

or Future Funeral?



Edited by Olaf Steenfadt

A Guide to Public Service Media Regulation in Europe

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EDITOR

Olaf Steenfadt, Screenworld

AUTHORS

Michał Główacki, University of Wrocław

Boyko Boev, Article 19

Susanne Nikoltchev & Francisco Javier Cabrera Blàzquez,

European Audiovisual Observatory

Michał Kuś, Wrocław University

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Documentation

Additional material from the conference *Future or Funeral?: The Dual System at a Crossroads—Defining Legislative Standards for the Survivability of Public Service Media, Jan 22–23 2010, in Warsaw* can be found here: www.mediapolicy.org/future-funeral

Including:

- Keynote speech by Doris Pack, MEP and Chairwoman Culture and Media Committee of the European Parliament: “The Dual System at a Crossroads—Why European Media Policy Is Just a Bit More than Competition Law”
- Observations by Hans Peter Lehofer, Judge at the Austrian Higher Administrative Court, Media Lawyer and Blogger, Austria
- Observations by Jan Malinowski, Head of the Media and Information Society Division, Directorate General of Human Rights and Legal Affairs, The Council of Europe
- “Working Model or Failed Experiment?: Public Service Television in New Zealand” by Nick Perry, Department of Film, Television and Media Studies, University of Auckland, Auckland, New Zealand
- Closing remarks by Karol Jakubowicz, “A Future for PSM? Only a Copernican Revolution Can Prevent Its Funeral.”

Preface

By Olaf Steenfadt

The list of references and related documents quoted here proves the obvious: nobody needs another paper on the future of public service media in Europe. This unique phenomenon of collectively-funded electronic mass media has been subject to extensive research over the last few decades and different models have been described and analysed to the nth degree.

Yet, interestingly, when public media is condensed down to its core *raison d'être*, there is no apparent conflict, competition of concepts or clash of opposing ideas. Indeed, it would seem that if asked to state their universal remit, the entirety of researchers and experts would probably be able to reach a consensus relatively easily.

But then there is real life and the question of how to practically engineer this branch of public service in a way that delivers optimal results. And suddenly, an endless variety of legislative approaches and solutions unfolds; all producing very different results.

Now, one would expect that a more or less unified objective—such as the remit of public media—might over time have narrowed down through trial and error the possibilities for finding best regulatory practice. However, rather the opposite is happening right now and two possible reasons immediately spring to mind. First, there is the concept of cultural diversity, which also serves as the main argument for the subsidiarity model and the subsequent EU logic that delivers the competent jurisdiction to its Member States. Secondly, one quickly discerns that the various public media constitutions relate mainly to the same plethora of underlying interests and circumstances that predominate the original remit, over and over again.

As regards the idea of its subsidiarity function, that is, supporting cultural diversity across Europe, a clear distinction between product and institution may help. While probably no-one would reject having the broadest choice in terms of content, that is, actual programming, the question remains whether the same amount of variety is needed in the regulatory field. If universal standards for management excellence exist in the media field, just like in every other industry, why then would Europe and its citizens benefit from a hotchpotch of media laws—even more so in an increasingly globalised market place?

The second question of political interests tackles one of the most distinctive and critical, indeed, innate features of public media; that is, its interrelation with political elites and their sphere of decision making.

One cannot deny the interdependencies that are at work here and they are not, *per se*, a matter of good or evil. Politics needs diffusion on order to function and would hardly be thinkable without transmission through the media. So why should it be condemnable for politicians to

seek maximum media coverage for their statements? Neither can it be denied nor is it automatically damnable that, vice versa, a fairly stable provision of funding for public service broadcasting entails certain obligations and encumbrances.

But neither politics nor broadcasting act in an isolated vacuum. Both spheres are exposed to extreme competition: one for power and opinion, the other for market share. And one side has a decisive impact on the market of the other. Politicians regulate the media industry, for example, the introduction of the dual system, that is, the co-existence of private and public service media, was and still is a political project. Another current example is spectrum policy. The mass media, for its part, dominates the opinion market and can influence the outcome of elections.

This reciprocal control may seem like a healthy balance, if politics and the media meet at eye level but this requires that transparent and fair rules apply and are observed in both fields of competition.

This means an up-to-date, functional legislation and enforcement of laws—making it a socio-cultural issue, rather than a merely legal one.

Insofar as sound media legislation is a prerequisite for a healthy media landscape and is in the best interest of any civic society, then this paper shall serve as corresponding inspiration.

- How has the remit of public media developed over time and what would an updated, consensual version of it look like today?
- Which minimal regulatory elements are necessary to enable sustainable public media?
- What are, in each field, the main legislative challenges?
- Which examples and best practices exist?
- What could model provisions look like?

Chapter 1 describes the current, critical situation public media finds itself in, especially in Central and Eastern Europe. Twenty years after the regime changes, the current trend in media politics can be best described as a “counter-reformation” rather than a progressive transition. Many public media organisations are further away from stable and sound operation than ever, some of them teetering continuously on the brink of collapse. In a mix of cause and effect, this dire situation manifests itself in lack of funding, dearth of status among the public, a creative brain drain and waning program quality, quantity and variety. At the same time, the whole media sector comes under increasing economic pressure that is fuelled by the impact of both digitalisation and a concurrent world financial crisis.

In chapter 2 the remit of public media is discussed, with a special emphasis on scrutinising the thesis of universal objectives versus the necessity to provide an acceptable level of programming diversity.

Chapter 3 contains the three constitutional pillars of media regulation as identified by the authors: governance, funding and access. The suggestion being that the malfunctioning of just one of these three elements would cause the disintegration of the whole system.

Subsequently, such a high level of complexity and interconnectivity calls for a holistic approach, rather than isolated, tactical moves—a quest that means nothing, by the way, more than “good governance” and targets not only the media but each and every field of politics.

What makes the regulation of public media special and demanding, however, is its dialectical nature, which produces a number of inescapable contradictions and conflicts of interest, a mere few of which are mentioned below:

- Its output—radio and television programmes, and increasingly online content—is a commodity that targets highly competitive markets, while at the same time being a priceless, collectively-owned cultural asset.
- High-profile journalism—as one integral part of public media—controls politics, while politicians govern public media institutions.
- Institutional independence and freedom on the one hand, and full accountability towards the public as stakeholder on the other, exclude each other to some extent.

These discrepancies are not solvable per se. They merely define the onerous task of continuously balancing counteractive, complex and often sometimes contradictory forces. Not surprisingly, this task cannot be simply reduced to the implementation of legalistic technology alone. The construction, functioning and maintenance of this fragile Chinese maze require collective cultural responsibility and intelligence.

Recent examples show that this challenge can only be met through a concerted effort by society as a whole. This requirement would, consequently, exclude single-sided approaches, which we can currently witness in two rather vividly contrasting illustrations. In Hungary, a newly elected government has briskly superimposed a closed-shop regime upon the whole media sector, while in Poland a fully de-politicised concept has been discussed and developed, albeit without an apparent result.

In the light of these and other pressing examples, this paper aims to provide a useful template for a structured approach towards public media regulation. Researchers, lawmakers, experts, media journalists and indeed every interested citizen should be enabled to understand the inter-dependencies of the different elements making up the holistic media picture. This might become especially helpful in those cases where only isolated, partial amendments of media laws occur, mainly due to rather short-sighted political tactics. The authors and contributors of this work consider the enhanced participation of civic society in public media governance a prime objective for a successful twenty-first century media world.

1.

Public Service Media in Europe—Future or Funeral?

By Michał Głowiński

Introduction

Public service media was created to serve society and fulfil a social need. It is of fundamental significance for freedom of expression and the proper functioning of democracy and civil society would be impossible without it. Indeed it is emblematic of a truly functioning democratic political system at work.

Over the last few years reforms on public service media (PSM) organisations have been undertaken in many countries including Austria, Estonia, France, Latvia, Italy, New Zealand, Spain and Slovenia. Most recently, new media regulations have been adopted in Hungary, Poland and Slovakia.

The future of public service media has often been a subject of difficult and controversial political debate, where questions such as: “Future of Funeral?” underlined the different crises facing PSM organisations.

In New Zealand the effort to restore PSM has failed and “the prospect is that in its future campaigning for a second term, the current National-led administration will seek a mandate to sell off part, or all, of TVNZ”.¹

In Israel the current situation of the IBA was reported as facing closure following difficult relations between the PSM organisation and the Ministry of Finance and the government that resulted with consideration that public service broadcasting in Israel is no longer needed.²

Public service media in Europe is in crisis:

- Firstly, PSM is still organised and governed in accordance with ideas from the past. In Western European democracies the idea of public service was introduced in the early years of the twentieth century; in the countries of Central and Eastern Europe state radio and television were transformed into PSB only after the collapse of communism and output was based on ideas from the time when public service broadcasting was first developed.
- Secondly, private media companies have started to compete with PSM in terms of diversity and overall programming output and many audiences have refused to pay the licence fee. The funding crisis, in some countries, has often been followed by market crisis, where financing PSM activities from public funds has become a subject of complaint by commercial competitors who feel it contravenes EU procedures on the prevention of “unfair competition”.

¹ See Perry (2010).

² See “IFJ Supports Coalition Protests over Threats to Public Broadcaster in Israel” (2010).

- Finally, policy makers in some countries have been concerned with gaining more power over public service media rather than creating conditions for technological development, innovation, participation, delivery of sufficient funding, improvement of transparency and fulfilment of the public service remit.

Despite the fact that the standards for constructing independent, accountable and fully-participatory PSM corporations have been adopted, the practice in many cases has proved that the mechanisms or bodies that should have monitored their implementation have become too weak to react to the resulting difficulties encountered due to improper management, poor audience relations and different types of commercial and political interference.

Public service in the field of mass media in Europe has always been connected to media policy and the development of broadcasting. However, its relation to the state and society has varied during the different eras of:

- monopoly,
- dualistic competition,
- convergence and the growing importance of new platforms and technologies.

I.I. Yesterday: From Monopoly to the Dual System of Broadcasting

I.I.I Media Policy Change

From the very beginning both radio and television in Europe were believed to have great power and therefore were highly regulated. State broadcasting in many Western European countries was transformed into a public forum in order to be more closely associated with civil society, or rather was introduced in accordance with the paternalistic organisational form of the BBC and, in some cases, was part of a broader social and political change.³

³ See Jakubowicz (2008a).

The media policy paradigm in the period of state broadcasting monopolies was based on a social-democratic vision of the welfare state, and mainly focused on information, education and protection of the national language and culture.⁴

Due to technical limitations when PSB was first introduced, radio and television functioned as top-down structures, where audiences were passive and dependent on media content that streamed from one single channel.⁵

Social, cultural and political changes, coupled with the development of cable and broadcasting satellites in the early 1980s, have led Western European policy makers to accept new types of regulations, abolishing state broadcasting, setting limits on the number of competing channels and creating new regulatory authorities.

Policy makers in European countries introduced a reform of public service broadcasting in order to adapt to the new conditions.

The media policy paradigm in the period of deregulation started to evolve towards a new paradigm that prioritised market development and gave more priority to economic rather than social-cultural and political welfare.⁶

Deregulation of the media market in Europe resulted in a change of relations between the media and its public, since audiences started to be defined more as consumers rather than citizens. The transformation from mono- to multi-channel television saw audiences switch from being passive observers into active media users.⁷

The emergence of new dual media structures, based on the performance of both public service and private broadcasting, caused changes to the goals, means, logic and criteria for programming selection.

4 See Blumler (1992).

5 See Nissen (2006).

6 See van Cuilenburg, McQuail (2003).

7 See Nissen (2006).

Table 1.1

Public service monopoly and the dual media structures in a comparative approach

	Public service monopoly	The dual system
Broadcasting	Monopoly	Competition
Goals	Democracy	Survival/success/profit
Means	Programme production/ selection of material	Selection of material/ programming mix
Logic	Responsibility	Market/economics
Criteria for selection	Political relevance	Sale
Audiences	Citizens	Consumers
Focus on	Decisions taken/power structure	Processes of policy-making/new conflict dimensions
Perspective	Nation/system	Individual and global

Source: Siune, Hultén (1998).

I.I.2 Introduction of the Dual System of Broadcasting

In taking a closer look at the Western European broadcasting model prevalent in the early 1980s, the dual system could be observed in the cases of Finland, Italy and the United Kingdom. Most of the Western European countries at that time, including Austria, France, Greece, Ireland, the Netherlands, Portugal, Spain and Switzerland still had systems based on public monopoly with mixed revenue from licence fees and advertising. The model of a public monopoly financed by public funds was observable in Belgium, Denmark, Norway and Sweden. Luxembourg was the only country in the region which had a system entirely financed by commercial revenue.

In Central and Eastern European countries the introduction of the dual system was more complex and was a result of social, political and economic transformation, combined with the introduction of freedom of speech. State radio and television in post-communist Europe were being transformed into public service organisations in accordance with Western models of broadcasting in the hope of creating a democratic society which supported democratic ideas. At the same time private broadcasting was beginning to be permitted.

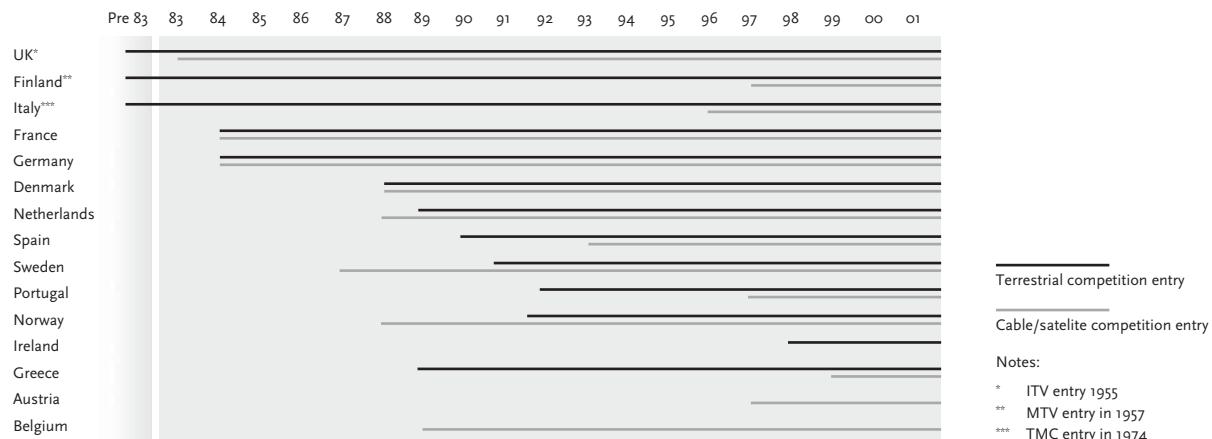
With a few exceptions, including Austria and Switzerland, the dual system of broadcasting was operating in all Western European democracies in the early 1990s.⁸ In tandem with this new media legislation was implemented in Czechoslovakia and further in Poland, Romania, Bulgaria, Hungary and the Baltic States.⁹

8 See Brants, Siune (1992), Humphreys (1996).

9 See Sükösd, Bajomi-Lázár (2003).

Figure 1.1

Market entry of private media companies in selected countries in Europe



Source: "Safeguarding the Future of the European Audiovisual Market. A White Paper on the Financing and Regulation of the Publicly Funded Broadcasters" (2004).

I.I.3 Between Media and Politics: Media Reform or Counter-reformation?

Differences in the policy goals and media reforms of public service broadcasting have traditionally been explained with reference political culture, as well as different models of democracy and party systems.

National traditions and differences have a significant impact on the formal models chosen by the policy makers.

Three concepts linking television and politics have been distinguished:

- formally autonomous systems, where mechanisms for distancing politics from broadcasting were adopted;
- politics-in-broadcasting systems, where governing bodies of public radio and television included both representatives of political parties and the social groups affiliated to them;
- politics-over-broadcasting systems, in which state organs were authorised to intervene in broadcasting decisions.¹⁰

Most recently, changes with regard to media regulation, undertaken in some countries, have been referred to using the term 'counter-reformation', emphasising that media reforms

¹⁰ See for instance Brants, Siune (1998).

introduced in line with European Union and Council of Europe recommendations during the second half of the 1990s had largely stopped or been put on hold. The phenomenon of “counter-reformation”, explained by the practice of electing members of public service radio and television governing bodies or appointing national regulators because of their political ties, further caused the re-establishment of political influence or even explicit political control in certain cases.¹¹ To this end public service broadcasters in many European countries turned out to be too feeble to face up to political elites on one side and to market pressure on the other.¹²

1.2 Today: The Dual System at the Crossroads

1.2.1 Defining the Dual Media Systems in Europe

The notion of the dual media system is often used to describe the system of broadcasting that is based on the performance of both public service and private companies.

The “duality” of media systems in Europe is in stark contrast to the American model of media system, where the concepts of Public Broadcasting Service (PBS) and National Public Radio (NPR) were only introduced in the early 1970s and have existed on the margins of American broadcasting ever since.

Policy makers at the European level have made several attempts to define the dual media structures in Europe.

Most recently the 2007 Commission Staff Working Document on Media Pluralism in the Member States of the European Union emphasised that both public service and private broadcasters contribute to media pluralism.¹³

The importance of the dual structure in Europe was also emphasised in the Audiovisual Media Directive, where the performance of both public and commercial media companies was expected to ensure a diverse range of programming and to contribute to cultural and linguistic diversity, editorial competition and freedom of expression.¹⁴

¹¹ See Thompson (2010).

¹² See Dobek-Ostrowska, Głowacki (2008).

¹³ Commission Staff Working Document Media Pluralism the Member States of the European Union {SEC(2007) 32}. Brussels, 16 January 2007.

¹⁴ Directive 2010/13/EU of the European Parliament and of the Council of March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

However, in the working paper prepared for the future work of the European Parliament's Committee on Culture and Education it is argued that the broadcasting landscape today is far from being a balanced dual broadcasting system which is supported by two equal pillars.¹⁵

I.2.2 The Dual System Under Pressure

Generally, the dual media systems in Europe have always been under pressure.

- In some European countries the public service remit has been carried out by private broadcasting companies from the early stages of demonopolisation to the present;

Private media companies, mixing public service values with private ownership, have become important players in the media market in the United Kingdom (Channel 4), Sweden (TV4), Norway (TV2) and Denmark, where the deregulation of the television system in 1988 resulted in the introduction of the second nationwide television channel TV2, that was owned by the state and financed by revenue from both licence fees and advertising.

The pure form of the dual system in Germany further developed into the so-called "federal model" based on the performance of both decentralised (ARD) and centralised (ZDF) public service organisations. In the Netherlands it was created in league with the prevailing social groups and political organisations in power at the time.

For many years the balance with regard to the co-existence of both public service and private broadcasting was in jeopardy, even in Austria, where commercial broadcasting was only introduced in the year 2002.

- The lack of true balance between public service and private media companies could also be observed when analysing the number of channels and figures on market share in selected European countries.

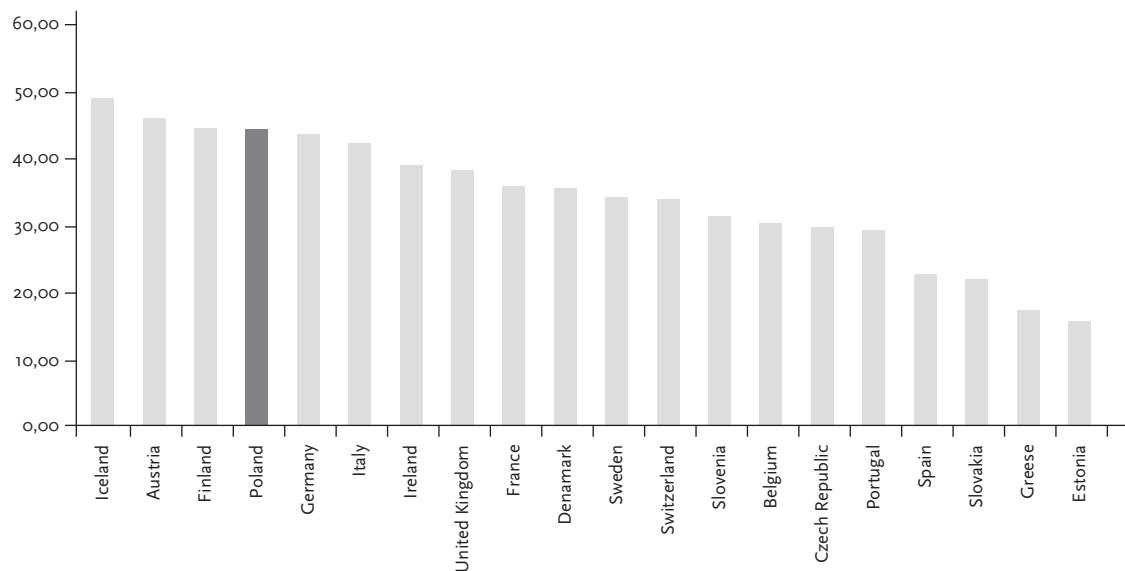
In comparison, in 2009, among the entire range of channels available on all platforms in the member states of the EU, as well as in Croatia and Turkey, only seven percent of existing channels were public service.¹⁶

¹⁵ See Belet (2010).

¹⁶ See European Audiovisual Observatory (2009).

Figure 1.2

Public service television market shares (%) in selected European countries 2008



Source: Stępka, P., Woźniak, P., Murawska-Najmiec, E. (2010).

The development of new platforms and players, including telecoms, search engines, content aggregators, internet service providers and social networks, combined with the growth of “citizen journalism” has changed the nature of communication and made it more fragmented, individual, personalised, selective and interactive.

Nowadays, YouTube users can upload video clips created by themselves or from others sources, comment on and rate videos, create profiles, link to others and subscribe to channels offered by traditional broadcasters or other media organisations. In addition, social networks, including Google Groups and MySpace, allow users to create, tag, discuss, share, package and distribute media content through message boards, chats, or instant messaging and further promote interaction with their friends or followers. The social network Facebook has recently been reported to have more than 500 million active users in the whole world that spend over 700 billion minutes per month on Facebook.

The emergence of new media players and services puts a new pressure on the “duality” in European media systems.

1.2.3 Looking to the Future of the Dual Media Systems in Europe

Recently one can read about how the dual structure of media in Europe has already been transformed into a multi-player and multimedia environment with the growing importance of participatory media companies.

Table 1.2
Moving towards a multiplayer environment

Media	Traditional public service and private broadcasting, non-linear services provided by public service and private media firms, new market players, the growing importance of media-like services
Goals	Innovation, inclusion, independence, openness, responsiveness
Means	Development of citizen journalism and content provided by non-professionals
Logic	More audience participation
Criteria for content selection	Relevance to the public
Audiences	Engagers, participants
Focus on	Multistakeholder governance, transparency and constant control, accountability
Perspective	Individual, personalised, selective and interactive

Source: Author.

The dual system is at a crossroads but:

“[m]ore than ever the highly fragmented, volatile and rapidly moving media landscape needs an independent, reliable point of reference, a role that can be played by public service providers ... ”.¹⁷

¹⁷ See Belet (2010).

I.3 Tomorrow: Looking to the Future of PSM Institutions

I.3.1 From Public Service Broadcasting to Public Service Communication

As a result of the extension of public service broadcasting (PSB) operations into new multimedia platforms and online services, the traditional PSB concept was replaced by that of public service media and, more recently, by that of public service communication.¹⁸

Public service media is not dead yet and significant changes that occur outside PSM companies today create real opportunities for renewing the legitimacy of the enterprise towards a new media ecology.

With regard to full access, ability to perform a high level of professionalism, as well as the ability to be less dependent on advertising income and to perform independently, public service media can act as an alternative to conglomerated private media firms and semi-professional online media.¹⁹

I.3.2 Public Service Media Goes Truly Public

The debate on the future performance of PSM in the new social and media environment should start with the redefinition of the partnership between public service media and society. It is desirable for PSM companies to find their new place in society in order to make public service media truly public. PSM organisations need to convince the public that they still have an important role to play in order to preserve their role ability to deliver their public service mandate, which entails also preserving their funding system exemplified by the licence fee which is directly levied from the audience.

Hence, the editorial independence of PSM, requiring in particular the absence of political interference or pressure and a sufficient level of financial security, continues to be a priority but needs to be complemented by a wider change of both on the internal and external level:

- External factors that are related to the legal and policy framework as well as relations with policy makers, other media players and most notably civil society, need to change in order to give PSM organisations the freedom to be innovative, responsive and accountable.
- Work on internal factors should concentrate on proposals for PSM on how they could improve their organisational and management procedures to meet these goals.²⁰

¹⁸ See for example Bardoel & Lowe (2007), Tambini & Cowling (2004), Born (2005), Collins (2010), Iosifidis (2010).

¹⁹ See Trappel (2010).

²⁰ For more of this approach see Jakubowicz (2008b).

All the challenges that are relevant for PSM companies today have already been discussed by the members of the Council of Europe's Ad-Hoc Advisory Group on Public Service Media Governance (MC-S-PG), operating under the authority of the Steering Committee on Media and New Communication Services (CDMC). Taking into account the mandate arising from the political documents adopted at the 1st Ministerial Conference on the Media and New Communication Services (28–29 May 2009, Reykjavik), the Group is dealing with the role of PSM in a democratic society and examining management methods and governance approaches that could contribute to fulfilling PSM's remit in an era of market competition, in addition to studying the growing importance of media-like services. As a result of the consultation meeting on public service media governance (17–18 September 2009, Strasbourg), as well as the first meeting of the MC-S-PG (27–28 May 2010, Strasbourg), the Group decided to concentrate its work on modality changes that would need to be applied to existing organisations in order to allow them to develop innovation, openness, responsiveness, and independence, as well as proper levels of accountability and transparency in PSM governance. On the basis of meetings of the MC-S-PG²¹ and the background reports prepared by the Secretariat of the Media and Information Society Division in the Council of Europe,²² several challenges for PSM have already been underlined.

New modalities for PSM call for of management methods that maintain creativity, inclusion and innovation and further provide the ability to think beyond the existing business models. It is expected that internal management will deal with both national/legal perspectives and regulation by the media themselves, provided by owners and professionals, notably journalists with their professional standards, codes of ethics and criteria for recruitment (self-regulation). Those standards are seen to be based on effective performance and risk management, as well as on accepted standards of accounting, social responsibility and independence from both politics and market. Hence, among the many tasks faced by PSM management today are maintaining quality of public involvement, engagement in the process of governance and reaching citizens wherever it is possible. Policy makers are expected to mandate and support all those developments by generating more flexible forms of regulation that influence people's behaviour.²³

²¹ Reports of the work of the Ad hoc Advisory Group on public service media governance (MC-S-PG) are available on the official Council of Europe website: http://www.coe.int/t/dghl/standardsetting/media/MC-S-PG/default_en.asp

²² Background reports relevant to the work of the MC-S-PG include "Public Service Media Governance: Looking to the Future" (2009) and "Back to Society? Rethinking Governance in European Public Service Media" (2010).

²³ The ideas advanced in this chapter are further elaborated on in a discussion paper "Back to Society? Rethinking governance in European public service media" prepared by the Secretariat of Media and Information Society Division (Council of Europe) for the first meeting of the Ad Hoc Advisory Group on Public Service Media Governance (MC-S-PG) (Strasbourg, 27 and 28 May, 2010).

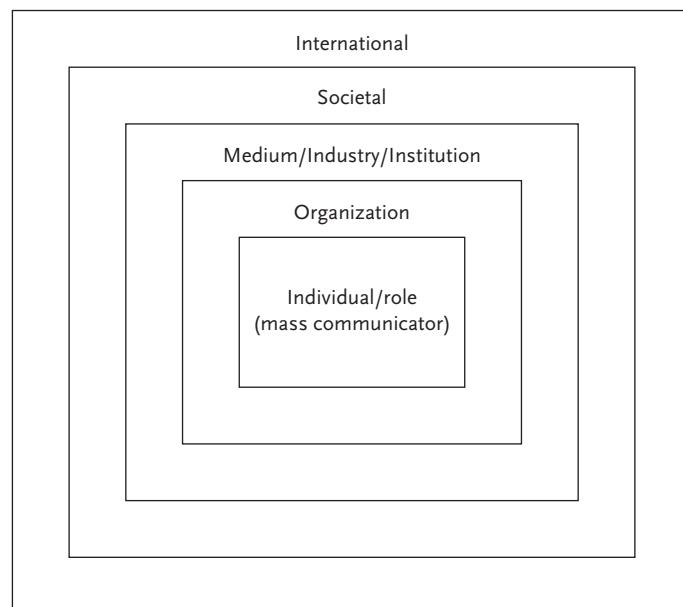
Are current PSM structures of management and decision-making arrangements capable of fostering all of these innovations? What is the future of traditional PSM institutions?

1.3.3 Towards a Reorganisation of PSM

In taking a closer look at the theories of media and mass communication one may find that different approaches have been taken when analysing media as either an institution or an organisation.

The notion of media as an institution has been analysed with regard to medium and industry. In contrast to media organisations, defined mainly with regard to management, staff and technical equipment, the notion of institutions is analysed by emphasising institutional forms that are embedded in and recognised by the wider society.²⁴ Thus, media institutions are mainly defined with regard to wider norms and standards that perceive audiences as rational citizens, concerned with collective problems and issues.²⁵

Figure 1.3
Levels of analysis of media organisations



Source: McQuail (2010).

²⁴ See McQuail (2010).

