

Public Service Media : Money for Content

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Financing and Supervision of Public Service Broadcasting

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Foreword

There have been many public statements on the funding of public service broadcasting and the expectations associated with it. As far as the European Union is concerned, mention might be made of the Communication from the Commission of 27 October 2009 on the application of state aid rules to public service broadcasting (OJ C 257, pp. 1–14) or in the case of the Council of Europe, the Committee of Ministers’ reply of 21 April 2010 welcoming the Parliamentary Assembly’s Recommendation 1878 (2009) on the funding of public service broadcasting.

At a national level too, much thought is being given to how the funding of public service broadcasting should be organised. In many cases, discussions have been triggered by the reservations expressed by the European Commission with regard to planned or existing funding systems. The European Broadcasting Union, the public service broadcasters’ mouthpiece, provided an additional contribution to the debate in December 2009 with an overview of possible funding models and regulatory reforms of public service broadcasting in Europe (published under the title “Funding of Public Service Broadcasting”). A recent example of national thinking on this subject (April 2010) is the Kirchhof Report commissioned by the German broadcasters ARD, ZDF and Deutschlandradio on the broadcasting levy in Germany.

The lead article of this IRIS plus issue deals both with the financing of public service programme content and with the question of the overseeing of the proper use of these funds. With this contribution, the EMR follows on from its IRIS plus 2009-6 lead article on “The Public Service Remit and the New Media”. Parallel to the present lead article, the Related Reporting section of this IRIS plus looks at various financing models and ways of ensuring that funds are employed in the public interest, providing concrete examples of current legal developments in various states.

However familiar we think we are with the issue of funding public service broadcasting, the outcome of the present discussion seems uncertain as far as one important aspect is concerned: namely the scope of the public media services to be funded. The dispute has long ceased to be only about the funding of public television services and has been extended in particular to the financing of other audiovisual media services in the public interest. The issue involved is accordingly the funding of a key area discussed in the recently published green paper “Unlocking the potential of cultural and creative industries” (COM(2010) 183/3). It is about the funding of the new media, which the green paper defines as part of this cultural and creative industry. One question that arises – but is not mentioned by the green paper – is how much of this part of the cultural and creative industry is to receive money from public funds and therefore withdrawn from the free market.

Not only the lead article but also the ZOOM of this IRIS plus look at how individual states respond to this question. The ZOOM presents a list in tabular form of new media services

that are being or have been examined to see if they comply with the public service remit. The second part of the ZOOM provides information on the economic dimension of public funding for broadcasting. It contains the latest figures on the operating revenues of the public service broadcasters, a comparison of the corresponding national public funding growth rates and the per capita operating revenues. These and related statistics are updated annually in Volume 2 ("Trends in European television") of the Observatory's Yearbook (http://www.obs.coe.int/oea_publ/yb/yb_vol2.html).

The funding of media services to fulfil the public service remit is and will remain an absorbing and many-sided subject. Reading this IRIS plus will put you right at the heart of the ongoing discussion.

Strasbourg, June 2010

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Financing and supervision of public service broadcasting

European legislation and current national developments
concerning financial and content-related supervision

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I. Introduction

Ten years ago, *IRIS Focus* looked at the financing of public service broadcasting,¹ particularly in selected central and eastern European states, which are now all members of the EU. Since that time, public service broadcasting, particularly its financing and remit, has repeatedly been the subject of media policy debate, various legislative developments and, not least, a range of different publications both within and outside the Observatory's "IRIS family".² Last year, an edition of *IRIS plus* dealt with the public service remit and online services offered by broadcasters.³ The present article takes this a step further and particularly investigates current developments relating to the financing and supervision of public service broadcasting.

The article begins with an overview of the European legislative framework (II.). The financing models of public service broadcasters are then considered, with reference to existing legislation in selected member states. We also examine broadcasting fees for Internet-capable PCs, an issue that has recently emerged at national level (III.). The financial and content-related supervision of public broadcasting services is also put under the microscope. As becomes clear, these two control mechanisms are often linked together; one current and prominent example of this is the so-called public value test or three-step test (IV.). Finally, some conclusions are drawn (V.).

II. European legislative framework for the financing and supervision of public media services

The admissibility and rules for the financing of public media services (whether state-funded or otherwise) are, like the related evaluation and supervision processes, largely determined by European framework legislation.

1) An updated version of the *IRIS Focus* (a predecessor of *IRIS plus*) was published in 2003 in: European Audiovisual Observatory (ed.), *IRIS plus* Collection, Key Legal Questions for the Audiovisual Sector, Strasbourg 2003: Däther/Scheuer et al., "The Financing of Public Service Broadcasting in Selected Central and Eastern European States As Illustrated by Bulgaria, the Czech Republic, Hungary, Poland and the Slovak Republic", pp. 106 ff.

2) See the following publications, for example: European Audiovisual Observatory (ed.), *The Public Service Broadcasting Culture*, *IRIS Special*, Strasbourg 2007; European Audiovisual Observatory (ed.), *Broadcasters' Obligations to Invest in Cinematographic Production*, *IRIS Special*, Strasbourg 2006; Ader, "Cultural and Regional Remits in Broadcasting", *IRIS plus* 2006-8; Mayer-Robitaille, "Application of EC Competition Policy regarding Agreements and State Aid in the Audiovisual Field", *IRIS plus* 2005-10.

3) Ridinger, "The Public Service Remit and the New Media", *IRIS plus* 2009-6, pp. 7 ff.

1. European Union

The provisions of the Treaty on the Functioning of the European Union (TFEU), and of the EU Commission, Council and Courts, govern the supervision of public media services at EU level.

1.1. 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.⁴ The 1997 Amsterdam Protocol⁵ stipulates that the 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.⁶

The Commission confirmed its approach to the examination of public funding of audiovisual services in its 2009 Broadcasting Communication,⁷ stating that the member states are "free to choose" the means of financing public service broadcasting.⁸ 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:

"[...] 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

4) 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).

5) 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.

6) 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.

7) 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.

