



EUROPEAN COMMISSION

Brussels, 14.12.1999

SG(99) D/ 10201

Subject: State aid No NN 88/98 – UNITED KINGDOM
Financing of a 24-hour advertising-free news channel out of the licence fee by the BBC

Sir,

PROCEDURE

1. By letter dated 13 August 1997, British Sky Broadcasting Limited (hereinafter referred to as "BSkyB") addressed a letter to the Commission departments to bring to their attention the BBC's plans to launch a special interest channel dedicated to news (hereinafter referred to as "BBC News 24"). On 26 September 1997, BSKyB filed a complaint against the United Kingdom and the British Broadcasting Corporation (hereinafter referred to as "the BBC"), for infringements of Articles 81, 82, 86 and 87-88 of the EC Treaty. This decision deals only with the alleged infringement of Articles 87-88 of the EC Treaty.
2. Under Articles 81 and 82 EC Treaty (in conjunction with Article 86 (1) EC Treaty) the Commission reached the conclusion, based on an economic analysis of the situation, that the case in hand does not breach those Articles. This was communicated to the complainant by letter dated 2 October 1997.
3. Additional documentation concerning the State aid allegations was provided on several occasions by the complainant. The Commission departments, by letters dated 8 May 1998 and 1 March and 7 May 1999, requested information on the matter from the UK authorities, which provided the requested information on 1 July 1998 and 26 March and 8 June 1999. The complainant submitted additional information at a meeting with the Commission departments on 6 July 1999.

The Right Hon. Robin COOK, MP
Secretary of State for
Foreign and Commonwealth Affairs
Downing Street
London SW1A 2AL
United Kingdom

DESCRIPTION OF THE MEASURES

4. The BBC is a public undertaking within the meaning of Directive 80/723/EEC, entrusted by the State, by virtue of the “Royal Charter for the continuance of the British Broadcasting Corporation” (hereinafter referred to as “the Charter”) and of the “Agreement between Her Majesty’s Secretary of State for National Heritage and the British Broadcasting Corporation (hereinafter referred to as “the Agreement”), with the delivery of certain services under pre-defined conditions. The Charter and the Agreement were last modified and entered into force on 1 May and 25 January 1996 respectively, replacing the existing Charter and Agreement.
5. According to the Charter (Article 3), the BBC’s tasks are to provide:
 - as “public services”, sound and television broadcasting services (whether by analogue or digital means) and programmes of information, education and entertainment in the UK (“Home Services”) and abroad (“World Service”); such services are referred to in the Charter as “Public Services”;
 - subject to the prior approval of the Secretary of State, “as public services”, other services whether or not broadcasting or programme supply services; these services are referred to in the Charter as “Ancillary Services”;
 - subject to the prior approval of the Secretary of State, sound and television programmes of information, education and entertainment funded by advertisements, subscription, sponsorship, pay-per-view system or any other means of finance, whether or not for universal free-of-charge reach; these services are referred to in the Charter as “Commercial Services”.
6. In addition to the above tasks, the Charter requires the BBC to perform various activities which may be considered essential to fulfilling such tasks, such as maintaining and developing a broadcasting network, and maintaining and acquiring property, licences and rights.
7. According to Article 16 of the Charter, the BBC is granted, as financial resources, the proceeds of the Licence Revenues (a tax levied on every UK household owning a TV set and hereinafter referred to as “the licence fee”).
8. The Agreement, in turn, specifies the content of the broadcasting obligations mentioned in the Charter. For example, according to Clause 2, the Home Services consist of:
 - two television programmes available for general reception in the UK;
 - five radio programmes and supplementary services available for general reception in the UK;
 - four additional radio programmes for Scotland, Northern Ireland and Wales;
 - a number of local radio programmes.