²⁵ See Hagen (1999).

Institutions of public service media today tend to be analysed in the sense of being organisations (in the same sense as public schools or public hospitals) which are grounded in a system of cultural values legitimising particular arrangements of social practice (orientation).²⁶

By emphasising two different meanings of PSM as institutions, Lowe (2010) further underlined that the institution tends to trump the organisation for a variety of reasons that are entirely legitimate to PSM employees “It could not be otherwise wherever the principles grounding the ethos that legitimates the organisation are no longer as widely or deeply shared”.²⁷

Hence, possible scenarios for the reconstruction of PSM are related to challenges to deliver the PSM remit via other organisations, in addition to, or in some instances instead of, the main PSM organisation. For instance, public service media could be revitalised by generating non-commercial open spaces based on the principle of reciprocity with public service institutions as a cornerstone for future development. The idea of ‘commons’ that everybody in a community can use but no one can own was expected to further develop new arenas for public debate that could be funded by the public and independently managed.²⁸ All of that while preserving an institutional framework that guarantees fulfilment of the public service remit and the proper level of independence.

The future will look different if public service media takes the reins of its own destiny and draws force to further develop the idea of personalised public service that will allow audiences to operate at new levels with the support of existing PSM institution. Searching for regulatory solutions that might solve current PSM crises and adapt traditional broadcasting into new technologies should be connected to decision-making processes and arrangements which strengthen both public participation in the new multimedia environment and the relevance of PSM to the public, while still preserving the necessary editorial and financial independence. Thus, any attempt to reform the existing structures of PSM organisations should further define the key factors such as constraining political systems, social structures, media ownership and journalistic cultures in order to understand the current crises as well as the problems inherited from the previous stage, when the dual system was introduced.

²⁶ See Lowe (2010).

²⁷ *Ibid.*

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2.

Towards an Understanding of the Public Service Media Remit Today —A Pan-European Consensus?

By Michał Głowiak

Introduction

Generally, no universally accepted definition of public service media (PSM) has been nor can be applied. Due to technological developments and changing audience behaviours, the core features of traditional public service broadcasting have evolved and become more complex over the last few years.

The notion of media, traditionally analysed with regard to print and broadcasting, has recently been extended to new media created by new actors, including non-professional content creators (bloggers), the growth of citizen journalism and new forms of media (Internet service providers, search engines, content aggregators).²⁹

The notion of public, traditionally understood as audience, citizens, the masses and consumers, has recently been replaced by that of individuals, players, engagers, participants and audiences more broadly.³⁰

Most of the definitions of public service media today emphasise the principle of service that reaches everyone with high quality standards and content that differs from the one offered by private media companies.

2.1 (Re)defining the Public Service Media Remit

2.1.1 The Nature of the Public Service Media Remit

The role of the public service media is reflected in its remit, supporting the values related to political, legal and social structure of democratic societies.

Public service media's task is to contribute to a democratic and/or pluralistic society, sustain national culture, maintain universal access, provide high quality programming and meet high journalistic or moral standards together with values like impartiality, respect of privacy and human dignity.³¹ It pursues this by providing different content to individuals and groups by using different media and platforms.

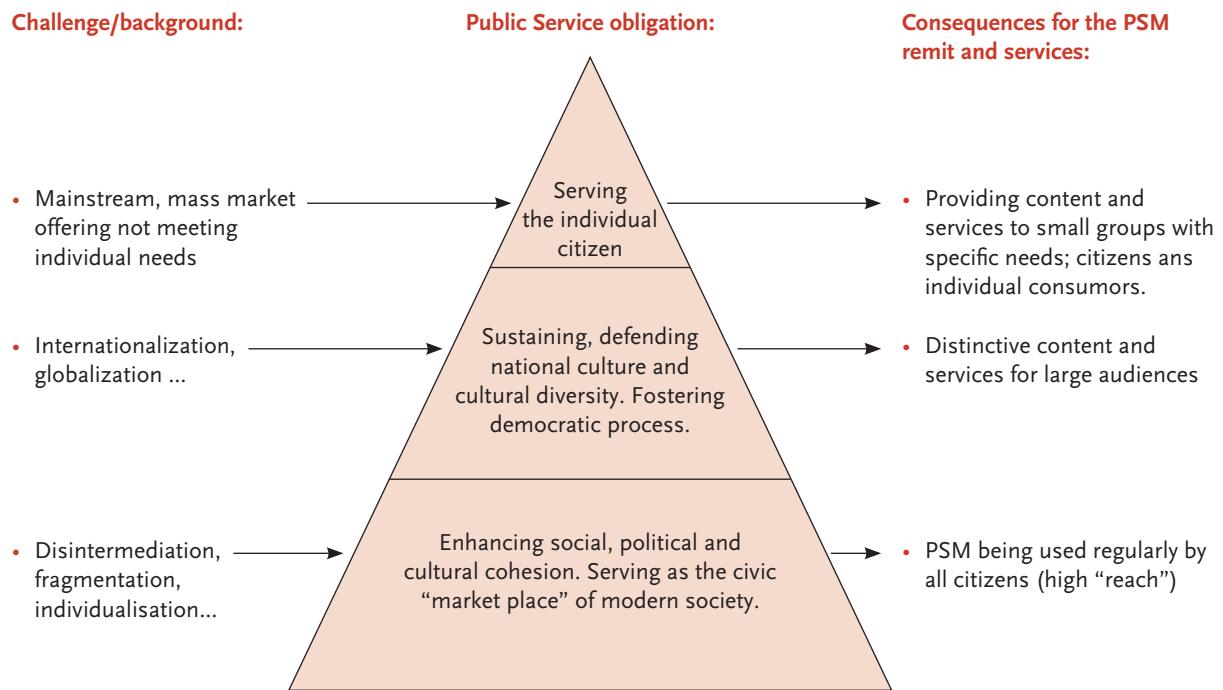
²⁹ See Jakubowicz (2009).

³⁰ See Aslama (2010), Syvertsen (2004), Livingstone (2005), Jackson (2010).

³¹ See Nissen (2006), Betzel (2007).

- I. Public service media should offer news, educational, cultural, sports and entertainment programmes catering for the views and tastes of all segments and groups – thus contributing to pluralism, cohesion and understanding. By encouraging creativity it promotes cultural diversity and identity.
- II. Public service media should integrate all communities and groups, including minority groups, young and old persons, disadvantaged and underprivileged, by reflecting their problems, portraying them and promoting the content created for and by them. Through such diversified programming it fosters a sense of co-responsibility and mutual trust.
- III. In order to achieve this public service media should use new technologies, interactive services and digital platforms. Those opportunities should be used to support social inclusion and democratic debate. Through effective use of interactive services they can mobilise young people for dialogue and reach potentially marginalised citizens, such as minorities, asylum seekers, migrants and immigrants.³²

Figure 2.1
Public service media obligations—their background and consequences



Source: from Nissen (2006).

³² See Zankova (2009).

2.I.2 Public Service Media Remit in the Era of New Technologies

The processes of convergence and technological development have called for the redefinition of media content based on the old triad of information, entertainment and education.

Table 2.1
Traditional and additional tasks for PSM

	Traditional tasks of PSM	Additional tasks of PSM
Political citizenship and democracy	<ul style="list-style-type: none"> • serving democracy at local, regional and national level • representing civil society vis-à-vis the authorities • providing a forum for public debate • serving as the watchdog for the government 	<ul style="list-style-type: none"> • informing citizens of the work of international organisations • contributing to creating a public sphere and elements of a civil society at the regional, continental and global level • serving as a watchdog of international and global organisations • developing social capital and a sense of community and co-responsibility for the nation-state at a time when cyberspace allows individuals to participate in virtual communities and become detached from their own societies and nations
Culture	<ul style="list-style-type: none"> • providing universal access to culture • raising the cultural competence of the audience • creating new audiovisual works • supporting and promoting creative talent • investment into domestic audiovisual production • facilitating culture events • promoting the national culture abroad 	<ul style="list-style-type: none"> • serving minorities and immigrant communities in a way that satisfies their cultural and linguistic needs, but does not prevent their integration with the rest of the population • creating a sense of affinity and understanding with the people of other countries in the region, especially if the country in question is involved in an international integration scheme • promoting intercultural and inter-religious dialogue at home and internationally • promoting acceptance of, and respect for, cultural diversity, while at the same time introducing the audience to other cultures around the world • striving to prevent, or reduce, the digital divide, so no-one is prevented from access to culture via new technologies
Education	<ul style="list-style-type: none"> • broadcast school and educational programming • launching projects like Open University 	<ul style="list-style-type: none"> • contributing to life-long learning systems • contributing to e-learning • adjusting educational content to the requirements of the 21st century

Source: Jakubowicz (2006).

Thus, in addition to promoting social cohesion, rejecting discrimination and integrating all audience members, many other PSM tasks have been recognised of late including: supporting traditional broadcasting content with interactive resources, promoting digital media literacy as well as an awareness of the tools of the information society and performing on all multimedia platforms. New tasks have also been added to the traditional remit with regard to political citizenship/democracy, culture and education.

2.1.3 Towards Understanding Differences Between Public Service and Private Media Companies Today

Public service media is “owned” by the public and is often described as a partnership or pact with the audience.³³ The mission of public service media should be defined in relation to the needs of the society, and not in relation to the market.

The access to public communication in PSM shall not be restricted.³⁴

2.2 The International Approach to Public Service Media

2.2.1 Europeanisation of Media Policy

The role of public service media has been underlined by international organisations dealing with the problems of freedom of expression and information, intercultural dialogue, media pluralism and diversity.

The process of Europeanisation of media policy resulted in a high number of policy directives, declarations, resolutions and reports that contain suggestions and policy requirements relevant to the member states for defining and reorganising the concept of PSM on a national level.

Both the Council of Europe (CoE) and the European Union (EU) have focused much of their media-related work on PSM but it is to be noted that they differ significantly in their approach to the subject.

³³ See Nissen (2006).

³⁴ See Spichal (2007).

2.2.2 The European Union

In the European Union the respective competencies of the EU and the member states were set out in the Protocol on the System of Public Broadcasting in the Member States where the system of public broadcasting was recalled as directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism.³⁵ The importance of public service broadcasting was also reaffirmed in the 1996 Resolution on the role of public service television in a multi-media society³⁶, the 1999 Council Resolution,³⁷ and the 2001 Communication from the Commission on the application of State aid rules to public service broadcasting, where a central role of broadcasting media in the functioning of modern democratic societies was underlined.³⁸ Finally, the importance of public service broadcasting as a reliable source of information and tool for stimulating citizens' participation in public debate became an integrated part of the new Communication from the Commission on the application of State aid rules to public service broadcasting (2009).³⁹

One of the main activities of the EU in the field of public service media is connected to the rules with regard to State aid and competition. By recalling recent regulatory developments (e.g. the 2003 Altmark judgment,⁴⁰ AVMSD⁴¹) and several public consultations, new Communication from the Commission on the application of State aid rules to public service broadcasting clarifies the principles followed by the Commission in the application of Articles 87 and 86(2) of the EC Treaty to the public funding of audiovisual services in the broadcasting sector.

³⁵ Protocol on the System of Public Broadcasting in the Member States. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts. Official Journal C 340, 10 November 1997.

³⁶ Resolution on the role of public service television in a multi-media society. A4-0243/1996.

³⁷ Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 (OJ C 30, 5.2.1999).

³⁸ Communication from the Commission on the application of State aid rules to public service broadcasting. *Official Journal C 320, 15/11/2001 P. 0005–0011.*

³⁹ Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01).

⁴⁰ Court of Justice. Judgement of the Court of 24 July 2003. *Official Journal of the European Union.* (2003/C 226/01).

⁴¹ Directive 2010/13/EU of the European Parliament and of the Council of March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

Most importantly, the 2009 Communication:

- I. underlines that state financing of public service broadcasters can be generally considered to affect trade between Member States,
- II. emphasises that the definition of the public service mandate falls within the competence of the Member States, which can decide at national, regional or local level, in accordance with their national legal policies,
- III. calls for an official definition of the public service mandate decided in accordance with the national legal order of the Member State,
- IV. advises that the definition of the public service mandate should be as precise as possible and it should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not,
- V. clarifies the legal framework applicable for the expansion of public service broadcasters into new distribution platforms, the legitimacy of thematic and pay TV channels and the control of financial transparency and over-compensation,
- VI. calls to entrust public service remit to one or more undertakings by means of an official act and further explores funding schemes for public service broadcasting, which are defined on a national level,
- VII. invites Member States to ensure that public service broadcasters respect the principle of proportionality and market principles when carrying out commercial performance.

The EU activities relevant for the functioning of public service media also contain different policy instruments with regard to convergence, transition from analogue to digital broadcasting, media pluralism and cultural diversity. The current activities are connected to the work of the European Parliament's Committee on Culture and Education. In early 2010 the Committee presented a draft report on public service broadcasting in the digital era and the future of a dual system.⁴²

42 See Belet (2010).

2.2.3 The Council of Europe

The Council of Europe (CoE) has consistently emphasised the value of public service media for society. The notion of traditional public service broadcasting has always been defined with regard to diverse, universal and high quality content, preserving democracy and media diversity as well as protection of national culture and identity. The fundamental role of PSM in respect of freedom of expression and information and hence to democracy and the development of civil society has been referred to in a range of statements of various nature and in policy resolutions, declarations, statements and recommendations on the public service remit adopted by the Committee of Ministers of the Council of Europe and the Parliamentary Assembly of the Council of Europe.⁴³

Recommendation (2007) 3 of the Committee of Ministers to member states on the remit of public service media in the information society has emphasised that public service broadcasters are expected to:

- I. be a reference point for all members of society,
- II. be a forum for democratic debate (thus fostering democratic participation),
- III. be a factor in the social cohesion and integration of individuals and communities,
- IV. be a source of impartial, independent and diverse information,

⁴³ The documents of the Committee of Ministers of the Council of Europe include: Resolution No. 1 on the future of public service broadcasting adopted at the 4th European Ministerial Conference on Mass Media Policy in Prague (1994), Recommendation No. R (94) 13 on measures to promote media transparency (adopted on 22 November 1994), Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting (adopted on 11 September 1996), Recommendation No. R (99) 1 on measures to promote media pluralism (adopted on 19 January 1999), Recommendation Rec (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting (adopted on 28 May 2003), Resolution No. 2 on Cultural Diversity and media pluralism in times of globalisation (adopted on 10/11 March 2005), Declaration on the guarantee of the independence of public service broadcasting in the member states (adopted on 27 September 2006), Recommendation (2007) 3 of the Committee of Ministers to member states on the remit of public service media in the information society (adopted on 31 January 2007), Recommendation Rec (2007) 16 on measures to promote the public service value of the Internet (adopted on 7 November 2007), Declaration of the allocation and management of the digital dividend and the public interest (adopted on 20 February 2008), Political declaration adopted during the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (adopted on 28/29 May 2009, Reykjavik). The documents of the Parliamentary Assembly of the Council of Europe include: Recommendation 748 (1975) on the role of management of national broadcasting (adopted on 23 January 1975), Recommendation 1067 (1987) on the cultural dimension of broadcasting in Europe (adopted on 8 October 1987), Recommendation 1147 (1991) on parliamentary responsibility for the democratic reform of broadcasting (adopted on 22 April 1991), Recommendation 1407 (1999) on media and democratic culture (adopted on 29 April 1999), Recommendation 1641 (2004) on public service broadcasting (adopted on 30 September 2004), Resolution 1636 (2008) on Indicators for media in democracy (adopted on 3 October 2008), Recommendation 1855 (2009) on the regulation of audio-visual media services (adopted on 27 January 2009), Recommendation 1878 (2009) on the funding of public service broadcasting (adopted on 25 June 2009).

- V. provide high quality innovative audiovisual content that complies with high ethical and quality standards,
- VI. to be a forum for public discussion and a means of promoting broader democratic participation of individuals,
- VII. to contribute to the production of audiovisual material for the national and European cultural heritage.

The Recommendation has further called for an extended and diversified remit incorporating new technologies, interactive services and digital platforms.⁴⁴

In 2009, the political declaration adopted during the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (28 and 29 May 2009, Reykjavik) again underlined that PSM is expected to contribute to media diversity and help counterbalance the risk of misuse of power in a situation of strong concentration of the media and new communication services.⁴⁵ Later in the same year (25 June 2009) the Parliamentary Assembly reaffirmed that PSB remains an essential element for member states in meeting the needs of individuals and society as a whole with regard to information, education and culture.⁴⁶

2.3 National Media Policies and Public Service Media

2.3.1 The Role of National Media Policies

Public service media cannot be understood outside the social and political structures of the society it is mandated to serve.

National state authorities are responsible for defining ownership and legislative requirements for public service remit as well as the provision of funds and the definition of PSM remit.

Taking into account the challenges of the information society, member states are free to organise their own national systems of public service media, suited to the rapidly changing technological and social realities, while at the same time remaining faithful to the fundamental principles of public service.

⁴⁴ See Recommendation (2007) 3 of the Committee of Ministers to member states on the remit of public service media in the information society (adopted on 31 January 2007).

⁴⁵ See Political declaration adopted during the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (adopted on 28–29 May 2009, Reykjavik).

⁴⁶ See Recommendation 1878 (2009) on funding of public service broadcasting.

2.3.2 Comparing the Remit of PSM in Europe

Most European countries have defined remits for the performance of PSM organisations. Although they differ with regard to trends in regulation, control over the fulfilment of public service remit and the existence of programme content obligations, namely: qualitative, quantitative or audience-related content obligations (e.g. disabled people, national minorities),⁴⁷ they usually includes contribution to democracy and national culture as well as the provision of high quality programs. Regulation of content, based on balance, impartiality and serving minority interests is one of the most important factors, which define the nature of public service media today.⁴⁸

In Italy public service media organisations have the specific tasks of ensuring, to a greater degree than the commercial broadcasters, the right to information, as well as the dissemination of culture, so as to promote citizens' participation and to contribute to the social and cultural development of the country.

In Ireland public service media organisations shall be responsive to the interests and concerns of the whole community, ensure that the programmes reflect the Irish culture, and uphold the democratic values related to freedom of expression.

Similarly to this, media regulation in Austria, Poland and Slovenia calls for provision of independent information and emphasises the cultural, educational and entertaining role of public service media by offering high quality programmes and other services that strengthen national identities and cultures.⁴⁹

Generally, European countries may differ a little in general programme tasks but share many common features with regard to programme categories and the public service remit. However, they further be differwith regard to organisation and governance and selected funding schemes as well as to the performance of PSM in the new multimedia environment.

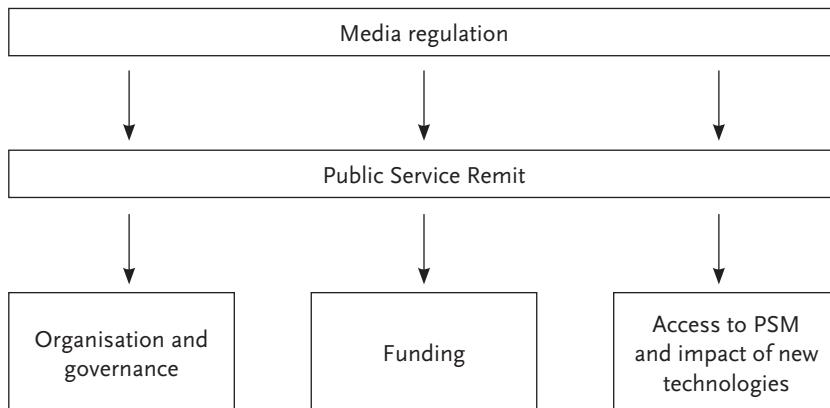
⁴⁷ See Betzel (2007).

⁴⁸ See Siune, Hulten (1998).

⁴⁹ See Nikoltchev (2009).

Figure 2.2

Different levels of state intervention in public service media



Source: Author. Ideas advanced from Nord, Głowacki (2010).

2.3.3 Towards an Understanding of the Differences Between PSM in Europe

Firstly, European countries differ with regard to organisation, decision making and different structures of supervisory bodies and PSM management (Director General, programme directors, heads of programme departments, journalists, producers, etc.), as well as their relations with other institutional bodies involved in the process of governance (parliaments, governments and independent regulatory authorities);

In most cases, public service media has been united within one single organisation, while Poland, as well as the Czech Republic, Latvia and Slovakia, still distinguish between performances of public service radio and public service television.

Members of the Administrative Council of Yleisradio (YLE) are elected by the Finnish Parliament during the first session of its term. In addition to the members appointed by the legislative body, two representatives appointed by the company's staff are entitled to attend and exercise the right to be heard at meetings of the Administrative Council.

Members of the National Broadcasting Council (NBC) of Poland are appointed by the President and representatives of both chambers in the Parliament. This system, created to attain a certain balance of power between political forces, was introduced in France and further developed in Bulgaria, Romania and Ukraine.⁵⁰

⁵⁰ See Machet (2002).

The French model is opposed to the four other types of PSM governance, including the Northern (Norway, United Kingdom), the Parliamentary (Italy, Latvia), the Corporatist (Austria and Germany) and the Residual model (Portugal).⁵¹

Secondly, there is no universal scheme and model of supervision with regard to the funding of public service media in Europe;

PSM in the Nordic countries, France and the United Kingdom represent a public model of funding, which is mainly based on the revenue from licence fees or contributions to public service broadcasting. In the Netherlands, where licence fees were abolished in 2000, the Dutch system of public service media has been funded through annual state subsidies.

The move towards the abolishment of advertising in PSM seems to be a new trend when discussing the current operations of many European public service media organisations. At the same time a mixed revenue model, based on both public funds and advertising is still preserved in Austria, Germany, Poland and Slovakia.

In many European countries, including Belgium, Denmark, France, Italy and the Netherlands, funding PSM activities from public funds has become a subject of complaint within EU State aid procedures.

The amount of public funds in the budgets of public service media in Europe differs from more than 90% in Denmark, Finland and Sweden to around 44% in Ireland and only around 25% in Poland.⁵²

Finally, the countries in Europe differ in accordance to access and performance of public service media on new multimedia platforms. Currently an important number of traditional broadcasters are allowed or obliged to offer online or other new communication services as part of their remit.

⁵¹ See Hanretty (2007).

⁵² See Sępka, Woźniak (2009).

In the Czech Republic both public service radio and television are obliged to fulfill public service tasks by developing and providing innovative services and by making use of technological progress and in Belgium, the Flemish broadcaster VRT has already introduced an organisational structure in which strategy, channel profiling, programming, production and operational activities are all part of a single process on digital television.⁵³

In Germany and the United Kingdom the performance of PSM in new multimedia platforms became a subject of public value tests to reconcile the principle of state-distant organisation of public service broadcasting with the obligation to provide output that satisfies the needs of society.

However, due to insufficient funding and lack of new regulation many countries have been more traditional in their approach to new multimedia markets, while, at the same time, some of them still, particularly in Eastern and Central Europe, only have a small staff and no organisational standards for the development of PSM multimedia services.⁵⁴

However, a comparative analysis of PSM in Europe with regard to public service remit, organisation, governance, funding schemes and access demands a high level of methodological care. The role of the state with regard to public service media should include not only the level of interference but also the form that it takes. All mentioned levels of state interference are more complex and include different types of activities that need to be taken into account when analysing the performance and fulfilment of PSM remit today.

The debate on the role of the state with regard to public service media should include not only the level of interference but also the form that it takes.

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3. Legal Guidelines on Public Service Media Governance

3.1 Governance

by Boyko Boev, Senior Legal Officer, Article XIX

Introduction

These guidelines focus on the issue of governance of public service media (PSM). The term ‘governance’ refers to the ways of exercising power to organise affairs and manage problems.⁵⁵ For the purposes of these guidelines ‘PSM governance’ covers the establishment and decision making of the governing bodies of PSM and their interactions with state bodies, PSM staff and viewers’ and listeners’ organisations such as audience councils.

It is widely acknowledged that different PSM governance models exist across Europe and that each PSM institution is unique. The differences are a result of many factors including organisational history, administrative traditions, and policy considerations. Nevertheless, all PSM shares two things in common. First, its governance is legally regulated. Normally, PSM is set up by a law. The powers and responsibilities of its governing bodies are legally specified, as well as the interface between PSM and other stakeholders such as the government, and the public. Second, all PSM in Europe is independent from the State, publicly accountable and subject to some content rules established internationally.

The two observations above form the basis of the underlying assumption of these guidelines: everyone—whether a public or private body or an individual—engaged in drafting or modernising PSM laws or in PSM governance shares many fundamental challenges, despite the unique legislative environment or operational cultures in which they work.

The assumption makes it possible to develop common guidelines which explore the commonalities and provide legislative solutions in line with the relevant broadcasting standards and best international practice to main challenges to PSM such as institutional building and autonomy, editorial independence, public accountability and content regulation.

Part I examines PSM as an institution and relates to the process of policy and decision making. The main challenges to PSM as an institution concern the protection of institutional autonomy and editorial independence, the building of a professional and creative environment and the establishment of mechanisms for public accountability of PSM.

⁵⁵ Discussion Paper prepared for the First Meeting of the Ad Hoc Advisory Group on Public Service Media Governance includes several definitions of governance including definitions by the 1995 UN Commission of Global Governance and the World Bank. See *Back to Society? Rethinking Governance in European Public Service Media*, Strasbourg, 27 and 28 May 2010, p. 9.

Part 2 deals with broadcasting content restrictions and outlines legal standards for PSM on content restrictions and quotas, obligation to provide airtime, the right to reply, and advertising and sponsorship.

Each part outlines challenges, points to existing choices and provides legal solutions concerning the key issue it examines. Information about relevant international standards and references to PSM governance models are included.

The guidelines draw upon the findings of the Open Society's monitoring reports on broadcasting in Europe⁵⁶, the Council of Europe's policy papers on public broadcasting⁵⁷, the UNESCO review of best practices on public service broadcasting,⁵⁸ and model laws on public service broadcasting by ARTICLE 19⁵⁹ and the Telecommunication Union, BDR Telecommunication Bureau and UNESCO⁶⁰.

3.1.1 PSM as an Institution

Like any institution PSM's structure includes different types of bodies with particular membership and specific powers and responsibilities. The structure of PSM is the object of legal regulation. In addition, PSM laws regulate the relations between PSM and the government, parliament, the national broadcasting regulator, civil society and professional organisations, and individual viewers and listeners in the process of decision-making within PSM and of supervision of PSM.

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- 56 Open Society Institute, *Television Across Europe: Regulation, Policy and Independence*, 3 volumes and Summary, 2005 (hereinafter 2005 OSI Report), available at http://www.soros.org/initiatives/media/articles_publications/publications/eurotv_20051011/summary_20051011.pdf and *Television Across Europe, More Channels, Less Independence*, 2008 (hereinafter 2008 OSI Report), available at http://www.soros.org/initiatives/media/articles_publications/publications/television_20090313
 - 57 *Public service media governance: looking to the future*, Background Text of the 1st Council of Europe Conference of Ministers responsible for media and new communication services, A new notion of media?, 28–29 May 2009, Reykjavik, Iceland and *Back to Society? Rethinking Governance in European Public Service Media*, Discussion Paper Prepared for the First Meeting of the Ad Hoc Advisory Group on Public Service Media Governance (MC-S-PG), Strasbourg, 27 and 28 May 2010.
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3.I.I.I PSM Structure

PSM has different structures across Europe. Choices exist with respect to the following questions:

- ▶ **Should PSM's structure be centralised or decentralised?** Normally, PSM is centralised. However, ARD in Germany is a consortium of 9 regional broadcasting stations and Deutsche Welle. The decentralised structure reflects the federal structure of government in Germany according to which the Länder have powers to regulate broadcasting. In contrast, a centralised structure of PSM is more appropriate for unitary states. However there are exceptions as revealed by the example below

Spain presents an interesting example of decentralised PSM. Even though Spain is not a federal state, its autonomous communities have responsibilities for public service broadcasting. The national PSM, RTVE, has regional centres, which provide content to the national programming services and also prepare specific regional content to be broadcast to only specific parts of the country, using the regional language where there is one. At the same time regional public service broadcasters exist in Spain. They are created by regional parliaments and are independent from RTVE.⁶¹

- ▶ **What should be the elements of PSM's structure?** The variety of PSM structures across Europe reveals that no single model of PSM is suitable to all states. Despite their existing differences, which are a result of specific traditions and political cultures, models seek to secure the independence of PSM from government. As a result few traits are common:
 - First, parliaments and governments play a role in PSM organisation. Parliaments are responsible for the adoption of PSM legislation and may participate in the appointment of members of supervisory boards. Parliaments also examine annual reports on PSM activities and debate on their state.
 - Second, governments are responsible for setting up PSM. Increasingly across Europe governments conclude management contracts with PSM stipulating obligations and the remit in detail. Management contracts are a form of external control by the government and the public as they document PSM's overall goals and translate them into quantifiable performance targets.
 - Third, supervisory boards are created as “buffer zones” between the government and PSM.
 - Fourth, management bodies (director general and management boards) responsible for day-to-day business of PSM are established.

⁶¹ *The Public Service Broadcasting Culture*, European Audiovisual Observatory, Strasbourg (France), 2007, p. 71.

- Fifth, independent regulatory authorities may also play a role in PSM governance structure in certain cases. These include monitoring the activities of PSM and its compliance with broadcasting regulation, the management contract and pan-European quotas and rules concerning advertising, sponsorship and product placement.
- Sixth, public organisations as audiovisual councils are created to express the views of viewers and listeners and monitor PSM performance.

