the University of Potsdam, Germany.

1 See Pemice/Wernicke, in: Grabitz/Hilf (eds.), *Das Recht der EU*, April 2003, Article 86 EC point 95; also Opinion of AG Jacobs on Case C-126/01 GEMO SA of 30.4.2002, paragraph 94 et seq.

2 von Burchard, in: Schwarze (ed.), *EU-Kommentar*, 2000, Article 86 EC point 54.

3 ECJ, Case 240/83 *Procureur de la République v. ADBHU* [1985] ECR 531, paragraph 18.

4 CFI, Case T-106/95 *FFSA et al. v. Commission* [1997] ECR II-229, paragraph 172, 199; confirmed by ECJ, Case C-174/97 *P FFSA* [1998] ECR I-1303; CFI, Case T-46/97 *SIC* [2000] ECR II-2125, paragraph 84.

5 ECJ, Case C-53/00 *Ferring* [2001] ECR I-9067.

6 ECJ, Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 29.

dard and the principle of proportionality under Article 86(2) EC.⁷ In his opinion on the *Altmark Trans*⁸ case, Advocate General Léger came out against the Ferring judgment.⁹ Advocate General Jacobs later favoured a conciliatory approach in the *GEMO SA* case.¹⁰ He suggested that, in cases where a “direct and manifest link” between State financing and clearly defined general interest obligations could be established, an appropriate remuneration for the services provided should not constitute State aid within the meaning of Article 87(1) EC. In those cases where the link between State funding and the obligations imposed was either not direct or not manifest, or the general interest obligations were not clearly defined, State funding should constitute State aid within the meaning of Article 87(1) EC. It might, however, be justified under Article 86(2) EC.

Nevertheless, the ECJ abided by its *Waste oil and Ferring* rulings in its recent *Altmark Trans* judgment of 24 July 2003,¹¹ qualifying the requirements for non-classification as State aid according to Article 87(1) EC. In the *Altmark Trans* judgment it is expressly stated that a State measure is not subject to Article 87(1) EC if it has to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations¹². The ECJ establishes four qualified requirements that the compensation must meet in a cumulative manner to rule out its classification as State aid¹³:

“First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. [...]

Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. [...]

Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. [...]

Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”

IV. Impact on the licence-fee-based financing of public service broadcasting in Germany

1. The German licence-fee-based financing system

The characteristic features of the German financing system for public service broadcasters can only be understood in the light of German Federal Constitutional Court rulings on the German broadcasting provisions, which also comprise the financing principles.¹⁴ The rules developed by the Federal Constitutional Court for the broadcasting regulations include the rule that the State shall ensure that public service broadcasters receive sufficient funds to meet their responsibilities.¹⁵ However, another characteristic of public service broadcasting is the constitutional provision of freedom from State control.¹⁶ Hence, broadcasting must be financed in such a way that the State has no possibilities of exerting control, especially on programme design.

According to section 12 (1) subclause 2 of the Interstate Treaty on Broadcasting (“*Rundfunkstaatsvertrag*” – RStV)¹⁷ and the specifications made by the German Federal Constitutional Court,¹⁸ licence fees are the main source of income for public service broadcasters. Advertising income and other income play a much smaller role.¹⁹ Sections 1 to 7 of the Interstate

7 Cf. Communication from the Commission on Services of General Interest in Europe of 20.9.2000, OJ EC 2001 C 17/4; ECJ, Case C-202/88 *France v. Commission* [1991] ECR I-1223, paragraph 12; Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 103.

8 Opinion of AG Léger on Case C-280/00 *Altmark Trans GmbH* of 19.3.2002.

9 Cf. con: Gündel, *RiW* 2002, 222 (222 et seq.); pro: Bartosch, *NWZ* 2002, 174 (174 et seq.).

10 Opinion of AG Jacobs on Case C-126/01 *GEMO SA* of 30.4.2002, paragraph 118 et seqq.

11 ECJ, Case C-280/00 *Altmark Trans GmbH*, judgment of 24.7.2003, *NJW* 2003, 2515, paragraph 86 et seqq.

12 ECJ, Case C-280/00 *Altmark Trans GmbH* (note 11), paragraph 87.

13 ECJ, Case C-280/00 *Altmark Trans GmbH* (note 11), paragraph 89-93, 95.

14 These are mainly the eight broadcasting rulings, Federal Constitutional Court Ruling 12, 205; 31, 314; 57, 295; 73, 118; 74, 297; 83, 238; 87, 181; 89, 144; 90, 60; cf. the overview in *Beucher/Leyendecker/von Rosenberg, Mediengesetze, Kommentar*, 1999, Preamble RStV, point 3 et seqq.

15 Federal Constitutional Court Ruling 90, 60 (90 et seqq.); 87, 181 (199); 83, 238 (298); 73, 118 (158); Ricker, in: *Ricker/Schiwy, Rundfunkverfassungsrecht*, 1997, 206 et seq. (C point 74 et seq.); fundamentally: Jarass, *Die Freiheit des Rundfunks vom Staat*, 1981; Gersdorf, *Staatsfreiheit des Rundfunks in der dualen Rundfunkordnung der Bundesrepublik Deutschland*, 1991.