8) 2009 Broadcasting Communication, *op. cit.*, (footnote 7), 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).

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.

1.2. 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*⁹ and *TV2 Danmark et al. v. Commission*¹⁰ 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 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.

2. Council of Europe

2.1. Legal instruments

Organs of the Council of Europe have dealt with the financing and supervision of public service broadcasting in several recommendations.¹¹

According to Recommendation R (96) 10,¹² 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

9) 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/>

10) 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/>

11) 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.), *IRIS Special: The Public Service Broadcasting Culture*, op. cit. (footnote 2), pp. 7 ff.

12) 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/>

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 be satisfied in an equitable manner. Recommendation (2003) 9¹³ 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) 3¹⁴ 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),¹⁵ the Parliamentary Assembly of the Council of Europe 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.

2.2. ECHR case law

The European Court of Human Rights (ECHR) has frequently examined aspects of broadcasting law.¹⁶ In the decision *Faccio v. Italy*,¹⁷ 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.

III. Funding models for public service media in the member states

Some member states have recently moved away from the traditional licence fee model that still exists in countries such as Germany and Austria. Alternative funding models are possible, in principle, under European rules. In this section, current developments are described in the form of examples from several member states in which changes have either been made recently or are at least being seriously considered.¹⁸ In this connection, the topical issue of a PC tax for Internet-capable computers is also discussed.

1. Germany

Public service broadcasting in Germany is funded through a mixture of licence fees, advertising (including sponsorship) and other revenue such as donations, rental and leasing of buildings, or

13) 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/>

14) 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/>

15) 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 de Beer, "Parliamentary Assembly: The Funding of Public Service Broadcasting", IRIS 2009-8: 4/3, available at: <http://merlin.obs.coe.int/>

16) 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

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

18) See also comments on Belgium, Denmark and Ireland in Ridinger, *op. cit.* (footnote 3), 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>

interest. However, Art. 13(1)(1) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement – RStV),¹⁹ stipulates that “the primary source of income is the broadcasting licence fee.”

The monthly licence fee currently comprises a basic fee of EUR 5.76 and an additional television fee of EUR 12.22 for television set owners. This represents an annual total of EUR 215.76. In 2008, total revenue from licence fees was approximately EUR 7.2 billion,²⁰ while advertising revenue amounted to around EUR 220 million.²¹ 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).

The dispute over the definition and admissibility of licence fees under European law was provisionally ended by the 2007 compromise on aid.²² 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 can also offer telemedia, i.e. electronic information and communication services, as long as they meet 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.

1.1. PC tax

It is currently unclear whether broadcasting fees apply to Internet PCs in Germany.²³ Although several administrative appeal courts have ruled on the applicability of licence fees to such PCs (in a variety of different cases),²⁴ no clear answer either “for” or “against” such an obligation has emerged.

Under 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)(1) RGebStV, for any reception device owned by broadcasting participants (i.e. viewers and listeners), subject to the exceptions provided for in Arts. 5 and 6 RGebStV.²⁵

According to Art. 1(1)(1) 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”.

19) 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.

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

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

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

23) 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.

24) e.g. OVG Münster, ruling of 26 May 2009, case no.: 8 A 2690/08; BayVG, ruling of 19 May 2009, case no. 7 B 08.2922; OVG Koblenz, ruling of 12 March 2009, case no. 7 A 10959/08.OVG.

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

In the opinion of the *Verwaltungsgericht Wiesbaden* (Wiesbaden Administrative Court – VG Wiesbaden), a “rational citizen” would understand a broadcasting reception device to be a radio/reception device purchased for the purpose of receiving broadcast programmes. The legislator should have included new broadcasting reception devices in Art. 1 and 2 RGebStV if it had definitely wanted such devices to be subject to the licence fee obligation.²⁶ Therefore, according to the Wiesbaden court, PCs are not broadcasting reception devices.

In contrast, the *VG Ansbach* (Ansbach Administrative Court) ruled that an Internet-capable PC should be categorised as a broadcasting reception device, particularly as it enabled users to receive a wide range of broadcast services. Seventy TV channels could now be watched via the Internet (e.g. via Zattoo).²⁷ The *VG Ansbach*’s opinion was supported by the fact that the licence fee exemption in Art. 5(3) RGebStV applied to “new types of broadcasting reception device”.²⁸ The fact that an Internet-capable computer was categorised as a “new type of broadcasting reception device” therefore meant that it was a broadcasting reception device in the sense of Art. 1(1) RGebStV.²⁹

According to Art. 1(2)(2) RGebStV, a broadcasting reception device is “ready to receive programmes”:

“if it can receive encrypted or unencrypted broadcast services without any particular additional technical procedure, regardless of the type, volume and number of channels”.

Where traditional reception devices are concerned, the fact that the device is technically capable of receiving programmes is sufficient, regardless of whether or not it is actually used for that purpose or whether it is the owner’s intention to do so.³⁰ Most German administrative courts therefore consider that Internet PCs fulfil the condition of being “ready to receive programmes”.³¹ The assumption that the technical capability to receive programmes indicates that it is “ready to receive programmes” is at least open to debate where Internet PCs are concerned. For computers are essentially designed to be used for sending and receiving e-mails, carrying out research, word processing or spreadsheets. It is therefore not surprising that some German courts argue that Internet PCs are not “ready to receive programmes”.³²

In summary, it is clear that German case law on the applicability of the licence fee to Internet PCs is inconsistent and that this legal uncertainty will presumably remain until the *Bundesverwaltungsgericht* (Federal Administrative Court) clarifies the matter or until licence fee law is made clearer. Nevertheless, it is conceivable that the traditional licence fee system will be replaced by an alternative funding model, since the German Constitution does not contain any definite funding regulations.³³

1.2. Alternative funding models

Three new funding systems are currently under discussion. 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

26) *VG Wiesbaden*, ruling of 19 November 2008, case no. 5 K 243/08.WI, in: ZUM 2009, pp. 262, 263. In the following, we mainly mention rulings of VGs (administrative courts) which, partly on account of different procedures, often go into greater detail than OVGs (administrative appeal courts) in their examination of the reasons for and against the application of the licence fee.