Good PSM laws create a complex system of checks and balances between the above mentioned bodies entrusted with PSM governance.

Model Provisions

- *Governing Bodies*

The governing bodies of PSM shall be the Supervisory Board and the Management Board headed by the General Director.

- *Competence of Supervisory Board*

- The Supervisory Board shall have overall responsibility for: the determination of internal policy, for ensuring compliance with all policies and the Guiding Principles, laid down in this Law, for ensuring that PSM meets the highest standards of probity and value for money, for appointing the General Director and for setting the overall strategy of PSM.
- The Supervisory Board shall, in accordance with this law and other relevant legislation, establish policies, operational guidelines and procedures.
- The Supervisory Board may request from the Management Board and the Director General written information on any activities or omissions which, in the Supervisory Authority's view, violate the present Law.
- The Supervisory Board may instruct PSM to take the action necessary to stop the violation.
- The Supervisory Board may directly institute proceedings with the court against any such instructions if the Management Board fails within a reasonable period, or if more extensive supervisory measures are required by the Supervisory Board.

- *Competence of the Management Board*

The Management Board shall

1. have final responsibility for the programming content, and shall ensure that programmes are consistent with the Guiding Principles laid down in this Law and do not violate any other laws.
2. determine the basic guidelines for the development, scope and structure of the programme service,

3. adopt the rules of the structure and organisation of operation, for wages and honorariums, for advertising, for storage and use of stock material, and for external productions and co-productions,
4. adopt the structure and job descriptions of employees, the terms and procedures for conclusion of contracts with part-time contributors and journalists
5. endorse the draft budget and the report by the General Director for future use
6. endorse all advertising and sponsorship contracts, as well as any other contracts for a value exceeding a level specified in the rules of organisation and operation.⁶²

The Management Board shall report for its activities before the Supervisory Board.

The Management Board shall report on the utilisation of the budget, which shall be presented to [insert name of (lower chamber of) parliament] for approval.

- *Competence of the General Director*

The Director General shall

1. appoint the members of the Management Board
2. call and chair meetings of the Management Board
3. implement the programming policy
4. manage operatively PSM and its property
5. conclude and terminate the labour contracts of PSM employees
6. prepare the draft budget to be submitted to the Management Board for endorsement and organise the implementation, balancing and reporting of the budget to be submitted to the Management Board for endorsement
7. represent PSM both in court and out of court
8. choose individuals and legal bodies or radio and television operators for joint productions.⁶³

3.I.I.2 Institutional Autonomy

According to a monitoring study by the Open Society Institute public service broadcasters in Europe suffer mounting politicisation and pressure.⁶⁴ These threats to PSM independence arise from the public character of the media. Being owned by the public, PSM is regulated by and accountable to public bodies (parliament and government). These last are often tempted to place PSM under control thus failing to secure their institutional autonomy.

⁶² This provision is based on Article 62 of Bulgaria's Radio and Television Law, published in State Gazette, issue 138, 1998.

⁶³ *Ibid.*

⁶⁴ See 2008 OSI Report, see footnote No. 2.

Challenges

The key challenge for regulators is to ensure that PSM is both independent from government, parliament and businesses and at the same time accountable to the public.

Regulators should make the following choices concerning the institutional autonomy of PSM:

- ▶ **What should the role of the government and parliament be?** Freedom of expression and free media are fundamental elements of democracy. This implies that media should be protected from interference by state bodies. On the other hand, PSM media does not operate without being publicly accountable for the fulfilment of its remit and the spending of its resources. This implies external control over PSM by state authorities. This paradigm is one of the challenges for media regulators. It is their job to assure the necessary distance between government and PSM as institutions.

The information below reveals that states across Europe are involved in the operation of PSM in different ways. From an autonomy point of view, the best structural model is the one which insulates PSM from the political system.

According to Nissen⁶⁵, the existing models of PSM can be grouped in three categories in view of their involvement in the operation of PSM:

1. Systems in which government and majority parties in parliament steer the operation of PSM. (France, Greece and Spain are mentioned as falling into this group);
2. Systems in which influence is distributed among several political parties including the opposition and often a number of non-political organisations and institutions in society. (Nissen puts pre-Berlusconi Italy, Germany, Austria, Holland and some of the former eastern European states in this group);
3. Systems with a regulatory body as a go between the government and PSM (United Kingdom, Ireland and the Scandinavian countries are regarded as belonging to this category despite the fact that they also have some features in common with proportional representation).

- ▶ **What is the role of the Director General?** Director Generals are at the top of the management hierarchy. However, their powers may vary. In some countries (for example, Spain) the Director General has limited powers relating to the day-to-day operation of PSM. In other countries (for example, Switzerland and Germany) Director Generals have broader and more extensive powers, liaising informally with political bodies (the government and parliament) and issuing the main guidelines relating both in general and in detail to programme activities.

⁶⁵ See C. S. Nissen, *Public service media in the information society*, 2005. Report prepared for the Council of Europe's Group of specialists on Public Service Broadcasting (MC-S-PSM), p. 37, available at [http://www.coe.int/t/dghl/standardsetting/media/doc/H-Inf\(2006\)003_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/doc/H-Inf(2006)003_en.pdf)

If the law provides for broad powers of the Director General the personality of the latter becomes very significant for the operation of PSM. In contrast, the limited scope of powers of the Director General protects the institution from risks arising from the personality of its chief manager.

- ▶ **What is the role of the Management Board?** The Management Board can serve as a helper and advisor to the Director General or both bodies should make all decisions by consensus. In order to avoid dictatorial and authoritarian management of PSM it is advisable to limit the cases in which the Director General makes decisions alone. In other words PSM laws should provide for strong management boards.

A good example of a strong management board is the board of RTVE. It is responsible for the definition of the strategy of RTVE, the appointment of the main executive officers of RTVE (and its companies), the approval of the organisational chart, the approval of basic guidelines regarding production, advertising, programming and access to its television programming by relevant social and political groups, as well as the approval of the most important contracts, of the annual report, of the yearly balance and of the budget to be proposed to Parliament.⁶⁶

- ▶ **What is the role of the Supervisory Board?** Supervisory Boards represent PSM owners, i.e. the public. Normally, these boards are separate bodies. For example, ARD's broadcasting boards are set out on a regional basis as internal supervisory bodies. There are, however, exceptions. In some countries, for example Finland, the national broadcasting regulator supervises the operation of PSM. From an economic point of view, it is probably better to entrust a national broadcasting regulator with supervisory functions. However, if the latter is already too busy, (for example in a country with many broadcasters) then combining PSM supervision with other functions may cause overloading and ineffectiveness.

Besides representing PSM owners, Supervisory Boards have a steering role. These two roles conflict with each other. On the one hand Supervisory Boards should ensure that PSM is accountable to the public; on the other, they should guide and defend PSM from outside pressure.

From an autonomy point of view the most important issue is the relationship between the Supervisory Board and the Management Board of PSM. The best solution is to divide responsibilities. The Supervisory Board should concentrate on strategy whereas the Management Board should focus on day-to-day operations.

66 *The Public Service Broadcasting Culture*, p. 67, see footnote No. 7.

- ▶ **Who should appoint the Director General of PSM?** From an autonomy point of view, the government or the president should not appoint managers (for example Director General and members of management boards). That is why most often *the Director General* of PSM is appointed by the Supervisory Board. For example, Germany's ARD is appointed by the Broadcasting Board. However, exceptions exist. In France the chairmen of the public sector audiovisual companies (France Télévisions, Radio France and the company responsible for audiovisual services outside France) are appointed by the President of the Republic and his Council of Ministers.

The constitutionality of the appointment of PSM directors by the President

When examining the compliance with the Constitution of the recently adopted appointment system in France, in force since 2009, the Constitutional Council approved the regulation on condition that nominations are subjected to the opinion procedure and to the right of possible veto of the parliamentary committees, and are only made if the opinion of the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel—CSA) is favourable.⁶⁷

- ▶ **Who should appoint the Management Board?** There are different models: Denmark's DR is managed by a board of directors appointed by the Supervisory Board.⁶⁸ Similar is the situation in Poland where the members of the Supervisory Council appoint the Board of Management. In Spain the Congress and the Senate appoint the Management Board of RTVE. In Bulgaria the broadcasting regulator appoints the Director Generals and the management boards of Bulgarian National Television and Bulgarian National Radio, whose members are nominated by the respective Director Generals. In contrast, in Latvia, the General Director of LTV alone appoints his or her councillors.⁶⁹

There is an assumption that members of governing bodies appointed by parliament are independent. This assumption often turns out to be false. The OSI report contains many examples of politically loyal members of governing bodies. Therefore, it seems that independence depends not on the body appointing the candidates but on those nominating them.

⁶⁷ Amélie Blocman, *Audiovisual Reform Adopted and Promulgated*, IRIS Legal Observations of the European Audiovisual Observatory, IRIS 2009–4, pp. 10–11.

⁶⁸ The information about the management boards' members is taken from *Public service media governance: looking to the future, Background Text of the 1st Council of Europe Conference of Ministers responsible for media and new communication services, A new notion of media?*, 28–29 May 2009, Reykjavik, Iceland, pp. 37–46.

⁶⁹ 2005 OSI Report, Summary, p. 56, see footnote No. 2.

An example of fair regulation of the nomination process of a PSM Management Board comes from Albania. Since 2006, universities, professional organisations and civil society groups propose candidates for the Steering Board of the Radio Television of Albania.⁷⁰ The following associations and groups can propose at least five candidates for each Steering Council member:

1. Electronic and print media associations.
2. University of Tirana.
3. Associations of electric and electronic engineering.
4. Lawyers' associations, legal academics, and the National Chamber of Lawyers.
5. Parliamentary groups.
6. NGOs dealing with human and children's rights.
7. Advisory boards of the National Centre of Cinematography and the League of Writers.⁷¹

► **Who should appoint the Supervisory Board?** Different models also exist for appointment of supervisory boards: The Czech Parliament appoints the Public Broadcasting Council. The same is the case in Albania. In France the government, parliament, the broadcasting regulator and the staff of France Télévisions appoint the members to the Supervisory Board (Council of Administration). In Denmark, the 11-member Supervisory Board consists of 3 members appointed by the minister of culture, 6 members appointed by parliament and 2 members appointed by the public service broadcaster's employees. In Germany the Broadcasting Board's members represent 'socially relevant' groups. The lists of institutions, groups and associations that are entitled to elect or appoint its members is defined in the relevant Broadcasting Act of each province.

From an autonomy point of view it is recommended that Parliament appoint the Supervisory Board, based on nominations by civil society and professional organisations, in a process that is transparent and that allows public participation.

► **Who can sit in the Supervisory Board?** The main consideration regarding the supervision of PSM is to ensure that it is carried out in an independent manner. This implies that senior members of government and people with business interests in commercial broadcasting should not sit on the Supervisory Board. There are exceptions to this rule. For example, both in Germany and Austria politicians are allowed to sit on broadcasting boards as their experience and contacts are regarded as being valuable to PSM.

⁷⁰ 2008 OSI Report, p. 4, see footnote No. 2.

⁷¹ Law No. 9531, 11 May 2006, *Official Gazette*, 65, 2006, Article 2, paragraph 1, referred to in OSI Follow Up Report, p. 88.

Normally, PSM laws contain a provision regulating conflict of interests. For example, in Germany, members of the Broadcasting Board are not permitted to be employees with broadcasting corporations, a Land media authority, and they should not have any interests, political or economic, that may jeopardise their ability to fulfil their responsibilities. The Director General of the Irish public service broadcaster is not permitted to hold other offices or carry on business without the consent of the board of the corporation.⁷² In Albania those not eligible for the position of Director General include members of Parliament and Government, senior members of political parties, members of the RTSH Steering Council, and owners, co-owners or members of any private media company.⁷³

Typically, PSM laws require that the members of governing bodies have some relevant expertise, by virtue of their education or expertise, in the fields of broadcasting, policy, law, technology, journalism and business. Normally, there are no specific requirements for an academic degree for membership of governing bodies. One exception is Albania. See the box below.

Candidates with doctoral degree are preferred for membership in the Steering Committee of the RTSH in Albania. All nominees from the university and the association of electric and electronic engineering must have doctoral degrees. Candidates from the Parliamentary Media Commission should preferably have such degrees.⁷⁴

- ▶ **What should be the term of appointment for members of governing bodies?** The membership term of PSM governing bodies varies. The members of Austria's Audience Council serve four years; the membership term of the Macedonian Radio and Television Council is five years; and the members of the Council of Lithuanian Radio and Television are appointed for a six-year term. Whenever political bodies are responsible for election of the members of PSM governing bodies it is advisable that the term of membership does not end before or after the election of these bodies. This is reasonable in order to avoid delays of appointment of new members.

At the same time the membership term should not be too short or too long. In the first case, there is a risk that members will be avoiding tasks whose performance time outlasts the membership term. On the other hand, a prolonged membership term is problematic as it limits the opportunities for public accountability of governing bodies, making it possible for politically biased members to remain on the job for a long time.

⁷² Ireland Broadcasting Act, 2009 enacted on 12 July 2009 (Number 18 of 2009), §89(6).

⁷³ 2005 OSI Report (part I), p. 215, see footnote No.2.

⁷⁴ Law No. 9531, 11 May 2006, *Official Gazette*, 65, 2006, Article 2, paragraphs 3 and 4, referred to in OSI Follow Up Report, p. 88.

An infamous example of a very long membership term comes from Hungary. The members of the Media Council of Hungary (created in 2010) are elected for a nine-year term. The Council are a powerful body operating within a new authority which merges the national radio and television authority ORTT with the telecom authority NHH.

- ▶ ***How should continuity amongst members be ensured?*** Normally, members of governance bodies have a right to be re-elected which ensures continuity of PSM operation. Another measure to ensure continuity is to arrange membership on staggered terms so that the terms of membership do not expire at the same time.
- ▶ ***Should the members of Supervisory Boards be paid or not?*** The answer to this question depends on different factors; for example, the scope of responsibilities of the Supervisory Board and the frequencies of its meetings. While members of broadcasting boards in Germany meet only a few times a year, some of their colleagues across Europe often have meetings every week. Therefore, it is not very problematic if the first are unpaid. However, there is always a risk of political pressure being exerted on Supervisory Boards through threats of salary cuts, if they are too critical towards a government. With this in mind, in countries where PSM is funded by state subsidies there should be safeguards against exerting financial pressure on members of governing bodies and on the media as a whole.

Standards

There are no uniform standards regarding the model of PSM structure. States are free to choose the elements of the formal structure of their PSM in accordance with their traditions and political cultures. However, Council of Europe Recommendation No. R (96) 10⁷⁵ setting out safeguards for the independence of PSM, establishes that such safeguards should also relate to the competences of governing bodies. The PSM legal framework should define clearly and precisely the competences of governing bodies in order to prevent conflicts within PSM and interference with the work of any governing body.⁷⁶

According to Recommendation No. R (96) 10 management bodies, regardless of their character, should be solely responsible for the day-to-day operation of PSM. Any interference in the management of the activities of PSM should be prohibited. There should be a strict separation of powers between the management and supervisory bodies.

⁷⁵ Recommendation No. R (96) 10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting" (1996) and the Appendix to it, available online at: [http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec\(1996\)010&ExpMem_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1996)010&ExpMem_en.asp#TopOfPage)

⁷⁶ *Ibid.*

Recommendation No. R (96) 10 provides that the design and production of programmes should rest exclusively with the management boards. Supervisory boards should be competent to advise the management boards on programming matters and possibly to assist them in this area, however they should not exercise any *a priori control* over these.

In order to avoid difficulties regarding PSM's independence, management boards may be called to account for their functions before internal or external bodies (parliamentary commissions). Any decision taken by the supervisory bodies against members of the boards of management of public service broadcasting organisations, or persons assuming such functions in an individual capacity, for breach of their duties and obligations should be duly reasoned and subject to appeal to the competent courts.

The members of supervisory bodies should be appointed in a transparent and pluralistic manner, enabling the public to ascertain which rules govern their appointment. They should not represent only one point of political, social or economic view. The members should also reflect the diversity of its society's constituent groups.

The safeguards for PSM independence should relate to the appointment and removal of members of governing bodies. Provisions banning conflicts of interest should be included. Members of governing bodies may not, directly or indirectly, exercise functions, receive payment or hold interests in enterprises or other organisations in media or media-related sectors where this would lead to a conflict of interest with their functions in PSM.

Members of supervisory boards should be immune from dismissal, supervision or replacement during their term of office by any body or authority other than the one which appointed them, except where the supervisory body has duly certified that they are incapable of or have been prevented from exercising their functions.

Legal Solutions

In order to ensure institutional autonomy the legal framework of PSM should contain a number of safeguards against interference:

A good PSM law should include a clear statement about institutional autonomy, determining the scope of the latter. It should also include particular safeguards against:

1. Politically motivated appointments and removals of members of governing bodies;
2. Conflict of interest of members of governing bodies;

Finally, PSM laws should ensure that the pay and benefit packages for the members of the governing bodies are adequate and are not determined by the government.

Model Provisions

- **Legal Recognition of the Principle of Institutional Autonomy**

Recommendation No. R (96) 10 states that PSM laws should clearly stipulate their institutional autonomy, especially in areas such as:

- the organisation of the activities of the service;
- recruitment, employment and staff management within the service;
- the purchase, hire, sale and use of goods and services;
- the management of financial resources;
- the preparation and execution of the budget;
- the negotiation, preparation and signature of legal acts relating to the operation of the service;
- the representation of the service in legal proceedings as well as with respect to third parties.

Model Provision

1. The governing bodies of PSM shall be independent and impartial in the exercise of their functions.
2. Members of governing bodies shall neither seek nor accept instruction in the performance of their duties from any authority, except as provided by law.
3. The Supervisory Board and any third body shall not interfere with the day-to-day management of PSM including such matters as the recruitment, employment and management of staff, the management of financial resources, the preparation and the execution of the budget, the negotiation, preparation and signature of legal acts relating to the operation of the service.
4. Members of governing bodies shall act at all times in the overall public interest and shall not use their appointment to advance their personal interests, or the political or business interests of any other party or entity.
5. The governing bodies of PSM shall safeguard the institutional independence of PSM.

- **Appointment of Members of PSM Governing Bodies**

To ensure maximum institutional autonomy it is proposed that the Supervisory Board will be composed of members nominated by civil society and appointed by the independent broadcasting regulator. The first provision guarantees an open and transparent selection process in which civil key players are civil society and professional organisations. The process ensures that membership of the Supervisory Board as a whole represents, to the extent that this is reasonably possible, a broad cross section of the national society.

The second provision aims to ensure the independent appointment of the Director General. The latter should be able to choose the senior manager inasmuch as the decision-making procedure at the level of PSM is similar to the decision-making mechanism of other companies. The provision sets out criteria for dismissal to prevent arbitrariness and allows the director to appeal the decision for dismissal to court.

Model Provision

The Supervisory Board shall be appointed by the Broadcasting Regulatory Body in accordance with the following:

- the process shall be open and transparent;
- the Broadcasting Regulatory Body should aim to achieve a balance in gender;
- only candidates nominated by civil society and professional organisations shall be considered for appointment;
- a shortlist of candidates shall be published in advance and the public shall be given an opportunity to make representations concerning these candidates;
- a candidate shall be appointed only if he or she receives two-thirds of the votes cast;

The following civil society and professional organisations shall be entitled to nominate candidates:

1. ...
2. ...
3. ...⁷⁷

Members of the Supervisory Board shall be appointed for a term of 5 years. Re-appointment of the members shall be possible.

The Director General shall be appointed for a term of 5 years by the Supervisory Board by a majority vote after an open and transparent competition.

Nominations for the position of Director General shall not be restricted unless for the purpose of ensuring professionalism.

The Director General shall appoint the senior staff of PSM. Together with the Director General they will form the Management Board.

- **Dismissal of Members of Governing Bodies**

The independence of governing bodies cannot be sustained if their members are not protected against politically motivated dismissals and are subject to threats of these. Therefore, a PSM law should indicate the factors which may lead to dismissal. In addition, it should provide for independent court review of decisions for dismissals.

⁷⁷ Principle 8(4) of ARTICLE 19's *A Model Public Service Broadcasting Law*, see footnote No. 5.

Model Provision

The Broadcasting Regulatory Board may remove a member from the Supervisory Board only after a hearing and where that individual:

- (a) becomes ineligible for appointment to the Board;
- (b) is no longer able to perform his or her duties effectively; or
- (c) fails, without valid excuse, to attend meetings of the Board for a period of more than three (3) months.

Any decision for removal of a Board member from office should be duly reasoned and subject to appeal to court.⁷⁸

The Supervisory Board shall not exercise its power to remove the Director General unless in cases of conflict of interest or when they have committed a serious violation towards their responsibilities under the law, including by failing to respect the Guiding Principles of PSM.

Any decision for removal of the Director General from office should be duly reasoned and subject to appeal to court.

- **Conflict of Interests**

Another guarantee for the independence of PSM governing bodies is the prohibition of their members from having any financial interest in any broadcast company or from being members of political bodies. A breach of this rule could lead to dismissal.

Model Provision

No one shall be elected Director General or to the Supervisory Board or appointed as senior staff of PSM if he or she:

- (a) is employed in the civil service or any other branch of government;
- (b) holds an official office in, or is an employee of, a political party;
- (c) holds an elected position at any level of government;
- (d) holds a position in, receives payment from or has, directly or indirectly, significant financial interests in broadcasting or telecommunications;
- (e) has been convicted, after due process in accordance with internationally accepted legal principles, of a violent crime and/or a crime of dishonesty or theft, for which he or she has not been pardoned, unless five years have passed since the sentence was discharged;

provided that individuals who have been shortlisted pursuant to sub-section (1)(c) shall be given an adequate opportunity to take any necessary steps to remove a barrier to their appointment under this sub-section.

The members of the governing bodies and the staff shall not use their appointments for personal benefit, or for the benefit of any party or entity other than PSM.

78 Ibid.

- **Funding**

Legal safeguards against the use of funding as a means of political pressure include:

1. Setting out terms of funding in law;
2. Setting out the salaries of members of governing bodies in PSM laws;
3. Ensuring competitive pay and benefits for members of PSM governing bodies so that they do not need to look for additional income.

3.1.1.3 Editorial Independence

In order to be able to live up to fundamental ideals of journalism and serve as a public watchdog PSM should not be censored or have its news subject to other limitations. On the other hand, it is important that individuals be protected from unwarranted suffering as a result of media publicity. Without such a safeguard PSM may abuse its powers.

Challenges

Government, politicians or public or private entities exert undue influence on the content of news and programmes of PSM. Such interference often takes place during election campaigns to ensure favourable coverage. Journalists may also be subject to direct and indirect manipulation by PSM management and state and private bodies. One reason for this situation is the lack of firewalls between management and editorial desks.⁷⁹

At the same time, PSM runs the risk of unwarrantedly damaging someone's reputation. If this is the case, the media should allow the affected person to protect their reputation or correct the information.

Standards

Editorial independence is guaranteed by the European Convention on Human Rights. Article 10, paragraph 1 of which stipulates that the right to freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. The European Court of Human Rights has repeatedly highlighted the importance of ensuring the editorial independence of broadcasters.⁸⁰ According to European judges, the state's

⁷⁹ 2005 OSI Report, Summary, p. 65, see footnote No. 2.

⁸⁰ See for example, *Manole and Others v. Moldova*, Judgment 17 December 2009, Application no. 13936/02, VGT Verein gegen Tierfabriken v. Switzerland, no. 24699/94, §§ 73 and 75, ECHR 2001-VI; and also *De Geillustreerde v. the Netherlands*, no. 5178/71, Commission decision of 6 July 1976, § 86, Decisions and Reports (DR) 8, p. 13.

positive obligation to guarantee pluralism must be fulfilled through domestic law and practice which should ensure public broadcasters' independence from political interference and control.⁸¹

In *Declaration on the freedom of expression and information*⁸² the Committee of Ministers of the Council of Europe underlined that states should ensure the absence of any arbitrary controls or constraints on participants in the information process, on media content or on the transmission and dissemination of information. In *Resolution No. 1 on The Future of Public Service Broadcasting* (1994) the Council of Europe member states undertook "to guarantee the independence of public service broadcasters against political and economic interference".⁸³ The resolution also states, in particular, that day to day management and editorial responsibility for programme schedules and the content of programmes must be a matter entirely for the broadcasters themselves.

In *Recommendation No. R (96) 10* the Committee of Ministers of the Council of Europe pointed out that the independence of the media is essential for the functioning of a democratic society and adopted a number of detailed guidelines aimed at ensuring the independence of public service broadcasters and their editorial independence.⁸⁴ The Recommendation sets out the need for clear provisions to the effect that staff of public service broadcasting organisations may not take any instructions whatsoever from persons or bodies outside the organisation employing them without the agreement of the board of management of the organisation, subject to the competencies of the supervisory board.

Legal Solutions

PSM laws contain a number of safeguards for editorial independence. These are examined below:

- **Legal Recognition of the Principle of Editorial Independence**

Recommendation No. R (96) 10 states that PSM laws should clearly stipulate their editorial independence, especially in areas such as:

- the definition of programme schedules;
- the conception and production of programmes;
- the editing and presentation of news and current affairs programmes.

⁸¹ *Manole and Others v Moldova*, *ibid.* paragraphs 107–109.

⁸² *Declaration on the Freedom of Expression and Information*, Adopted by the Committee of Ministers on 29 April 1982 at its 70th Session, available online at <https://wcd.coe.int/corn.intranet.InstraServlet?command=corn.intranet.CmdBlobGet&IntranetImage=601273&SecMode=1&DocId=675536&Usage=2>

⁸³ *Resolution No. 1 on The Future of Public Service Broadcasting* adopted at the Fourth European Ministerial Conference on Mass Media Policy in Prague, 7–8 December 1994, by the Committee of Ministers of Council of Europe.

⁸⁴ See the *Appendix to Recommendation no. R (96) 10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting* (1996), available online at: [http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec\(1996\)010&ExpMem_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1996)010&ExpMem_en.asp#TopOfPage)

Furthermore, Recommendation No. R (96) recommends that the legal framework of PSM stipulate that the programming activities of public service broadcasting organisations shall not be subject to any form of censorship. “No *a priori* control of the activities of public service broadcasting organisations shall be exercised by external persons or bodies except in exceptional cases provided by law”.⁸⁵

Recommendation No. R (96) expresses the need for clear provisions to the effect that the staff of public service broadcasting organisations may not take any instructions whatsoever from persons or bodies outside the organisation employing them without the agreement of the board of management of the organisation, subject to the competencies of the supervisory board.

Model Provision

- (1) PSM shall have editorial independence in the definition of programming schedules, in the conception and production of programmes and in the editing and presentation of news and current affairs programmes.
- (2) The programming activities of public service broadcasting organisations shall not be subject to any form of censorship or to any *a priori* control.
- (3) Editors and journalists are free to make decisions with respect to the news and programme content, including decisions about what to cover, how to cover it and where to place the story in broadcasting programmes.
- (4) The staff of public service broadcasting organisations may not take any instructions whatsoever from persons or bodies outside the organisation employing them without the agreement of the board of management of the organisation, subject to the competencies of the supervisory board.
- (5) The Supervisory Board and the General Director shall safeguard the editorial independence of PSM.
- (6) PSM shall adopt mandatory editorial standards and production guidelines aimed at ensuring high quality programmes, and accurate and unbiased news. It shall be obliged to observe the norms of the Code of Journalists' Ethics and implement the decisions of self-regulatory bodies regarding complaints for violations of this code.

- **Editorial Standards and Professional Guiding Principles**

If PSM is regarded as a public utility it is justifiable for the legislature to set out basic standards to which the media should adhere in the production of programmes. This is a common approach in Europe to link PSM to the public efforts for equality of citizens, and for reduction of social differences, for quality of media content, fairness and building of social identity and a nation's collective experience.

⁸⁵ Appendix to Recommendation No. R (96) to the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting (1996), Appendix, Section 1, General provisions.

The Mass Media Law of Lithuania provides for general principles on how information should be presented to the public, including requirements for unbiased, accurate information, diversity of opinions and so forth⁸⁶. The law also requires producers of public information programmes to have their own internal codes of ethics.⁸⁷

Model Provision

- (i) PSM has an overall mandate to provide a wide range of programming for the whole territory of [insert name of State] that informs, enlightens and entertains, and that serves all the people of [insert name of State], taking into account ethnic, cultural and religious diversity.
- (2) PSM shall provide innovative and high quality broadcasting, which reflects the range of views and perspectives held in society, satisfies the needs and interests of the general public in relation to informative broadcasting, and complements programming provided by private broadcasters.
- (3) To fulfil its public service broadcasting role, PSM shall strive to provide a broadcasting service that:
 - (a) is independent of governmental, political or economic control, reflects editorial integrity and does not present the views or opinions of PSM;
 - (b) includes comprehensive, impartial and balanced news and current affairs programming, including during prime time, covering national and international events of general public interest;
 - (c) contributes to a sense of national identity, while reflecting and recognising the cultural diversity of [insert name of State];
 - (d) gives a voice to all ethnic groups and minorities, including through the establishment of Ethnic/Minority Programming Services and the provision of programming in ethnic/minority languages;
 - (e) strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences;
 - (f) provides appropriate coverage of the proceedings of key decision-making bodies, including the [insert name(s) of the house(s) of parliament];
 - (g) includes programmes that are of interest to different regions;
 - (h) ensures the diffusion of important public announcements;
 - (i) provides a reasonable proportion of educational programmes and programmes oriented towards children;

⁸⁶ The Mass Media Law of Lithuania, adopted on 2 June 1996, No.l-1418, Article 41, paragraph 2.