9. According to Clause 10, the BBC is granted the whole net licence fee, defined in subclause 10.4 as the licence fee received by the Government, less the amount of any refund and the expenses incurred by the Government in collecting the fee. Such amount is granted to the BBC “for the purposes of the Home Services, provided that (...) such sums shall not, without the prior written approval of the Secretary of State, be used for the purposes of any television or sound programme services wholly or partly funded by advertisements, subscription, sponsorship, pay-per-view system (...)”.
10. Subclause 10.1 also provides for the possibility for the Secretary of State to direct, from time to time, that the licence fee be used for “such purposes (not being purposes of the Home Services or the World Service) as he may specify”.
11. In accordance with the provisions of Article 3 of the Charter, by letter dated 16 September 1997 the BBC requested the Secretary of State’s approval for the launching of a 24-hour public service news channel on the analogue cable infrastructure, as an “ancillary service” within the meaning of Article 3(b) of the Charter.
12. The Secretary of State, by letter dated 9 October 1997, gave his consent to the launching of this channel as an “ancillary service”. Subsequently, by letter dated 13 October 1997, the Secretary of State authorised the BBC to use licence fee revenue to fund the new service, under subclause 10.1 of the Agreement. On the basis of this consent, on 24 November 1997 the BBC launched the BBC News 24 service on the analogue cable infrastructure and, after closing of normal transmissions, during the night on the free-to-air frequency of BBC1.
13. As the Secretary of State gave his consent to the launching of the service as an “ancillary service”, BBC News 24 was offered free of charge to the cable distributors and was not entitled to carry any advertising. Ancillary services are in fact to be provided by the BBC “as public services”, as specified in Article 3(b), and therefore cannot collect any market revenues. It was not included in a “must carry” tier, but was included – free of charge – in the lowest payable bouquet being offered by the cable distributors.
14. It must be noted that the Secretary of State gave, on 21 March 1997, a previous preliminary consent to the BBC to launch a public digital television service, including a 24-hour news channel. Accordingly, the BBC was already entitled to broadcast a 24-hour news channel on the digital platforms (in particular, the satellite one) which were, at that time, being developed. On this basis, the BBC started to develop its BBC News 24 channel, with a view to broadcasting it via the digital platforms being constructed. In particular, at that time, BSkyB’s digital satellite platform – by which BBC News 24 was supposed to be distributed - was expected to be launched by autumn 1997.
15. However, given that the launching of the digital satellite network was delayed from autumn 1997 to spring 1998, the BBC sought consent from the Secretary of State to launch the BBC News 24 channel on the existing broadcasting infrastructures. A preliminary consent was given to the BBC on 9 July 1997, followed by a final consent, as mentioned above, on 9 October 1997.

16. In its complaint of 26 September 1997, BSkyB alleges that:
- (i) the launching of the advertising-free and free-of-charge 24-hour news channel by the BBC on the analogue cable infrastructure, financed by the use of part of the licence fee, constitutes State aid within the meaning of Article 87;
 - (ii) the State aid is unlawful as it was not notified to the Commission in accordance with the Article 88(2) procedure;
 - (iii) the aid is incompatible with the common market as it does not fulfil any of the conditions laid down in Article 87(2) and (3); nor can it qualify for an exemption under Article 86(2) as this channel is not part of the BBC's public service tasks as defined in Article 3(a) of the Charter.
17. As far as allegation (i) is concerned, BSkyB claims that the application of the licence fee to finance BBC News 24 fulfils all the conditions set out in Article 87(1), as:
- it is granted by the State or through State resources;
 - it distorts competition, as it puts the BBC in a more favourable position than its competitors;
 - it affects trade between Member States as it damages competitors of the BBC such as BSkyB which operate both inside and outside the UK.
18. In the light of the complainant's allegations, this decision does not discuss the remit, the operations and the financing of the BBC in general. It only assesses whether the Secretary of State's decision to authorise the BBC to launch BBC News 24 and to finance it by a new application of the licence fee has to be considered State aid. If so, it analyses whether such aid could escape the ban set by Article 87(1) under any of the derogations provided for in Article 87(2) and (3) or Article 86(2).
19. This decision is without prejudice to the Commission's assessment of other (public) special interest channels in the UK or in other Member States.

ASSESSMENT OF THE MEASURES AS STATE AID

20. In order to ascertain whether a State measure constitutes aid within the meaning of Article 87(1), the Commission assesses whether it is granted by the State or through State resources, whether it distorts or threatens to distort competition by favouring certain undertakings, and whether it affects trade between Member States.
21. In the case under assessment, it has to be established whether the funds granted to the BBC for the financing of BBC News 24:
- are granted by the State or through State resources,
 - are capable of distorting competition by favouring certain undertakings or the production of certain goods, and
 - affect trade between Member States.

Presence of public resources

22. The licence fee represents an obligation, imposed by the public authorities, on all owners of a receiving appliance, irrespective of whether or not the appliance is actually used to watch the programmes of the BBC. Also, the decision to authorise the use of the licence fee to finance BBC News 24 was taken by the Secretary of State (see letter of 13 October 1997).
23. On this ground, the licence fee constitutes a mandatory fee imposed by the State, and, therefore, the funds thereby obtained constitute State funds within the meaning of Article 87(1) of the Treaty.

The favouring of certain undertakings

24. The Commission considers that any financial measure granted by the State to an undertaking which, in various forms, would mitigate the charges normally included in the accounts of the undertaking, has to be considered State aid within the meaning of Article 87. In this particular case, the licence fee constitutes a direct cash inflow for the BBC, similar to commercial revenues, for which the undertaking does not need to compete on the market. In this sense, there is no doubt that the licence fee, providing an economic and financial advantage to the beneficiary compared with other competitors not receiving the same funds, has to be regarded as favouring an undertaking within the meaning of Article 87.
25. However, the UK authorities argue that this measure does not infringe the Treaty rules, as the funds transferred to the BBC by way of licence fee – for the purposes of this decision, the ones used to finance BBC News 24 - compensate legitimate public service obligations fulfilled by the BBC. According to the UK authorities, the BBC does not gain any economic advantage from the licence fee, as these funds are intended to reimburse the costs incurred by the BBC in fulfilling its public service obligations, as defined in the Charter.
26. The Commission considers that, in accordance with the case-law of the Court of Justice, any State measure capable of putting an undertaking in a more favourable position than its competitors and having an effect on trade between Member States has to be regarded as falling under the ban in Article 87(1). However, the Treaty provides for derogations from that ban, in that State aid may be found to be compatible with the common market pursuant to Article 87(2) or (3) or Article 86(2) of the Treaty¹.