16 Cf. the overview in *Hesse, Rundfunkrecht*, 3rd ed. 2003, 2nd chap. point 37 et seqq.

17 Published in: *Hartstein/Ring/Kreile/Dörr/Stettner, Rundfunkstaatsvertrag, Kommentar*, April 2003, A 1.1.

18 Federal Constitutional Court Ruling 90, 60 (91); 87, 181 (200).

19 On financing in detail *Hesse* (note 16), 4th chap. point 126 et seqq., also with notes on limited advertising possibilities of public service broadcasters compared with private broadcasting; on advertising regulations for private broadcasters: *loc. cit.*, 231 et seq. (point 5.53 et seqq.).

Treaty on Broadcasting Finance ("Rundfunkfinanzierungsstaatsvertrag" – RFinStV)²⁰ serve to implement the principles established by the German Federal Constitutional Court for fixing licence fees by assessing the financial requirements of public broadcasting organisations. According to this, a three-step procedure is used to determine the licence fees, centred on an independent Commission for the Assessment of Financial Requirements of German Public Broadcasting ("Kommission zur Überprüfung und Ermittlung des Finanzbedarfs der Rundfunkanstalten" – KEF). At the first stage, the public service broadcasters report their financial requirements to KEF. At the second stage, according to section 3 (1) clause 1 of the RFinStV, KEF examines the notified financial requirements. In this context, KEF is required to maintain the programming autonomy of the broadcasting organisations. Section 3 (1) clause 2 of the RFinStV stipulates that KEF's examination focuses on whether programming decisions are within the scope of the broadcasting remit defined by law and whether the financial requirements derived were assessed appropriately and in accordance with the principles of business efficiency and thrift. Following this review, an amount is recommended for the licence fee which serves as the basis for the licence fee determined by an Interstate Treaty of the regional States ("Länder") according to section 13 (4) of the RStV. This is implemented – at a third stage – by the Länder Prime Ministers and Parliaments.

As an independent expert body, KEF ensures the freedom from State control in its assessment of fees.²¹ According to RFinStV section 4 (5) clause 1, the 16

members of KEF are appointed by the Prime Ministers of the Länder for a term of five years, with re-appointments allowed.²² The members of KEF are not restricted by remits or instructions in the performance of their tasks (RFinStV section 2 clause 2). KEF is required to submit a report to the Länder Governments at least once every two years. So far, the practice has evolved that KEF is submitting a licence fee report every four years, followed by an interim report two years later incorporating and evaluating any changes that have occurred in the meantime. KEF is currently preparing its 14th report.

2. The implementation of the four Altmark Trans requirements

The Altmark Trans judgment has made an impact on the licence-fee-based financing of public service broadcasting in Germany. However, it should be kept in mind that the financing of public service broadcasting in Germany by licence fees cannot be classified as State aid within the meaning of Article 87(1) EC, as the fees – according to the *PreussenElektra*²³ and the *Stardust Marine*²⁴ rulings of the ECJ – are neither "granted directly by the State" nor "granted by a public or private body designated [...] by the State".²⁵

However, even if it is assumed that broadcasting licence fees are granted by a Member State, the licence fees are not to be regarded as State aid within the meaning of Article 87(1) EC if the four requirements established by the ECJ in its Altmark Trans judgment are met. This is reviewed below as applied to the West German Broadcasting company ("Westdeutscher Rundfunk" – WDR).

a. Mandate with clearly defined public service obligations

Public service obligations

First of all, WDR must be entrusted with services of general economic interest. The term "public service obligations"²⁶ used in the Altmark Trans ruling corresponds to the term of the provision of services of "general economic interest" in Article 86(2) EC. The concept of general economic interest is broad.²⁷ The Commission defines services of general economic interest as market-related activities that are "services which the Member States subject to specific public service obligations by virtue of a general interest criterion."²⁸

Although the concept of service of general economic interest is an autonomous term of Community law,²⁹ the Member States have a wide margin of appreciation and discretion in defining the general economic interest of the service concerned.³⁰ According to Protocol no. 23 annexed to the Treaty of Amsterdam "on the system of Public Service

20 Published in: Hartstein/Ring/Kreile/Dörr/Stettner (note 17), A 1.5.

21 Federal Constitutional Court Ruling 90, 60 (97 et seq.); Ricker, in: Ricker/Schiwy (note 15), 206 et seq. (C point 91 et seq.).

22 This board of 16 experts combines various fields of expertise according to a precisely defined formula. According to RFinStV section 4 (4) clause 2 they comprise: three experts from the fields of auditing/business consulting, two business managers, two broadcasting law experts, three experts from the fields of media management/media science, one broadcasting engineer and five experts from the Länder Courts of Audit.

23 ECJ, Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

24 ECJ, Case C-482/99 *Stardust Marine* [2002] ECR I-4397.

25 ECJ, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58. – See in detail Koenig/Kühling, ZUM 2001, 537 et seq.; against Pelny, ZUM 2003, 643 (648).

26 ECJ, Case C-280/00 *Altmark Trans GmbH* (note 11), paragraph 89.

27 See opinion of AG de Lamoignon on Case 10/71 *Hafen von Merteit* [1971] ECR 723/732 (739).

28 Services of General Interest in Europe, OJ EC 1996 C 281/3, Communication on Services of General Interest 2000 (note 7), annex II.