⁸⁷ *Ibid*, Article 43.

- (j) promotes programme production within [insert name of State]; and
- (k) contributes to informed debate and critical thought.

- **Professional Status and Rights of Journalists**

Editorial independence can only be achieved if PSM laws guarantee fair and decent working conditions for journalists and media workers.

Recommendation No. R (96) contains references to recruitment and non-discrimination, associative activities and the right to engage in industrial action.⁸⁸

The staff of public service broadcasting organisations should be guaranteed without discrimination the right to take part in trade union activities and to strike, subject to any restrictions laid down by law to guarantee the continuity of the public service or other legitimate reasons.

The right to freedom of expression is recognised by Article 10 of the European Convention on Human Rights. There is broad international recognition that the protection of journalistic sources constitutes one of the basic conditions of press freedom. Council of Europe Recommendation No. R (2000) 7⁸⁹ of the establishes safeguards for the right of journalists not to disclose their sources.

Bulgaria's Law on Radio and Television⁹⁰ provides good legal protection for journalists' rights.

Article 11

- (1) Any opinion shall be expressed freely in media services.
- (2) Journalists and creative workers, who have contracts with providers of media services shall not receive instructions and guidelines for the exercise of their activities by individuals and/or groups outside bodies' management of media services.
- (3) Public criticism toward the media service by employees shall not constitute disloyalty to the employer.
- (4) Journalists whether employed or hired by providers of media services shall have the right to refuse to perform an assigned task if it is not related to the provisions of this Law or the relevant contracts and contrary to their personal beliefs. Technical and editorial processing of programme material and news shall not be denied.

Article 15

- (1) Media service providers shall not be required to disclose their sources of information, unless there is a pending lawsuit proceeding or proceedings pending appeal by the affected person, the Council for Electronic Media.
- (2) Journalists shall not be obliged to disclose their sources of information not only to the audience but also to the management of a media service provider, except under paragraph 1.

⁸⁸ Part IV of the *Appendix to Recommendation No. R (96) 10 of the Committee of Ministers to member states on the guarantee of the independence of public service broadcasting*" (1996).

⁸⁹ Available at [http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec\(2000\)007&ExpMem_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(2000)007&ExpMem_en.asp#TopOfPage)

⁹⁰ Radio and Television Law of Bulgaria, see footnote 8.

Model Provision

Any opinion shall be expressed freely in PSM.

Any measures taken pursuant to PSM law and to any other law shall not violate the right to freedom of expression of PSM and of individual staff members.

Journalists working at PSM shall have the right to refuse to perform an assigned task if it is not related to the provisions of this Law or the relevant contracts and contrary to their personal beliefs. Technical and editorial processing of programme material and news shall not be denied.

The staff of PSM shall be protected against discrimination.

PSM shall respect the rights of staff members to association, including membership of trade unions and to engage in industrial action, including strikes, subject to any restrictions laid down by law to guarantee the continuity of public service or other legitimate reasons.

Journalists, editors or other PSM staff practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- (1) the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- (2) the information or similar information leading to the same result cannot be obtained elsewhere;
- (3) the public interest in disclosure outweighs the harm to freedom of expression; and disclosure has been ordered by a court, after a full hearing.

- **Sponsors and Advertisers**

Advertising and sponsorship of PSM may be permitted or restricted depending on policy considerations and regulations in each country. Where PSM is open for sponsorship, advertisers may influence the content of programmes in exchange for their financial support or advertisement. In view of this risk the Audiovisual Media Services Directive (AVMS Directive)⁹¹, and the Council of Europe Convention on Transfrontier Television (ECTT)⁹² set out that PSM laws should include specific provisions specifying that sponsors and advertisers cannot exercise any influence on editorial content and/or the scheduling of a television programme.

⁹¹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), available online at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

⁹² European Convention on Transfrontier Television, adopted on 5 June 1989—Text amended according to the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002.

Model Provision

Sponsorship and advertisement shall in no way affect the content or scheduling of programmes.

- **Airing Time**

There are situations in which the editorial independence of PSM may be restricted. These situations should be interpreted very strictly and justified only if they concern the provision of vital information for public information. For example, broadcasting of official messages, declarations or communications, reporting on acts or decisions of public authorities or giving air time to political parties or candidates for the Presidency during national elections campaigns.

Recommendation No. R (96) 10 sets out that the granting of airtime to the authorities or other bodies should be confined to exceptional circumstances expressly laid down in laws or regulations.⁹³

Model Provision

PSM shall be obliged to broadcast official messages, declarations or communications or to grant airtime to such authorities in case of natural calamities or imminent danger for the life, security and health of the public.⁹⁴

PSM shall provide airtime to political parties or candidates for the Presidency during campaigns for national elections under conditions and order set out by the relevant election laws.

PSM shall be entitled to request the reimbursement of its costs in connection with airtime granted to political parties during election campaigns.⁹⁵

- **Right to Reply**

The right of reply allows everyone to defend his/herself against public criticism in the same venue where it was published.⁹⁶ The right to reply should be distinguished from rectification. Unlike rectification, those who exercise the right to reply do not need to prove the statement was false and still less that their own counter-statement is correct. This is for the viewer or listener to appreciate.

Both the AVMS Directive and the ECTT define the right to reply. The latter stipulates that any natural or legal person, regardless of nationality, whose legitimate interests, (in particular

⁹³ See The programming policy of public service broadcasting organisations in the Appendix to *Recommendation No. R (96) 10 on "The guarantee of the independence of public service broadcasting"* (1996).

⁹⁴ Such a provision exists in Bulgaria's Law on Radio and Television, Article 51.

⁹⁵ The provision is based on a model provision proposed by International Telecommunication Union/Telecommunication Bureau, UNESCO, See *Model Public Service Broadcasting Law and Aspects of Regulating Commercial Broadcasting*, Geneva, September 1999.

⁹⁶ See Article 1 of 2004 *Draft Recommendation of the Committee of Ministers to member states on the right of reply in the new media environment*, available online at <http://webarchive.nationalarchives.gov.uk/+/><http://www.culture.gov.uk/images/consultations/MMSOD2004.pdf>

reputation and good name), have been damaged by an assertion of incorrect facts in a television and radio programme must have the right of reply or equivalent remedies. Member states are obliged to adopt the measures needed to establish the right and ensure that its exercise is not hindered by the imposition of unreasonable terms or conditions. The AVMAS Directive provides that disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

Model Provision

- (1) A natural or legal person who is affected by a statement of fact in a broadcast shall be entitled to the right of reply.
- (2) The right of reply is excluded with regard to accurate reports on public sessions of legislative bodies and the courts.
- (3) The reply must be restricted to the facts and may not have any criminal content. It must be presented in writing and signed by the party concerned or his legal representative.
- (4) PSM must broadcast the reply free of charge in such a way as to reach as soon as possible the public which has taken note of the contested factual statement (for example, in the next edition of the same programme, or programme category).
- (5) PSM may refuse to broadcast the reply if
 - (a) the person concerned has no legitimate interest in its dissemination,
 - (b) the reply is unreasonably long (for example, considerably longer than the contested factual statement),
 - (c) the request for a reply has not been received by PSM within two months of the broadcast of the contested factual statement.⁹⁷
- (6) Disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

3.I.I.4 PSM Public Accountability

The nature of PSM determines its public accountability. Irrespective of its type of funding, PSM is held accountable as to how it spends public resources and fulfils its mandate.

According to the Council of Europe's *Declaration on the guarantee of the independence of public service broadcasting in the member states*⁹⁸ PSM is "relatively" open and transparent in most

⁹⁷ International Telecommunication Union, BDR Telecommunication Bureau, UNESCO, *Model Public Service Broadcasting Law and Aspects of Regulating Commercial Broadcasting*, Geneva, September 1999.

⁹⁸ *Declaration on the guarantee of the independence of public service broadcasting in member states, Adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies*.

states. Examples of good practice include engagement of the public in providing audience feedback on performance and the publishing by PSM of relevant information on a regular basis. The Declaration, however, notes that in some cases there is insufficient openness, transparency and accountability. Furthermore, in some countries annual reports to national parliaments are rarely the subject of examination or real debate. This maybe the result of lack of practice in holding PSM publicly accountable or due to a perception that parliament has weaker supervisory functions if PSM's funding comes from advertisement or licence fees.

Whatever the reasons are, shortfalls concerning PSM's accountability affect the public's trust in it, and leads to alienation of viewers and listeners.

Challenges

The key legal challenge is to create effective mechanisms for PSM accountability which do not affect its independence or ability to protect its commercial confidentiality.

Standards

Resolution No. 1 adopted at the 4th European Ministerial Conference on Mass Media Policy set out that “public service broadcasters must be directly accountable to the public. To that end, public service broadcasters should regularly publish information on their activities and develop procedures for allowing viewers and listeners to comment on the way in which they carry out their missions”.

Recommendation No. R. (96) 10 sets out that management boards or “individuals assuming such functions” should only be accountable for the exercise of their functions to the supervisory body of their public service broadcasting organisation. Any decision by supervisory bodies against members of management boards or the Director General for breach of their duties should be duly reasoned and subject to appeal to competent courts.

Legal Solutions

Normally, PSM laws specify the duties and responsibilities of the governing bodies as well as the means through which they will be held accountable. Typical mechanisms for accountability include reporting obligations of the governing bodies and adoption of complaint procedures.

Every other year the Finnish YLE's Administrative Council must submit a report on YLE's operations to Parliament. The YLE Board must submit an annual report to the Finnish Communications Regulatory Authority on the public service provided.⁹⁹

99 *The Public Service Broadcasting Culture*, p. 76. see footnote No. 7.

The public can hold PSM accountable through public representatives sitting in the supervisory board and complaints procedures for breaches of Code of Practice. The complaint procedures adopted in the BBC are exemplary in this regard. See the box below.

The BBC has a special body, the Editorial Complaints Unit, dealing with serious complaints about breaches of the BBC's editorial standards. It deals with complaints about any BBC service or product where the BBC has editorial responsibility. If complainants are not satisfied by the Editorial Complaints Unit finding, they can appeal to the Governors' Programme Complaints Committee. For the most serious upheld complaints, an apology or correction from the BBC may be published online or on air.¹⁰⁰

The key question is what kind of the complaint procedure will be chosen. While in some jurisdictions (for example, Switzerland, see the box below) complaints are examined by external bodies, in others they are submitted to the PSM governing bodies. While from an economic point of view the operation of a new body may be expensive this type of complaint mechanism can guarantee objectivity to a higher extent. At the same time the legislation should ensure that the decisions of the separate body are enforceable.

The RTV law in Switzerland sets out that an Ombudsman ("Ombudsstelle"), appointed by the radio or television station concerned, examines complaints by persons offended by a programme. The "Ombudsstelle" does not have the right to make a binding decision; the person in charge has the function of a mediator. If the mediation is not successful, the offended person is entitled to file a complaint to an independent regulatory agency which deals with complaints regarding programme activities. This independent regulatory agency has quasi-judicial functions; a decision of this body can be appealed to the Federal Court. The independent regulatory agency supervises the programme activities of the SRG (and the other broadcast providers) from a legal angle, however, it is restricted insofar as the legal "review" must address the question of a possible violation of a person's right in his/her integrity; furthermore, a complaint can be made that a specific programme did not comply with the minimal content standards.¹⁰¹

Finally, the legal framework has to ensure that the operation of PSM is subjected to public debate. In view of the mission of the Audience Council of the ORF in Austria to facilitate debate on PSM related issues we refer to it in the box below.

¹⁰⁰ BBC Complaints—Editorial complaints unit rulings, available at <http://www.bbc.co.uk/complaints/ecu/>

¹⁰¹ *The Public Service Broadcasting Culture*, p. 34, see footnote No. 7.

The Audience Council of the ORF in Austria is established to “safeguard the interests of the listeners and viewers”. Its 35 members are appointed by “the Federal Economic Chamber, the Conference of the Presidents of the Austrian Chamber of Agriculture, the Austrian Board of the Chambers of Labour and the Federation of the Austrian Trade Unions” (each shall appoint one member), “the Chambers of the Liberal Professions” (together one member), the Roman Catholic Church and the Lutheran Church (each one member), “those entities who are responsible for civic political education within the political parties” (each one member), the Academy of Sciences (one member). “For the appointment of further members, the Federal Chancellor shall solicit proposals from the institutions or organisations which are representative of the following sectors or groups: academia, education, arts, sports, youth, students, the elderly, handicapped people, parents and the family, national minorities, tourism, motorists, consumers, and environmental protection” (17 members)¹⁰². Finally, six members are to be elected by the viewers and listeners directly. People can vote via telephone, telefax, Internet and other comparable technical facilities within one week that shall be granted for the casting of votes.

Model Provisions

- **Responsibility of the Management Board¹⁰³**

Annual Review of Managing Director

 - (1) The Board shall conduct an annual review of the Management Board with a view to assessing its performance and to providing feedback on it.
 - (2) The annual review referred to in sub-section (1) shall be published and widely disseminated.

- **Responsibility of Supervisory Bodies**

Annual Report

 - (1) The Supervisory Board shall after consultation with the Management Board prepare, publish and distribute widely an Annual Report, along with externally audited accounts, for PSM. Each Annual Report shall include the following information: –
 - (a) a summary of the externally audited accounts, along with an overview of income and expenditure for the previous year;
 - (b) information on any company or enterprise that is wholly or partly owned, whether directly or indirectly, by PSM;

¹⁰² See Federal Act on the Austrian Broadcasting Corporation (ORF Act) Federal Law Gazette No. 379/1984 as amended by Federal Law Gazette I No. 83/2001, available at http://www.ris.bka.gv.at/Dokumente/Erv/ERV_1984-379/ERV_1984-379.html

¹⁰³ The model provisions in this part are based on ARTICLE 19's *A Model Public Service Broadcasting Law*.

- (c) the budget for the following year;
 - (d) information relating to finance and administration;
 - (e) the objectives of PSM for the previous year, the extent to which they have been met and its objectives for the upcoming year;
 - (f) editorial policy of PSM;
 - (g) a description of the activities undertaken by PSM during the previous year;
 - (h) the Programme Schedule and any planned changes to it;
 - (i) a list of programmes broadcast by PSM that were prepared by independent producers, including the names of the producers or production companies responsible for each independent production;
 - (j) recommendations concerning public broadcasting; and
 - (k) information on complaints by viewers.
- (2) The Board shall formally place the Annual Report and externally audited accounts before the [insert name of (lower chamber of) parliament] for their consideration.

- **Public Review**

In order to ensure transparency and to improve its service in the public interest, PSM shall constantly inform the public about their activities, including by publishing information on their websites, holding public meetings and seminars to look at ways it might better serve the public interest.

- **Complaints Procedure**

- (i) PSM shall develop a Code of Broadcasting Practice in consultation with interested stakeholders which shall govern its broadcasting practices and programme content.
- (2) The Code referred to in sub-section (i) shall, among other things, address the following issues:
 - (a) accuracy, balance and fairness;
 - (b) privacy, harassment and subterfuge;
 - (c) protection of children and scheduling;
 - (d) portrayal of sexual conduct and violence, and the use of strong language;
 - (e) treatment of victims and those in grief;
 - (f) portrayal of criminal or anti-social behaviour;
 - (g) advertising;
 - (h) financial issues such as payment for information and conflicts of interest;
 - (i) discrimination; and
 - (j) leaked material and the protection of sources.

-
- (3) The Supervisory Board will establish a Complaints Unit to deal with complaints about breaches of PSM's editorial standards.
 - (4) Individuals may lodge a complaint against PSM for breach of the Code referred to in sub-section (1) and such complaints shall be dealt with by PSM in a fair and balanced manner.
 - (5) To give effect to sub-section (3), PSM shall establish an internal procedure for processing complaints.
 - (6) The procedure provided for in sub-section (4) shall provide for a range of remedies appropriate to any breach including rectification of any false statements of fact, a right of reply and apologies.
 - (7) Lodging an internal complaint shall not preclude an individual from pursuing any other remedies which may be available.

3.I.2. Content

PSM is typically universal in terms of content. It offers a variety of programmes and services catering for the needs of all groups in society. However, many states impose content restrictions to protect individual rights and interests such as the normal development of minors.

Content regulation is necessary to resolve conflict between these rights and interests with the right to freedom of expression. In addition, concerned about the effects of globalisation on local culture, some States impose language and original production quotas to ensure cultural diversity of programming and protect minority languages.

Challenges

In terms of content, the key challenge is how to take adequate account of the particularities of the different geographical areas and communities and ensure effective enforcement of the content restrictions. In other cases—such as production of programmes for minorities—the main problem relates to funding. Minority programmes with little budget are held in cheap studios by talking heads, alienating both minorities and the public at large.

Standards

General programming standards are set out by the *Audiovisual Media Services Directive* (AVMS Directive)¹⁰⁴ and the *Council of Europe Convention on Transfrontier Television* (ECTT)¹⁰⁵. The provisions in these legal instruments aim at regulating conflicts between broadcasting freedom of expression and other fundamental rights and interests and set out content restrictions.¹⁰⁶

The AVMS contains rules concerning the presentation and content, quality and frequency and insertion and amount of advertising, teleshopping and sponsorship. The AVMS Directive provides for accessibility of broadcasting services to people with a visual or hearing disability.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions recognises the powers of states to adopt policies and measures aiming at protection and promotion of cultural expressions, including enhancing diversity of the media through public service broadcasting.¹⁰⁷ Such measures can include quotas. The ECTT and AVMS Directive elaborate on quotas in favour of European works and independent producers.

Furthermore, states should not discriminate national minorities in their right to freedom of expression. Recommendation No. R (99) 1 regards language usage as one of the measures towards enhancing media pluralism and diversity providing that states are able to consider providing subsidies for media broadcasting in a minority language.¹⁰⁸

Legal Solutions

Regulation of Content

The definition of PSM's mission should contain policy goals relating to content provision and the protection of certain cultural and social aspects. A good example of regulation of content is the Ofcom Broadcasting Code.¹⁰⁹ See the box below.

¹⁰⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive—referred to hereinafter as AVMS Directive).

¹⁰⁵ European Convention on Transfrontier Television, adopted on 5 June 1989, Text amended according to the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002 (referred to hereinafter as ECTT).

¹⁰⁶ In order to coordinate between the two instruments, the ECTT only applies to members of the EU insofar as there is no pre-eminent EU rule (i.e. no provision in the AVMS Directive governing the particular subject concerned).

¹⁰⁷ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, see Article 6.2.h.

¹⁰⁸ Recommendation No. R (99) 1 on measures to promote media pluralism, adopted by the Committee of Ministers' on 19 January 1999.

¹⁰⁹ The Ofcom Broadcasting Code, available at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code>

The UK regulator Ofcom is required by law to draw up a code for television and radio, covering standards in programmes, sponsorship, fairness and privacy. The Code, known as the Ofcom Broadcasting Code, is more than 100 pages long. Broadcasters are required by the terms of their license to observe the whole Code. Observance of the Code is also required in the case of the BBC by the BBC Agreement. The BBC is subject to the regulation of Ofcom in the following six areas: protecting the under-eighteens, harm and offence, crime, religion, fairness and privacy.

In setting these standards, Ofcom secures the standards objectives set out in the Broadcasting Act and gives effect to a number of requirements relating to television in the EC Audiovisual Directive.

Any viewer or listener who believes that the programme standard has been breached can complain to Ofcom who will adjudicate on the matter. Viewers or listeners of the BBC can complain about BBC programmes to the BBC or to Ofcom depending on the subject matter of the complaint.

► Special Rules on Content Regulation

- ***Rule for respect of the human being and fundamental rights of others:*** Article 7.1. of the ECTT requires that all items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others. In line with this requirement broadcasting laws contain provisions prohibiting offences to human dignity and requiring respect for good taste and decency.
- ***Rule of advertisement, teleshopping and product placement:*** According to the AVMS Directive advertising and teleshopping are not permitted for prescription medication and tobacco products, while alcoholic drinks must comply with specific restrictions.¹¹⁰

In line with the AVMS Directive, Section 33, the Slovak Broadcasting and Retransmission Act allows advertising of beer throughout the day, wine only between 8 p.m. and 6 a.m. and other alcoholic beverages between 10 p.m. and 6 a.m. only.

Furthermore, the AVMS sets out that advertising and teleshopping spots may not take up more than 20% of any given hour of broadcasting time¹¹¹. Teleshopping windows must last at least 15 minutes. Advertising and teleshopping may be inserted during children's pro-

¹¹⁰ AVMS Directive, Chapter VII.

¹¹¹ *Ibid*, Article 23.

grammes, films and news programmes only once in each scheduled period of at least 30 minutes. Production placement is prohibited but derogations are possible.¹¹²

- ***Rules on regulation of sponsorship:*** The AVMS Directive prohibits sponsoring pharmaceutical companies to promote specific medicines or medical treatments. Sponsorship of programmes by undertakings whose main activity is manufacture or sale of tobacco products is prohibited. News and current affairs programmes may not be sponsored.¹¹³
- ***Rules on accessibility of audiovisual services:*** The AVMS Directive stipulates that media service providers should be encouraged to ensure that their services are gradually made accessible to people with a visual or hearing disability. Accessibility can be secured by sign language, subtitling, audio-description or easily understandable menu navigation.
- ***Quota for European works:*** In view of the European audiovisual industry trade deficit with the US industry, the AVMS Directive requires that broadcasters including public service ones reserve a *majority proportion* of their transmission time for European works.¹¹⁴
- ***Quota for programmes by independent producers:*** According to the AVMS Directive, broadcasters should reserve a minimum proportion (at least 10%) of their transmission time for European works created by independent producers. Alternatively, Member States may require broadcasters to allocate at least 10% of their programme budget to independent productions.¹¹⁵

Quotas for programmes by independent producers may fail to promote diversity. It is a short-fall of the AVMS Directive that it does not specifically require that quotas for independent producers be attached to any genre. If PSM laws adopt such an approach, quotas for programmes by independent producers will more certainly lead to programme diversity.

- ***Prohibited content:*** The AVMS Directive prohibits any incitement to hatred based on race, sex, religion or nationality.¹¹⁶ Both AVMS Directive and the ECTT prohibit pornography or gratuitous violence as these are regarded as programmes that might seriously impair the development of minors.¹¹⁷ By contrast, programmes that are only likely to impair the development of minors may be televised, subject to scheduling restrictions or use of technical measures (e.g. encryption), so that minors in the area of transmission will not normally hear or see such broadcasts.¹¹⁸

¹¹² *Ibid*, Article 11.

¹¹³ *Ibid*, Article 10.

¹¹⁴ *Ibid*, Article 16.

¹¹⁵ *Ibid*, Article 17.

¹¹⁶ *Ibid*, Article 6.

¹¹⁷ Article 7 of the *ECTT*.

¹¹⁸ Article 27 (2), (3) of the *AVMS Directive*.

► **Content Regulation Subject to Choice**

- ***Should there be minority programming and programming in minority languages?***¹¹⁹ There are no explicit requirements for establishment of quotas of minority programming and programming in minority languages. With regard to public service broadcasting, the European Charter for Regional or Minority Languages sets out that states undertake to ensure the creation of at least one radio station and one television channel in the regional or minority languages; or to encourage and/or facilitate the creation of at least one radio station and one television channel in the regional or minority languages; or to make adequate provision so that broadcasters offer programming in the regional or minority languages.

Even though there are no international obligations for quotas on minority programming, national broadcasting laws can impose such quotas.

These Autonomous Communities in Spain have imposed language requirements which affect public, private and local broadcasters within their jurisdictions. For example, television broadcasters under Catalan jurisdiction must comply with quotas for audiovisual works in Catalan, and the regional Acts on the use of the co-official languages and dialects require public authorities to fund the production and distribution of audiovisual works in those regional languages.¹²⁰

In Finland, the YLE's radio programming comprises three national Finnish language radio channels, two Swedish language channels, a regional network in Northern Finland for programming in Sámi language.¹²¹

Finally, broadcasting legislation in Romania sets a general obligation to broadcasters to dedicate programmes to national minorities.¹²²

- ***Should religious broadcasting be permitted?*** The topic of religious programming on PSM is sensitive in view of the existence of different religious groups as well as a significant number of viewers who are atheist. The main challenge is to define special rules to ensure that due respect is given to all religious beliefs, and religious intolerance is not provoked. One solution is the principle of neutrality, according to which PSM legislation should not impose (and permit) religious requirements.

¹¹⁹ See Article 11 of the *European Charter for Regional or Minority Languages*, available online at <http://conventions.coe.int/treaty/en/Treaties/Html/148.htm>

¹²⁰ See *The Public Service Broadcasting Culture*, p. 70, see footnote No. 7.

¹²¹ *Ibid.* p. 76.

¹²² 2005 OSI Report (Summary), p. 76, see footnote No. 2.

According to Article 45(2)(d) of the Broadcasting Code of Italy the public service broadcaster is obliged to grant access to its programming to, *inter alia*, religious creeds. The National Contract of Service, RAI undertakes to broadcast both religious features and ceremonies (Article 3 (1) (b) and (d)).¹²³

- ***What should be the use of advertisement, teleshopping and production placement?*** A key decision many nations must make is whether or not advertisement, teleshopping and production placement will be carried out by PSM. The decision depends on availability of sources of PSM funding. Normally, PSM do not rely on advertisement as a source of revenue to the same degree as commercial broadcasters. Where advertisement is permitted it is subject to time and content restrictions.

BBC programmes, which are funded by licence fees, must be completely free of advertising. Likewise a gradual abolition of advertising on public service channels was introduced in 2009 in France¹²⁴. Advertising in programmes of the Estonian PSM is also prohibited.

A question may arise whether advertising to children should be prohibited.

Advertisements in children's programmes are prohibited in Sweden and Greece. The ban is justified by the need to protect children in view of their propensity to be easily manipulated and used to put unacceptable pressure on their parents to buy what may be inappropriate goods.¹²⁵

- ***How should minors be protected?*** Apart from the specific content restrictions aiming at protection of minors, many countries require that warnings precede programmes which are not suitable for children, or that on-screen symbols are used to 'rate' programmes. Another means for the protection of minors is the introduction of a 'watershed' system

¹²³ See *The Public Service Broadcasting Culture*, p. 133, see footnote No. 7.

¹²⁴ Eve Salomon, *Guidelines for Broadcasting Regulation*, Second Edition, Published by the Commonwealth Broadcasting Association, December 2008, p. 15. The guidelines are available at <http://unesdoc.unesco.org/images/0018/001832/183285e.pdf>

¹²⁵ *Ibid.* p. 52, 7.86.

for broadcasting. For example, in Romania adult programmes cannot be shown before 22.00.¹²⁶

In order to protect minors, regulators may wish to prohibit programmes which may induce minors to harm each other, such as programmes which show how to make bombs or administer drugs or commit suicide. For example, videos broadcasted in Romania showing a young man who committed suicide induced scores of other young people to commit suicides too, believing that by doing so they would gain notoriety.¹²⁷

¹²⁶ *Ibid.* p. 15, 2.29.

¹²⁷ *Ibid.* p. 45, 7.34.

3.2 Funding of Public Service Media

by Susanne Nikoltchev & Francisco Javier Cabrera

Blázquez, European Audiovisual Observatory, based on the work of Christian Bron, Institute of European Media Law

In July 2010, the European Audiovisual Observatory released the fourth issue of its 2010 IRIS *plus*-series entitled “Public Service Media: Money for Content”.¹²⁸ That this publication has been topical and timely quickly became clear when we were invited to participate in the project “Future or Funeral?” and, more concretely, were asked to use this IRIS *plus* for contributing the chapter on the funding of public service media. As a result, parts one and two of the chapter are largely based on the Lead Article of our previous publication and thus on the work done by Christian Bron from our partner institution the Institute of European Media Law (EMR). In addition, we would like to mention the support of Tarlach McGonagle & Christina Angelopoulos (IViR), Sebastian Schweda (EMR), Marina Österlund Karinkanta (Finnish Broadcasting Company YLE), Amélie Blocman (Légipresse), Jana Markechova (Markechova Law Offices), and Juraj Polák (Council for Broadcasting and Retransmission of Slovakia) from the IRIS network, who helped us update the countries’ information. The information on advertising revenue contained in the first part was kindly supplied by our colleague, André Lange, Head of the Department for Information on Markets and Financing.

The European Audiovisual Observatory accepts responsibility for the concept, the introductory and summarising passages, the updates and certainly anything that may have gone wrong when putting the different information from the various sources together.

¹²⁸ IRIS *plus* 2010-4 “Public Service Media: Money for Content”, European Audiovisual Observatory (Ed. Susanne Nikoltchev), Strasbourg 2010. The issue featured a Lead Article written by Christian Bron of the Institute of European Media Law on financing and supervision of public service broadcasting, several related short reports on how countries within Europe recently addressed financing issues and, as practical information, an overview on tests introduced and applied to evaluate whether or not new services fell within the public service remit of a given system as well as recent statistics comparing the funding of public sector broadcasting in the European Union. For more information see http://www.obs.coe.int/oea_publ/iris/iris_plus/2010-4.html

3.2.1. Environment: Changes and Challenges

The funding of public service media did not used to be questioned as long as no alternative services were offered by commercial media—as is the case today. From having frequencies reserved to having their entire operations financed by some form of public money, public service broadcasters—as *the* public service media of the time—did not need to worry about funding or privileges. The emergence of commercially-run television services, and their Europeanisation (and even internationalisation), fuelled mainly by the introduction of cable and satellite transmission, fundamentally changed this picture.