Effect on Community trade

27. The third condition to be met for State measures to fall under the provision of Article 87 is that they have a real or potential effect on trade between Member States. In the case in hand, it must be noted that BBC News 24 has been launched on the analogue cable infrastructure where several other programs are being distributed.

¹ See Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229.

28. In particular, BBC News 24 is in direct competition with other special interest channels dedicated to news, such as SkyNews, Euronews, Bloomberg Info TV, CNN and NBC. In principle, it would be possible to argue that BBC News 24 may be in competition also with other channels distributed over analogue cable, even though they are not dedicated to news. The presence of a new channel may, in theory, influence the preferences of viewers to switch from other channels – whether dedicated to news or not – to watch the new BBC News 24 service. Also, cable distributors may possibly decide to terminate other channels – not dedicated to news – in consequence of the availability of BBC News 24.
29. However, the main distortion of trade that may be envisaged in consequence of the emergence of a new news channel free of charge and without advertising is in relation to other specialised news channels, such as the aforementioned SkyNews, Euronews, Bloomberg Info TV, CNN and NBC. The possibility, for cable distributors, to have a new channel – free of charge and without advertising – may lead to the decision to replace one or more existing news channels – for which they have to pay a subscription fee – with the new BBC channel. This circumstance has indeed been claimed by BSkyB, which has provided figures on the reduced market share of its SkyNews channel since the launching of BBC News 24.
30. It is not necessary, in order to evaluate the impact on trade between Member States, to demonstrate whether the reduction of penetration suffered by SkyNews after the launching of BBC News 24 is a direct consequence of the presence of a free-of-charge channel or not. It is sufficient to argue that the possibility for an undertaking to offer a service on conditions which cannot be matched by any other commercial operator (commercial broadcasters need necessarily either to charge a subscription fee or to carry advertising on their channels, or both) may put other undertakings in an unfavourable position. All the undertakings concerned are active on the international broadcasting market, both for the acquisition of programme rights, for the sale of programmes to cable distributors and for the sale of advertising space.
31. In addition, it must be noted that, according to the Court of Justice, for a State measure to be relevant under Article 87, a direct impact on actual trade between Member States is not necessary. It is sufficient that the measures put the recipient in a more favourable position compared with other undertakings which are competing in intra-Community trade². This is the case with BSkyB but also with Euronews, Bloomberg Info TV, CNN and NBC channels.
32. In this sense, it can be concluded that the measures under examination fulfil also the third condition described in paragraph 20 above, and therefore constitute State aid within the meaning of Article 87(1).

Compatibility with the common market

33. Having determined that the measures in question constitute State aid within the meaning of Article 87(1), the Commission has to assess whether they can be declared compatible with the common market under the provisions of Article 87(2) and (3), and of Article 86(2).

² Case 730/79 *Philip Morris v Commission* [1980] ECR 2671.

34. However, the provisions of Article 87(2) can be excluded as the aid measure does not have any social character granted to individual consumers, nor is it intended to make good the damage caused by natural disasters.
35. As for the provisions of Article 87(3)(a), (b) and (c), as regards this latter's regional aspect, the aid appears not to be given in order to promote the development of specific regions, given the variety of locations in which the BBC is present. Also, it is not aimed at promoting "the execution of an important project of common European interest" or at remedying "a serious disturbance in the economy of a Member State" within the meaning of Article 87(3)(b). Nor does the aid facilitate "the development of certain economic activities": therefore, inasmuch as the measure is being granted for the benefit of a single undertaking and is not linked to any restructuring plan, the derogation in Article 87(3)(c) can also be excluded.
36. In principle, a cultural derogation under Article 87(3)(d) might be envisaged, as long as the support does not affect trade between Member States to an extent contrary to the common interest. It has to be noted, however, that the UK authorities have not claimed the financing of BBC News 24 to be intended as promoting culture or national heritage. Moreover, it appears that the provision of a 24-hour news channel is aimed more at fulfilling the information needs of UK citizens than at promoting culture or national heritage within the meaning of Article 87(3)(d).
37. Where paragraphs (2) and (3) of Article 87 are not applicable, State aid may benefit from the derogation provided for in Article 86(2) in cases of undertakings entrusted with the provision of "services of general economic interest", as long as the conditions laid down in Article 86(2) are fulfilled.
38. According to Article 86(2) as interpreted by the Court, in order to qualify for exemption from the competition rules by virtue of the provision of a "service of general economic interest", certain conditions have to be met:
- the service in question must be a service of general economic interest and be clearly defined as such by the Member State;
 - the undertaking in question must be officially entrusted by the Member State with the provision of that service;
 - the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking;
 - the exemption must not affect the development of trade to an extent that would be contrary to the interests of the Community.
39. According to the established case-law of the Court, Article 86 is a derogatory provision which has to be interpreted restrictively. In this sense, for a measure to benefit from such derogation, it is necessary that all the above-described conditions are fulfilled: it is for the Commission to assess whether these criteria are fulfilled in a particular case. In the case of broadcasting, the Commission, when performing the above task, has also to take into account the "Protocol on the system of public service broadcasting", which

was adopted in June 1997 and entered into force on 1 May 1999 (hereinafter referred to as “the Protocol”).