27) *VG Ansbach*, ruling of 10 July 2008, case no. AN 5 K 08.00348, in: K&R 2008, pp. 562, 563.

28) Regarding the development of the legislation, see Scheuer, “Broadcasting Fee for New Devices Enters Into Force”, IRIS 2007-1:7/11, available at: <http://merlin.obs.coe.int/>

29) See *VG Ansbach*, *op. cit.* (footnote 27), pp. 562, 563; Schneider, NVwZ 2009, pp. 741, 743.

30) BVerwGE 87, 181, 201; Jutzi, Informationsfreiheit und Rundfunkgebührenpflicht, NVwZ 2008, pp. 603, 607.

31) The abstract capacity to receive programmes is sufficient for: *VG Minden*, ruling of 10 November 2009, case no. 12 K 1230/09; *BayVGH*, *op. cit.* (footnote 24); *OVG Koblenz*, *op. cit.* (footnote 24); *VG Würzburg*, ruling of 27 January 2009, case no. W 1 K 08.1886.

32) *VG Gießen*, ruling of 18 January 2010, case no. 9 K 305/09.GI; *VG Braunschweig*, ruling of 20 November 2009, case no. 4 A 188/09; *VG Schleswig*, ruling of 3 August 2009, case no. 14 A 243/08.

33) BVerfG, ruling of 22 February 1994, 1 BvL 30/88 (1st licence fee ruling).

and business tax").³⁴ The other 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.

The Minister-Presidents of the *Länder* would like to examine in more detail the media contribution and the household and business tax, as well as the simplified licence fee model. The Broadcasting Commission of the *Länder* has also announced its desire to reform the broadcasting funding system from the next licensing period in 2013; a decision on this is expected in June 2010.³⁵

2. Finland

Public service broadcaster *Yleisradio Oy*³⁶ (*YLE*) is funded through a television licence fee in accordance with the Act on the State Television and Radio Fund (no. 745/1998).³⁷ 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.³⁸

The licence fee is currently EUR 231.05 per year. In 2008, approximately 1.9 million fee payers were registered with the television licence fee office.³⁹ Total revenue in 2008 was around EUR 438 million. Under Art. 12 of Act no. 1380/93, YLE may not generate additional income through advertising.

2.1. PC tax

FICORA believes that 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.⁴⁰

2.2. Reform of the funding system

Under proposals by a parliamentary working group set up by the Ministry for Communications, the television fee would be replaced by a "general media services fee" from 2012.⁴¹ The new fee, payable by all households and by all businesses with an annual turnover of EUR 400 000 or more, would be used to finance YLE. The fee would no longer be based on possession of suitable reception devices, but on the notion that the public services provided by YLE are actually aimed at all Finns, produced for television, radio and the Internet, and received via various end devices. The total number of fee payers would increase under such a system and the annual cost to the individual would therefore be reduced to around EUR 175 (businesses would have to pay more).

34) See Holzer, *Abkehr von der Gebühr – Ein Irrweg?*, ZUM 2010, vol. 5 (to be published shortly).

35) Editor's note: At their conference on 9 June 2010, the prime ministers of the *Länder* agreed in a position paper that the broadcasting licence fee will in future not be charged per device but per household (home) or place of business. See Bron, "Land Prime Ministers Agree on Household Based Licence Fee", IRIS 2010-6: 21.

36) 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.

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

38) *Österlund-Karinkanta*, in: IRIS *Special*, The Public Service Broadcasting Culture, *op. cit.* (footnote 2), pp. 77, 81.

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

40) 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/tietoa/ukkk.html>

41) 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=Yleisradio%20julkisen%20palvelu%20ja%20rahoitus.%20Yleisradio%20julkista%20palvelua%20ja%20rahoitusta%20selvitt%C3%A4neen%20ty%C3%B6ryhm%C3%A4n%20loppuraportti.%2023.4.2009

3. France

Public service broadcasting in France is funded through a licence fee (now known as *contribution à l'audiovisuel public* – contribution to public service broadcasting). The fee (which is paid with the *taxe d'habitation* – residence tax⁴²) is based on possession of a television set. It only has to be paid annually and covers all family members living under the same roof. The annual fee from 2010 is EUR 121⁴³ (EUR 10.08 per month) and a total sum of around EUR 2.1 billion is generated each year.

The Act on audiovisual communication and the new public television service⁴⁴ prohibits all advertising on public service television from the end of 2011.⁴⁵ As well as the aforementioned *contribution à l'audiovisuel public*, funding will comprise a tax (between 1.5 and 3%) on television advertising broadcast on commercial television and a further tax on operators of electronic communications, including Internet and mobile telephony services (0.9%).

3.1. PC tax

To date, Internet PCs have not been taxed in France due to a ministerial directive of 6 July 2005.⁴⁶ Instead, the use of such PCs will, from 2010, be covered by a EUR 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.

3.2. Reform of the funding system

The Commission is currently examining whether the planned reforms of the funding mechanism for public service broadcasting in France are compatible with European state aid rules.⁴⁷ It is assessing proposals on the use of the taxes to be introduced under the reforms and the possible overcompensation of the costs linked to fulfilment of the public service remit. In a separate development, the Commission opened an infringement procedure against France on 28 January 2010 relating to the “telecoms tax” on telecommunications operators. 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”^{48, 49}

42) 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.

43) 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

44) *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.

45) 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 Courtinat, “France: Reform of the Public-Sector Audiovisual Scene Applied Before Parliament Vote”, IRIS 2009-2:13/21, available at: <http://merlin.obs.coe.int/>; see also Blocman, “France: Conseil d’Etat Cancels Abolition of Advertising on Public Television Before Legislation is Adopted”, IRIS 2010-3:20, available at: <http://merlin.obs.coe.int/>

46) *Instruction codificatrice n° 05-029-A8 du 6 juillet 2005*, available at:

http://www.minefi.gouv.fr/directions_services/Tresor_public/bocp/bocp0507/icd05029.pdf

47) 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 EUR 450 million of public funds for 2009 as compensation for the income shortfall.