More recently, and possibly even more profoundly, the media landscape changed again because of the digital technology that mitigated spectrum scarcity and now allows for a wide array of traditional and on-demand media services offered by a great variety of incumbent and novice actors. Today, citizens across Europe are offered a wealth of new channels and content on their TV screens, a development that challenges old public service paradigms.

Last but not least, the recent and persistent financial crisis obliges governments and citizens to live on much tighter budgets and to cut their spending—reducing their willingness to support public services at either end. As will be discussed *infra*, several European states have moved away from or are considering abandoning the system under which public service media is (partially or entirely) funded via licence fees. Instead, some of the recently reformed systems rely on a general media tax or direct subsidies from the state budget. As history shows, however, direct state funding is often not without consequences for the degree of influence that a state may exercise over the public service media. States also call into question to what extent—if at all—public service media should be allowed to raise advertising revenue. In parallel, the fight among media service providers for available resources has intensified. Advertising revenue is more than ever the natural object of desire for competing businesses.

For the countries in Europe, two organisations have been instrumental in dealing with these changes and the related challenges for funding in the intervening years, namely the Council of Europe, for the Europe of 47 countries and the European Union, for its 27 member states. All along, both have been faithful to their mandates. When addressing the digital environment, the Council of Europe has primarily aimed to defend human rights, democracy and the rule of law while the European Union has mainly focused on the building-up of the internal market. Their respective key positions on the issue of funding are explained in the following sections in the context of recent developments. As far as the financial crisis is concerned, the shrinking of the advertising market in 2008, and even more drastically in 2009, serves to illustrate the impact of economies on the systems for funding public service media in a separate third point.

3.2.I.I. Council of Europe

In May 2009 at the first Council of Europe Conference of Ministers responsible for Media and New Communication Services in Reykjavik (hereinafter “the Reykjavik Ministerial Conference”),¹²⁹ many media experts and government officials gave their green light to the task of defining the new notion of media. The need felt for redefining media is very telling inasmuch as it reflects how much the environment, and the media as part of it, has changed since the days where public service television, together with cinema, were the main suppliers of audiovisual information and entertainment. In contrast, today’s situation is characterised by what might be entitled the “any” approach: namely, offers of audiovisual media services at “any” time and “any” place, by “any” means of reception, delivered to “any” audience, with “any” level of interactivity.

Point 2 of the Political Declaration¹³⁰ of the Reykjavik Ministerial Conference explains the changes and resulting new notion of media in the following words:

“The ways in which information is gathered, content is created and the methods by which both are made available and sought have changed with technological developments. Users have ready access to, and create content for, means of mass communication which employ diversified communication platforms for both existing and newly developed media or comparable media-like mass-communication or information services. The relations between the media or other providers of those services and users or consumers have also evolved. It is therefore an opportune moment to review the notion of the media, understood as certain forms of mass communication that are transmitted by means of print or broadcasting involving ethical standards and editorial responsibility”.

In our special context of public service media, point 4 of the Political Declaration of the Reykjavik Ministerial Conference deserves particular attention because it explicitly mentions challenges raised by the changed environment:

“Public service media, having genuine editorial independence and institutional autonomy, contribute to media diversity and help counterbalance the risk of misuse of power in a situation of strong concentration of the media and new communication services. They are therefore a fundamental component of the media landscape in our democratic societies. However, in a changing environment, public service media face major challenges which may threaten their very survival. Reflection on possible responses to these challenges should be pursued”.

¹²⁹ For more details on the Ministerial Conference, see Tarlach McGonagle, “Conference of Ministers responsible for Media and New Communication Services”, IRIS 2009-8/2, available at: <http://merlin.obs.coe.int/iris/2009/8/article2.en.html>

¹³⁰ MCM(2009)011, available at: http://www.coe.int/t/dghl/standardsetting/media/MCM%282009%29011_en_final_web.pdf

The Resolution adopted at the Reykjavik Ministerial Conference¹³¹ explains that one major challenge is indeed the funding of public service media:

“Another important element for ensuring access to trustworthy sources of information is genuine, independent and adequately resourced public service media. At present, not all Council of Europe member states offer public service media that are able to attract and to serve all segments of society and contribute to people’s full participation in political, social and cultural life. Developing the role of public service media may well involve public expenditure on cutting-edge media and media-like services and technologies. The modalities of expenditure on public media or information services may also need to be reviewed”.

Concerning the modalities of expenditure on public media, it is obvious that, for example, the budget term may have a significant impact on how the media is managed. As many public media budgets are fixed on a yearly or bi-yearly basis, it would seem that long-term planning and keeping up an adequate infrastructure is a rather difficult task. Likewise, there is little doubt that the availability or lack of company capital, as the case may be, matter for the degree of genuineness, independence and adequacy of resources of public service media. It is, however, beyond the scope of this legal contribution to provide more detailed information.

The following passages describe the Council of Europe’s standards concerning the funding of public service media and its latest contribution to the review of the “modalities of expenditures” mentioned in the Resolution.

Legal Instruments

Organs of the Council of Europe have dealt with the financing and supervision of public service broadcasting in several recommendations.¹³²

According to Recommendation R (96) 10 of the Committee of Ministers,¹³³ wherever a public service broadcasting organisation is funded by the state (via the state budget or licence fees), the decision-making power of external authorities regarding its funding should not be used to exert any influence over the editorial independence and institutional autonomy of the broadcasting organisation concerned. The level of state funding should be fixed after consultation with the broadcaster concerned and the funds should be used for its long-term activities. Where several public service broadcasters in the same country are funded, the needs of each broadcaster should

¹³¹ Point 11 of the Resolution, which forms an integral part of the same document quoted in footnote 3.

¹³² For general information about the Council of Europe’s role in public service broadcasting, see: Nikoltchev, “European backing for public service broadcasting, Council of Europe rules and standards”, in: European Audiovisual Observatory (ed.), *The Public Service Broadcasting Culture, IRIS Special*, Strasbourg 2007, p. 7ff.

¹³³ Recommendation R (96) 10 of the Committee of Ministers of the Council of Europe of 11 September 1996 on the guarantee of the independence of public service broadcasting, available at: <http://www.coe.int/>

be satisfied in an equitable manner. Recommendation (2003) 9¹³⁴ requires the member states to give public service broadcasters the possibility of having access to the necessary financial means to fulfil their public service remit. Recommendation (2007) 3¹³⁵ reaffirms the possibility of traditional funding through licence fees, the state budget and advertising. It adds that other sources of finance may be envisaged. For example, public service media could consider charging a fee for new personalised services.

In Recommendation 1878 (2009),¹³⁶ the Parliamentary Assembly of the Council of Europe (PACE) notes that member states have developed different rules for the funding of their public service broadcasters in accordance with their respective cultures. However, it states that public acceptance of the funding of public service broadcasting is decreasing in view of the availability of audiovisual content on the Internet. The Parliamentary Assembly points out that possible funding models, which may take the form of mixed funding, include the payment of a flat broadcasting licence fee, taxation, state subsidies, advertising and sponsorship, specialised pay-per-view channels and the sale of books, videos and films.

On 21 April 2010, the Committee of Ministers adopted its Reply¹³⁷ to Recommendation 1878 (2009) of the PACE.¹³⁸ The Comments of the Steering Committee on the Media and New Communication Services (CDMC) are appended to the Committee of Ministers' Reply.

Both the Committee of Ministers and the CDMC welcome the PACE Recommendation for its timeliness and usefulness. The Committee of Ministers (following the CDMC) "notes in particular the Assembly's recognition of the need for public service broadcasters to make full use of all the technologies and platforms currently available and those of the future in order to provide high quality programming to the widest audience possible".

The Committee of Ministers refers to its own replies to earlier PACE Recommendations with similar focuses, before noting that "follow-up action or future review of developments in the funding of public service broadcasters is very important".

¹³⁴ Recommendation (2003) 9 of the Committee of Ministers of the Council of Europe of 28 May 2003 on measures to promote the democratic and social contribution of digital broadcasting, available at: <http://www.coe.int/>

¹³⁵ Recommendation (2007) 3 of the Committee of Ministers of the Council of Europe of 31 January 2007 on the remit of public service media in the information society, available at: <http://www.coe.int/>

¹³⁶ Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe of 25 June 2009, "Funding of public service broadcasting", available at: <http://assembly.coe.int/>. Regarding this Recommendation, see Kim de Beer, "Parliamentary Assembly: The Funding of Public Service Broadcasting", IRIS 2009-8/3, available at: <http://merlin.obs.coe.int/iris/2009/8/article3.en.html>

¹³⁷ The information on the Reply is taken from the article of Tarlach McGonagle "Committee of Ministers: Reply to PACE Recommendation on PSB Funding", IRIS 2010-7/2, available at: <http://merlin.obs.coe.int/iris/2010/7/article2.en.html>

¹³⁸ Reply to "The funding of public service broadcasting"—Parliamentary Assembly Recommendation 1878 (2009), Committee of Ministers of the Council of Europe, Doc. CM/AS(2010)Rec1878 final, 23 April 2010, available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/AS%282010%29Rec1878&Language=lanEnglish&Ver=final&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864-%20FR>

The Committee of Ministers' Reply clearly tracks the comments it received from the CDMC, which seek to situate the Recommendation in the context of the Committee of Ministers' relevant standard-setting work, the Action Plan adopted at the Reykjavik Ministerial Conference and ongoing work within the CDMC.

Based on Recommendation Rec(2007)3 of the Committee of Ministers on the remit of public service media in the information society,¹³⁹ the CDMC "considers that public value in respect of public service broadcasters or more broadly public media services can only be assessed if they are considered as an integral whole, rather than as discrete and disconnected features of public service". It continues: "More particularly, public service media cannot be confined to a subsidiary role, characterised by offering services that do not feature highly on the agendas of commercial broadcasters".

ECHR Case Law

The European Court of Human Rights (ECHR) has frequently examined aspects of broadcasting law.¹⁴⁰ In the decision *Faccio v. Italy*,¹⁴¹ it ruled that the payment of licence fees for public service broadcasting represented a contribution to a community service rather than the price for receiving a particular channel. The fees were used to finance public broadcasting and were payable by anyone in possession of a suitable receiver. A system whereby viewers could be exempted from paying the licence fee if they only wanted to watch private channels would deprive the tax of its very nature.¹⁴²

3.2.1.2. European Union

For member states of the European Union, any financing of public service media must respect the EU legal framework, and in particular EU competition law. Over the past years, EU rules on State aid have become a major tool for reviewing the use of public money by public service broadcasters for offering online services because "The legality of the funding of public service broadcasters under the law relating to State aid depends on the extent to which the public service remit constitutes justification under Art. 86 (2) ECT [now 106 (2) TFEU]". The competition law framework within which public service media may offer online services has been worked out in

¹³⁹ For further info see also Mara Rossini, "Committee of Ministers: Declaration and Recommendations in the Field of Media", IRIS 2007-3/5, available at: <http://merlin.obs.coe.int/iris/2007/3/articles5.en.html>

¹⁴⁰ Concerning ECHR decisions related to broadcasting law, see Scheuer/Maus, in: EMR study "Public Service Media According to Constitutional Jurisprudence—The Human Rights and Constitutional Law Dimension of the Role, Remit and Independence", 2 July 2009, pp. 15 ff., available at: http://www.ebu.ch/en/legal/other/EMR_Study_PSM.php

¹⁴¹ ECHR, decision of 31 March 2009, application no. 33/04, available at: <http://echr.coe.int/>

¹⁴² For further information on the case see also Dirk Voorhoof, "European Court of Human Rights: Case *Faccio v. Italy*", IRIS 2009-6/1, available at: <http://merlin.obs.coe.int/iris/2009/6/article1.en.html>

an earlier IRIS *plus*-publication on “The New Public Service Remit”.¹⁴³ It summarises, among others, the investigations of the European Commission conducted with regard to the definition of the public service remit and the funding of online services offered by public service broadcasters in France, the United Kingdom, Ireland, Belgium, Denmark, the Netherlands and Germany.¹⁴⁴ Lessons learned from the Commission decisions include that:

“a prerequisite for that remit is that services offered via the new media also meet social needs. Moreover, it is clear that the Commission attaches great importance to the establishment of procedures for examining this aspect and any potential impact on the market. Implementing these requirements would lead to a discussion at the national level on where the ‘public value’ in the new media service lies”.¹⁴⁵

How various EU member states have since adjusted their supervisory systems for public service media funding and services in order to ensure that “public money” does solely pay for “public value” is described in more detail in the part of the IRIS *plus* 2010-4 on Public Service Media: Money for Content that we did not integrate in this article.¹⁴⁶ On page 25, the author concludes that:

“As a rule, a whole host of internal and external bodies are responsible for monitoring the funding and content of public service media; their task can be split into *ex-ante* and/or *ex post* monitoring procedures. An important example of how financial and content-related supervision can be combined is the range of tests recently introduced in several countries, to be carried out prior to the launch or amendment of new media services”.¹⁴⁷

EU competition law has also been instrumental in defining the framework within which EU member states may set up their respective funding systems for public service media, which is the focus of this contribution and described hereinafter.

¹⁴³ See Meike Ridinger “The Public Service Remit and the New Media”, in IRIS *plus* 2009 “The New Public Service Remit” (Ed. European Audiovisual Observatory), p. 11.

¹⁴⁴ For an overview on the related decisions as well as an introduction to the relevant EU legislation and case law, see Meike Ridinger, *op. cit.*, pp. 10–20.

¹⁴⁵ Meike Ridinger, *op. cit.*, p. 19.

¹⁴⁶ See Christian M. Bron, Financing and supervision of public service broadcasting, in IRIS plus 2010-4 on Public Service Media: Money for Content, pp. 18–25.

¹⁴⁷ The tests referred to are the “three-step test” in Germany, the public value test in Ireland and the United Kingdom and the *ex ante*-procedures (§ 6b ORF-Gesetz) and *ex post*-controls (§ 38a ORF-G) introduced by the recently passed ORF-Gesetz in Austria. For more on the ORF-G, see Christian M. Bron, “Austria: Comprehensive Media Rights Reform Adopted”, IRIS 2010-8/11, available at: <http://merlin.obs.coe.int/iris/2010/8/article11.en.html>

Legal Instruments

According to Art. 2 of the Treaty on European Union (TEU), the EU is founded on various basic values and principles that are common to all the member states in a society in which pluralism, among other things, prevails. In view of the role played by public service broadcasting in (media) pluralism and, thereby, in the freedom of expression, a role that is recognised in all member states' constitutions, Art. 2 TEU has an important function in terms of directing the application of the EU treaties to the field of broadcasting. The fundamental provision of European law governing the evaluation of financing systems for public service broadcasting is Art. 107(1) TFEU. In principle, this provision prohibits aid granted to certain undertakings by a member state or through state resources which distorts competition and affects trade between member states. Art. 106(2) TFEU provides an exception in favour of undertakings entrusted with the operation of services of general economic interest.¹⁴⁸ The 1997 Amsterdam Protocol¹⁴⁹ stipulates that member states can fund public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit and does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest.¹⁵⁰

The Commission confirmed its approach to the examination of public funding of audiovisual services in its 2009 Broadcasting Communication,¹⁵¹ stating that member states are "free to choose" the means of financing public service broadcasting.¹⁵² Funding schemes are divided into "single funding" and "mixed funding". The "single funding" category comprises all systems in which public service broadcasting is financed only through public funds, in whatever form. "Mixed funding" (previously known as "dual funding") systems comprise a wide range of schemes, where public service broadcasting is financed by a combination of state funds and revenue from commercial activities, such as the sale of advertising space or programmes and the provision of services against payment. In addition, rec. 77 of the 2009 Broadcasting Communication states, with regard to the control of funding systems for public service broadcasting, that the member states:

¹⁴⁸ Art. 14 TFEU emphasises the importance of these services. Under this provision, the European Parliament and the Council can—without prejudice to the competence of member states (see below)—in future, by means of regulations, establish principles and conditions, *particularly economic and financial conditions*, for the functioning of these services (emphasis added).

¹⁴⁹ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties Establishing the European Communities and certain related acts—Protocols annexed to the Treaty Establishing the European Community—Protocol on the system of public broadcasting in the Member States of 1 May 1997, OJ C 340, 1997, p. 109.

¹⁵⁰ Incidentally, these provisions correspond with the Resolution of the Council and of the representatives of the governments of the member states, meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ C 30, 1999, p. 1, rec. 2.

¹⁵¹ Commission Communication of 2 July 2009 on the application of State aid rules to public service broadcasting, OJ 2009, C 257, p. 1. The 2009 Broadcasting Communication replaces the Communication from the Commission on the application of State aid rules to public service broadcasting of 15 November 2001, OJ 2001, C 320, p. 5.

¹⁵² 2009 Broadcasting Communication, *op. cit.*, rec. 58. However, this is on condition that the Commission has verified, under Art. 86(2) ECT (now: Art. 106(2) TFEU), that the state funding does not affect competition in the common market in a disproportionate manner (rec. 59).

“[...] shall ensure regular and effective control of the use of public funding, to prevent overcompensation and cross-subsidisation, and to scrutinise the level and the use of ‘public service reserves’. It is within the competence of Member States to choose the most appropriate and effective control mechanisms in their national broadcasting systems, taking also into account the need to ensure coherence with the mechanisms in place for the supervision of the fulfilment of the public service remit”.

Here, the Commission mentions the crucial aspect of control over the use of public funding. There are two types of control: financial control over how funds are used and content-related control aimed at guaranteeing the fulfilment of the public service remit. However, both forms of control should be viewed together, for the evaluation of the proper use of funds and that of the fulfilment of the public service remit are interlinked. This observation is vitally important in the context of the present investigation and also for understanding that as a matter of principle accountability of public service media has become a prime issue.

Case Law of the Court

As far as the funding and supervision of public service broadcasting and media services are concerned, the rulings of the General Court of the European Union (formerly: Court of First Instance; General Court) in the cases *SIC v. Commission*¹⁵³ and *TV2 Danmark et al. v. Commission*¹⁵⁴ are crucial.

In its ruling in *SIC v. Commission*, the General Court makes two essential statements relating to the issue at hand:

- Firstly, a public service broadcaster can offer a wide range of programmes and carry out commercial activities, in particular the sale of advertising space, in order to fund those programmes, without this affecting the classification of the service as being in the general economic interest. This means that public service broadcasters can, in principle, carry out any financial activities in order to fund their services, since the use of the phrase “in particular” shows that the sale of advertising space is not the only possible commercial activity.
- Secondly, the member states must establish a mechanism to monitor the fulfilment of the remit of public service broadcasters, which assesses compliance with the quality standards defined in the public service remit. However, the Commission can only verify whether the relevant monitoring mechanism is being used. The General Court treats the financial supervision of public service broadcasting as a separate process: the Commission can fully verify

¹⁵³ General Court (formerly Court of First Instance), judgment of 26 June 2008, T-442/03, *SIC v. Commission*, esp. rec. 202, 212, 213 and 229, available at: <http://curia.europa.eu/>

¹⁵⁴ General Court (formerly Court of First Instance), judgment of 22 October 2008, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2 Danmark et al. v. Commission*, esp. rec. 109 and 113, available at: <http://curia.europa.eu/>

whether State aid used to fulfil the public service remit is proportional within the context of Art. 106(2) TFEU.

In the *TV2 Danmark* judgment, the General Court states that public service channels can, in general, be funded through advertising even if they are services of general economic interest. In particular, a public service broadcaster that operates a mixed funding system does not need to be limited to the broadcasting of non-profitable programming in order to provide a service of general economic interest. Therefore, the public service broadcasting system can be financed from sources other than public funding alone; public service media may therefore engage in commercial activities.

More recently, the Court of Justice of the European Union (ECJ) ruled on the question of the compliance of State aid granted by the French State to France Télévisions with the rules of the EC Treaty.¹⁵⁵ The aid is intended to cover the cost of public service broadcasting undertaken by France Télévisions in view of the decision of the French authorities, announced initially in 2008, to eliminate advertising on public channels, which will then financially rely on subsidies collected through two new taxes, one on advertising and one on electronic communications.¹⁵⁶ France notified the European Commission of its plan to provide capital funding of €150 million to France Télévisions. In its decision of 16 July 2008 the Commission found the plan to constitute State aid compliant with EU rules. In response, two French commercial channels, M6 and TF1, brought an action before the ECJ seeking the annulment of the Commission's decision.

In its judgement of 1 July 2010,¹⁵⁷ the Court finds that the funding in question is intended, explicitly and exclusively, to cover the costs of the public service broadcasting undertaken by France Télévisions. This conclusion is supported by the fact that, as the Commission had already observed in its decision, the €150 million funding notified by France is significantly less than the cost of the public service broadcasting undertaken by France Télévisions, estimated at €300 millions. Under paragraph 71 of the Broadcasting Communication, "it is as a general rule necessary that the amount of public compensation does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission". On the basis of this reasoning, the Court decided to dismiss the action against the Commission.

In September 2009 the European Commission launched a subsequent examination of the compatibility of the French funding mechanism for public service broadcasting with European State aid rules, which it meanwhile approved the annual subsidy mechanism. The recently passed French law in question, however, will not be fully applied because the responsible Minister

¹⁵⁵ The following information and text is largely taken from an article authored by Christina Angelopoulos on "Court of Justice of the European Union: Joined Cases M6 and TF1 v. Commission", IRIS 2010-7/3, available at: <http://merlin.obs.coe.int/iris/2010/7/article3.en.html>

¹⁵⁶ See the chapter dedicated to France *infra*.

¹⁵⁷ Joined cases T 568/08 et T 573/08, Métropole television and Télévision française 1 v. Commission, 1 July 2010, available at: <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=fr&num=79899298T19080568&doc=T&ouvert=T&seance=ARRET>

announced a moratorium on the provision that forbids day-time advertising. This is described *infra* in the chapter concerning France. The reason behind the Minister's decision was that the tax-based funding system did not raise the expected tax income needed to support public service media. The slightly confusing chronology of events concerning legislation, government decisions, Commission investigation and case law on the funding of public service media in France, underlines how important the availability of hoped for resources are in this context.

3.2.1.3. The Financial Crisis Measured in Advertising Revenue

In 2008, the French President Nicolas Sarkozy announced that he was considering bringing an end to all advertising on public service TV channels. He stated that if they "operate according to the same criteria, the same demands and the same logic as the private channels, then there is no point in having a public service". This blunt assertion reflects the growing difficulty that public service broadcasters (PSB) experience in justifying their own existence in times of crisis and technological change. From the very outset President Sarkozy's project has been more than just a money matter. It included a groundbreaking reform of France Télévisions' financing system. A centre piece of the reform consisted of leaving advertising revenue entirely to commercial broadcasters.

The so-called mixed funding for public service media also has many supporters outside of France as it is probably Europe's favourite funding model. Traditionally, in these mixed systems, funding is largely made up of income from commercial activities, such as advertising, sponsorship and the sale of programmes.

For public broadcasting organisations the share taken by commercial revenue can be quite substantial. For example, in 2009 the ORF's (Austria) commercial revenue accounted for 45.6%. For RTVE (Spain) it was 36.7%, for the BBC Group (United Kingdom) 25%, for RTE (Ireland) 46.6%, for RAI (Italy) 38.8%, for LNRT (Lithuania) 33.1% and for PBS (Malta) 81%.¹⁵⁸ In specific cases, where broadcasters offer public services but lack any kind of public funding, as is the situation for TV2 (Denmark) or Channel 4 Group (United Kingdom) the share of commercial revenue is obviously even higher (93.4% and 100%).¹⁵⁹

For a significant number of public broadcasting organisations in Europe commercial revenue still accounts for between 10 and 20 percent of their income. This is for example the case for the BNT (Bulgaria—16.6%), CT (Czech Republic—12.6%), ARD and ZDF (Germany—11.3 and 11.9%), France Télévisions (France—19.8%), ERT (Greece—13.8%), and Magyar Televízió (Hungary—10.4%).¹⁶⁰ Only very few broadcasters have no commercial revenue at all. Among them are DR (Denmark), YLE (Finland), and Audiovisuel extérieur de la France (France).

¹⁵⁸ For all countries, the percentage comprises revenues from radio and television services.

¹⁵⁹ The percentage for TV2 and Channel 4 Group applies to television services only.

¹⁶⁰ In the case of ARD and ERT this covers radio and television, for all others television only.

Obviously, the advertising market has been hit hard by the recent financial crisis. According to estimates by Warc,¹⁶¹ advertising investment on the main European markets fell by 4.4% in 2008. This had a considerable impact on European broadcasters: television advertising fell by 10.9%. Interestingly, Internet advertising rose by 5.7% during the same period (but less than the 14.3% of the previous year).¹⁶²

The most recent trends, however, indicate a recovery of the advertising market, with particularly good marks for the United Kingdom but also, in general, for all major television broadcasters.¹⁶³ The “up” and certainly the “down” of the advertising market brought this very particular source of revenue very much into the limelight.

Public and private broadcasters are in direct competition for the same advertising market, and this competition has increased in parallel with the mushrooming of new market players. Private broadcasters complain that State aid distorts competition on the advertising market because State aid spent on programme content results in a higher viewer share which in turn leads to higher market share and advertising revenue. Hence public broadcasters and their commercial competitors no longer compete on a level playing field.¹⁶⁴ Besides, it can be argued that fighting for audience shares might be to the detriment of fulfilling the public service remit.¹⁶⁵ Therefore, France and Spain have decided that public service broadcasting should not be financed through the sale of advertising time. In order to compensate for the related income shortfalls, both countries extended state funding to include subsidies generated via the “taxation” of the profits of private broadcasters and telecoms providers.

The decision to keep public service media free from advertising bears some risks: number one is that public service media might become increasingly dependent on state decisions. Broadcasters that are recipients of direct state payments rather than beneficiaries of licence fees and commercial revenue—such as income from advertising and sponsorship—have less protection against potential state interference. Politicians may attempt to (indirectly) influence programme content or operational structures. Only when the level of funding is determined in accordance with actual needs—and not as a consequence of political decisions possibly unrelated to the mandate of pub-

161 <http://www.warc.com/Information/AboutUs.asp>

162 For more information on the advertising market see European Audiovisual Observatory, Yearbook 2009, Film, Television and Video in Europe. 2009 Edition, Vol. 2 “Trends in European Television”, European Audiovisual Observatory, Strasbourg 2009.

163 See Nick Clark “The return of the advert”, *The Independent* of 9 April 2010, available at <http://www.independent.co.uk/news/business/analysis-and-features/the-return-of-the-advert-1939818.html>. The positive development of the advertising market has been confirmed in a recent presentation by Daniel Knapp (screendigest), in which, for example, the percentage of net advertising revenue was predicted to change from the year 2009 to 2010 from -10,5% to +10,1% for the United Kingdom, from -13,0% to +9,3% for France and from -9,8% to +8,2% for Germany.

164 See e.g. ACT Comments on draft Communication on State Aid and Public Broadcasting, available at: http://www.acte.be/EPUB/easnet.dll/GetDoc?APPL=1&DAT_IM=026D70

165 See e.g. CSA, Avis du 7 octobre 2008 sur le projet de loi modernisant le secteur public de la communication audiovisuelle et relatif aux nouveaux services, available at. http://www.csa.fr/infos/textes_detail.php?id=127365

lic service media—are broadcasters guarded against funding cuts based on economic crises such as we are currently facing in Europe and many other parts of the world.

The following section describes current developments in several member states where changes to the funding of public service media have either been recently made or are at least under serious consideration.¹⁶⁶

3.2.2 Practices: Various Ways to Funding Public Service Media

3.2.2.1 Germany

The Current System

Public service broadcasting in Germany is currently funded through a mixture of licence fees, advertising (including sponsorship) and other revenue such as donations, rental and leasing of buildings, or interest. However, Art. 13(1)(1) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement—RStV),¹⁶⁷ stipulates that “the primary source of income is the broadcasting licence fee”.

The monthly licence fee currently comprises a basic fee of €5.76 and an additional television fee of €12.22 for television set owners. This represents an annual total of €215.76. In 2008, total revenue from licence fees was approximately €7.2 billion,¹⁶⁸ while advertising revenue amounted to around €220 million.¹⁶⁹ This money is used to finance the 11 public service broadcasters, as well as subsidise other broadcasters (arte, 3sat). Part of the licence fee income is also used to fund the *Landesmedienanstalten* (state media authorities) and the *Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten* (licence fee collecting office for public service broadcasters—GEZ).

Germany has a unique way of determining the amount of the monthly licence fee, which is prescribed by Art. 7 of the *Rundfunkfinanzierungsvertrag* (Interstate Treaty on the Financing of Broadcasting). It consists of the following three basic steps: firstly, the public service broad-

¹⁶⁶ See also comments on Belgium, Denmark and Ireland in Meike Ridinger, “The Public Service Remit and the New Media”, IRIS plus 2009–6, pp. 16f.; and EU Commission press releases on Belgium (IP/08/316), Ireland (IP/08/317) and Portugal (IP/06/349), all available at: <http://europa.eu/rapid>

¹⁶⁷ Inter-State Agreement on Broadcasting and Telemedia (RStV) of 31 August 1991, as amended most recently by Art. 1 of the 13th Inter-State Agreement Amending the Inter-State Broadcasting Agreements of 30 October 2009, which entered into force on 1 April 2010.