40. The interpretative rules laid down by the Protocol, while stating that the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and the need to preserve media pluralism, underline the competence of the Member States to define the "public service (broadcasting) remit", to assign these services to certain undertakings and to organise the funding of these services.
41. More specifically, Member States have "the competence ... to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account."
42. According to the Treaty, Member States are in principle free to define the public service remit in any economic sector. For broadcasting, the Protocol has confirmed this right of the Member States to define and confer public service tasks and to provide for their funding, in so far as such funding does not affect trading conditions and competition to an extent contrary to the common interest.
43. While Member States are competent to define the public service remit, to entrust its execution to one or more undertakings and to provide for its funding, the Commission - under the control of the Court - has the duty to prevent any abuse of this competence and to ensure that such funding does not affect trade to an extent contrary to the common interest³.
44. In the case in hand, as stated above, the complainant does not contest the public service mandate of the BBC in general, as entrusted to the BBC by virtue of the Charter, but only the possibility of considering to be a public service the provision of a special interest channel dedicated to news. This fact is substantiated, according to the complainant, by the circumstance that the Secretary of State gave his consent to the BBC to launch BBC News 24 as an “ancillary service” within the meaning of Article 3(b) of the Charter, and not as a “public service” within the meaning of Article 3(a).
45. As described above (see paragraphs 9 and 10), the Charter contains the obligation for the BBC to provide, as public services, a set of radio and television programmes of information, education and entertainment for general reception. As for its financing, Clause 10 of the Agreement provides that these services are to be financed solely by the licence fee. In addition to these, the Charter ensures the possibility for the BBC – subject to explicit approval by the Secretary of State – to provide as “ancillary services” services other than those provided for in Article 3(a). As regards the funding of the ancillary services, the Secretary of State may, under subclause 10(1)(a), direct part of the licence fee to finance the provision of such services. In general, and subject to further approval by the Secretary of State, ancillary services cannot be financed by sums

³ See, for example, Case C-179/90 *Merzi convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

directed from the licence fee under subclause 10(1)(a) if they are wholly or partially funded by commercial revenues.

46. As can be deduced from the above, none of the definitions contained in the Charter refers to the concept of “service of general economic interest” within the meaning of Article 86(2) of the Treaty. Nevertheless, it is not for the Commission to pronounce on the concept used in national legislation to define the provision of such services, nor to discuss the concepts of “public service” and “ancillary service” as defined in the Charter.
47. For the purposes of this decision, it is not necessary to discuss whether the launching of BBC News 24 has to be regarded as falling under the definition of “public service”, as per Article 3(a), or under that of “ancillary service”, as per Article 3(b). It is for the Member State to define and organise the public service mission in the way that best suits the needs of its citizens. In this sense, the definition of “public service” and “ancillary service” is related to the national organisation and definition of the provision of the public service in this specific case. The Commission, as stated above (paragraphs 42 and 43), has only the duty to ensure that no abuse occurs in the definition of services which fall to be assessed under Article 86(2) as “services of general economic interest”.
48. In the case in hand, even if the provision of a special interest channel dedicated to news is not included in the basic “public service” definition as specified by the Charter and the Agreement, it has been included in the public service mission of the BBC by the Secretary of State. As stated above, as long as no abuse can be detected, it is for the Member State to define the public service remit, using any technical or legal definition that best suits the characteristics of the Member State concerned.
49. The Commission has only to assess whether the public service mission defined by a Member State does not exceed what can be regarded as “services of general economic interest” under the rules of the Treaty. In the case under examination, the Commission is of the opinion that the provision of news can be considered a public service mission in broadcasting. In particular, a 24-hour news service would help to meet the democratic and social needs of a society, as referred to in the Protocol, by allowing the coverage of a wider range of events and a more in-depth analysis of the events. Although the BBC already provides a broad coverage of news and information according to a pre-defined timetable on its public service channels BBC1 and BBC2, BBC News 24 may be considered an additional service, able to provide a more detailed analysis of events.
50. In this sense, the provision of a 24-hour news service can be considered as addressing the democratic and social needs of society by ensuring a wider coverage of news topics and providing a greater degree of depth in the analysis of events. The Commission would therefore consider that the task assigned by the UK Government to the BBC to provide BBC News 24 fulfils one of the basic tasks of public service broadcasting as identified in the Protocol.