48) 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.

49) Commission press release IP/10/67 of 28 January 2010, available at: <http://europa.eu/rapid/>

4. Netherlands

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).⁵⁰ 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.⁵¹ In the 2008 financial year, NPO received EUR 738 million in state subsidies and EUR 226 million of advertising income.

In addition, the Dutch state paid public service broadcasters a total of EUR 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.⁵² 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”.⁵³

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.⁵⁴

5. Austria

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

The licence fees comprise the so-called programme fee (consisting of radio and television fees) for the reception of channels operated by *Österreichischer Rundfunk* (ORF), the radio and television fee paid to the Federal Government, a contribution to support the arts and a *Land* tax. The combined licence fees in Austria amount to an average of EUR 22 per month and are collected by the Austrian fee collection office, *Gebühren Info Service GmbH* (GIS). ORF receives EUR 14.50 per month or EUR 174 per year from the programme fee.⁵⁵

In 2008, ORF received a total of EUR 503.9 million from programme fees, EUR 263.3 million from advertising and EUR 272.3 million from other sources.⁵⁶

5.1. PC tax

In principle, under Art. 31 of the *ORF-Gesetz* (ORF Act), anyone is entitled to receive ORF radio and television programmes in return for continued payment of programme fees, while Art. 31(3) *ORF-Gesetz* 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

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

51) See also van Eijk, in: *IRIS Special*, The Public Service Broadcasting Culture, *op. cit.* (footnote 2), pp. 159, 163f.

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

53) 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, pp. 3 ff.

54) 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.

55) Concerning the debate on the programme fee increase in 2008, see Rittler, “Austria: ORF Licence Fee Increased”, *IRIS* 2008-2: 8/9, and Rittler, “Public Council Objects to Rise in ORF License Fee”, *IRIS* 2008-3: 7/9.

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

rules applicable to broadcasting fees. According to Art. 2(1)(1) in connection with Art. 1(1) of the *Rundfunkgebührengesetz*⁵⁷ (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(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)^[58].”

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.⁵⁹ 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.⁶⁰ It can therefore be assumed that the GIS cannot collect a television fee for a PC unless it can actually receive ORF television programmes.

5.2. Reform of the funding system

Following complaints from private Austrian media providers, the Commission investigated the public funding system and decided that the 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 is being fulfilled. The Commission also found that no suitable precautions were being 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.⁶¹ Austria particularly agreed to conduct a public consultation before introducing new media services operated by ORF and to clearly separate ORF’s commercial and public service activities.

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

58) 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.”

59) 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/>

60) 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.

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

6. Slovak Republic

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

All natural persons with an electricity supply and all employers of three or more people must pay broadcasting fees. The monthly broadcasting fee is SKK 140 (approx. EUR 4.77) for natural persons and between SKK 140 and 14 000 (approx. EUR 4.77 and EUR 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 2010.⁶² 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 EUR 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.⁶³

7. Spain

In Spain, Act no. 8/2009 on the funding of public service broadcasting, 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.⁶⁴ Free-to-air commercial TV broadcasters are required to pay 3% of their 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 EUR 330 million per year. This percentage can be modified by the yearly Budget Act).

There are no broadcasting fees 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 EUR 1.2 billion. State guarantees amounted to around EUR 502 million in 2008, in addition to potential advertising revenue of approx. EUR 600 million.⁶⁵

Meanwhile, the Commission has opened a formal state aid procedure against Spain in order to investigate the new funding system for RTVE.⁶⁶ Since Spain did not notify the reform, the Commission could not assess it before it came into effect. It will analyse it on the basis of the 2001 Broadcasting Communication. The Commission also has doubts over whether the newly introduced tax on the income of telecoms operators is compatible with the rules on electronic communications networks and services.⁶⁷ In this respect, Spain has received a formal request for information under Art. 258 TFEU.⁶⁸

62) 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

63) See Markechova, "Slovakia: Contracts Between the State and Public Broadcasters", IRIS 2010-1: 40, available at: <http://merlin.obs.coe.int/>

64) See García Leiva, "Spain: Law on the Funding of RTVE Corporation Adopted", IRIS 2010-1: 18, available at: <http://merlin.obs.coe.int/>

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

66) Commission press release IP/09/1861 of 2 December 2009, available at: <http://europa.eu/rapid>

67) Directive 2002/20/EC, *op. cit.*, (footnote 47).

68) Commission press release IP/10/322 of 18 March 2010, available at: <http://europa.eu/rapid>

IV. Supervision of public service media funding and services

The funding of public service broadcasting is monitored by internal and external bodies using both *ex-ante* and *ex-post* procedures. The process is also linked to the supervision of the content provided by public service broadcasters. In the member states mentioned here as examples, legislative amendments have either taken place or are in the pipeline, in most cases as a result of Commission decisions in state aid procedures. In addition, the so-called public value test or three-step test has already been used in some states.

1. Germany

In Germany, several different bodies are responsible for monitoring content and funding. The main external body for financial (and content-related) supervision of public service broadcasting is the *Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten* (Commission for the determination of the financial needs of broadcasters – KEF), which acts both *ex ante* and *ex post*. The *Land* parliaments and audit offices also externally monitor – *ex post* – the activities and funding of public service broadcasters. Internal supervisory bodies are the *Rundfunkrat* (Broadcasting Council),⁶⁹ whose members represents many different organisations and which can act *ex ante* and *ex post*, and the *Verwaltungsrat* (Administrative Council), which (normally) operates *ex post*.