¹⁶⁸ See GEZ report for 2008, available at: <http://www.gez.de/e160/e161/e1248/gb2008.pdf>

¹⁶⁹ See 17th KEF report, December 2009, available at: http://www.kef-online.de/inhalte/bericht17/kef_17bericht.pdf

casters announce their financial needs to the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission of inquiry for the financial needs of the broadcasting organisation—KEF).¹⁷⁰ Secondly, the KEF verifies the demand and then calculates the licence fees necessary to fulfill them. Thirdly, the Länder parliaments adopt the amount after having verified that they correspond to social requirements. The KEF consists of independent experts appointed in a pluralistic manner by the prime ministers of the Länder.

The dispute over the definition and admissibility of licence fees under European law was provisionally ended by the 2007 compromise on aid.¹⁷¹ Germany made commitments to bring its description of the remit, funding and supervision of public service broadcasting into line with that of the Commission. With regard to state funding, the Commission accepted that, as part of their remit, public service broadcasters could also offer telemedia, that is, electronic information and communication services, as long as they met the same democratic, cultural and social needs as public service television and radio services. Therefore, telemedia services may be funded from licence fee revenue (although the RStV prevents them from being funded through advertising), provided they fall within the public service remit of the broadcaster concerned.

The PC Tax Controversy

Under the current German system it is unclear whether broadcasting fees apply to Internet PCs.¹⁷² According to the *Rundfunkgebührenstaatsvertrag* (Inter-State Agreement on Broadcasting Licence Fees—RGebStV), in the version of 1 September 2008, licence fees are due, in principle, in accordance with Art. 2(2) in connection with Art. 1(2)(i) RGebStV, for any reception device owned by broadcasting participants (i.e. viewers and listeners), subject to the exceptions provided for in Art. 5 and 6 RGebStV.¹⁷³

According to Art. 1(1)(i) RGebStV, broadcasting reception devices are:

“technical devices that can be used, with or without wires, to listen to, watch or record live broadcast services”.

Under Art. 5(3) RGebStV, new broadcasting reception devices include:

“in particular, computers that can receive broadcast programmes exclusively via the Internet”.

¹⁷⁰ <http://www.kef-online.de/>

¹⁷¹ State aid E 3/2005—Germany, Financing of public service broadcasters in Germany, COM (2007) 1761 final

¹⁷² In a decision rejecting a complaint that the licence fee for Internet PCs was unconstitutional, the Federal Constitutional Court (BVerfG) held that the specialist courts should clarify which devices are subject to the fee, ruling of 30 January 2008, case no. 1 BvR 829/06.

¹⁷³ Art. 5 and 6 RGebStV mention exemptions for second devices in homes, private motor vehicles, portable reception devices and numerous exemptions on social grounds.

How to apply these rules in practice had become a contentious issue in Germany. Whereas several administrative appeal courts ruled on the applicability of licence fees to PCs (in a variety of different cases),¹⁷⁴ these decisions produced neither a definite vote in favour of nor against such an obligation. Finally, on 27 October 2010, the *Bundesverwaltungsgericht* (Federal Administrative Court) clarified the matter. It found that the licence fee is also applicable to Internet-enabled computers, irrespective of the actual or intended use of the computer, provided that the owner possesses no other reception device.¹⁷⁵

Proposal for a New Licence Fee

The PC tax controversy and other uncertainties of how to deal with licence fees in times of media convergence, led to a discussion about reforming the current rules for imposing licence fees. Given that the German constitution does not prescribe a specific way of funding, three proposals were put on the table. Under the first, every citizen with their own income would pay a so-called “media contribution” (or “media tax”). The second model aims to impose such a tax on each household, with a separate charge for business premises (“household and business tax”).¹⁷⁶ The third idea being considered is to maintain the device-related fee, while removing certain provisions such as the obligation to pay the fee for a small business owner’s car radio.

On 15 December 2010, the 15 *Rundfunkänderungsstaatsvertrag* (Agreement amending the Inter-State Broadcasting Agreement—RÄStV) was signed. It endorses the second financing model according to which the licence fee will be charged per household (home) or place of business. Besides solving the problem of media convergence, this reform aims at creating a simpler system for levying licence fees and at reducing administrative costs. The new model shall apply starting from 1 January 2013.

It is intended to keep the licence fee at its current level of €17.98, and there will no longer be a distinction between the basic fee and the fee for television reception. The amount payable per place of business will vary according to the number of people regularly employed there and will be based on a sliding scale.

The exemptions for private dwellings will in principle remain unchanged; in the case of non-private areas, they can be dropped for establishments exempted up to now since the payment will already have been reduced following the introduction of the sliding scale.

In connection with the planned levy of a household-based licence fee from 1 January 2013, advertising and sponsorship in public service broadcasting are to be treated in the same way from

¹⁷⁴ For more information on case law concerning the applicability of the licence fee to PCs see European Audiovisual Observatory (ed.), *Public Service Media: Money for Content*, IRIS plus 2010-4. Strasbourg 2010, p. 11 ff.

¹⁷⁵ Decisions of the BVerwG 6 C 12.09, 6 C 17.09 and 6 C 21.09, 27 October 2010.

¹⁷⁶ See Holzer, *Von der Rundfunkgebühr zum Medienbeitrag*, in *Europäisches und nationales Medienrecht im Dialog*, Festschrift aus Anlass des 20-jährigen Bestehens des Instituts für Europäisches Medienrecht e.V. (EMR), Baden-Baden 2010, pp. 175–188.

that date, which means there may be no sponsorship on Sundays and public holidays and after 8 pm Monday to Saturday, with the exception of major sporting events.

The prime ministers believe that their position as officially agreed upon in the 15 RÄStV is in line with Professor Kirchhof's report on the funding of public service broadcasting published on 6 May 2010.¹⁷⁷ In that report, the author had set out under what conditions the funding of public service broadcasting by means of a household/place of business based licence fee is permissible under German constitutional law.¹⁷⁸

3.2.2.2 Finland

The Current System

The public service broadcaster *Yleisradio Oy*¹⁷⁹ (YLE) is funded through a television licence fee in accordance with the Act on the State Television and Radio Fund (no. 745/1998).¹⁸⁰ Under Art. 7(1) (1) of the Act, the licence fee is based, in principle, on the use of a television set. Exemptions apply to public institutions, families (including married and non-married couples) and businesses. The fees are collected by the television licence fee office, a department of the Finnish communications regulator (*Viestintävirasto*—FICORA), and paid into the television and radio fund.¹⁸¹

The licence fee is currently €231.05 per year. In 2008, approximately 1.9 million fee payers were registered with the television licence fee office.¹⁸² Total revenue in 2008 was around €438 million. Under Art. 12 of Act no. 1380/93, YLE may not generate additional income through advertising.

According to the understanding of FICORA, broadcasting fees also apply to Internet PCs. Internet-capable computers are subject to the fee if they are suitably equipped to receive television programmes in real time.¹⁸³

¹⁷⁷ See Christian M. Bron, "Germany: Kirchhof Report on Household Tax Published", IRIS 2010-6/22, available at: <http://merlin.obs.coe.int/iris/2010/6/article22.en.html>

¹⁷⁸ Another study, commissioned by ARD and ZDF, examined (and confirmed) the compatibility of the planned licence fee with constitutional rules on data protection. See *Datenschutzrechtliche Fragen im Zusammenhang mit der Einführung eines Rundfunkbeitrags—Rechtsgutachten im Auftrag der ARD und des ZDF*, erstattet von Dr. jur. Hans Peter Bull, 20. September 2010, available at: <http://www.ard.de/intern/standpunkte/-/id=1604680/property=download/nid=8236/137nkg1/Gutachten+zu+datenschutzrechtlichen+Fragen.pdf>. For more information on this particular aspect see, Sebastian Schweda on "Germany: Study Finds Planned Broadcasting Licence Fee Complies with Data Protection Rules", IRIS 2010-10/26, available at: <http://merlin.obs.coe.int/iris/2010/10/article26.en.html>

¹⁷⁹ The legal basis of YLE is Act no. 1380/93 on *Yleisradio Oy*, most recently amended by Act no. 635/2005 of 1 January 2006.

¹⁸⁰ Act no. 745/1998 on the state radio and television fund, most recently amended by Act no. 713/2005 of 1 April 2005.

¹⁸¹ Österlund-Karinkanta, in: IRIS Special, The Public Service Broadcasting Culture, *op. cit.*, pp. 77, 81.

¹⁸² See information published by FICORA, available at: <http://www.tv-maksu.fi/en/index/tietoa.html>

¹⁸³ See FICORA's reply to the question whether television licence fees apply to computers, on its website, under the heading "*Information on television fee > Frequently asked questions*", available at: <http://www.tv-maksu.fi/index/ukk.html>

Reform of the Funding System¹⁸⁴

In April 2009 a Parliamentary working group, with representatives of all political parties in the Parliament and set up by the Ministry of Transport and Communications, suggested that the television fee paid by television households would be replaced by a public service fee paid by all household-dwelling units regardless of whether they possessed a television or not.¹⁸⁵ Companies and institutions with an annual turnover exceeding EUR 400,000 were to pay three times more than the household-dwelling units.

The suggestion was made unanimously and at first it seemed that Finland would implement the reform despite being heavily criticised in the press. One of the crucial points made by the critics was that the new system lacked exemptions or reductions from the fee for social reasons. Therefore the new fee, which was renamed as the “media fee”, was labelled as unfair. Another criticised aspect was that the funding system reform was linked to YLE’s governance issues.

After preparing for the reform the Minister suddenly decided to drop the suggestion and to postpone the decisions concerning YLE’s future financing until after the next government elections in April 2011. This decision was taken in March 2010. As a consequence, the Chairmen of all the political parties represented in Parliament announced their decision that the operations of the public service company YLE were to be secured at the level of the services they had in 2010. This decision is problematic because the present television fee system cannot bring in enough funds to meet with the level defined.

In October 2010 the Government decided to increase the television fee by 6% as of 1 January 2011. The fee will then rise from €231.05 to €244.90 a year. It will be up to the new Government to decide about YLE’s future funding system after the elections in April 2011.

3.2.2.3 France

The Current System

On 7 March 2009 the Act on audiovisual communication and the new public television service was adopted.¹⁸⁶ It introduced an important change in the financing system of the public service group France Télévisions. Until the adoption of the new act, France had a mixed system of financing France Télévisions based mainly on a licence fee plus income generated by selling advertising

¹⁸⁴ The information on the reform of Finland’s funding system was provided by Marina Österlund Karinkanta.

¹⁸⁵ The parliamentary working group’s report of 23 April 2009 is available at: http://www.lvm.fi/c/document_library/get_file?folderId=534580&name=DLFE-7420.pdf&title=Yleisradion%20julkinen%2opalvelu%2oja%2orahoitus.%20Yleisradion%20julkista%2opalvelua%2oja%2orahoitusta%2oselvitt%C3%A4neen%2oty%C3%B6ryhm%C3%A4n%20loppuraportti.%2023.4.2009

¹⁸⁶ *Loi no. 2009-258 relative à la communication audiovisuelle et au nouveau service public de la télévision* of 5 March 2009, French Official Gazette no. 56 of 7 March 2009, p. 4321.

space. The new act prohibits all advertising on public service television from the end of 2011.¹⁸⁷ In order to compensate for the financial loss caused by this measure, the act foresees a tax on television advertising broadcast on commercial television (between 1.5 and 3%) and a further tax on operators of electronic communications, including Internet and mobile telephony services (0.9%). Furthermore, France Télévisions will receive a share of the revenue from the licence fee plus a subsidy from the national budget.

The licence fee (so-called “*contribution à l’audiovisuel public*” which is paid with the “*taxe d’habitation*”—residence tax¹⁸⁸) is based on the possession of a television set. It has to be paid annually and covers all family members living under the same roof. For 2010, the annual fee is €121¹⁸⁹ and a total sum of around €2.1 billion is generated each year. The new act provides that the licence fee should be indexed to inflation. With regard to Internet PCs, they have not been taxed in France due to a ministerial directive of 6 July 2005.¹⁹⁰ Instead, the use of such PCs will, from 2010, be covered by a €2 increase in the “*contribution à l’audiovisuel public*”. This increase applies to owners of television sets. People who have not registered a television set but own an Internet PC still do not need to pay the contribution.

However, this new system may never be applied in its current form. On 17 September 2010 Frédéric Mitterrand, Minister for Culture, announced a two-year moratorium, until January 2014, for the envisaged abolition of day-time advertising on public-service television.¹⁹¹ Total abolition will therefore not take place at the end of 2011—as provided for in the Act—for purely budgetary reasons, as it would take between €300 and €400 million to compensate for the total abolition of advertising.

At the same time, on 21 September 2010, the National Assembly’s cultural affairs committee presented the conclusions of the working party “on advertising and the commercial activities of public-sector television”. The report draws up an initial assessment of the application of the reform and draws conclusions for the future. In this respect, the parliamentarians recommend maintaining advertising before 8 p.m. The abolition of day-time advertising does not raise the same editorial issues as advertising during peak-time viewing. Its cost to the State’s budget would also appear to

¹⁸⁷ However, under a decision of the President of France Télévisions, the ban on advertising on public service television has applied between 8 p.m. and 6 a.m. since 5 January 2009, see Aurélie Courtinat, “France: Reform of the Public-Sector Audiovisual Scene Applied Before Parliament Vote”, IRIS 2009-2/21, available at: <http://merlin.obs.coe.int/iris/2009/2/article21.en.html>; see also Amélie Blocman, “France: Conseil d’Etat Cancels Abolition of Advertising on Public Television Before Legislation is Adopted”, IRIS 2010-3:1/20, available at: <http://merlin.obs.coe.int/iris/2010/3/article20.en.html>

¹⁸⁸ The Commission had approved the previous residence tax in a decision of 20 April 2005 (see Decision C (2005) 1166 final on aid granted to France Télévisions—France 2 and France 3 [Aid E 10/2005—France, Audiovisual licence fee]); confirmed by General Court, judgment of 11 March 2009, T-354/05, *Télévision française 1 SA (TF1) v. Commission of the European Communities*, not yet published in the OJ.

¹⁸⁹ Ministry of Finance (*Direction Générale des Finances Publiques*), directive of 11 February 2010, 6 A-1-10, available at: http://www.leparticulier.fr/upload/docs/application/pdf/2010-02/boi_6_a-1-10.pdf

¹⁹⁰ *Instruction codificatrice n° 05-029-A8 du 6 juillet 2005*, available at: http://www.minefi.gouv.fr/directions_services/Tresor_public/bocp/bocpo507/icdo5029.pdf

¹⁹¹ The following information and text is largely taken from an article authored by Amélie Blocman on “France: Abolition of Advertising on Public-sector Channels Suspended”, IRIS 2010-9/25, available at: <http://merlin.obs.coe.int/iris/2010/9/article25.en.html>

be higher than previously forecast. Lastly, there was the risk that the total abolition of advertising on France Télévisions would result in an overall loss of advertising income for the audiovisual industries as a whole. The committee's recommendations include maintaining the exemptions to abolishing advertising after 8 p.m. The level of the tax imposed on the private-sector channels is 0.5%.

An amendment to the *Loi de finances pour 2011* (Budget Act 2011), if finally adopted in December 2010, will maintain advertising before 8 p.m on France Télévisions.¹⁹² According to Michèle Tabarot, president of the Commission of Social Affairs responsible for the amendment, the cost of abolishing advertising on public service television is incompatible with the current state of state finances while maintaining advertising during day-time offers France Télévisions a long-term perspective over its economic model.¹⁹³

The European Commission's Infringement Procedure

Budgetary considerations are not the only threat to France's proposed financing system. In September 2009 the European Commission launched an examination of the planned French funding mechanism for public service broadcasting and its compatibility with European State aid rules.¹⁹⁴ The Commission approved the annual subsidy mechanism for France Télévisions and found that the mechanisms for preventing over-compensation for the costs of the public service mission fully comply with the rules on State aid for public broadcasting services.¹⁹⁵ Nevertheless on 28 January 2010, the Commission opened an infringement procedure against France relating to the "telecoms tax" on telecommunications operators.¹⁹⁶ The Commission takes the view that the tax does not comply with the conditions laid down in community telecommunications rules, particularly Art. 12 of the "Authorisation Directive".¹⁹⁷ The Commission has taken a similar action against Spain (see *infra*).

¹⁹² On 17 November 2010 the French *Assemblée nationale* adopted the amendment, which was subsequently rejected by the French Senate. Now both chambers will have to find an agreement on this matter, so that a final decision is included in the *Loi de finances* 2011, due to be adopted before the end of 2010.

¹⁹³ *Les députés votent le maintien définitif de la publicité en journée sur France Télévisions*, Le Monde, 16 November 2010, available at: http://www.lemonde.fr/politique/article/2010/11/16/les-deputes-votent-le-maintien-definitif-de-la-publicite-en-journee-sur-france-television_1441033_823448.html

¹⁹⁴ In a decision of 1 September 2009, State aid C 27/2009—French Republic—Subvention budgétaire France Télévisions (2010–2012)—Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ 2009 C 237, p. 9, the Commission only approved the grant of €450 million of public funds for 2009 as compensation for the income shortfall.

¹⁹⁵ Commission press release IP/10/979 of 20 July 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/979&format=HTML&aged=0&language=EN&guiLanguage=en>

¹⁹⁶ Commission press release IP/10/67 of 28 January 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/67&format=HTML&aged=0&language=EN&guiLanguage=en>

¹⁹⁷ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ 2009 L 337, p. 37.

According to Viviane Reding, who in January 2010 was still the Commissioner responsible for the information society and media: “Not only does this new tax on operators seem incompatible with the European rules, it also concerns a sector that is now one of the major drivers of economic growth. Moreover, there is a serious risk that it will be passed on to customers at a time when we are in fact trying to reduce their bills by cutting termination rates and the costs of mobile phone calls, data transfer and text message roaming”. Under EU telecom rules (in particular Art. 12 of the Authorisation Directive), charges can be levied on telecoms operators only to cover certain administrative and regulatory costs (mainly authorisations and regulatory functions). They should be objective, transparent and proportionate. Moreover, interested parties must also be consulted in an appropriate manner of any amendments of charges applied to telecoms operators. Following the usual steps for infringement procedures, in September 2010, the European Commission decided to send France a reasoned opinion asking for the abolishment of the tax on the turnover of telecoms operators.¹⁹⁸ If France fails to inform the Commission of measures taken to comply with EU telecoms rules in the next two months, the Commission may refer the case to the Court of Justice of the European Union.¹⁹⁹

3.2.2.4 The Netherlands

The Current System

Since broadcasting licence fees were abolished in 2000, the Dutch public service broadcasting system *Nederlandse Publieke Omroep* (NPO) has essentially been funded through annual state subsidies. The relevant rules are described in detail in the Dutch Media Act (*Mediawet 2008*).²⁰⁰ Additional sources of income are advertising and self-generated funds, including members' contributions, permitted forms of sponsorship, the publication of a programme guide, intellectual property rights and so-called supplementary activities.²⁰¹ In the 2008 financial year, NPO received €738 million in state subsidies and generated €226 million in advertising income.²⁰²

¹⁹⁸ Commission press release IP/10/1211 of 30 September 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1211&format=HTML&aged=0&language=EN&guiLanguage=en>

¹⁹⁹ An overview of telecoms infringement proceedings is available at: http://ec.europa.eu/information_society/policy/ecomms/implementation_enforcement/infringement/

²⁰⁰ The 2008 *Mediawet* of 29 December 2008 entered into force on 1 January 2009.

²⁰¹ See also van Eijk, in: IRIS Special, The Public Service Broadcasting Culture, *op. cit.*, pp. 159, 163f.

²⁰² According to news from 5 November 2011 published on the NPO website, the government wants a total of EUR 200 million cut to public broadcasting. See <http://corporate.publiekeomroep.nl/page/nieuws/artikel/715>

The European Commission's Investigation

In addition, the Dutch state paid public service broadcasters a total of €261.1 million in ad hoc funding between 1996 and 2002. However, in 2006 the Commission decided that this State aid, which had been granted under Art. 106a and 170c of the Dutch Media Act, in force until December 2008, was incompatible with the common market.²⁰³ The Netherlands and NOS (*Nederlandse Omroep Stichting*—Dutch broadcasting foundation) brought an action against this decision to the General Court, arguing that the Commission had incorrectly construed and applied the concepts of “new aid” and “existing aid”.²⁰⁴

The Commission also decided that the new annual funding system for public service broadcasters infringed State aid rules. However, during the investigation, the Netherlands promised to amend the financing mechanism, limiting the compensation of public service broadcasters to what is necessary to fulfil the public service remit. Suitable monitoring mechanisms would be established accordingly. As a result, the Commission recently approved the financing regime.²⁰⁵

3.2.2.5 Austria

The Current System

The funding of public service broadcasting in Austria is based on licence fees, advertising revenue and other income.

The *Rundfunkgebühr* (licence fee) comprises the so-called *Fernsehentgelt* (programme fee consisting of radio and television fees)²⁰⁶ for the reception of channels operated by *Österreichischer Rundfunk* (ORF), the *Fernsehgebühr* and the *Radiogebühr* (television and radio fee) paid to the Federal Government, the *Kunstförderungsbeitrag* (a contribution to support the arts) and the *Landesabgabe* (a *Land* tax). The licence fees in Austria amount to an average of €22 per month and are collected by the Austrian fee collection office, *Gebühren Info Service GmbH* (GIS). ORF receives only a part of it, more concretely an amount corresponding to the *Fernsehentgelt* minus taxes and GIS expenses, which currently amounts to €14.50 per month or €174 per year.²⁰⁷ In 2008, ORF received a total of

²⁰³ Commission decision of 22 June 2006, C 2/2004, rec. 105 and 111.

²⁰⁴ See the applications in cases T-231/06 and T-237/06, available at: <http://curia.europa.eu/>. Regarding the difference between “existing aid” and “new aid”, see also Kleist/Scheuer, *Das Beihilfe-Risiko—Die Haushaltsabgabe und das EU-Recht*, in: epd medien, vol. 28, 14 April 2010, p. 3 ff.

²⁰⁵ Commission decision of 26 January 2010, State aid E 5/2005—Annual financing of the Dutch public service broadcasters—The Netherlands, COM (2010) 132 final.

²⁰⁶ There is a reduced fee called *Radioentgelt* for radio receiving devices.

²⁰⁷ In the case of the *Radioentgelt* the ORF receives €4.03 net per month. Concerning the debate on the programme fee increase in 2008, see Robert Rittler, “Austria: ORF Licence Fee Increased”, IRIS 2008-2/9, available at: <http://merlin.obs.coe.int/iris/2008/2/article9.en.html> and Robert Rittler, “Austria: Public Council Objects to Rise in ORF License Fee”, IRIS 2008-3/9, available at: <http://merlin.obs.coe.int/iris/2008/3/article9.en.html>

€503.9 million from the *Fernsehentgelt*, €263.3 million from advertising and €272.3 million from other sources.²⁰⁸

On 17 June 2010, the *Nationalrat* (national assembly) adopted amendments²⁰⁹ to a number of acts including the *ORF-Gesetz* (ORF Act—ORF-G).²¹⁰ ORF remains partly funded through licence fees, which will be fixed on a five-yearly basis and whose usage will also be monitored by *KommAustria* (Art. 31 paras. 14 and 15 ORF-G). The ORF Director-General will provide *KommAustria* with a structural concept with measures to cut broadcasters' costs, including an income and expenditure plan (Art. 31 para. 13 ORF-G). An evaluation committee set up within *KommAustria* will submit its opinion on this concept to the *ORF Stiftungsrat* (Foundation Board), which will take the final decision.

Under Art. 31 of the ORF Act, anyone is in principle entitled to receive ORF radio and television programmes in return for continued payment of programme fees, while Art. 31 para. 3 ORF-G requires programme fees to be paid irrespective of the frequency and quality of the programmes or their reception. The commencement and expiry of this obligation are subject to the rules applicable to broadcasting fees. According to Art. 2 para. 1 (1) in connection with Art. 1 para. 1 of the *Rundfunkgebührengesetz*²¹¹ (Broadcasting Fees Act—RGG), broadcasting fees must, in principle, be paid by anyone who “operates a broadcasting reception device indoors”. Reception devices are defined in Art. 1 para. 1 RGG as technical devices

“which can be used to watch and/or listen to items in the sense of Article I(1) of the *Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks* (Federal Constitutional Act Ensuring the Independence of Broadcasting).²¹²”

²⁰⁸ See ORF report for the 2008 financial year, available at: http://kundendienst.orf.at/service/publikationen/gb_2008.pdf

²⁰⁹ 50. *Bundesgesetz, mit dem das Bundes-Verfassungsgesetz, das KommAustria-Gesetz, das Telekommunikationsgesetz 2003, das Verwertungsgesellschaftengesetz 2006, das ORF-Gesetz, das Privatfernsehgesetz, das Privatradiogesetz und das Fernseh-Exklusivrechtegesetz geändert werden* (50th Federal Act Amending the Federal Constitutional Act, *KommAustria* Act, 2003 Telecommunications Act, 2006 Collecting Societies Act, ORF Act, Private Television Act, Private Radio Act and Exclusive Television Rights Act), available at: http://www.bka.gv.at/Docs/2010/7/19/BGBL_2010_I_50.pdf

²¹⁰ The following information and text is largely taken from an article authored by Christian M. Bron on “Austria: Comprehensive Media Rights Reforms Adopted”, IRIS 2010-8/11, available at: <http://merlin.obs.coe.int/iris/2010/8/article11.en.html>

²¹¹ *Bundesgesetz betreffend die Einhebung von Rundfunkgebühren* (Federal Act on the Collection of Broadcasting Fees—RGG), version of 2 February 2010.

²¹² Art. I(1) of the Federal Constitutional Act Ensuring the Independence of Broadcasting of 10 July 1974, Federal Law Gazette no. 396/1974, states as follows: “Broadcasting is the transmission of all kinds of items in the form of words, sounds or images, intended for the general public and communicated by means of electrical oscillations without recourse to connecting circuits, or alternatively through or via a conductor, as well as the operation of technical facilities serving this end”.

The GIS concludes from these provisions that a computer with an Internet connection or TV card is able to receive and play radio and TV programmes.²¹³ However, it distinguishes between the reception of radio and television programmes. Since television programmes cannot yet be transmitted via the Internet as a continuous live stream and video-on-demand services are not considered to be broadcasting by the GIS, a licence fee only needs to be paid for TV programmes if the computer has been converted into a television receiver through the addition of a TV card or the use of a USB stick to receive signals broadcast using the DVB-T standard.

According to media reports, in 2008 the GIS decided that a PC user should pay the licence fee because he had “created an operational broadcasting reception device” using his multimedia PC. The responsible tax office overturned this decision on appeal.

A ruling of the Austrian *Verwaltungsgerichtshof* (Administrative Court—VwGH) may also be relevant to the applicability of the licence fee to Internet-capable PCs. Under this decision, the television fee can only be collected for ORF if a household contains devices that can actually be used to receive ORF television programmes.²¹⁴ It can therefore be assumed that the GIS cannot collect a television fee for a PC unless it can actually receive ORF television programmes.

The European Commission’s Preceding Infringement Procedure

The amendments to the ORF-G came as a result of the Commission’s decision that the previous funding of ORF through programme fees infringed EU State aid rules. The Commission’s concerns mainly related to the imprecise definition of the public service remit, particularly for online services and sports channels, as well as the lack of appropriate monitoring of whether the remit was being fulfilled. The Commission had also found that no suitable precautions had been taken to prevent overcompensation and to ensure that ORF was carrying out its commercial activities according to standard market principles. After Austria had promised to amend the ORF funding rules in the light of the Commission’s criticisms and instructions, the Commission closed its investigation.²¹⁵ Austria had agreed in particular to conduct a public consultation before introducing new media services operated by ORF and to clearly separate ORF’s commercial and public service activities.

²¹³ See the GIS’s opinion on its website, FAQ no. 18: “Do fees apply to PCs with an Internet connection?”, available at: <http://www.orf-gis.at/>

²¹⁴ VwGH, judgment of 4 September 2008, case no. 2008/17/0059, p. 4, available at: <http://www.ris.bka.gv.at/Vwgh/>. According to Art. 31 *ORF-Gesetz*, the television fee is the part of the broadcasting fee which the ORF receives for its television channels. However, all other taxes are to be paid in such circumstances, including the fee for reception of radio programmes.

²¹⁵ Commission decision of 28 October 2009, State aid E 2/2008—Financing of ORF, COM (2009) 8113 final, rec. 177 ff. and 214 ff.

3.2.2.6 Slovak Republic

The Current Model

Under Art. 21 of Act no. 16/2004,²¹⁶ public service broadcasting is funded, in order to fulfil the public service remit, by means of licence fees, State aid, advertising revenue and subsidies.