51. Moreover, the launching of BBC News 24 has enriched the choice of 24-hour news services for consumers, thus responding to the mission – as identified by the Protocol – to preserve media pluralism, in particular in the provision of news services.
52. The Commission also notes that, when giving his consent to the launching of this service, the Secretary of State explicitly stated that the provision of a channel with the content of BBC News 24 is a public service, provided it is financed solely by the licence fee. It can be deduced from this that the UK authorities consider a channel dedicated to news, free of advertising and with a high degree of information to be "services of general economic interest" within the meaning of Article 86(2) of the Treaty.
53. The Commission cannot detect any abuse of the Member State's competence to define such public service remit, taking into account also that the specific features of the service cannot be found in services provided by private operators. None of the available existing channels, in fact, is provided free of charge and with no advertising.
54. The argument of the complainant that BBC News 24 is to be considered a commercial channel and must, therefore, be financed only with market revenues, cannot be upheld. It is not for the Commission to decide, as long as no abuse can be detected, whether a programme or service is to be provided by the market or as a service of general economic interest (according to the national definition, i.e. as a public or ancillary service) within the meaning of Article 86(2). In the case in hand, it is clear that the UK authorities consider the provision of a special interest channel entirely dedicated to news and carrying no advertising to be a service of general economic interest. More specifically, they have considered that it is to be intended as an "ancillary service" within the meaning of Article 3(b) of the Charter.
55. It must be noted that, already on 21 March 1997, the Secretary of State gave a preliminary consent to launch a 24-hour news service as an ancillary service under Article 3(b) of the Charter, as part of a new digital service, on condition that the service was offered free of charge and was not platform-specific. Such channel was intended to be also part of the new digital packages to be delivered on the digital satellite platform being developed by BSkyB. BSkyB has never lodged a complaint against the preliminary consent. It seems that BSkyB accepted the idea of such a service being developed by the BBC and being provided as a public service on its digital satellite platform.
56. It was only when the BBC decided to make the channel available on all possible platforms without awaiting the launch of the digital satellite platform – i.e. on analogue cable and on the free-to-air ones - that BSkyB contested the channel's public service nature. However, it must be stressed that the nature (i.e. the content) of the channel has not changed since the preliminary approval and that its funding agreement is exactly the same.
57. The public service nature of a service cannot be judged on the basis of the distribution platform. Once the UK Government has defined a certain service as being a public service (thereby referring to the service of general economic interest of Article 86(2)), such service remains a public service regardless of the delivery platform, as long as its programme concept and its funding arrangements remain unchanged. In the case in hand, as stated, the content of BBC News 24 was known from the very beginning, and its funding arrangement has remained completely unchanged.

58. It can also be noted that, when the digital satellite platform was finally launched, BBC News 24 was included in the package offered on the same financial terms as were offered on the analogue cable and free-to-air infrastructures, i.e. free of charge and without advertising.
59. Finally, BSkyB argues that BBC News 24 cannot be considered a public service as it is not available to the whole UK population, but instead only to a limited number of viewers (those connected to the analogue cable services, i.e. roughly 10% of all households).
60. The Commission notes in this respect that:
- the preliminary consent of 21 March, which was not contested by BSkyB, was also given for a limited distribution platform, i.e. the digital platform, which would not have been available to the whole population for a number of years;
 - BBC News 24 has been made available to the maximum number of viewers possible, taking into account the existing technical constraints (i.e. it is distributed at night on free-to-air analogue frequency, as no other frequency is available), and with the aim of distributing it to the whole population as soon as this becomes technically possible (e.g. it is distributed also on the digital satellite platform since this became available).
61. The Commission considers, therefore, that the first condition described in paragraph 38 is fulfilled in that the UK authorities – in this case the Secretary of State for Culture, Media and Sport – have defined the provision of a 24-hour news channel carrying no advertising as a service of general economic interest within the meaning of Article 86(2).
62. As far as the second condition described in paragraph 38 is concerned, it has to be noted that the Secretary of State, in his consent of 9 October 1997, approved the BBC's programme concept of BBC News 24. In this sense, it entrusted the BBC with the provision of such channel.
63. In this respect, it may be questioned whether the public service remit is, in the case of BBC News 24, accurately defined and actually assigned to the BBC as an obligation. In order to pronounce on this, it is necessary to look at the wording of the Charter and of the Agreement. In particular, Article 3 of the Charter requires the BBC to provide public services, ancillary services and commercial services. As far as the public services are concerned, these are detailed in the Agreement, whereas no details are provided for the ancillary and commercial services. The Charter simply requires, for the provision of these services, prior approval of the Secretary of State.
64. In the Commission's opinion, it can be deduced from the logic of the Charter that the BBC seems to be under an obligation to provide some sort of ancillary service; nonetheless, no further details as to what these ancillary services are to be are available. The content of the ancillary services is defined neither in the Charter nor in the Agreement.