29 Cf. ECJ, Case 41/83 *Italy v. Commission* [1985] ECR 873, paragraph 30; CFI, Case T-260/94 *Air Inter v. Commission* [1997] ECR II-997, paragraph 135; Jung, in: Calliess/Ruffert (eds.), *Kommentar zu EU- und EG-Vertrag*, 2nd ed. 2002, Article 86 EC point 37; Pemice/Wernicke, in: Grabitz/Hilf (note 1), Article 86 EC point 32; Schindler, CMLR 1970, 57 (70 et seq.).

30 Lecheler/Gundel, RdE 1998, 92 (93), even speak of a "definition competence" of the Member States, but that is going rather too far.

Broadcasting in the Member States³¹, and also according to opinion of the Commission³², the public remit of public service broadcasters is defined by the Member States.

The ECJ³³ and the Commission³⁴ have both fundamentally recognised that the activities of public service broadcasters are of general economic interest. The Communication from the Commission on the application of State aid rules to public service broadcasting from 2001 expressly states that it is legitimate to entrust a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience.³⁵ However, given the specific nature of the broadcasting sector, such a "wide" definition is consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.³⁶ In the Commission's opinion, the definition by the Member States need not be restricted to obliging a certain broadcaster to offer a balanced and varied broadcasting programme. The public service remit may also comprise "services" (such as online information services) that are not "programmes" in the traditional sense, to the extent that they are addressing the same democratic, social and cultural needs of the society in question while taking into account the development and diversification of activities in the digital age.³⁷

As regards the definition of public service in the broadcasting sector, the Commission's role is limited to checking for manifest errors.³⁸ The definition of the public service remit would, however, be obviously wrong if it included activities like e-commerce, for example, that could not reasonably be considered as meeting the democratic, social and cultural needs of society.³⁹

WDR's remit is defined in section 3 (1) of the WDR Act⁴⁰ as "the production and distribution of audiovisual performances of all kinds, intended for the public, using electromagnetic frequencies without connecting lines or along or by means of a conductor." According to section 3 (2) clause 2 of the WDR Act, the broadcasting organisation is obliged to provide an equal service to the whole of North Rhine Westphalia.

This obligation assignment is supplemented by a provision in section 4 of the WDR Act. According to this provision, WDR is obliged to produce and distribute broadcasting as a medium and part of the process of forming free opinion, and also as a public concern. In its broadcasts, WDR shall provide comprehensive insight into international and national events in all major spheres of life. Its programmes shall serve to inform, educate and entertain. It shall provide culture, art and programmes offering advice. The programme of broadcasts has to take into account the regional

structure and cultural plurality of the relevant geographical area. The new section 11 of the Interstate Treaty on Broadcasting (RStV), incorporated in the Interstate Treaty on Broadcasting by the Seventh Amendment of the Interstate Treaty on Broadcasting of 26 September 2003⁴¹, gives a similar definition for the public service broadcasting remit. According to RStV section 11 (1), public service broadcasting shall serve as a medium and factor of the process of forming free, individual and public opinion by producing and distributing radio and television programmes. In this context it must provide a comprehensive insight into international, European, national and regional events in all major spheres of life. (RStV section 11 (2) clause 1). Its programmes shall serve to inform, educate, advise and entertain and, in particular, provide cultural offerings (RStV section 11 (2) clauses 2 and 3). While executing their remit, public service broadcasters must observe the principles of objective and unbiased reporting, plurality of opinions and ensure balance in its offerings and programmes (RStV section 11 (3)).

According to section 4 (3) of the ARD Interstate Treaty⁴², the regional broadcasting organisations allied in the Association of Regional Public Service Broadcasting Stations in Germany ("Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands" – ARD) are entitled to offer sponsor-free media services according to section 2 (2) no. 4 of the Interstate Treaty

31 Protocol on the System of Public Service Broadcasting in the Member States, OJ EC 1997 C 340/1, 109.

32 Communication from the Commission on the application of State aid rules to public service broadcasting of 15.11.2001, OJ EC 2001 C 320/5, paragraph 33.

33 ECJ, Case 155/73 *Sacchi* [1974] ECR 409, paragraph 15.

34 Commission ruling of 24.2.1999, State Aid NN 70/98, *Kinderkanal and Phoenix*, 10; also Commission ruling of 14.12.1999, State Aid NN 88/98, *BBC News 24*, paragraph 52; recently in detail in *Broadcasting State Aid Communication* (note 32), paragraph 28 et seqq.

35 *Broadcasting State Aid Communication* (note 32), paragraph 33.

36 *Broadcasting State Aid Communication* (note 32), paragraph 33.

37 *Broadcasting State Aid Communication* (note 32), paragraph 34.

38 *Broadcasting State Aid Communication* (note 32), paragraph 36; see also ECJ, Case C-67/96 *Albany International BV* [1999] ECR I-5751, paragraph 107; also Case C-202/88 *France v. Commission* [1991] ECR I-1223, paragraph 12; Case C-157/94 *Commission v. Netherlands* [1997] ECR I-5699, paragraph 38 et seqq.; explicitly *Commission Communication on Services of General Interest 2000* (note 7), paragraph 22, and *Opinion of AG Léger of 10.7.2001*, Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 162.