1.1. Ex-ante procedures

The process of supervising the funding of public service broadcasting begins when the public service broadcasters register their financial needs with the KEF. This triggers a process in which the broadcasters' estimated requirements are counter-checked. The KEF also assesses whether and to what extent the broadcasters' programming decisions fall within the public service remit and include the potential for savings to be made. It then proposes the level of licence fees and the *Länder* fix the licence fees by means of an inter-state agreement. This process is therefore *ex ante* and external, since the independent KEF informs the broadcasters how much they can spend in advance. The BVerfG has explained that external control of the broadcasters' notification of their financial needs is necessary in the interests of licence fee payers. However, since the funding decision of the (*Land*) legislators (after financial needs have been registered and checked) cannot be linked to any indirect influence on the fulfilment of the public service remit, this monitoring process cannot assess whether the broadcasters' programming decisions are sensible or appropriate. It only examines whether the programming decisions fall within the legally defined public service remit and whether the related financial needs have been established accurately and in accordance with the principle of economic efficiency.⁷⁰

The *Rundfunkrat* of each broadcaster sets out the broadcaster's programming guidelines and advises the *Intendant* (i.e., the director general of each broadcaster) on programming issues; it therefore exercises *ex-ante* control over programme content. It approves the budget proposed by the *Verwaltungsrat*.

In the 2007 state aid compromise, Germany agreed to conduct a three-step test with more detailed criteria for all new and amended digital services. This test, which is described in Art. 11f(4) RStV, requires the broadcasters to inform the *Rundfunkrat*:

1. to what extent the service meets the democratic, social and cultural needs of society;
2. to what extent the service will contribute to media competition from a qualitative point of view; and

69) ZDF's *Fernsehrat* (Television Council) and DLR's *Hörfunkrat* (Radio Council) are the equivalent of the *Rundfunkrat* of the individual regional broadcasters that make up the ARD. Here, the term *Rundfunkrat* refers to all these bodies.

70) See BVerfG, ruling of 11 September 2007, 1 BvR 2270/05 (2nd licence fee ruling); ruling of 22 February 1994, *op. cit.* (footnote 33).

3. how much the service will cost.

The first step should establish the relationship between the proposed service and the general remit set out in Art. 11 RStV. The reference to “democratic, social and cultural needs” requires a practical definition of the need for information and what this actually means for society. The second step involves evaluating current media competition and forecasting how it will be affected if the new public service is introduced.⁷¹ Finally, the third element of the test is designed to create financial transparency and clarify for all stakeholders, particularly involved third parties and decision-making bodies, how much the likely (additional) “public value” created by the new service is going to cost.⁷² The three-step test is applied to the examination of new or amended telemedia services before they are approved and “activated”.⁷³ It therefore has direct consequences for the budget and thus the funding of public service broadcasters. It could also alter the financial needs registered by broadcasters with the KEF. The three-step test is therefore a specific form of the *ex-ante* monitoring procedure carried out by the *Rundfunkrat*⁷⁴ and combines content-related and financial supervision of services.

On 21 September 2009, the *Rundfunkrat* of the Mitteldeutscher Rundfunk (MDR) approved the telemedia services kikaninchen.de (a portal for preschool children) and KI.KAplus (a media library).⁷⁵ Among other things, both services helped Internet novices to develop their media literacy and made a positive contribution to media competition from a qualitative point of view. The financial outlay for kikaninchen.de was EUR 352 000 for 2009, EUR 251 460 for 2010 and EUR 253 990 for 2011; for KI.KAplus it was a maximum of EUR 220 000 per year between 2009 and 2011.

The three-step test has now been officially carried out for most of the telemedia services of *Deutschlandradio*.⁷⁶ The services remain on the Internet for between seven days for daily news items and indefinitely for archived articles about contemporary and culturally significant events. According to reports, the news portal tagesschau.de is also expected to pass the three-step test. A report commissioned by the *Rundfunkrat* of the Norddeutscher Rundfunk (NDR) states that tagesschau.de creates positive incentives for private telemedia and that media competition for the support of users leads to an improvement in the quality of commercial services competing with public telemedia services.

1.2. Ex-post procedures

The *Verwaltungsrat*, as an internal body responsible for monitoring the economic activity of public service broadcasters,⁷⁷ has a direct influence on their programming. The members of the *Verwaltungsrat* are mainly appointed by the *Rundfunkrat*, which represents many different organisations, and, in some cases, by the state.

The *Rundfunkrat* monitors internally compliance with the programming principles that apply to the organisation of broadcast programmes and which are set out in the relevant broadcasting laws. It also checks whether public service broadcasters adhere to their programming guidelines and voluntary commitments.

71) See Schulz, *Der Programmauftrag als Prozess seiner Begründung, Kurzstudie im Auftrag der Friedrich-Ebert-Stiftung*, Berlin 2008, pp. 31f.

72) See Peters, *Der Drei-Stufen-Test: Die Zukunft der öffentlich-rechtlichen Onlineangebote*, K&R 2009, pp. 26, 33.

73) All existing services that remained in operation after 1 June 2009 must also be evaluated by 31 August 2010. This currently applies to the online and teletext services of ZDF, 3sat and PHOENIX, for example.

74) According to Art. 11f(7) RStV, the state regulator also has the right to examine services using the three-step test. The authority responsible checks compliance with the procedural steps and legislative provisions. If it concludes that the procedure has been correctly followed and that the new service fulfils the legal remit, a description of the service is published in the relevant official gazette. Once this is published, the service can become operational.

75) The decisions approving these services, issued on 21 September 2009, are available at: <http://www.mdr.de/DL/6860635.pdf> and <http://www.mdr.de/DL/6860733.pdf>

76) Lower Saxony ministerial gazette, 10 February 2010, no. 6/2010, pp. 160 ff.

77) Regarding the supervisory powers of the *Verwaltungsrat*, see Hahn, *Die Aufsicht des öffentlich-rechtlichen Rundfunks*, Frankfurt am Main 2010, pp. 72 ff.