As established by Act No. 68/2008 Coll.,²¹⁷ all natural persons with an electricity supply and all employers of three or more people must pay licence fees (so-called “payments for public services in the area of television and radio broadcasting”). The monthly broadcasting fee is SKK 140 (approx. €4.77) for natural persons and between SKK 140 and 14 000 (approx. €4.77 and €477.18) for employers (depending on the number of employees). The state grants subsidies on the basis of the agreement between *Slovenská televízia* (STV) and the Ministry of Culture concerning the content, aims and provision of public television broadcasting services for the period 2010–2014 (“state agreement”) and the first draft amendment to the state agreement for 2010.²¹⁸ The state agreement sets out a medium-term strategy for the creation, production and transmission of programmes by STV. Under the agreement, the state is obliged to provide €61.4 million of funding for STV in order to support the production and transmission of public interest programmes, i.e. programmes aimed at meeting the information and cultural needs of viewers within the broadcaster’s transmission area. STV undertakes to use these funds in accordance with the agreement, particularly for dramatic, documentary and animated films that promote the cultural identity of the Slovak Republic in accordance with Art. 3(h) of Act no. 308/2000 on broadcasting and retransmission.²¹⁹

Reform of the Funding System

On 11 August 2010 the National Assembly of the Slovak Republic approved the new Government Programme Declaration (“Declaration”) 2010–2014.²²⁰ The main objectives in the area of culture are the protection and restoration of the cultural heritage, a complete reform of the public media and an efficient administration of public finances.²²¹

²¹⁶ Zákon c.16/2004 Z.z. o Slovenskej televízii, 01.02.2004, Zbierka Zákonov 2004, 7, p. 119 (Act on Slovak television No.16/2004, 1 January 2004, Official Journal of 2004, section 7, p. 119)

²¹⁷ Zákon c. 68/2008 Z. z. z 15. februára 2008 o úhrade za služby verejnosti poskytované Slovenskou televíziou a Slovenským rozhlasom a o zmene a doplnení niektorých zákonov (Act No. 68/2008 Coll. on Payments for Services Provided for Public by the Slovak Television and the Slovak Radio and amending and supplementing certain acts).

²¹⁸ The state agreement between the Slovak Republic and STV of 21 September 2009 is available at: http://www.stv.sk/chillout_items/2/5/6/256724_3240cb.pdf

²¹⁹ See Jana Markechova, “Slovakia: Contracts Between the State and Public Broadcasters”, IRIS 2010-1/40, available at: <http://merlin.obs.coe.int/iris/2010/1/article40.en.html>

²²⁰ Občianska Zodpovednosť a Spolupráca Programové Vyhľásenie Vlády Slovenskej Republiky na Obdobie Rokov 2010–2014 (Government Programme Declaration, August 2010), available at: <http://www.government.gov.sk/data/files/6257.pdf>

²²¹ The following information and text is largely taken from two articles authored by Jana Markechova, “Slovakia: Plans of the New Government in the Area of Media”, IRIS 2010–9/36, available at: <http://merlin.obs.coe.int/iris/2010/9/article36.en.html> and “Slovakia: Merger of Slovak Television and Slovak Radio into a Single Public Service Institution”, IRIS 2011-1 (to be published).

One key area liable to change is the payment system for public media. According to the Declaration “the Government will repeal the licence fees and create a new legislative framework for the financing, organising and functioning of the public media with an aim to increase their efficiency and strengthen their public character”. Firstly, the Minister of Culture wants to bring forward the concept of public media to discuss it with specialists. A part of this concept is also the repeal of licence fees, planned to be concluded by 1 January 2012. The Minister of Culture has pointed out that five statutes will have to be amended before this reform can be effectuated and a long legislative process will therefore be necessary.

Following up on the Government Programme Declaration, the Ministry of Culture proposed the Draft Bill on Slovak Radio and Slovak Television (“Bill”)²²² to the National Council of the Slovak Republic (“NRSR”), which the latter received on 3 November 2010. A day later, the NRSR agreed with the proposal of the Minister of Culture to discuss the respective Bill in a shortened legislative process. The Bill is currently in the second reading.

Pursuant to the Bill, that should come into effect on 1 January 2011, the Slovak Television (STV) and Slovak Radio (SRo) will merge into a new single public service institution called Slovak Radio and Television (“RTS”) and the assets of STV and SRo shall be transferred to this new institution. The establishment of the RTS will be the first step in introducing a new model of public broadcasting in the Slovak Republic. The main aim of this step is—according to the Explanatory Memorandum of the Bill—to prevent public broadcasting from running further into debt and to create the conditions for its consolidation. In case of such a merger, the expected savings should amount to at least €1.65 million in 2011.

It should be noted that neither the position, aim or extent of the main activities of the RTS, nor the means of funding shall be changed under the Bill. However, the Bill envisages replacing the licence fee for Slovak Television and Slovak Radio with a single payment from the State budget.

3.2.2.7 Spain

The Current System

In Spain, Act no. 8/2009 on the funding of public service broadcasting,²²³ in force since 1 September 2009, provides for a “new” funding model for public service broadcaster *Corporación de Radio y Televisión Española* (RTVE). The model involves funding from state subsidies and three different types of taxes.²²⁴ Free-to-air commercial TV broadcasters are required to pay 3% of their

²²² Vládny návrh zákona o Rozhlase a televízii Slovenska a o zmene a doplnení niektorých zákonov (Draft Bill on Slovak Radio and Slovak Television), available at: <http://www.nrsr.sk/Default.aspx?sid=zakony/zakon&MasterID=3490>

²²³ Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española (Act 8/2009 of 28 August 2009 on the funding of RTVE Corporation), available at: http://www.congreso.es/constitucion/ficheros/leyes_espa/l_008_2009.pdf

²²⁴ See Trinidad García Leiva, “Spain: Law on the Funding of RTVE Corporation Adopted”, IRIS 2010-1/18, available at: <http://merlin.obs.coe.int/iris/2010/1/article18.en.html>

income, pay-TV broadcasters 1.5% and electronic communications operators 0.9%; funds are also generated from the existing tax on the use of spectrum frequencies (80% of the tax's revenue is allocated to RTVE, up to a maximum of €330 million per year. This percentage can be modified by the yearly Budget Act).

There is no licence fee in Spain. In addition, RTVE receives no advertising income under the new law. RTVE can also no longer count on unlimited state guarantees. Its budget for 2010 and 2011 combined is limited to €1.2 billion. State guarantees amounted to around €502 million in 2008, in addition to potential advertising revenue of approx. €600 million.²²⁵

The Commission's Investigation

In December 2009, the Commission opened a formal State aid procedure against Spain in order to investigate the new funding system for RTVE.²²⁶ Since Spain did not notify the reform, the Commission could not assess it before it came into effect. On 20 July 2010, the Commission decided that the new financing system of RTVE is compatible with EU State aid rules *inter alia* because it does not give rise to disproportionate distortions of competition between public and private broadcasters as there is no over-compensation for the costs of their public service missions.²²⁷ However, this State aid decision is without prejudice to the compatibility of the charges on telecommunications companies with EU telecoms rules, and in particular the Authorisation Directive (2002/20/EC). The Commission's investigation showed that the amount of the aid to be granted to RTVE does not depend on the revenue generated by these taxes, but is only determined by the net operational costs of the broadcaster. Therefore, the compatibility of the aid is not dependent on whether the taxes are legal or not, a matter which is being examined in a separate procedure (see *infra*). Moreover, Spain demonstrated that safeguards to avoid overcompensation were in place, in particular, the external auditing of RTVE's annual accounts.

With regard to the newly introduced tax on the income of telecoms operators, in March 2010 Spain received a formal request for information under Art. 258 TFEU.²²⁸ Later that year, in September, the European Commission decided to sent Spain a reasoned opinion asking the abolishment of the tax.²²⁹ According to the Commission, these charges are incompatible with the rules on electronic communications networks and services. Under these rules (in particular Art.

²²⁵ See European Audiovisual Observatory (ed.), *Yearbook 2009—Film, Television and Video in Europe, Volume 1, Television in 36 European States*, Spain, pp. 81, 87.

²²⁶ Commission press release IP/09/1861 of 2 December 2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1861&format=HTML&aged=0&language=EN&guiLanguage=fr>

²²⁷ Commission press release IP/10/978 of 20 July 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/978&format=HTML&aged=0&language=EN&guiLanguage=en>

²²⁸ Commission press release IP/10/322 of 18 March 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/322&format=HTML&aged=0&language=EN&guiLanguage=en>

²²⁹ Commission press release IP/10/1211 of 30 September 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1211&format=HTML&aged=0&language=EN&guiLanguage=en>

12 of the Authorisation Directive, charges can be levied on telecoms operators to cover only certain administrative and regulatory costs (mainly authorisations and regulatory functions) and should be objective, transparent and proportionate. Moreover, interested parties must also be consulted in an appropriate manner of any amendments to charges applied to telecoms operators. If Spain fails to inform the Commission of measures taken to comply with EU telecoms rules within the next two months, the Commission may refer it to the EU Court of Justice.²³⁰

3.2.3 Solutions and Summary

During the 1990s when former Eastern bloc countries started to reflect upon how to set up a public service broadcaster or how to transform the state broadcaster into a public service broadcaster, the issue of funding was high up on their discussion list. Potential sources of income were contemplated; the practicalities of using them examined and advice sought from countries that already had functioning public service broadcasting systems.

The funding issue has, however, never been easy for anybody no matter whether public service broadcasting had been at the very origin of a country's broadcasting system or whether it could only be introduced after the political landscape finally allowed for it. Those countries who started off with public service broadcasting had to review and possibly adjust their financing systems in order to accommodate the development of a commercial broadcasting market and also take into account the importance of public service broadcasting for fundamental rights as continuously stressed by both the European Court of Human Rights²³¹ and the Court of Justice the European Union,²³² and as reflected in national constitutions.²³³

Convergence introduced new questions about how to fund broadcasters since television content can now be received via different devices. As a result we witness in various countries discussions about whether or not to impose fees on owners of PCs based on the idea that the PC might be used for broadcasting services. And this is only one example.

²³⁰ An overview of telecoms infringement proceedings is available at: http://ec.europa.eu/information_society/policy/ecomm/implementation_enforcement/infringement/

²³¹ For the influence of ECHR decisions on "the freedom of broadcasting", see Scheuer/Maus, *o.p cit.*, p. 15ff. (19–28).

²³² For the relevant jurisprudence of the Court of Justice of the European Communities, see the summary by Scheuer/Maus, *op. cit.* p. 37ff (47–49).

²³³ See for example Art. 5 para. 1, 2nd sentence of the German *Grundgesetz* (Constitution), which reads: "Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet". ("The freedom of the press and the freedom of by means of broadcasts and films shall be guaranteed"). The Constitutional Court has consistently interpreted this sentence as a duty of the state to secure that broadcasting may present free, comprehensive and truthful information, that it shall be neither influenced by government nor by particular private interests but instead shall have the objective of a high diversity of opinions.

Convergence has also changed our understanding of public service in the context of media. It is no longer only broadcasting that may be offered as a public service but rather any media that can deserve the public service label. This new understanding can also impact the idea of how to fund public service broadcasting/media. It has certainly attracted new players to the idea that they too may be eligible for public money if they offer what could be viewed as public services (e.g. local TV).

All of the above needs to be seen in relation to the prevalent economic situation when the funding system is being established or confirmed. Depending on the stability and potency of the state budget, the advertising industry, the national economy and private households, different solutions may appeal and funding will be more or less generous.

Over the years certain sources, which we list below, have been classic examples of how public service broadcasting has been funded across Europe. Different countries used different combinations of them; some, though much fewer, relied on a single source. Picking one or several sources, however, does not do the trick. In addition, it is necessary to define how the money shall be collected and, of course, to fix the precise amount. Last but not least, it is crucial to determine who makes the relevant decisions.

The two last aspects—amount and decision maker—have been subject to the description of concrete examples (see above II Practices). The following list provides a synthesis of potential sources and ways of collecting money that our analysis of existing systems revealed:

3.2.3.1 (Broadcasting) Licence Fee

The broadcasting licence fee might be best described as a fee imposed on citizens (and under certain conditions, businesses) for receiving public service broadcast and which is collected in order to finance public service (television and radio) broadcasting. Different schools of thought exist as to how to raise the fee, some of which stipulate that payments should only cover the type of broadcast actually received (that is, television or radio broadcast). Convergence has led to the spreading of systems whereby the licence fee is linked to a generally reception of audiovisual media services and is called a “media contribution” or a “media tax” as the case may be. The licence fee will be named according to the chosen model (see below).

(a) Per income

Every citizen with his own income must pay a broadcasting licence fee that may also be called a “media contribution” or “media tax”.

(b) Per household/business premise

Each household is obliged to pay a fee (or “media contribution” or “tax”). Business premises would be subject to a separate charge.

A further point for decision is whether to waive the fee if a household/business does not possess a device capable of receiving a television signal.

(c) **Per device**

Any person or business possessing a receiving device would be asked for payment for each device.

This model often carries exemptions for certain groups such as small business owners possessing car radios. It is also at the root of the discussion about whether or not PCs should be considered as devices.

(d) **Per electricity supply**

All natural persons with an electricity supply and all employers of a certain number of persons are obliged to pay a fee.

In addition to the above-mentioned exemptions, it is possible to build in further exemptions, such as for

- Low-income households
- The elderly
- The physically impaired
- Educational institutions, etc.

3.2.3.2 Tax Based Income

Broadcasters may also be funded by money raised through taxes imposed on enterprises or activities rather than citizens, especially with the aim of financing public service broadcasters/media. Some examples are:

(a) **Tax on the use of spectrum frequencies**

(b) **Tax imposed on telecommunications (or electronic communications) operators.**

These taxes may be imposed for income generated from:

- carrying broadcast signals—offering Internet services
- offering mobile services

(c) **Tax on commercial television companies** (the amount may be calculated as a proportion of their income from broadcasting advertisements).

3.2.3.3 State Subsidies

In this context, state subsidies shall be understood as payments made from the general state budget. The support to the public service broadcaster can again take different forms.

- (a) Direct support of the system in the form of direct payments to companies providing public broadcasting/media services
- (b) Indirect support through subsidies for television productions/programmes/ transmissions.

3.2.3.4 Commercial Communications

A classic option to generate funds for broadcasting is advertising. Advertising in all its different shapes as well as related forms of using “images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity” have been reorganised under the notion of commercial communications in the framework of the Audiovisual Media Services Directive. Public service broadcasters are often restricted not only as to the amount of hours/minutes they can spend on commercial communications and on the time of the day when they may broadcast it but also as to what form of commercial communication they may use.

National laws distinguish in particular between:

- (a) Advertising
- (b) Sponsorship
- (c) Product placement (e.g. not allowed for Germany’s PSB).

3.2.3.5 Other Self-generated Funds

Today’s public service broadcasters/media actively participate in the economic life of companies. Consequently they are also in a position to raise money that may potentially be used to finance their public services. Self-generated income may in particular result from:

- (a) Own products (for example, programme guides) and services
- (b) Intellectual property rights
- (c) Supplementary (sideline) activities
- (d) Rental leasing of buildings
- (e) Donations²³⁴
- (f) Interest from bank assets

²³⁴ For example the National Public Radio (US) has the following slogan on its website: “Donate now and your tax-deductible gift helps keep all your favorite news, entertainment, and music programs on your local public radio station”. See <http://www.npr.org/stations/donate/>. Because “asking entails no costs” we might see more requests for donations in the future.

It should be noted that self-generated funds may be subject to restrictions. For example, in the Netherlands supplementary activities may not impair the core activities of the public service broadcaster, they must have a link to the broadcasters' main task and may not distort competition.²³⁵

3.2.3.6 Mixed Models

In practice, financing systems often consist of a combination of the financial sources presented in 1 to 5, above. Some combinations seem to have gathered more prominence than others. This seems to be the case for the combined licence fee/advertising income model.

With the general decline of advertising revenue, commercial broadcasters have been very actively pursuing their claim that public service broadcasters should be financed through other sources. It seems that this has triggered an increase in the popularity of the model combining licence fees with some form of tax-based income.

Self-generated income appears to be allowed as an additional means of funding under almost any model provided that the activity is compatible with the public service remit of the broadcaster.

3.2.3.7 Methods of Collecting the Funds

Irrespective of what source or combination of sources is being chosen, how to collect the funding is an additional question that needs to be addressed.

The ways of collecting licence fees are manifold, they range from collection through electricity companies (for example, in Greece, Cyprus, Turkey), telephone companies (for example, in Bosnia and Montenegro) to even post offices (for example, in Ireland).²³⁶ In Switzerland, the Bundesrat can entrust an independent organisation with the task of collecting and managing licence fees,²³⁷ and since 1998 the Billag AG performs this function.²³⁸

In many cases collection goes through a department of the national broadcaster (for example, in Norway, Denmark and Italy). In the UK a department of the national broadcaster fulfils this task, but all activities are outsourced to partner companies, which are independent of the broadcaster; only the management is provided for by the broadcasting company. In Germany, the GEZ belongs jointly to the ZDF, ARD and Deutschlandradio. The GEZ is a non-profit joint administrative entity

²³⁵ See Nico van Eijk, *op. cit.*, p. 154.

²³⁶ For an overview of this question see Denk, *Ways to Collect the Broadcasting License Fee—An International Overview*. Cologne, October 2010, available at: <http://www.rundfunk-institut.uni-koeln.de/institut/publikationen/arbeitspapiere/ap272.php>

²³⁷ See Art. 69 of the *Bundesgesetz über Radio und Fernsehen (RTVG) vom 24. März 2006* (Federal Act on Radio and Television of 24 March 2006), available at: http://www.admin.ch/ch/d/sr/784_40/a69.html

²³⁸ http://www.billag.ch/web/de/fragen_und_antworten/auftrag.html

without own legal capacity (*eine öffentlich-rechtliche, nicht rechtsfähige Verwaltungsgemeinschaft*). The licence fees in Austria are collected by a private company owned by the ORF, *Gebühren Info Service GmbH* (GIS).

In Finland the fees are collected by the television licence fee office, a department of the Finnish communications regulator (*Viestintävirasto*—FICORA), and paid into the television and radio fund. In France, the licence fee is paid with the “*taxe d’habitation*” (residence tax).

In countries without licence fees such as Spain and the Netherlands, the system does obviously not require a specific money collecting system, which saves an administrative layer and therefore money, a fact that opponents of licence fees like to stress.

Different collecting methods also entail different costs and produce different success rates. Whereas a rather comprehensive structure like that of the GEZ would be rather expensive, it is also likely to result in a higher enforcement rate.²³⁹

²³⁹ The GEZ had 994 regular posts and a total of 1143 employees in 2009 and expenditure of €161,6 million for the collection of licence fees in 2009. In return it noted 41,9 million customer accounts. See GEZ Geschäftsbericht 2009. available at: <http://www.gez.de/e160/e161/e1457/gb2009.pdf>

3.3 Access

by Michał Kuś

Introduction

...the main goal of any communication policy can be described as that of securing the free and equal access to a social communication system that diversely provides for the information and communication needs in society. In a context of technological convergence and increasing market competition, communication policies are likely to be primarily policy of access.

The concept of “access to communications” applies to structure, content and audiences and it can in general be defined as the possibility for individuals, groups of individuals, organizations and institutions to share society communication’s resources; that is, to participate in the market of distribution services (communication infrastructure and transport), and in the market of content and information services, both as senders and receivers.

(van Cuilenburg, McQuail, 2003)

The above statements could be regarded as an inherent part of any discussion on contemporary media policy. But the issue of free and equal access to communications is not only an important part of contemporary discussions about the quality of particular media (and, more widely, social communication) systems. It is also an important part of the general discussion on the quality of democracy, citizenship and social inclusion. In this context Habermas (2006) points out that “securing the diversity of independent mass media, and a general access of inclusive mass audiences to public sphere” is one of the key elements for the institutional design of modern democracies, because it guarantees “the independence of a public sphere that operates as an intermediary system between state and society”.

One of the starting points of our study is the assumption that public service media is a fundamental part of such an intermediary system between the state and society (in Habermas’ understanding)—a system that guarantees the appropriate operation of the public sphere and, accordingly, a high quality of public debate. In this context, ensuring a diverse, pluralist, high-quality range of media available to all citizens is one of the fundamental tasks of modern democracies. This is why public service media’s existence and appropriate performance is a crucial factor in contemporary democracies’ quality.

Public Service Media (PSM) opponents, but in some cases also media policy makers, often forget about the long-term positive effects for the whole of society (for example, from a cultural, educational and economical perspective) that are related to PSM activity. Those numerous benefits allow us to discuss the kind of give-and-take relationship between PSM and its social environment. We must be aware that such a “deal” between PSM and society must be based on mutual commitment. Society, expecting the already mentioned long-term positive effects, must enable and help PSM to fulfill its remits. This mainly means a financial and organisational commitment, but also the guarantee of access to limited resources, such as broadcast spectrum, etc.

This is why the access issue is so important. The fairness of the deal between “PSM liability” and “PSM entitlement” depends strongly on the aforementioned guarantee of access, enabling PSM to be an important actor in the whole media system.

Although contemporary media is changing, we strongly believe that PSM needs (and deserves) its space in the new digital media world. It is not because we simply want PSM to survive, but mainly because we believe that contemporary societies still need PSM, “media with purpose” (EBU, 2002)—in some ways even more strongly than in the past.

Thus, the natural consequence of such a mindset is the assumption that, as has already been mentioned in the previous part of our report, the main question of our research is not whether society needs public service media, but how PSM can adapt to the changing world in order to find its place in the media market and society. The access issue is, in some ways, even more closely related to this question than governance and funding issues.

Passing on to more detailed and practical deliberations, the main contemporary challenge for public service media, in terms of access, is its migration from traditional to new communication platforms. Changing patterns of media use (for example, a decreasing number of traditional media users, the dynamic development of the Internet), enforce such a migration because traditional media platforms constantly lose their position. It is a brand new challenge, not only for public service media, but also for law and policy makers, responsible for establishing rules for the performance of PSM (and mass media in general).

Every guide to writing a PSM law—and our study has such an ambition—should, or even must, take into account all those new developments. New ways of thinking about PSM must be related to new media, which increasingly forms part of the communication environment of contemporary societies.

The need to redefine PSM in the digital context is evident. This is why, for example, the European Union or Council of Europe member states are constantly asked to ensure that the specific legal, technical, financial and organisational conditions required to fulfill the public service remit are accepted and adapted to the new digital environment.

Our analysis of the access issue will concentrate on three main areas: structure, content and audience (van Cuilenburg, McQuail, 2003). We will deal with the usual PSM remit (see: Chapter 2) as the ultimate objective, also in reference to these three areas. Only universal and untrammeled access to PSM enables us to fulfill those remits. Such objectives can only be accomplished on some basic conditions. This belief leads us directly to the problem of specific requirements,

indispensable to securing universal and untrammelled access to PSM. All those issues are in our area of interest and should be an area of interest for contemporary media law and policy makers.

From a regulatory point of view (of utmost interest to our study), it is mainly transmission- and device-related. Recently, this problem has mainly been related to managing the so-called “digital dividend”, the consequence of the contemporary “digital revolution”. It also means, that the “universal access” issue should now be analysed in a completely new context. As Korenke (2009) notes, the “digital dividend” concept means that now 75% of the current broadcast spectrum (previously used to distribute television channels in an analogue way) could serve for new purposes. Those “freed” frequencies may serve not only to offer new television (or radio) channels, but could also be used to offer other telecommunication services. Therefore, future use of the “digital dividend” is one of the main dilemmas of the digital era.

A general overview of the main issues related to universal access issue leads us to the most practical part of our deliberations. Although we can list a number of requirements for universal access to PSM in the digital era we can basically distinguish three main dimensions to this issue: usage (personal capabilities of users, media literacy, bridging the “digital divide”, see Part 3.3.1), devices (the interoperability issue) and transmission “going where the viewer/listener goes” paradigm—i.e. the digital switchover, net neutrality, “must-carry” rule—see Part 3.3.2.).

The final part of our deliberation is proposals for practical solutions, based on necessary changes in each particular national media law.

3.3.1 Reception

Universal access—in terms of structure, content, but mostly in terms of audience—is one of the main habitual characteristics of public service broadcasting (Negrine, Papathanassopoulos, 1990) and is frequently treated as a “higher order value” (Steemers, 2002). Traditional PSM tasks, such as providing universal access to culture and providing a forum for public debate (Jakubowicz, 2006) are strictly related to universal access requirements and the issue of means of transmission.

Contemporary discussions about “universal access” must take into account recent developments in media technology, especially in terms of digitalisation. The digitalisation process brings brand new concepts and contexts, i.e. related to the so-called “digital dividend” and “digital divide”. These concepts are sometimes perceived as crucial challenges for contemporary media policy makers. It also means that the matter of how people use what media has to offer—and also how they are prepared to benefit from the possibilities offered by new communication technologies—is an inherent part of all contemporary media policy discussions.

All these new developments, in relation to traditional and new notions of “universal access”, will be the principal objects of analysis in Part 3.3.1.

3.3.1.1 Principle: Between Digital Divide and Dividend

The digitalisation of media leads to the very important subject of the significant transformation of contemporary media markets, especially in terms of production, aggregation and distribution of information (Galperin, 2004). One of the most important effects of these new developments is the emergence of the already mentioned “digital dividend”.

But, apart from a discussion about the new use and distribution of the “digital dividend”, it is obvious that such a situation offers brand new possibilities, for example, in the area of bridging the so-called “digital divide”, understood as “*the gap between the access of individuals, households, organisations, countries and regions at different socio-economic levels to ICTs and Internet*” (van Lesame, 2005). This problem is observed on both a national (the growing gap between different social groups) and international (the growing gap between developed and developing or underdeveloped societies) level.

In both contexts it may be observed that there are a significant number of social groups with very limited or no access to ICT (*Information and Communications Technology*) of the digital era—both in terms of physical access and requisite skills. The main handicaps to overcome are: an insufficient, digitally literate online population; the lack of a sufficiently dynamic, entrepreneurial, service-oriented culture; and, what is the most important from our point of view, a public sector which is not playing a sufficiently active role in enabling the development of new applications and services²⁴⁰.

Challenge

Bridging the “digital divide” and managing the “digital dividend” in the public interest is obviously a big challenge because an important aspect of the “digital dividend” discussion is also the fact that additional spectrum may generate significant additional income for the state budget (if it were commercialised). It may also be regarded as one of the main driving forces promoting the digital switchover, and not necessarily in a positive context either.

PSM seems to be the perfect instrument for applying “digital dividend” use, based on public interest and the communication needs of different sectors of society. But increasingly, the strong economic forces driving this issue and also the political environment of contemporary discussions about PSM are rarely favourable for PSM advocates. In effect, it is also worth discussing if PSM is currently fit and well enough equipped to perform in this area, because the development of new applications and services (that may help bridge the “digital divide”) depend substantially on additional funding and an adequate regulatory framework.

²⁴⁰ eEurope. *An Information Society For All. Communication on a Commission Initiative for the Special European Council of Lisbon, 23 and 24 March 2000*. Retrieved 7 August 2010, from: http://ec.europa.eu/information_society/eeurope/i2010/docs/2002/english.pdf

Standards/References

The mode of bridging the “digital divide” and the new use and distribution of the “digital dividend” (to achieve this goal) is still under discussion in many countries and also in the international arena. The European Commission modus operandi concentrates on market demand as a principal variable for such a decision (Jakubowicz, 2010), but other viewpoints are also being discussed, for example, by the Council of Europe and the European Parliament, who are concentrating more on the social and cultural aspects of the whole process (Bustamante, 2008).

The *Political Declaration*, adopted by the Council of Europe Conference of Ministers responsible for Media and New Communication Services (Reykjavik, 28 and 29 May 2009) stress the importance of PSM’s role in this context: “*Public service media, having genuine editorial independence and institutional autonomy, contribute to media diversity and help counterbalance the risk of misuse of power in a situation of strong concentration of the media and new communication services. They are therefore a fundamental component of the media landscape in our democratic societies*”.²⁴¹

Examples/Cases

Different types of actions are taken to avoid a “digital divide”—for example, within the European Union or within each particular society. The EU programme “e-Inclusion” is also a good example to follow in a national context, with its specific goals such as:

- (a) Build up the knowledge base on the socio-economic factors of e-Inclusion, as well as on the understanding of ICT use in daily life;
- (b) Use ICT within existing social policies in order to make them more efficient and effective, to empower social workers and local communities; associate more closely the beneficiaries to the discussion and evaluation of those policies.
- (c) Focusing e-Inclusion policy measures more on local and community levels, where the diversity of real needs can best be expressed, assessed and addressed. The issue here is to devise public policies able to support (in an efficient and accountable way) small and local projects often carried out by NGOs or even informal groups.
- (d) Consider including access to indispensable networks and e-services within the scope of “Universal Service” for electronic communications in the EU. Mainstream accessibility provisions, in particular through a “European Accessibility Act” covering the design of, and access to, public e-services, as well as public procurement of ICT.
- (e) Further exploit the possibilities of ICT in relation to the development of key skills, integrating ICT-based activities across curricula, using ICT in order to facilitate access to, and management of, individual lifelong learning strategies, with a particular focus on low-qualified professions, SMEs, and disadvantaged communities.

²⁴¹ *Political Declaration of the Ministers of States participating in the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik on 28 and 29 May 2009*, paragraph 4.

