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PUBLIC SERVICE MEDIA AND HUMAN RIGHTS

Issue Discussion Paper

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FOREWORD

The concept of public service media (PSM) is not often linked to human rights, but it can indeed play a vital role in assuring media freedom and diversity. Well functioning PSM can be decisive in the protection of human rights, particularly the freedom of expression, and provide room for all voices in society, not least minorities, children and other groups which tend to be marginalised.

The airwaves were once a finite resource – a situation which is now changing. In the digital age, we have a broader and more interactive media landscape and it has become logical to discuss the broader concept of PSM rather than just Public Service Broadcasting. The former is much more than radio and TV, it has a wider scope in terms of services and it includes both traditional media and new media.

The model for most Public Service Broadcasting is the British Broadcasting Corporation (BBC), established in the 1920s. The rationale for such media has been the need for heavy investments in expensive broadcasting equipment but also the nationwide demand for impartial news presentation and reporting. Another factor has been the feeling that there should be one media outlet standing free from undue market influences and giving room for minority interests.

There are two major threats to media freedom across Europe today. One is the attempt by state authorities to dominate the media market. The other is the commercialisation and monopoly tendencies we see across Europe. PSM have an essential role as a counter-balance to the business-driven entertainment media and the state or private media empires. Being independent, including non-dependent on advertisers, they could encourage good, investigative journalism and knowledge-based content.

It has been argued that there is no objective truth, that impartial reporting therefore is an illusion and that all presentations of news and backgrounds will always be more or less biased. This is an argument against State media but not against true PSM. The point is whether there is a genuine ambition to seek impartiality and whether there are safeguards for that ambition.

Here the link to human rights is particularly relevant. If PSM base their development on a rights-based approach - encompassing principles of human rights, accountability, participation, non-discrimination and empowerment – their credibility will be strengthened and thereby enable them to act in the best interests of the public.

I have noticed that where there are strong, independent PSM there is often good quality, ethical journalism. There is a healthy chain effect. Yet, in many countries in Europe PSM are being called into question, and sometimes campaigns are conducted against them.

Despite the rapid changes in the media ecosystem, the basic ideas of PSM are still relevant:

- The independence and impartiality of public service media should be protected. They should neither be commercial nor state-owned, and must be free from political interference and pressure from commercial forces;
- Public service media should include interests for which there are no large markets. They should aim at providing impartial news across the nation, give room to minority interests and remain clear of undue market influence;
- There is a need for studies and exchanges on how public service media actually function across Europe today and to what extent they incorporate human rights principles. This discussion must include the steps necessary to ensure that the potential of Internet-based social media will be fully exploited in the service of the public;
- There is a need to discuss the promotion of genuinely independent and useful public service media, including their mandate, organisation and funding, and accountability.

The authors of this Issue Discussion Paper both work for Article 19, an international organisation defending the right to freedom of expression and freedom of information. Boyko Boev, Senior Legal Officer, and Barbora Bukovska, Senior Director for Law and Policy, call for the adoption of a rights-based approach to guide the reforms and policies related to PSM. They discuss how the rights-based approach can impact positively on PSM and the need for a system of human rights indicators that can be used to assess and improve PSM.

I hope their contribution will help revive the discussion and resurrect the vision of PSM in many countries. There is a need for studies and dialogues on how PSM actually function across Europe today and to what extent human rights principles are incorporated. This discussion must include what steps are necessary to ensure that the potential of the internet-based social media can be fully exploited in the service of the public.

Thomas Hammarberg

SUMMARY

The future of public service media (PSM) is unclear. At present, two general scenarios are under discussion in Europe. The first is optimistic: it refers to PSM's importance for the cultural heritage of the country. The second is pessimistic and claims that the public service broadcasting model is outdated, idealistic and expensive with no future in the digital age. The aim of this chapter is to contribute to the current debates by suggesting the "rights-based approach" to PSM.

Section one highlights developments and challenges to PSM today and their consequences on the free flow of information and human rights. Media regulators, broadcasters, politicians and the public seek responses to the following four challenges faced by PSM: transformation from public service broadcasting to PSM; explosive competition at production and transmission; securing the right level of independence from the state, private competitors and interest groups; and securing public support and public funding for PSM. These challenges, arising from technological developments, competition and calls for PSM accountability, can improve the free flow of information.