65. Therefore, although the BBC is under an obligation to provide ancillary services, these are nowhere defined. For this reason, the BBC has to seek the Government's consent for the provision of such services. At the same time, the funding of such services has to be arranged by the Government by means of a specific authorisation. In the case of BBC News 24, the Secretary of State, in his letter of 13 October 1997, decided to direct sums from the licence fee to the funding of the new service.
66. In this sense, the BBC has a limited degree of freedom in deciding which services to provide as ancillary services, as any proposal has to be formally authorised by the UK Government. It is not sufficient to argue, as the complainant does, that the provision of a special interest channel dedicated to news cannot be considered a service of general economic interest, for the mere reason that it is not included among the basic “public services” provided for in Article 3(a) of the Charter.
67. In order to assess whether a service fulfils the conditions described in paragraph 38 for being considered a “service of general economic interest”, it is not sufficient to take a merely formalistic view of the act entrusting an undertaking with such mission. It is necessary to evaluate the whole body of legislative and administrative provisions related to the definition of the public service remit and to the entrustment of that service to an undertaking.
68. In the case in hand, it is clear that the Charter includes the obligation to provide public services in addition to the “basic” services defined in Article 3(a) of the Charter and in the Agreement. However, in order to actually provide such additional services, the BBC requires the explicit consent of the UK Government. All such conditions have been fulfilled in the case in hand, given that the BBC sought the consent of the public authorities and that such consent was given by an official act (the letters of 9 and 13 October 1997).
69. However, the Commission notes that the legislative and administrative framework defining the public service mission and entrusting it to the BBC leaves some room for doubt as to what is defined as a public service and what is not. In particular, it notes that no clear definition of which services can be provided by the BBC as ancillary services is available. Also, it appears that, initially, it is for the BBC to propose to the Secretary of State new services that may possibly be provided as ancillary or commercial services. It is only subsequently that the Government, through the giving or withholding of consent by the Secretary of State, may or may not entrust the provision of that service to the BBC.
70. Notwithstanding this, for the purposes of assessment under Article 86(2), the ways and means by which the entrustment of the public service is made – e.g. whether the initiative comes from the Government, from the Secretary of State or from any other authority - are not decisive. What is decisive in this respect is the fact that, eventually, there is an official entrustment to the BBC of the task of providing a specific public service.

71. Therefore, even if the arrangements between the BBC and the UK Government could be made clearer and a more straightforward definition of the remit would have facilitated the Commission's task of monitoring compliance with the conditions of Article 86(2), the Commission considers that the second condition of Article 86(2), as described in paragraph 38, is met.
72. As far as the third condition indicated in paragraph 38 is concerned, it has to be examined whether the State aid is actually necessary for the purpose of having the "services of general economic interest" carried out and whether the amounts do not exceed the necessary level.
73. In the case in hand, the Secretary of State defined BBC News 24 as being part of BBC's public service remit on condition that the channel does not contain any advertising and that consumers (and cable operators) are not charged for it. As a result of these conditions, BBC News 24 is not able to raise funds on the market like a commercial broadcaster. This particular arrangement makes the service provided by BBC News 24 a unique service in the market place, as no other operator is capable of providing the same service on the same financial terms.
74. In other words, in the absence of any possible commercial income, the production of BBC News 24 in the form requested by the State authorities would not have been financially possible without the transfer of public funds. Being unable to charge cable operators any fee (as commercial operators normally do), or to carry advertising, the only funding source available – for the explicit requirement set by the public authorities in the entrusting act – is public funding derived from the licence fee. Therefore, prohibiting these funds would make the performance of the particular task *de facto* impossible.
75. As regards the question whether the funds transferred are limited to the channel's actual costs, the UK authorities have provided figures on the actual costs incurred in providing the service, as reported in Exhibit 1.

Exhibit 1: BBC News 24 costs (GBP millions)

	1997/98	1998/99	1999/2000 (budget)
Commissioning and programming
News gathering
Promotion
Distribution and transmission
Overhead
TOTAL

Source: BBC's internal accounting

76. The above amounts refer to the fiscal periods ending in March each year and have been certified by external auditors. It should be noted that the costs for 1997/1998 refer only to five months, as the service was launched in November 1997.