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- (f) Accompany the development of public e-services with specific provisions designed to provide all kinds of mediation services (human or electronic, local or distant), either directly or through other public, non-governmental or even private entities.²⁴²

Proposals/Solutions

National regulations should guarantee that the fixed part of the “digital dividend” is used to bridge the “digital divide” within society, as a means of fulfilling the gaps in access to ICTs and Internet for individuals, households, organisations, countries and regions from different socio-economic levels.

PSM should be (*ipso iure*) one of the leading institutions managing part of the “digital dividend” with the purpose of bridging the “digital divide”.

The commercial use of part of the “digital dividend” should be co-ordinated by an independent regulatory body (such as an already existing media council), who could safeguard public interest in relation to social cohesion, access to culture and public debate, and supporting disadvantaged communities and social groups.

3.3.1.2 Media Literacy

Two main countermeasures helping battle the negative consequences of the “digital divide” and also promoting socially favourable effects are:

- (a) digital media education
- (b) the development of infrastructure (free access to digital and information technology for selected groups etc.).

Thus, emphasis must be put both not only on the technological platform itself (equipment and services) but also on the way in which it is used. Digital media education is indispensable for acquirement of necessary knowledge and skills such as collaborative working, creativity, multidisciplinarity, adaptability, intercultural communication and problem-solving. Educational systems and their environment (and also mass media) must create favourable environments for everybody who wants to fully benefit from new technologies.²⁴³

²⁴² eEurope Advisory Group. *e-Inclusion: New challenges and policy recommendations*, p. 6.

²⁴³ eEurope. *An Information Society For All. Communication on a Commission Initiative for the Special European Council of Lisbon, 23 and 24 March 2000*. Retrieved 7 August 2010, from: http://ec.europa.eu/information_society/eeurope/i2010/docs/2002/english.pdf

Challenge

As has already been stated, the “digital dividend” and “digital divide” could be treated as two sides of the same coin. Opportunities and resources created by the existence of the “digital dividend” can be effectively used to promote social cohesion or inclusion of peripheral (e.g. rural) territories or social groups to the new, knowledge-based, digital economy. But, at the same time, those resources can, as previously mentioned, also reinforce existing differences in terms of access to communication, both on a national and international level.

Standards/References

European Commission initiatives such as *eEurope* (2002, 2005), *iEurope 2010* and *Digital Agenda* (for 2020), constitute an important part of the EU digital dividend policy. For example, the key objectives of *eEurope* were:

- Bringing every citizen, home and school, every business and administration, into the digital age and online.
- Creating a digitally literate Europe, supported by an entrepreneurial culture ready to finance and develop new ideas.
- Ensuring the whole process is socially inclusive, builds consumer trust and strengthens social cohesion.²⁴⁴

It must be stressed, that all these goals are in fact strictly related to the general PSM remit. This is why it is all the more strange that the whole digital agenda of the EU somewhat neglects the role of PSM in this field.

This is especially important because ten years after *eEurope* was launched, many important issues, as mentioned by the European Commission in the year 2000, are still present, and not only in public or academic debate. Fighting the negative consequences of the “digital divide”—on an international and national level—remains an important task for contemporary media policy makers.

The role of public service media in this process is a matter of course. The traditional tasks of PSB in terms of social cohesion (such as integrating all members of the audience or rejecting any discrimination in programming or employment) might be applied, as Jakubowicz (2006) points out, e.g. by:

- developing strong and recognizable programme and institutional brands, serving as a beacon for people among the multitude of new content providers;
- being available on all digital platforms, and thus attracting people to gain access to them;
- supporting traditional broadcasting content with Internet and interactive resources;
- providing multimedia interactive services, independent and complimentary web services;
- serving as a trusted third party, a reliable and trustworthy guide to content in the online world;

²⁴⁴ *Ibid.*

- actively promoting digital media literacy and awareness of the tools of the information society, in particular the use of Internet; providing content in local and minority languages in order to encourage minorities to use the tools of the information society, as well as for groups neglected by commercial content providers;
- promoting open standards in API, CA/CI. etc.

In general, additional PSM tasks in this context could be described as striving to prevent, or reduce, the “digital divide”, so that no-one is prevented from access to culture via new technologies.

Examples/Cases

The last 15 years have been a period of constant development of PSM’s presence and activity in the digital domain—from simple programmes offering guides to very complex digital products and services. Some of those developments surely could be treated as activities upholding important public values, also related to “digital dividend” management and fighting the negative consequences of the “digital divide”. Offering good quality digital content (which is not a casual matter in the case of commercial services), educating audiences in digital skills, inclusion of new users—those are the positive effects of such activities.

A good example of such an initiative is the BBC’s *Creative Archive* project, launched in April 2005. The *Creative Archive* platform offers free access to selected BBC content for learning, pleasure and creativity. *Creative Archive* users are able, and what is more important, encouraged, to search for selected content (television and radio programmes, non-broadcast quality versions) and also to modify and create their own versions of the programmes and share this new content with others. All those materials can be used for, for example, classroom presentations, personal projects or other non-commercial uses, thus being, undoubtedly, important tools for digital media education (Leurdijk, 2006).

Another important example of PSM activities supporting digital media literacy for particular social groups is services for people with disabilities. As one Council of Europe report proves²⁴⁵, European PSM initiatives (in comparison with their commercial competitors) are vital in terms of involving people with disabilities in the digital media users’ community. The Swedish, Finnish, British and Spanish PSM are the most advanced in this context.

Proposals/Solutions

Media education—and especially digital media education—should be an inherent part of the learning process, at every level of education.

²⁴⁵ Contribution of public service media in promoting social cohesion and integrating all communities and generations (2009). Report prepared by the Group of Specialists on Public Service Media in the Information Society (MC-S-PSM). Strasbourg: Directorate General of Human Rights and Legal Affairs, Council of Europe.

PSM should be one of the most important producers and distributors of multimedia resources to be used during the aforementioned learning process (at least in public schools). PSM should co-operate closely with ministries of education and other institutions in the educational sector. Such PSM activities should preferably be based on public service contracts.

3.3.2 Distribution

Traditional public radio and television achieved quasi-universal access to the population, penetrating each home, offering uniform, stable and either free or very affordable programs. Content distributed by traditional networks and offered services were the same for all individuals and groups accessing the network (Becerra, 2008).

At present, the order of the day is for all PSM to ensure universal access in terms of emerging new platforms of communication, increasing the role of conditional access systems (CAS), etc. In this context, as we have already observed, the concept of universal access has significantly changed and the traditional model is not so relevant anymore. We must be aware of developments such as technological progress, individualisation of media use, emergence of media-like services etc. (Ridinger, 2010). It forces us to think not only in a traditional way (the need for universal access), but also to take into account, for example, the need for personalised PSM, which is more suitable for contemporary, fragmented audiences. It means that ensuring universal access to PSM in new circumstances requires a completely new approach to the media distribution issue.

3.3.2.1 Principle: Going where the Viewer Goes

The traditional concept of universal access to PSM must face up to new developments—mostly technological, but also legal, economic and social in their nature. Consequently, new PSM tasks must include (as mentioned) the performance of PSM on all multimedia platforms and in supporting traditional broadcasting content with interactive resources. According to the TNO Report (2006), digital services for traditional broadcasting should include: digital radio and television channels, Internet, channel- and programme-related websites, maintaining interactivity, user generated content, video on demand, podcasting, vodcasting, time shifting and mobile television (Leurdijk, 2006).

Thus, universality of access to PSM must include the presence in all media and on platforms with significant penetration, but also the ability to deliver a personalised public service in the “pull”, online and on-demand environment (Jakubowicz, 2003), according to the often-used paradigm: “going where the viewer/listener goes”. Providing universal access to independent information should still be among the most common objectives for PSB in European countries (Leurdijk, 2006), despite the fact that the concept of universal access has since changed.

The universal access issue in this context is also related to technological neutrality discussions (in terms of the Internet it is the so-called “net neutrality”). The European Union institutions’ position is that PSM “should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis”.²⁴⁶ Obviously, the EU supports the PSM’s position in the face of opinions (expressed mainly by commercial competitors) against PSM’s presence in the new media environment.

Challenge

The main contemporary developments in media technology, the changing concept of media, evolving from traditional linear radio and television broadcasting to non-linear media services and the multiplication of distribution platforms and technologies, such as digital television, IPTV, mobile TV and video on demand, are the most important factors in the changing approach to the issue of universal access to PSM.

The nature of communication in the multimedia environment has become non-linear, fragmented, individual, personalised, selective and interactive. It has also meant increasing rivalry—between “old” and “new” media and between the public and private sector—in situations when media receivers’ time and attention is still (despite the increasing amount of time dedicated to media by users) a limited resource.

It means that, at present, ensuring universal access to PSM demands not only the ensuring of PSM’s presence in the context of traditional media platforms (the broadcast spectrum) but also that PSM’s legal framework must also ensure the migration and strong presence of PSM in new media platforms such as the Internet.

Standards/References

PSM’s survival is directly related to its presence in the new media environment and this must be accentuated despite the efforts by commercial competitors to inhibit PSM from the new media domain. Fortunately, in the general European context, the legal acts of the European Community (the Amsterdam Protocol, the Resolution of the Council of 25 January 1999, the Audiovisual Media Services Directive and the Revised Broadcasting Communication) and especially the recommendations, resolutions and declarations of the Council of Europe (Committee of Ministers and the Parliamentary Assembly) emphasise the importance, or even necessity, of PSM’s participation in new media services and the need for an appropriate institutional and financial framework for these activities. Indeed it is seen as a prerequisite for fulfilling its public service remit. Obviously, it also creates a good environment for the implementation of these requirements in national legislation (EMR, 2009).

²⁴⁶ Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01).

The expansion of PSM into new distribution platforms is, at present, not a luxury but a necessity. That is why the solution to such a challenge seems to be rather unambiguous. International institutions (the EU, the Council of Europe) and the majority of national governments in Europe have generally allowed PSM to expand into the digital domain so that it may be treated as common practice (at least in the European audiovisual landscape).

In the context of EU media policy (a context which is crucial for our analysis) the Universal Service Directive²⁴⁷ seems to be the most important base for ensuring universal access to public service media in member countries. Article 31.1. (“Must-carry” obligations) enables the imposing of reasonable “must-carry” obligations, for the transmission of specified radio and television broadcast channels and services, where necessary, to meet clearly defined general interest objectives and must be proportionate and transparent. This means that where there are clearly defined, general interest PSM objectives (for example, clear public service value), public service media should be present on all main communication platforms.

In this context, according to the European Commission, the role of the Member States is not reduced to simply “gap filling”. Indications from EU jurisprudence (e.g. 2008 judgments for Portugal’s RTP and Denmark’s TV2) are that the principle of technological neutrality implies PSM’s presence on new media platforms (Kliemann, 2010). The position of the Council of Europe on this matter is similar.²⁴⁸

Examples/Cases

The Irish Broadcasting Act (2009)²⁴⁹ is a good example of regulation which takes into account the needs of PSM in the digital era. The Bill extends the public service remit, in terms of universal access and especially with regard to the new media. According to paragraph 114.1(g) (“Principal objects and associated powers of RTE”) the objectives of RTE (*Radio Telefis Éireann*) are also to: “establish, maintain and operate, in so far as it is reasonably practicable, community, local; or regional broadcasting services, which shall have the character of a public service” (paragraph 114.1.h). In pursuit of the objectives outlined in paragraph 114.1 RTE shall, for example: establish and maintain websites, establish and maintain an electronic communications network or establish and maintain an “electronic communications service” (paragraph 114.4.q). The results of such a regulation are RTE services such as Live TV, rte.ie Mobile Edition, RTE Player, etc.

The cases of Germany’s ARD and ZDF (and the European Commission investigation that ended on 24 April 2007 with the so-called “public aid compromise”) also provided an important

²⁴⁷ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

²⁴⁸ Recommendation (2007) 3 of the Committee of Ministers to member states on the remit of public service media in the information society.

²⁴⁹ Seanad Éireann (2009). Broadcasting Act (Number 18 of 2009). Retrieved 12 August 2010 from: <http://www.oireachtas.ie/documents/bills28/acts/2009/a1809.pdf>

context for discussions on the universal access issue. The most important consequences of the EC investigation have been: the explicitly expressed need for a clear definition (on a national level) of the extent of the PSM remit in a changing media environment, especially in the area of the new media; and the explicitly expressed need for procedures for monitoring such a development (for example, the German “three stage-test”), ensuring effective control at the national level (Ridinger, 2010). This compromise may be treated as a kind of “give-and-take” relationship: the three-stage-test in exchange for semi-universal access (EMR, 2009).

French PSM also passed dynamically into the digital era. France Télévisions (FT) proposed a VoD service on the Internet from November 2005, on the website Francetvod.fr. Also a “24/24 TV” service, launched in 2007 in co-operation with Orange is an important part of FT’s new media strategy because it allows the free viewing of programmes from France 2, France 3, France 4, France 5 and France Ô on several platforms (computer, television and mobile phone). The new media strategy of France Télévisions assumes that a “global media” strategy for the public sector is necessary and that the France Télévisions group should be present on all existing and future media distribution platforms (mobile television, Internet, VoD). Accordingly, a recent book detailing the administrative obligations of France Télévisions states that on-demand audiovisual services (directed at all publics and accessible on all electronic communication media) are an integral part of FT activity (EMR, 2009).

Proposals/Solutions

Media law should enable PSM operation on all existing media platforms.

“Must-carry” obligations should be implemented in national legislation.

PSM should be supported by public authorities with appropriate institutional and financial frameworks for activities in the digital domain, with regard to the existing (at least in the EU) and already mentioned “public aid compromise”.

3.3.2.2 Spectrum Policy and Digital Switchover

The digital-only television environment is now the forecast for the next few years. EU member states have decided to finalise the digital switchover by 2012 (with only a few exceptions, for example, Poland) (Jakubowicz, 2010). In this context, transmission networks in the digital environment and the role of PSM in facilitating the digital switchover are some of the most discussed topics relating to the whole digitalisation process.

Challenge

Digitalisation, being a different way of sending, packaging, receiving and decoding the signals that carry transmitted broadcast content, offers many new opportunities for contemporary media and also for PSM (Nyman-Metcalf, Richter, 2010). Digitalisation is strictly related to convergence,

being a form of take-over of all forms of media. In such a sense, it may be regarded as a kind of “end of history” (using Fukuyama’s concept) in terms of mass media development. Jakubowicz (2006) notes that it leads to “*the ability of different network platforms to carry essentially similar kinds of services, as telecommunication networks provide distant people with connectivity and access to content anywhere*”. This is why the transition from analogue to digital media seems to be crucial not only for media as such but for society as whole.

But, in practice, commercial media enterprises are often averse to the whole process because of the risk of stronger competition and market fragmentation. That is why, at least in some cases, the digital switchover requires a strong PSM pioneering role.

The scope and mode of PSM’s participation in the digital switchover is the kind of strategic, far-reaching choice that will be decisive for PSM’s near and distant future. Effects of such a transformation are crucial not only for the future of PSM but also for the future pluralism of media systems. As Nyman-Metcalf and Richter (2010) state, pluralism is more than just a multitude of channels. The existence of PSM is one of the mainstays of diversity of opinion in society and it must be taken into account in every digitalisation reform.

Standards/References

In perspective of the next few years, there is no retreat from the complete digitalisation of broadcasting, especially in the European context. PSM should, on the one hand, prepare itself for this moment. On the other hand, there is an expectation (expressed by both the European Parliament and the Council of Europe²⁵⁰) that PSM will participate actively in the whole process so that: “*public service broadcasting, as an essential factor for the cohesion of democratic societies, is maintained in the new digital environment by ensuring universal access by individuals to the programmes of public service broadcasters and giving it inter alia a central role in the transition to terrestrial digital broadcasting*”.

In the European context, a common model is that of the development of several multiplexes. It includes a free-to-air package available to everyone with appropriate receiving equipment, without additional payment. The “must-carry” rule guarantees a relatively strong presence of PSM channels on those multiplexes because the adequate radio-frequency spectrum for PSM, during both the digital switch-over and after the switch-off of analogue radio frequencies, must be ensured (EMR, 2009).

Examples/Cases

There are two potential scenarios involving PSM participation in the digital switchover. First, the active participation of PSM as one of the main forces pushing ahead the digitalisation process. The second one, the assumption that PSM should only respond to general trends already existing

²⁵⁰ Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

on the market. As has already been mentioned, the first option is supported by the international institutions.

For the most part it is predicted that PSM will play a proactive role in the digital switchover. International and national regulations usually acknowledge that PSM still plays a significant role as one of the most important stakeholders on contemporary media markets.

Previously observed (and in some cases finalised) digitalisation processes prove that PSM is always a very important player in helping along the whole transition process, although the situation does differ from country to country (Table 3.3.1).

Table 3.3.1

16 national DTT line-ups, pay models, switch-off status, and balance between public and private channels

	Penetration ^a TV-Homes (%)	No. of channels on the national line ups	Payment model	Analogue switch off	% Public	% Private	% Mixed	% Total
Group 1		171	/	Yes	32	68	1	100
BE (FLA)	—	3	Free	Yes	100	0	0	100
DE	11	47	Free	Yes	43	55	2	100
FI	54	33	Free/Pay	Yes	18	82	0	100
LU	—	12	Free	Yes	0	100	0	100
NL	10	41	Free/Pay	Yes	46	54	0	100
SE	18	35	Free/Pay	Yes	17	83	0	100
Group 2		158	/	No	22	75	3	100
ES	50	21	Free	No	14	86	0	100
IT	32	61	Free/Pay	No	15	84	2	100
FR	48	28	Free/Pay	No	25	71	4	100
GB	37	48	Free/Pay	No	33	63	4	100
Group 3		206	/	No	17	81	2	100
AT	12	8	Free	No	75	25	0	100
BE (WAL)	—	7	Free	No	86	0	14	100
CZ	10	12	Free	No	33	67	0	100
EE	3.40	50	Free/Pay	No	4	94	2	100
H	—	6	Free/Pay	No	67	33	0	100
LT	1	54	Free/Pay	No	11	85	4	100
MT	—	69	Pay	No	10	88	1	100
Total		535			23	75	2	100

Source: European Audiovisual Observatory (2009). *DTT comes of age in the European TV Market*. Retrieved August 10, 2010, from: http://www.obs.coe.int/about/oea/pr/miptv2009_mavise.html

A very good example of the active role played by PSM in the digital switchover is the BBC—sometimes referred to as “Auntie” but still in fact very full of life. The BBC has found its feet in the digital age, thereby maintaining a core position in the highly competitive British audiovisual media system. The strong position of PSM on the Freeview platform has been the best exponent of the BBC taking a leading role, with substantial success (Bustamante, 2008).

As Bustamante (2008) observes, in countries with well-developed and financially stable PSM, governments have generally allowed those institutions to lead the process of transition to DTT, often providing them with additional resources.

Proposals/Solutions

The proactive role of PSM in digital switchover should be assumed. PSM should be one of the players responsible for the whole process.

An adequate presence of PSM on national multiplexes should be guaranteed.

3.3.2.3 New Platforms and Infrastructural Investments

As has been already mentioned, PSM’s digital transition and use of new platforms is related to two basic needs—the need for a new regulatory framework and the need for additional funding. Both are indispensable. Providing the financial support and legal, economic and technical conditions is a prerequisite for PSM’s presence on the different digital platforms.²⁵¹

As the experience of the last few years shows us, the transfer to new media platforms is generally an expensive one. This simple fact has numerous and far-reaching consequences. Decreasing media advertising revenue (due to the economic crisis), audience fragmentation (changes in users’ behaviour), and the significant cost of transition to digitalisation—are only a few of the adverse factors related to this issue. It also means that expectations regarding private sector contributions to the costs of the process must be lowered, because start-up costs are high and neither the timescale nor the extent of the eventual advantages can be accurately predicted. As studies (and praxis) point out, digital television is not, therefore, as profitable as was predicted (Nyman-Metcalf, Richter, 2010).

Without question, additional funding for the transfer of PSM to new platforms (in relation to the conclusions from Chapter 3.2) is essential, as the basic requirement for the successful evolution of the whole process.

²⁵¹ Ibid.

Challenge

As mentioned before, additional PSM activities in the digital domain are now a must but generally speaking, funding for digital activities is still modest compared to the budgets available for television and radio.

Digitalisation requires significant investments and is initially very expensive for all market players, but a payback can be expected in the long term. That is why the funding issue is so delicate. Necessary investments include, in particular, the building of digital infrastructure.

All costs related to such a process can be divided into two main groups: once-off investments (extra costs of new infrastructure) and ongoing future operational expenditure. It means both possible savings and a cost increase because although digitalisation can diminish costs for distribution and production, it also leads to extra costs such as investments in digitalising archive material and networks, costs for hosting and storage, new applications and software systems and copyrights (Leurdijk, 2006).

Thus, the crucial question arising in debates about the transfer of PSM to new platforms is: who will pay for it? The PSM funding issue is the source of many doubts (see Chapter 3.2), as is the provision of additional funding for PSM's transfer to new platforms. The financial woes of much PSM (in Europe, but not only) further complicates this dilemma.

On the other hand, PSM's transfer to new platforms is crucial from the viewpoint of social communication needs. Thus, funding this is, in some cases, necessary in order to fulfill PSM obligations.

Standards/References

Possible solutions to this rather complicated situation include, first and foremost: state aid, co-operation between the public and private sector, co-operation with network operators and the industry. The delicate financial situation of much PSM eliminates the possibility of PSM only using its own resources. That is why the need for public aid during the switchover process is well-acknowledged (even the European Commission, usually opposed to a proliferation of different forms of public aid, recognises it). Such aid could be, for example, in the form of public funding and guaranteed investments. Possible forms of public financial support for the digital switchover and general transfer of PSM to new platforms could be: funding for establishing a transmission network or financial compensation in order to reach the entire population with particular products and services.

Different forms of possible public aid may be used, for example, so called Public Private Partnerships (between central, regional or local authorities and broadcasters and network operators). It is an increasingly popular concept, raising the necessary private capital for projects of public interest. Of course, adopted solutions would depend on the legal and institutional situation in each country. Such partnerships may include co-operation in terms of use of infrastructure because, as mentioned before, the relatively high cost of new installations must be taken into account. Co-hire and general sharing of infrastructure should help keep down the costs of the

required investment. In many countries such sharing is obligatory, and similar provisions can be implemented in the digital environment as well (Nyman-Metcalf, Richter, 2010).

Also, more traditional forms of state aid are (within the EU regulatory framework) permitted. As the European Commission affirmed recently: “*In order to guarantee the fundamental role of public service broadcasters in the new digital environment, public service broadcasters may use State aid to provide audiovisual services over new distribution platforms, catering for the general public as well as for special interests*”.²⁵²

Examples/Cases

In Italy, RAI has received significant financial support from the government for the digital switchover and introduction of PSM on all important media platforms. For example, from 2007 to 2009 RAI obtained 33 million euros so that it could expand its digital signal to cover 85% of the population (Fernández Alonso et al., 2008).

In the United Kingdom, additional funding for the BBC (for the transfer to new platforms) has been under discussion since the late 1990s. There was talk of an additional digital subscription fee but ultimately the idea was rejected. The Government decided that the BBC could instead moderately increase its fee over a number of years. The BBC also made efficiency savings and increased its commercial revenue from selling programmes. It is predicted that the situation for the BBC will change—with a distinction being made between core public service output and other channels or tasks. It may also have to find partners for commercial ventures. Generally, the BBC’s digital services which are available to all are seen as a PSM contribution to digitalisation. (Nyman-Metcalf, Richter, 2010).

Proposals/Solutions

PSM investments, necessary for the migration to new media platforms and—accordingly—to fulfilling the PSM remit in the future should be financed (or co-financed) from public funds.

In some cases (depending on national regulations) Public Private Partnerships should also be taken into consideration.

²⁵² Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01).

3.3.2.4 Interoperability and Devices

Nyman-Metcalf and Richter (2010²⁵³) define interoperability as “*the ability of devices or machines to work together with each other and to communicate in one language, in particular the capability of software and hardware produced by various manufacturers to work together*”. This issue, always important in the media environment, recently became extremely important in terms of dynamic media technology development.

Challenge

The main goals to achieve in terms of building a “digital society” and thanks to interoperability between products and services, are very well described in a document entitled “Digital Agenda for Europe: key initiatives”: “*We need effective interoperability between IT products and services to build a truly digital society. The internet is the best example of the power of technical interoperability. Its open architecture has brought interoperable devices and applications to billions around the world. But to reap the full benefits of ICT deployment in Europe, it is essential to enhance the interoperability between devices, applications, data repositories, services and networks*

²⁵⁴”.

In the context of PSM activity, achieving a satisfying level of interoperability is necessary for maintaining PSM in the mainstream of contemporary media systems. That is why the interoperability issue is so important. Lack of interoperability with other types of media and with the most important new media platforms would signal the death sentence, or at the very least the marginalisation, of PSM.

Standards/References

European Union and Council of Europe policy strongly emphasise the principle of interoperability, especially in terms of digitalisation. As Nyman-Metcalf and Richter (2010) note, “*Equipments should be interoperable. The standards shall be market-made but with regulatory oversight*”. It must guarantee the possibility for users to benefit from all types of content and services related to digital media, especially digital television services (Jakubowicz, 2010).

As Nyman-Metcalf and Richter (2010) note: “*the early digitalising countries have promoted competition and thus achieved inexpensive set-top boxes as well as more elaborate types of equipment*”. But, on the other hand, consumers’ protection and making the European market attractive for manufacturers require establishing common standards and fostering and ensuring interoperability between the different sets of equipment. This is why interoperability is promoted by the EU, although EU regulations also take into account principal market tendencies.

²⁵³ http://www.osce.org/documents/rfm/2010/03/42898_en.pdf

²⁵⁴ *Digital Agenda for Europe: key initiatives.* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/200&format=HTML&aged=0&language=EN&guiLanguage=en>

The most important dimensions of interoperability are those related to: the characteristics of so called “set-top boxes” (devices decompressing and decoding the data stream, both required for the reception of digital television); the application programme interface (API) and the Electronic Program Guide (EPG). The principal of interoperability could be achieved, at best, by promoting the open architecture of both software and hardware, necessary for accessing all the available resources of digital media. PSM has already carried out very important research on this area and made significant developments, especially as regards standard-setting, for example, via EBU activity (EBU, 2002).

The role of public institutions (both on a national and international level) is the taking into account of existing technological developments and trends in digital hardware and software and ensuring the use of interoperable, good quality and relatively cheap and affordable equipment. Thus, public procurement and legislation is crucial in the context of establishing good standards for equipment producers and distributors’ performance (Jakubowicz, 2010).

In reference to this, the aforementioned EU Digital Agenda suggests, first of all, proposing “*legal measures to reform the rules on implementation of ICT standards to allow the use of certain ICT fora and consortia standards*” but also addressing “*situations in which standards do not help because significant market players do not support them*”, to avoid any potential negative consequences of such a situation. The Digital Agenda established a new tool to guarantee interoperability—the European Interoperability Strategy and Framework. Within the Digital Agenda, Key Action 5, (a goal to be achieved by 2020) is to: “*propose legal measures on ICT interoperability to reform the rules on implementation of ICT standards in Europe to allow use of certain ICT fora and consortia standards*” (as a part of the review of EU standardisation policy).²⁵⁵

The EU Universal Service Directive²⁵⁶ is the most relevant regulation relating to the interoperability issue. The Directive points out that “*End-users should be able to enjoy a guarantee of interoperability in respect of all equipment sold in the Community for the reception of digital television*” and “*Member States should be able to require minimum harmonised standards in respect of such equipment. Such standards could be adapted from time to time in the light of technological and market developments*”. In this context, interoperability is treated as an “*evolving concept in dynamic markets*”. National regulations should guarantee and ensure that “*connectors are available on television sets that are capable of passing all the necessary elements of a digital signal, including the audio and video streams, conditional access information, service information, application program interface (API) information and copy protection information*”. It means that interfaces for digital television should be open and functional, not limited by network operators, service providers or equipment manufacturers. Open interfaces are also recognised as a consumer benefit (Schweda, 2009).

²⁵⁵ *Digital Agenda for Europe: key initiatives.* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/200&format=HTML&aged=0&language=EN&guiLanguage=en>

²⁵⁶ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0051:0077:EN:PDF>

Without doubt, PSM should be—and in fact has been (Matteucci, 2008)—one of the most active lobbyists in terms of interoperability development. It should promote the open architecture of both software and hardware, necessary for accessing all the available resources of digital media.

Examples/Cases

An example of a generally positive result of national efforts, in terms of interoperability, was the implementation of the MHP (Multimedia Home Platform) open standard in Italy. MHP implementation, which was, broadly speaking, a failure in the wider European Union context, had its greatest success in Italy, where more than 2 million MHP-interactive decoders were sold. The main factors of such a success were: the voluntary agreement of Italian broadcasters to use MHP, the introduction of the subsidy scheme for interactive decoders by the authorities and the definition of common specifications for the implementation of the MHP standard. It proves that co-operation between the main market players combined with government involvement (in terms of marketing and financial support) are crucial for success in this area (Matteucci, 2008) despite the preference for open API standards.

Proposals/Solutions

Open architecture of both software and hardware, necessary for accessing all the available resources of digital media, should be promoted.

PSM representatives should be obliged to participate in public standard-setting bodies which decide the technical standards of new media platforms.

Technical standards should primarily be adopted according to the “value for money” criterion.

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Free monthly newsletter on the most important legal developments for the audiovisual industry in 37 European countries: <http://merlin.obs.coe.int/newsletter.php>

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