Every two years (the so-called reporting period), the public service broadcasters must submit to the *Land* parliaments *ex-post* reports on their financial situation and fulfilment of the public service remit.⁷⁸ The (external) KEF examines (also *ex post*) the total income of public service broadcasters by reviewing previous licence fee periods and the most recent reporting period. Funds that are not used by the broadcasters should be deducted by the KEF when determining (future) financial needs.⁷⁹ The relevant audit offices of the *Länder* also examine the budgetary and financial management of the public service broadcasters in accordance with the RStV. The *Länder* can also carry out limited *ex-post* state supervision⁸⁰ if the broadcasters' internal bodies either do not meet their obligations at all or ignore media law provisions or general legislation in doing so.

2. United Kingdom

In the United Kingdom, several institutions are responsible for overseeing the activities of the British Broadcasting Corporation (BBC). The BBC's internal supervisory body is the BBC Trust, which replaced the Board of Governors in 2007 and comprises 12 members (trustees). External supervision of the BBC is the responsibility of the state on the one hand, and of the Office of Communications⁸¹ (Ofcom, the communications regulator) on the other.

2.1. *Ex-ante* procedures

The Department for Culture, Media and Sport fixes the licence fee and, in doing so, exercises external *ex-ante* control over the BBC budget.

The BBC Trust monitors both the finances and content of the BBC, granting five-year licences for individual BBC services and channels to the Executive Board. The licences set out practical objectives, characteristics, references to matters of general interest, benefits to licence fee payers and the budget required for the service concerned. If a new service is to be introduced or an existing one significantly changed, the BBC Executive must submit to the Trust a detailed proposal, which is often followed by the launch of a public value test (PVT). The BBC Trust represents the interests of licence fee payers.

The PVT is a specific *ex-ante* procedure, designed in particular to ascertain whether new or amended BBC services are in the public interest. Its legal basis is found in the Royal Charter and the BBC Agreement,⁸² which is adopted by the BBC and the responsible Secretary of State for Culture, Media and Sport to complement the Charter. The test is carried out in accordance with the conditions laid down in Art. 23 ff. of the BBC Agreement and includes consideration of the following criteria (Art. 25(2) BBC Agreement):

- (a) impact – the extent to which the new/amended service is likely to affect relevant users and others;
- (b) cost – the financial implications of the change;

78) The ARD report for 2007/08 and ARD guidelines for 2009/10 are available at:

<http://www.daserste.de/service/ARD-Leitlinien08-2.pdf>; the ZDF programming plans for 2007/08 are available at:

http://www.unternehmen.zdf.de/uploads/media/Programm-Perspektiven__SVE_2007-2008_2.pdf

79) However, the public service broadcasters can keep some of the remaining funds. The European Commission states in the 2009 Broadcasting Communication that “an amount of up to 10% of the annual budgeted expenses of the public service mission may be deemed necessary to withstand cost and revenue fluctuations”, see rec. 73 of the 2009 Broadcasting Communication, *op. cit.* (footnote 7).

80) The restriction of legal supervision is linked, *inter alia*, to the principle of broadcasters' independence from the state, which is consistently applied in case law, see BVerfGE 12, 205, 262.

81) Ofcom is the national supervisory and competition authority for electronic media and telecommunications in the United Kingdom (<http://www.ofcom.org.uk>).

82) *Broadcasting, An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation* of 28 June 2006.

(c) novelty – the extent to which the change would involve the BBC in a new area of activity, as yet untested;

(d) duration – how long the new/amended service will last.

Like the three-step test in Germany, this test covers both content-related and financial aspects. The so-called Trust Unit, which advises the BBC Trust, begins by conducting a public value assessment (PVA) in accordance with Art. 28 of the BBC Agreement. This process is designed to assess the individual, social and financial “value” which the new/amended service would have for individual licence fee payers and society as a whole. The list of criteria for assessing a new BBC service includes (1) conformity with the BBC’s remit, (2) quality and originality, (3) consequences and value for users, reach of service, (4) cost and value for money. Under Art. 30 of the BBC Agreement, Ofcom then assesses the likely impact of the new services on the markets in which they are to be offered, as well as related markets. It investigates the extent to which the new services might hinder innovation and investment by other private sector providers. The results of both these tests should, as a rule, be published within three months. They form the basis of the provisional decision of the BBC Trust, which then publishes it for consultation purposes and takes into account all representations received in its final decision.

The BBC has already had to accept a negative PVT decision⁸³ concerning the licensing of local video services. In May 2008, the Executive submitted a proposal to the Trust to provide an additional local video news, sport and weather service in 60 areas of the United Kingdom, as well as five Welsh-language services on extended local BBC Internet sites. Around 400 staff and a total budget of GBP 68 million would have been required for an initial period of four years. The BBC Trust rejected the plans on the grounds that they would not improve services for the public enough to justify either the investment of licence fee funds or their potential negative impact on commercial media.⁸⁴

On 22 December 2009, the BBC Trust reached positive provisional conclusions following a PVT carried out for Project Canvas. Canvas is an open joint venture between the BBC, ITV, BT, Five, Channel 4 and TalkTalk to develop an Internet Protocol Television standard designed to enable viewers to watch on-demand services such as BBC iPlayer, ITV Player and other Internet content on television sets via broadband. The content would be accessed using a set-top box linked to the Internet, with only the broadband connection attracting a fee. The BBC Trust ruled that Canvas would provide a high public value, since it would add a new dimension to digital terrestrial television through a broadening of the range of content and services available.⁸⁵ However, the Trust only approved the project on condition that the core technical specification be published well in advance of the launch (to enable all manufacturers to adapt to the new standard), that access to the platform for content providers be on a fair, reasonable and non-discriminatory basis and that, 12 months after the project was launched, there would be a review of its effects on incentives for the partners involved to syndicate their content with other platforms.⁸⁶

In order to increase public value, the BBC is planning to offer free news and sport applications for the iPhone. The Trust is currently investigating (following complaints by the Newspaper Publishers Association (NPA)), whether the applications are covered by the BBC’s previously approved online strategy. It remains to be seen how the BBC’s future online strategy will develop in the light of its plans to reduce the services it provides in consultation with the BBC Trust.⁸⁷

83) The BBC Trust’s decision is available at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/local_video/decision.pdf