39 *Broadcasting State Aid Communication* (note 32), paragraph 36. – In this context, the Commission points out that the definition of the public service remit must not be confused with the question of the financing mechanism chosen to provide these services. While public service broadcasters are allowed to perform "commercial activities" (e.g. sale of advertising space) in order to obtain income, such activities cannot – in the Commission's opinion – be viewed as part of the public service remit.

40 Gesetz über den „Westdeutschen Rundfunk Köln“ (WDR Act), in the version announced on 25.4.1998, GV.NRW 265, last amended by the 10. Rundfunkänderungsgesetz of 17.6.2003, GV.NRW 2251.

41 According to Article 6 (2) the Seventh Amendment of the Interstate Treaty on Broadcasting shall become effective on 1.4.2004 after ratification by the Länder.

42 ARD Interstate Treaty of 31.8.1991, last amended by the Seventh Amendment of the Interstate Treaty on Broadcasting of 26.9.2003.

on Media Services,⁴³ i.e. including on-line services with programme-related contents. Section 3 (3) clause 2 of the WDR Act also authorises WDR to offer new services while using new technologies. According to section 4 (2) of the ARD-Interstate Treaty and section 3 (7) of the WDR Act, the regional broadcasting organisations (including WDR) are authorised to publish printed works with predominantly programme-related contents, if this is necessary to fulfil its tasks.⁴⁴ The new RStV section 11 also contains similar provisions. In subsection (1) clause 2 it rules that public service broadcasters may offer printed works to accompany programmes and media services with programme-related contents. In the official reasons to RStV section 11, it is expressly stated that if public service broadcasters exercise their right to offer printed works and media services, they are acting within the framework of their lawful remit as specified by the Member States in the Amsterdam Protocol. Information may be admitted that goes further than programme previews and the reproduction of programme contents and be relevant to the principles and framework conditions of programme activities, programme design, the structure, operation or people working for the organisation. While characteristic media features must be covered in the offering of media services, specific economic objectives may not be pursued. Regarding WDR's participation in film and TV production companies, the WDR Act provides in section 3 (8) that the WDR may co-operate with third parties for the creation and economic exploitation of broadcasting productions and may participate in other undertakings for this purpose. Section 45 (1) no. 1 of the WDR Act states this in more precise terms, namely that WDR may participate in an undertaking that has a commercial or other economic purpose, "if this is part of its lawful tasks."

Thus, public service broadcasters in Germany have the mandate to provide services of general economic interest within the meaning of the first requirement established by the ECJ in its *Altmark Trans* judgment.

Act of mandate

The ECJ stipulates that the undertaking must be expressly entrusted with a public service obligation.⁴⁵ For this, the principles developed in the context of Article 86(2) EC may be applied as appropriate. The Commission has observed that "the public remit should be entrusted to [...] undertakings by means of an official act"⁴⁶ In its earlier judgments on Article 86(2) EC, the ECJ also established certain requirements for the act of mandate. Accordingly, looking at only the activities of an undertaking in the public interest cannot be deemed a sufficient criterion, even if the undertaking's activities are monitored by public bodies.⁴⁷ What is required is a sovereign act,⁴⁸ passed by the Member State or by the territorial authorities of its federal units or by other sovereign bodies,⁴⁹ to specify certain public service obligations. This act must be conferred upon a specific undertaking.⁵⁰

WDR has been entrusted with certain tasks by Interstate Treaties and by WDR Act. This assignment of obligations by law formally meets Community law requirements for the act of mandate.⁵¹

Clarity of definition

The ECJ has also demanded that the public service obligations be clearly defined.⁵² Only when the remit to be performed has been clearly specified can an assessment be made later whether or not the allocated funds could be deemed to be adequate for this purpose. In its Broadcasting State Aid Communication, dating from 2001, the Commission specified that the public remit should be defined as precisely as possible.⁵³ This definition needs to indicate whether or not the Member State wants to incorporate a particular activity of the respective organisation in the public remit.

The assignment of WDR's tasks and remit, which is affected by RStV section 11 and by sections 3 and 4 of the WDR Act, has the clarification necessary. Section 3 (1) of the WDR Act offers a very precise definition of the WDR tasks, which consist of the production and distribution of audio-visual performances of all kinds, intended for the public, using electromagnetic frequencies without connecting lines or along or by means of a conductor. According to section 3 (2) clause 2 of the WDR Act, the broadcasting organisation is obliged to provide an equal service over the entire Land of North Rhine Westphalia. This mandated task is supplemented by the remit of the new section 11 of the RStV and by section 4 of the WDR Act. As is the case in any piece of legislation,

43 Interstate Treaty on Media Services in the version of the Sixth Amendment of the Interstate Treaty on Broadcasting, the Interstate Treaty on Broadcasting Finance and the Interstate Treaty on Media Services (Sixth Amendment of the Interstate Treaty on Broadcasting); effective since 1.7.2002.

44 Cf. e.g. Denninger, ZUM 1987, 479 (481); Jarass, *Online-Dienste und Funktionsbereich des Zweiten Deutschen Fernsehens*, 1997, 41; Degenhart, *Der Funktionsauftrag des öffentlich-rechtlichen Rundfunks in der „Digitalen Welt“*, 2001, 43 et seqq.