77. The lion's share of the above costs relates to internal transactions put in place by the Business Unit BBC News 24 and other Business Units within the BBC for the use of facilities such as news bureaux, which have been charged at full cost. Such costs, whether internal or external, are covered using a proportionate amount directed from the licence fee.
78. The Secretary of State's consent of 13 October 1997 allows the BBC to use part of the licence fee to cover the cost of the BBC News 24 service. It did not provide for any increase in the total amount of the licence fee itself to raise the funds necessary for the launching and operation of BBC News 24. As a result, the BBC has to obtain the funds needed to set up and run the new service from its own internal resources, through cost savings.
79. As explained in paragraphs 7 to 9, the BBC is funded by a flat-rate licence fee levied on all TV appliances. With the funds thereby collected, the BBC has to discharge all the public service obligations set out in the Charter and in the Agreement, as described in paragraphs 5 and 6. In practice, the Secretary of State has imposed a new public service task on the BBC (the provision of a 24-hour news service), without providing any new funding to it. It is for the BBC to obtain such funds through internal measures, such as restructuring, rationalisation of activities and cost saving.
80. As mentioned in paragraph 9, the BBC is not entitled to collect market revenues from its public service activities (whether from the “public service”, or from the “ancillary services”). For this reason, the licence fee is designed to cover the cost of discharging the public service obligations imposed upon the BBC by the Charter and under the Agreement.
81. The same principle applies to the new public service obligation imposed upon the BBC of providing a 24-hour news channel. This new service is entitled neither to charge cable operators a fee nor to collect advertising revenues. The funds needed to operate this new service will necessarily have to be found within the BBC, by saving resources and improving efficiency.
82. The financing system defined by the UK for the BBC (only a licence fee with no market revenues) ensures that the amount of the funds received by the undertaking for fulfilling its public service obligations is limited to the net costs deriving from the provision of such services.
83. Applying the same reasoning, it can be concluded that the amount of licence fee used to finance BBC News 24 is strictly proportional to the actual costs incurred for the provision of the service. In fact, no market revenues would be collected by the new service and, at the same time, the BBC would have to collect the necessary resources from the amount received to fulfil all its public service obligations.
84. In this respect, the complainant argued that the funding received by BBC News 24 is not proportionate to its costs, given that the above-mentioned amounts are far higher than the costs of competing commercial services, including BSkyB's SkyNews channel. The Commission notes that, according to the information provided by the UK authorities, the costs incurred by BBC News 24 are higher due to the larger use of the news-gathering network of the BBC, for which, as stated, BBC News 24 pays the full cost.

85. According to that information, this news-gathering network is comprised of 47 offices worldwide employing 64 full-time staff, compared with SkyNews's 8 offices and CNN's 34. It is evident that the costs of using such an extensive network are higher than those incurred, by way of comparison, by SkyNews.
86. For the purposes of the assessment, the Commission has to ensure that the funding granted to the undertaking does not exceed the extra costs (in this case the full cost, as the service does not collect commercial revenues) incurred for the provision of that service. This is, in consequence of the funding system adopted – i.e. ex-post funding on the basis of the actual expenses incurred – in the opinion of the Commission, ensured. Therefore, the Commission considers that the third condition laid down in Article 86(2) and described in paragraph 38 is met.
87. As far as the fourth and last condition is concerned, the Commission has to analyse whether the decision of a Member State to provide a certain service of general economic interest on certain conditions does not distort competition to an extent that would be contrary to the common interest. In accordance with Article 86(2), as interpreted by the Protocol, the Commission has to assess whether the development of trade is not affected to an extent that would be contrary to the Community's interest, taking into account the provision of the service. This formulation of Article 86(2) indicates that a certain effect on trade and its development can be tolerated because of the general-interest nature of the service provided.
88. The production of BBC News 24 has *de facto* increased the number of channels available in the UK market, thereby intensifying competition and deteriorating the position of other broadcasters. Cable distributors have been given a wider choice of news channels, thereby increasing competitive pressure on other similar channels, such as BSkyB's SkyNews. These effects are more evident on the analogue cable infrastructure, where the limited bandwidth technically limits the number of possible channels being distributed.
89. The complainant argues that BSkyB's SkyNews channel, delivering a special interest channel of news and financed by advertising and subscription fees, was hit significantly by the emergence of BBC News 24. According to BSkyB, several cable distributors discontinued this channel following the launch of BBC News 24. Also, in order to remain in the market, it had to cut the subscription fees charged to the cable distributors. According to the following figures (Exhibit 2), SkyNews's penetration in cable was significantly reduced following the entry of BBC News 24.

Exhibit 2: SkyNews and BBC News 24 penetration (subscribers and %)

	October 1997	% of homes connected	April 1999	% of homes connected
BBC News 24	0	0	2,829,203	95%
Sky News	2,048,623	93%	2,044,253	69%
CNN	1,798,432	81%	1,798,052	61%
Bloomberg Info TV	844,102	38%	1,552,882	52%
NBC	1,249,852	56%	745,006	25%
Euronews	1,126,784	51%	215,598	7%