84) See Prosser, “BBC Plans for Local Video Rejected”, IRIS 2009-2:13/22, available at: <http://merlin.obs.coe.int/>

85) The related Market Impact Assessment of 22 December 2009 is available at:

http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/canvas/prov_conclusions/mia.pdf; the Public Value Assessment is available at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/canvas/prov_conclusions/pva.pdf

86) See Prosser, “BBC Trust Approves Project for On-Demand and Internet Services to be Made Available on TV Sets”, IRIS 2010-2:22, available at: <http://merlin.obs.coe.int/>

87) The report “Putting Quality First” lays down which services are to be cut. See Thompson’s presentation of 2 March 2010, available at: http://www.bbc.co.uk/aboutthebbc/strategyreview/putting_quality_first_final.pdf

2.2. *Ex-post* procedures

The BBC Trust internally monitors the Executive Board's compliance with objectives, licences and programming guidelines. Programmes are not examined until after they are broadcast, i.e. *ex post*. Ofcom is the external supervisory body for the BBC and, with the Ofcom Board, monitors compliance with programme quality and standards in the broadcasting field. In its report on the role of public service broadcasting in general, and with reference to the fulfilment of certain public interest obligations, Ofcom also publishes the BBC's expenditure annually, thereby providing *ex-post* financial transparency.⁸⁸ Finally, the Department for Culture, Media and Sport can require the BBC to put right any infringements.

3. Ireland

In Ireland, the new Broadcasting Act, which entered into force on 12 July 2009, contained numerous amendments.⁸⁹ The RTÉ Executive Board has internal responsibility for the financial supervision of public service broadcaster *Raidió Teilifís Éireann* (RTÉ). Externally, the Minister for Communications, Energy and Natural Resources, the Minister for Finance and the Broadcasting Authority of Ireland (BAI) exercise control over RTÉ.

3.1. *Ex-ante* procedures

The *ex-ante* supervision of the funding of public service broadcasting is based on a process whereby the Communications Minister, with the approval of the Finance Minister, pays annual amounts based on income from television licence fees (see Section 123 of the Broadcasting Act).

Under Section 103 of the Act, a PVT should be carried out for new or amended services. A public broadcasting company can only provide such a service with the approval of the Communications Minister, who has to assess the public value of the proposal according to the following criteria (see Sections 103(4)(c) and 103(8) of the Broadcasting Act):

- (a) the importance of the proposal in respect of the pursuance of the public service objects of the corporation,
- (b) the compatibility of the proposal with the Council Directive [Directive 89/552/EEC] and recommendations of the Council of Europe in respect of public service broadcasting,
- (c) the costs and revenues associated with the proposal and any impact on existing public service provision,
- (d) the extent to which the proposal contributes to meeting the democratic, cultural, linguistic, educational, and social needs of Irish society,
- (e) the extent to which the proposed service will be accessible by the public,
- (f) the extent to which the proposed service will reach underserved audiences,
- (g) the contribution of the proposed service or activity to raising the level of familiarity of the general public, or of individual groups within Irish society with new forms of services and technologies,
- (h) the contribution of the proposal to media plurality, and

88) Ofcom's report for 2009 is available at: http://www.ofcom.org.uk/tv/psb_review/annrep/psb09/psbrpt.pdf

89) Concerning the amendments in general, see McGonagle, "Ireland: New Broadcasting Act", IRIS 2009-10:13/18, available at: <http://merlin.obs.coe.int/>

- (i) such matters as the Minister may decide.

3.2. *Ex-post procedures*

The BAI examines annually whether the public service broadcaster fulfilled its public remit in the previous financial year and whether the level of public funds made available was reasonable. By 30 June the following year, the BAI submits a report to the Communications Minister, together with a recommendation for the licence fee. The Minister must then submit these reports to the Irish Parliament (*House of the Oireachtas*). In addition, three years after the entry into force of the Broadcasting Act (i.e. on 12 July 2012) and every five years thereafter, the BAI must conduct a review of the corporation's fulfilment of the public service remit. The Act sets out firm guidelines on what exactly should be reviewed (Section 124(9)). In particular, the BAI must take into account the financial resources available to the broadcaster, the current level of funding from licence fees and advertising, and international developments in public service broadcasting.

4. Austria

On 23 February 2010, the Austrian Government tabled draft amendments to the *ORF-Gesetz*, which include criteria and procedures for ensuring that the public service remit is fulfilled.⁹⁰ The monitoring of ORF funding should be improved by means of an extended internal quality control system (draft Art. 4a ORF-G). Until now, ORF has been supervised internally by its *Stiftungsrat* (Foundation Council – Art. 21 ORF-G), *Generaldirektor* (Director General – Art. 23 ORF-G) and *Publikumsrat* (Public Council – Arts. 28 ff. ORF-G), and externally by the *Bundeskommunikationssenat* (Federal Communications Board – BKS), which monitors ORF's compliance with the provisions of the ORF-G. In addition, the *Rechnungshof* (Audit Office) has external supervisory obligations, while the external *Prüfungskommission* (Auditing Commission), appointed by the *Stiftungsrat* (Art. 40 ORF-G), carries out financial controls.

4.1. *Ex-ante procedures*

The ORF Director General, with the agreement of the *Stiftungsrat*, lays down (and will continue to do so) general guidelines for the structure, production and coordination of radio and television programmes and for the drafting of annual programme schedules. He also submits to the *Stiftungsrat* proposals for the fixing of the programme fee and radio commercial tariffs, which are ultimately determined by the *Stiftungsrat*. Furthermore, he approves long-term programming, technological, financial and staffing plans. The *Publikumsrat* must approve the decisions of the *Stiftungsrat* concerning the fixing of the programme fee (radio and television fees). It can also submit recommendations regarding programme structure.

The ORF-G will, in future, include a provision requiring a procedure to be carried out before new public broadcasting services are launched. This examination procedure will be set out in Art. 6b ORF-G, which states that new services can be approved if:

- “1. the new service is expected to fulfil the social, democratic and cultural needs of the Austrian people and to contribute to the effective fulfilment of the public service remit, particularly the objectives set out in Art. 4(1) and 5a, and
2. the new service is not expected to have any negative effects on competition in the relevant market and on the diversity of services available to viewers, listeners and users, which are disproportionate to the contribution the new service will make to the fulfilment of the public service remit”.