45 ECJ, Case C-280/00 *Altmark Trans GmbH* (note 11), paragraph 89.

46 Broadcasting State Aid Communication (note 32), paragraph 40.

47 ECJ, Case 172/80 *Züchner v. Bayerische Vereinsbank* [1981] ECR 2021, paragraph 7; Case 7/82 *GVL* [1983] ECR 483, paragraph 29 et seqq.

48 ECJ, Case 127/73 *BRT II* [1974] ECR 313, paragraph 19/22; Case 172/80 *Züchner v. Bayerische Vereinsbank* [1981] ECR 2021, paragraph 7.

49 See Hochbaum, in: von der Groeben/Thiesing/Ehlermann (eds.), *Kommentar zum EU-/EG-Vertrag*, 5th ed. 1997, Article 90 EC point 57 with note 258.

50 ECJ, Case 7/82 *GVL* [1983] ECR 483, paragraph 31.

51 Also Pelny, ZUM 2003, 643 (651).

52 ECJ, Case C-280/00 *Altmark Trans GmbH* (note 11), paragraph 89.

53 Broadcasting State Aid Communication (note 32), paragraph 37.

this remit is worded in a general and abstract manner, but still remains sufficiently precise. It enables the bodies that discharge the remit and monitor its performance to clearly determine the scope and range of this remit and of the actions required.

b. Prior, objective and transparent establishment of parameters for calculating compensation

According to the ECJ, compensation does not constitute State aid if, and only if, the parameters for its calculation have been established in advance in an objective and transparent manner.⁵⁴ The calculation process for compensation must be carried out by an independent body and the method applied must be open and plausible.

As public service broadcasting is fundamentally free from State control, this also means that programme control or design cannot be allowed to have any direct or indirect influence on determining the licence fee level. In the interests of fee-paying users, the German Federal Constitutional Court has found it necessary to impose external controls on the determination of the financial requirements of public service broadcasters.⁵⁵ Hence, under German Federal Constitutional Court case law, when assigning these review and determination tasks to a body of experts, lawmakers are obliged to specify its task, composition and procedure and also to ensure the independence of its members.⁵⁶ The provisions of the Interstate Treaty on Broadcasting Finances meet these requirements by prescribing in RFinStV section 2 that an independent Commission for the Assessment of Financial Requirements of German Public Broadcasting (KEF) should be appointed, to be composed of 16 independent experts – as set down in RFinStV section 4 (1). KEF's tasks (RFinStV section 3) and procedures (sections 5 and 6) are laid down in the Interstate Treaty on Broadcasting Finance. These provisions already take into account the objective determination of compensation parameters stipulated by the ECJ's *Altmark Trans* decision.

In RStV Section 13 (3) it is specified that a "high degree of objectivity" should be achieved when reviewing and assessing the financial requirements. This can be interpreted as an express remit for KEF to design its procedures according to objective criteria and methods.⁵⁷ Together with the German public service broadcasters, KEF has jointly developed a method of assessing the financial requirements of public service broadcasters. The technical implementation of this so-called "Index-based Integrated Review and Calculation Procedure" (IIVF) is specified in a manual of procedures, which describes the individual IIVF steps for application in public service broadcasting undertakings, and even includes forms.⁵⁸

Briefly, the IIVF procedure has the following systematic steps:

1. Preparation of data sources:
 - a) Transformation of data from the accounts of public service broadcasters into basic figures for a projection of existing programmes
 - b) Calculation or selection of price increase rates and their application for the projection of individual expense categories
2. Main step A: Determination of financial requirements for expenses related to existing programmes
3. Main step B: Determination of financial requirements for development
4. Main step C: Reduction of financial requirements due to observed business efficiency and thrift potentials
5. Supplementary step D: Determination of financial requirements to reduce any cover gaps in funds for company pension schemes
6. Supplementary step E: Determination of non-licence fee proceeds
7. Supplementary step F: Correction of previous planning assumptions as a result of target/performance comparisons
8. Supplementary step G: Deduction of additional own creditable funds from financial requirements
9. Supplementary step H: Possible corrections due to adjustments related to existing programmes
10. Interim result: Determination of financial requirements to be met by licence fees
11. Supplementary step I: Determination and deduction of expected licence fee proceeds
12. Result: Determination of surplus or deficit.

Based on the amount recommended by KEF, the broadcasting licence fee is then determined in an Interstate Treaty of the Länder according to section 13 (4) of the Interstate Treaty on Broadcasting. According to German Federal Constitutional Court case law, the political bodies may only deviate from the financial requirements identified by KEF through invoking reasons that are in line with the freedom of broadcasting. Any potential deviations must be justified.⁵⁹ Hence, the determination of financial requirements by KEF does in fact have a binding effect.⁶⁰

54 ECJ, Case C-280/00 *Altmark Trans GmbH* (note 11), paragraph 90.

55 Federal Constitutional Court Ruling 90, 60 (102 et seq.); Libertus, in: Hahn/Vesting (eds.), *Kommentar zum Rundfunkrecht*, 2003, RStV section 13 point 27.