Source: ITC (Independent Television Commission) press releases

90. As can be seen from the table, in November 1997 SkyNews was received by almost 2,049,000 homes, i.e. over 93% of connected households (at that time, the total number of households connected to cable came to 2,211,000). After the launch of BBC News 24, SkyNews's penetration fell to 69% of connected households (i.e. 2,044,000 out of 2,971,000, as of April 1999), while BBC News 24 obtained a 95% penetration.
91. Similar effects were registered also by other competitors, such as CNN and NBC, whose penetration rate fell from 81% to 61% and from 56% to 25% respectively. Worse effects could be seen on Euronews, which lost some 48 points of penetration (from 51% in 1997 to 7% in 1999).
92. It can be deduced from the above figures that the launching of BBC News 24 had a significant impact on the broadcasting market, in particular in the analogue cable infrastructure (a much lower impact can be detected in the audience market in general). It was relatively easy for the national authorities to foresee that the launch of a new 24-hour news channel, to be provided free of charge to cable operators and carrying no advertising, would take a large market share and create difficulties for existing competitors.
93. Whenever a Member State decides to provide a service of general economic interest, a certain amount of damage to competitors is foreseeable. This is the reason why Article 86(2) requires that the *development* of trade shall not be excessively affected: it implies that some distorting effect has to be taken into account and tolerated, whilst it must neither be made impossible for competitors to continue to do business nor must potential competitors be precluded from entering the market.
94. In the case in hand, it is true that the competitors of BBC News 24 suffered a reduction in their market shares. This effect was to be expected from the outset as a result of the Member State's decision to provide the said service of general economic interest. Nevertheless, it must be noted that both SkyNews and CNN – i.e. the largest competitors – were able to maintain a large part of their customer base despite losing market share.

95. Over the same period, Bloomberg Info TV was able to increase its customer base by 80% (from 844,000 to 1,552,000), thereby showing an increase in penetration rate from 38% to 52%. In practice, a direct competitor of BBC News 24 was able to maintain and even increase its market share and to almost double its customer base notwithstanding the launching of a new channel on the market.
96. It is not necessary to discuss the reasons why Bloomberg Info TV was able to achieve these results – e.g. whether they were the result of aggressive commercial campaigns or of some other market trend. This circumstance may suggest that the different news providers were affected differently by the launching of BBC News 24: some lost customers, others were able to maintain the customer base and others still (namely Bloomberg Info TV) were even able to take advantage of the event.
97. Moreover, it is not possible to conclude that all the cable operators that discontinued SkyNews or other channels did so in consequence of the availability of BBC News 24. According to the information submitted by the UK authorities, for example, some operators discontinued SkyNews even before BBC News 24 was available for reasons that had nothing to do with the new service being launched (e.g. some operators discontinued SkyNews as a reaction to the wholesale price increase of the channel, before BBC News 24 was actually available).
98. It is not necessary for the purposes of this decision to perform a complete market analysis in order to investigate the reasons for the reduction in market share suffered by some operators. This reduction may even be a consequence of the launching of BBC News 24. It is sufficient to demonstrate that, although a certain impact on competition and trade can be detected, this effect is not excessive to the extent that it precludes the development of competition and trade in the sector concerned.
99. Overall, it can be estimated that the launching of BBC News 24 has enriched the choice of UK consumers, as there is at present one more news channel (with very specific features) available. The majority of cable operators retained all news channels available – adopting the new BBC News 24 and maintaining the existing SkyNews, CNN and, to a lesser extent, NBC and Euronews. Some, however, subscribed also to Bloomberg Info TV, possibly as a substitute for one or more of the terminated channels.
100. Moreover, even if the State financing of BBC News 24 would have led to more serious economic difficulties for its competitors, such effects could be accepted under Article 86(2) in order to allow services of general economic interest to be delivered. Article 86(2), as stated above, accepts a certain effect on competition and trade as a consequence of ensuring the provision of a public service remit.
101. In the present case, it can be concluded that the decision of the UK authorities to provide a 24-hour news channel free of charge and with no advertising, although having an effect on trade, does not affect the development of that trade to an extent contrary to the Community interest. In this sense, while the competitive environment for private services might be affected by BBC News 24, the freedom to provide services and the functioning of the common market as such for television are not affected to an extent contrary to the Community interest.

102. In particular, given the specificity of the services provided (no charge and no advertising), it can also be assumed that the provision of such service of general interest would not be possible to the same extent without the aid granted.
103. To sum up, the Commission concludes that the financing of BBC News 24 by licence fee fulfils also the fourth condition which must be satisfied in order to benefit from the application of Article 86(2).
104. The funding of BBC News 24 using financial resources from the licence fee constitutes State aid within the meaning of Article 87(1) of the Treaty. The Commission therefore regrets that the United Kingdom has put the State financing of the BBC 24-hour news channel into effect, contrary to Article 88(3) of the Treaty.
105. However, on the basis of the foregoing assessment, the Commission is of the opinion that the conditions laid down in Article 86(2) are fulfilled. The public funding of BBC News 24 can thus be accepted because it allows the provision of "services of general economic interest" without being disproportionate and without affecting the development of trade to an extent contrary to the common interest. It has therefore decided
- to consider the aid compatible with the EC Treaty.
106. If this letter contains elements of confidential information which should not be published, the UK government is invited to inform the Commission, within fifteen working days from the date of receipt of this letter. If the Commission does not receive a reasoned request within the stipulated period, it will consider itself authorised to make the full text of this letter available to third parties. Any request should be addressed to:

Commission of the European Communities
Directorate-General for Competition
Rue de la Loi 200
B-1040 Brussels

Fax: 0032.2.2969580

Yours faithfully,
For the Commission

Mario MONTI