90) *Regierungsvorlage des Nationalrats zu einem Bundesgesetz, mit dem das Bundes-Verfassungsgesetz, das KommAustria-Gesetz, das Telekommunikationsgesetz 2003, das Verwertungsgesellschaftengesetz 2006, das ORF-Gesetz, das Privatfernsehgesezt, das Privatradiogesetz und das Fernseh-Exklusivrechtgesetz geändert werden* (National Assembly government proposal for a Federal Act amending the Federal Constitution, KommAustria Act, 2003 Telecommunications Act, 2006 Collecting Societies Act, ORF Act, Private Television Act, Private Radio Act and Exclusive Television Rights Act), 23 February 2010, available at: http://www.bka.gv.at/Docs/2010/2/23/Regierungsvorlage_endg.pdf

The introduction of the examination procedure is meant to ensure that the funding of new public services – as long as the basic conditions for public service broadcasting remain otherwise unchanged – does not represent new aid in the context of Art. 107 TFEU. The aim is to avoid questions being raised after such services are notified to the Commission.⁹¹ In order to make the examination procedure as independent as possible, it will be conducted externally by the *Kommunikationsbehörde Austria* (Austrian Communications Authority – KommAustria), which is responsible for monitoring private broadcasters. As the applicant, ORF can participate in the procedure. A KommAustria advisory council, comprising five members appointed by the Federal Government for a five-year term, will submit recommendations on the public service evaluation of the new service. Finally, the *Bundewettbewerbsbehörde* (Federal Competition Authority) will comment on possible effects on competition in order to represent the public interest in the guarantee of effective competition in the broadcasting sector and other media markets.

4.2. *Ex-post* procedures

The overall performance of the quality control system will be assessed by an external expert appointed by the ORF Director General with the agreement of the *Stiftungsrat*. This *ex-post* assessment should be based on an annual report submitted by the Director General and approved by the *Stiftungsrat*. As part of the quality control system, public satisfaction with programming and content will also be evaluated by means of a continuous, representative, quality-based public monitoring process, including contributions from external experts from the relevant sectors. Unless any complaints are received, KommAustria will, every two years, assess compliance with the procedure for creating and reviewing the quality control system and determine whether and how existing legislative provisions have been breached.

The legislative amendments concerning *ex-post* controls are also designed to ensure that ORF uses all programme fee income to fulfil its public service remit. In order to provide a degree of flexibility, a limited amount of unused funds may be kept in reserve. KommAustria (as well as the existing supervisory bodies) will also monitor part of the financial management of ORF. It can order the repayment of programme fee income in cases mentioned under Art. 38a ORF-G and monitor ORF's finances. Finally, ORF remains subject to the legal supervision of the BKS.

It is hard to define the limits of *ex-post* supervision which, naturally, should draw conclusions with regard to the broadcaster's future activities. Linking financial issues with the fulfilment of the public service remit should be carried out sensitively in view of the need to protect providers from state interference, particularly in content-related decisions. In this regard, reference may be made to the view expressed by the *Verfassungsgerichtshofs* (VfGH) that, although ORF's legal commitment to raised quality benchmarks cannot be challenged under constitutional law in a dual broadcasting system, the evaluation of the monthly and annual programme schedules devised by ORF in order to meet that commitment cannot be extended to the evaluation of individual programmes.⁹²

V. Conclusions

Our investigation has shown that several European states have moved away from the system under which public service media are (at least partially) funded via licence fees – or are at least seriously discussing the possibility of doing so – replacing it with either a general media tax or direct subsidies from the state budget. In many cases, however, public funding is not the only source of finance. Traditionally, so-called mixed funding is largely made up of income from commercial activities, such as advertising, sponsorship and the sale of programmes. Alongside this,

91) See “*Vorblatt und Erläuterungen*” on the ministerial draft concerning a Federal Act amending the Federal Constitution, KommAustria Act, 2003 Telecommunications Act, 2006 Collecting Societies Act, ORF Act, Private Television Act, Private Radio Act and Exclusive Television Rights Act, pp. 6 f., available at: <http://www.bka.gv.at/Docs/2010/2/23/Erlaeuterungen.pdf>

92) See VfGH, decision of 25 June 2003, G 304/01; Strothmann, “Austria: ORF Act not Unconstitutional”, IRIS 2003-6: Extra, available at: <http://merlin.obs.coe.int/>

state funding is being extended to include subsidies generated via the “taxation” of the profits of private broadcasters and telecoms providers. This system is designed to keep programmes and other services free of commercial advertising and to compensate for the related income shortfall. As a result, however, public service media could become increasingly dependent on state decisions: (direct) access to licence fee revenue as well as advertising and sponsorship income can give public service broadcasters greater protection from politicians’ attempts to (indirectly) influence programme content or structure. In addition, a process whereby the level of funding is determined independently in accordance with actual needs should guard against funding cuts based on the current overall budgetary situation but unrelated to the subject matter.

As a rule, a whole host of internal and external bodies are responsible for monitoring the funding and content of public service media; their tasks 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. Care should be taken to ensure that the determination and use of funding, and the ensuing supervision of financial management, do not lead to unlawful interference in programming autonomy, either in general or as part of the aforementioned special *ex-ante* examination procedure.⁹³ For programming autonomy is an element of broadcasting freedom that is particularly closely protected under European and constitutional law.

93) It is also acknowledged that, as before, even against the background of existing legal or legislative protection of the independence of media providers, politicians may be tempted in many different ways to influence content or to seek ways of doing so, see
<http://www.sueddeutsche.de/medien/818/506983/text/> and
<http://www.arte.tv/de/Die-Welt-verstehen/Journalismus-auf-Abwegen/Meinungsmacher-packen-aus/3046842.html>