56 Federal Constitutional Court Ruling 90, 60 (103).

57 Libertus, in: Hahn/Vesting (note 55), RStV section 13 point 97.

58 KEF, *Feststellung des Finanzbedarfs der Rundfunkanstalten auf der Grundlage des Indexgestützten Integrierten Prüf- und Berechnungsverfahrens (IIVF)*, 21.2.2003, part 2, *Verfahrensheft (Rules of Procedure)*, point 32 et seqq.

59 Federal Constitutional Court Ruling 90, 60 (103 et seq.).

60 Also Hartstein/Ring/Kreile/Dörr/Stettner (note 17), RStV section 13, paragraph 100.

Both the individual steps of the IIVF procedure and the parameters to be applied are specified in advance and are therefore objective and plausible. The standards employed are objective standards that do not depend on subjective views of either KEF or the broadcasting organisations. Thus, the determination of financial requirements for existing programmes is calculated on the basis of a chosen base year. Programme expenses are extrapolated on the basis of a specially calculated "broadcasting-specific price increase rate". This procedure is comparable to that used by the German Federal Statistics Office for calculating the private cost-of-living index.⁶¹ It is based on a broadcasting-specific basket of commodities containing both elements primarily found in the broadcasting sector (and therefore to be projected with broadcasting-specific price increase rates) and also elements that are subject to general price development. The identified expenses for a base year are given proportionate weightings relative to total programme expenses. This generates insights into the actual cost structure for public service broadcasters. The projection of the personnel expenses of public service broadcasters (including pension schemes) is orientated towards forecasts of Länder personnel expenditure increases.⁶² Other material expenditure is projected using the GDP deflator.⁶³

As a benchmark for reasonable investment requirements, the IIVF incorporates an investment quota derived from the existing share of investments in financial requirements. The investment quota is calculated on the basis of the performance results of broadcasting organisations over the previous eight years as an average share of actual investment expenses in the adjusted total expenditure of these organisations.⁶⁴ The determination of financial requirements for new ventures ("projects") is calculated according to a "checklist method" developed by KEF in agreement with the public service broadcasters.⁶⁵ Examination of whether the activities of public service

broadcasters accord with the principles of business efficiency and thrift is based on evidence that the broadcasting corporations compile in a report ("Quantitative Evidence of Business Efficiency and Thrift" – QNWS).⁶⁶ In this report the individual expenditure categories of cost centres (personnel, programme and material expenses) for existing programmes of a base year are projected according to their respective rates of increase. The resulting index-based expenses are then compared with the notified expenses of the public service broadcasters for each cost category. If the notified values fall below the index values, this points to business efficiency effects. In the context of QNWS, key indicators are used to indicate the development of business efficiency.⁶⁷ These key indicators and their developments highlight potential savings and income improvements, and this generally leads to further analyses being made, from which measures are derived to improve business efficiency.⁶⁸

The supplementary steps in the procedure also use objective parameters that have been established in advance. Thus, the public service broadcasters' cover funds serve to safeguard company pension schemes for ARD staff members according to the "old" pension rulings and to close the existing "cover gap" (difference between pension reserves and the existing cover funds) successively by 2016.⁶⁹ Besides that, the corrections of earlier planning assumptions, made after target/performance comparisons, are based on objective parameters (e.g. GDP deflator).⁷⁰ The forecast rates for expenditure on programmes, materials and personnel, together with the number of fee-payers assumed for licence fee planning, are compared with the corresponding performance data.⁷¹

c. Compensation must equal net additional costs

Moreover, according to the principles of the Altmark Trans judgment, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking account of the relevant receipts and a reasonable profit for discharging these obligations.⁷²

Additional cost principle

Like the Ferring judgment, the Altmark Trans ruling is based on the additional cost principle. Hence, the focus is on the "additional costs" incurred by an undertaking as a result of imposed public service obligations.⁷³ However, the additional cost principle is obviously tailored to undertakings that primarily engage in commercial activities and are additionally entrusted with services of general interest in the context of public service obligations. Hence, the additional cost principle is not applicable to the public service broadcasting companies that provide services of general interest exclusively.

61 KEF, IIVF, Rules of Procedure (note 58), point 49 et seq.

62 Cf. KEF, IIVF, Rules of Procedure (note 58), point 52 et seqq.

63 Cf. KEF, IIVF, Rules of Procedure (note 58), point 68 et seqq.

64 KEF, IIVF, Rules of Procedure (note 58), point 79.

65 For the checklist method cf. KEF, IIVF, Rules of Procedure (note 58), point 91 et seqq.

66 KEF, IIVF, Rules of Procedure (note 58), point 98 et seqq.

67 Cf. Report of the ARD/ZDF study group "Kennzahlen" (key indicators) of 24.6.1999.

68 KEF, IIVF, Rules of Procedure (note 58), point 122.

69 KEF, IIVF, Rules of Procedure (note 58), point 124.

70 KEF, IIVF, Rules of Procedure (note 58), point 130, 140.

71 KEF, IIVF, Rules of Procedure (note 58), point 132 et seq.

72 ECJ, Case C-280/00 Altmark Trans GmbH (note 11), paragraph 92.

73 ECJ, Case C-53/00 Ferring [2001] ECR I-9067, paragraph 29; Case C-280/00 Altmark Trans GmbH (note 11), paragraph 86 and 87.

Sections 3 and 4 of the WDR Act provide the public service broadcasters with a comprehensive mandate to stage and distribute broadcasting productions as a medium and factor of the process of forming free opinion and as a public concern. The programme is required to integrate the major political, ideological and social powers and groups in the relevant geographical area in the performance of these tasks with personal responsibility. It shall provide comprehensive insight into international and national events in all major spheres of life, serve to inform, educate and entertain, provide programmes on culture, art and advice and shall take into account the regional structure and cultural plurality of the relevant geographical area. This remit is not imposed as a surplus to a programme that would have been provided without finance from licence fees. The aim is rather to provide a programme in line with certain constitutionally specified quality requirements. The Commission considers that such a wide mandate for a broadcaster is legitimate.⁷⁴

Furthermore, any "additional" services mandated to public service broadcasters would be very difficult to determine if the specifications were of a purely qualitative nature. One would have to try to determine the difference between a broadcasting programme that did not yet meet the requirements of balance and a programme that meets the specified requirements. In the case of public service broadcasters, it is virtually impossible to calculate trigger costs for the latest additional production unit which would not be offered or produced without the compensation connected with the mandate. Therefore the additional cost test is not applicable to public service broadcasters.

Net cost principle

The net cost principle is clearly expressed in the Altmark Trans ruling. The compensation cannot exceed the costs incurred in the discharge of services minus the relevant receipts.⁷⁵ All the other advantages conferred by the discharge of services must also be taken into account.⁷⁶ Nevertheless, for determining the adequacy of compensation one should also look for an adequate return on the invested capital.⁷⁷

In the context of KEF's determination of the financial requirements of public service broadcasters, the net costs are assessed in accordance with these requirements. Non-licence fee proceeds are deducted from the requirements in supplementary step E of the IIVF. Moreover, deductions are made from the financial requirements for creditable own funds in supplementary step G. Added to that, licence fee backflows from the regional media authorities (resulting from their unused funds) are deducted from the public service broadcasters' financial requirements. The same goes for proceeds that – in the case of WDR, for example – are paid by Bavaria Film GmbH to the broad-

casting organisation through Westdeutsche Rundfunkwerbung GmbH (WWF). KEF's review is even stricter than the analysis specified in the ECJ's Altmark Trans ruling, as KEF takes no account of an adequate return on the invested capital when determining the financial requirements of public service broadcasters.

d. Objective cost comparison (benchmarking) with a "typical well-run undertaking"

Necessity of a benchmarking analysis

If the undertaking entrusted with public service obligations is not chosen by a public procurement procedure, the ECJ requires, as a fourth compensation requirement of the Altmark Trans ruling, that the level of compensation must be determined by an analysis of the costs that would have been incurred in discharging these obligations by an average ("typical") well-run undertaking that meets the necessary public service requirements.⁷⁸

This fourth requirement constitutes a clear decision in favour of objective cost benchmarks. The Ferring judgment had still left the question open whether or not the subjective (actual) costs of the undertaking discharging the obligations could be refunded.⁷⁹ Now it seems that the ECJ has established an objective benchmark – that of a "typical well-run" undertaking. For, even in the case of other exchange transactions between the public and private sectors, the real costs that have, or will be, incurred by the undertakings providing the services cannot be charged; only the usual market prices are admitted ("market economy test").⁸⁰ However, the ECJ does not require a comparison with an ideal undertaking but rather a comparison with a typical well-run undertaking. In any case, a benchmarking analysis is needed.

Applicability to public service broadcasters

However, it is questionable whether this benchmarking analysis specified in the fourth Altmark Trans requirement is feasible for public service broadcasters and can be effectively applied. Regarding the provision of services of general economic interest, as in the case of public service broadcasters it is often not possible to make a real comparison with a typical well-run

74 Broadcasting State Aid Communication (note 32), paragraph 33.

75 ECJ, Case C-280/00 Altmark Trans GmbH (note 11), paragraph 92, 93.

76 Koenig/Kühling, EWS Vol. 3/2003, Die erste Seite (The first page), and by the same authors, ZHR 2002, 656 (680 et seqq.).

77 ECJ, Case C-280/00 Altmark Trans GmbH (note 11), paragraph 92.

78 ECJ, Case C-280/00 Altmark Trans GmbH (note 11), paragraph 93.

79 Nettesheim, EWS 2002, 253 (262 et seqq.), rightly points this out; cf. also Kühling/Wachinger, NVwZ 2003 (to be published soon).

80 See Koenig/Kühling/Ritter, EG-Beihilfenrecht, 2002, 43 et seqq.

undertaking that is fully exposed to competitive pressure (and hence cost pressures) and has a similarly wide variety of programme offerings. Securing such services within the wide spectrum of the public service remit (i.e. including offerings of programmes that do not appeal to the masses but are cost-intensive and of a high quality standard) is largely unique to public services, or at least not paralleled by private broadcasters.⁸¹ Therefore it is very doubtful whether it would be feasible to apply the fourth Altmark Trans requirement to public service broadcasters.

Restriction to comparison with public service broadcasters

Despite these doubts, it will be examined below whether the criteria of the fourth Altmark Trans requirement is being met by public service broadcasters, and whether the KEF method of assessing the financial requirements of public service broadcasters corresponds to the required benchmarking analysis focusing on the objective costs (i.e. on the analytical basis of simulated competition). At this point, the question arises whether the cost structures of other public service broadcasters only should be used as a benchmark, or the cost structures of private broadcasters. At first, it seems obvious to consult comparative prices from markets where competition exists. Partly, the literature holds that KEF should base its assessment of business efficiency and thrift on the cost structures of private broadcasters or on benchmarking results.⁸² Yet, the unique nature of public service broadcasters and the specific quality aspect of the services they provide restrict the search for suitable benchmark parameters to the public service broadcasting sector. In this context, the only typical, well-run comparable companies – according to the fourth Altmark Trans requirement – are the public service broadcasters.

In some areas of examining and determining financial requirements KEF is indeed already using the benchmarking method. When using key indicators for

the development of business efficiency as part of the QNWS analysis, KEF is comparing these figures with reference values, which can either be time-series comparisons for one broadcasting organisation or comparisons with other public service broadcasters or undertakings in the same industry. Examples are taken from organisations or undertakings that use the “best practices” in the relevant segments and should serve as role models.⁸³ According to the IIVF, determination of public service broadcasters’ financial requirements for existing programmes is achieved by using index-based projections with an orientation towards market prices.⁸⁴ If no suitable benchmarks are available, the public service broadcasters’ financial requirements have to be identified using an analytical cost model,⁸⁵ that models the objective costs that are expected to arise under (simulated) competitive conditions in the relevant markets for the provision of a particular service.⁸⁶ The key issue of this examination is whether the costs of the service offered correspond to the principles of average (“typical”) business efficiency and thrift on the market.

Public service broadcasters are obliged by law to make efforts to improve their business efficiency and thrift (cf. RStV section 13 (1) and section 39 (2) clause 1 of the WDR Act). RFinStV Section 3 (1) clause 2 obliges the KEF examination to investigate whether the notified financial requirements of public service broadcasters have been assessed in accordance with the principles of business efficiency and thrift. According to general opinion, the underlying definition of business efficiency comprises the so-called “minimum principle”, which means that a specified goal must be reached with a minimum of means; there is also the so-called “maximum principle”, according to which a maximum benefit must be achieved from a specified amount of funds.⁸⁷ A strict benchmark should apply, which is based on an average (“typical”) cost-efficient discharge of services. However, business efficiency and thrift monitoring must not undermine the broadcasting organisations’ freedom to make programme decisions.⁸⁸ KEF’s review meets these requirements. The business efficiency and thrift potential determined by KEF on the basis of QNWS⁸⁹ reduces the financial requirements of the broadcasting organisations and is therefore deducted from the total of the index-based projection of existing programmes and recognised development projects.⁹⁰ As KEF does not take an adequate return on the invested capital into account when determining the financial requirements of public service broadcasters, its review procedure so far has proved to be even stricter than the analysis demanded in the ECJ’s Altmark Trans ruling. Experience shows that KEF’s assessment of financial requirements notified by public service broadcasters has regularly resulted in financial reductions.

81 See also Libertus, in: Hahn/Vesting (note 55) RStV section 13 point 51.

82 Hartstein/Ring/Kreile/Dörr/Stettner (note 17), RStV section 13 point 47.

83 KEF, IIVF, Rules of Procedure (note 58), point 121.

84 Cf. KEF, IIVF, Rules of Procedure (note 58), point 46 et seqq.

85 Cf. Stamm, Die Entgeltregulierung im Telekommunikationsgesetz, 2001, 174 et seqq.; Vogelsang, MMR 1998, 594 et seqq.

86 In its Chronopost ruling the ECJ specifies that, if a real benchmark is lacking on the market, the “normal market conditions” should be identified using available objective and verifiable factors; ECJ, Joined Cases C-83/01 P, C-94/01 P and C-94/01 P Chronopost et al., judgment of 3.7.2003, EuZW 2003, 504 paragraph 38.

87 Lehment, ZUM 1994, 617 (622 et seq.); Libertus, in: Hahn/Vesting (note 55), RStV section 13 point 36, von Amim, Wirtschaftlichkeit als Rechtsprinzip, 1988, 49 et seq.

88 Libertus, in: Hahn/Vesting (note 55), RStV section 13 point 37.

89 See above note 66.

90 KEF, IIVF, Rules of Procedure (note 58), point 119.

V. Conclusion

The licence-fee-based financing of public service broadcasters in Germany does meet the requirements of the ECJ's *Altmark Trans* ruling and does not fall within the concept of State aid according to Article 87(1) EC. Licence fees serve to discharge public service obligations that are clearly defined in advance by law. The parameters, on the basis of which compensation is assessed, are established in advance in an objective

and transparent manner. The compensation determined in advance by KEF does not exceed what is necessary to cover the costs of the services provided. The amount of compensation is determined on the basis of a benchmarking analysis of costs that would be incurred by a typical well-run undertaking entrusted with these obligations. Where reference figures are lacking for a benchmarking analysis, the refundable costs have to be calculated on the basis of an analytical cost model, which assumes an average ("typical") cost-efficient discharge of services.