At the same time, there is a real danger that in the process of digitalisation and the introduction of new technologies some groups will be cut off from the information flow in PSM. Competition with private broadcasters and the demands for funding can result in less media pluralism and can degrade the quality of audiovisual works. Insufficient funding can be a barrier for language and cultural diversity.

In section two, we present the specific aspects of the rights-based approach to development. We argue that the analysis of PSM stakeholders' rights and duties should be used in PSM governance because it is a very useful political, economic and social test for taking decisions and for evaluating their outcomes. This approach can develop accountability, participation, non-discrimination and empowerment in the field of PSM. It can improve PSM image and performance by advocating interactive and inclusive systems of governance and programme policies. Most importantly, rights can empower those who are involved in PSM and create a strong initiative for public participation and focus on the most disadvantaged.

Section three outlines current initiatives to improve PSM at European and national levels that concentrate on addressing the role of PSM in the digital era, PSM governance and ensuring the independence of PSM.

Section four contains recommendations for a rights-based approach to PSM. These include, among others, the development of indicators for a rights-based approach to PSM and taking human rights into account in PSM legislation and policies. In this section, we conclude that the rights-based approach to PSM policy offers transformative solutions of vital importance for the future of PSM.

Introduction

PSM are media that produce and transmit public-interest content, are funded by the state or the public and have boards appointed by public bodies. The concept of PSM suggests a shift to a broader media landscape. In comparison with public service broadcasting, it has a much wider scope in terms of services, distribution, consumption and interaction as it uses digital media and platforms, including the Internet, instead of just broadcast television or radio. PSM encompasses traditional public service broadcasting and new communication services.

While PSM are well established in some countries, in others they are at different stages in their implementation and development. PSM systems operate in different cultural contexts and have different traditions. They are characterised by a variety of legal approaches vis-à-vis their role, remit and independence and use different models of governance. As there is no common media market in Europe, PSM have varying levels of resources. Arguments have been made for policymakers to restructure and rethink what PSM are and create new forms of systems that are inclusive, innovative and community oriented.¹

Still, PSM systems have some common characteristics. The first is that PSM are a part of the “tripartite” system, in which public service and commercial media exist together with community media.² The second feature is the general availability of PSM as a direct consequence of their public nature; PSM should be generally available to and accessible by everyone in the country, regardless of location and income. The third feature is the specific public remit of PSM; in general, the aim of PSM is not only to provide all of society with information, culture, education and entertainment, but also promote democratic values, citizenship and social cohesion. The fourth feature is the need for their independence from both state and commercial interests. Although in several countries PSM institutions have been highly politicised and governments have attempted to interfere with their editorial independence, it is generally understood that PSM institutions should not be subject to state control. Commercial independence requires that PSM institutions should not have to compete for funds in the same way as the private media. A fifth feature is impartiality. PSM should present information objectively and dispassionately, should treat all opinions even-handedly and should represent the concerns and interests of as many social groups as possible. Finally, PSM systems should be publicly accountable for their programmes and operation.³

At present, two general scenarios for the future of PSM are under discussion in Europe. The first is optimistic: it refers to PSM’s importance for the cultural heritage of the country and maintains that “with the right values ... it can have an equally wonderful future too.”⁴ The second scenario is pessimistic: claiming that the traditional public service broadcasting model is outdated, idealistic and expensive with no future in the digital age.⁵

In the light of these conflicting scenarios, stakeholders are discussing different approaches to PSM systems and governance. In this chapter, we aim to make a contribution to these debates by suggesting the “rights-based approach” to PSM. We believe that the rights-based approach,

¹ For example, there have been initiatives to expand traditional PSM functions to include more outreach and co-operation with other institutions such as museums and libraries, and developing joint community outreach initiatives. These efforts aim to make media more relevant to individual concerns and communities.

² See the Committee of Ministers Declaration on the role of community media in promoting social cohesion and intercultural dialogue, adopted on 11 February 2009 at the 1048th meeting of the Ministers’ Deputies. In the Declaration the Committee of Ministers recognises “community media as a distinct media sector, alongside public service and private commercial media”.

³ See PACE Recommendation 1878 (2009), paragraph 5.

⁴ See the speech of Mark Thompson, BBC Director General, “Public media in a digital age” given at the New America Foundation, Washington DC, on 5 October 2001, available at: www.bbc.co.uk/pressoffice/speeches/stories/thompson_naf.shtml.

⁵ This view is noted in the Political Declaration, adopted in Reykjavik at the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services, held on 28 and 29 May 2009, in Reykjavik, Iceland, MCM(2009)011, paragraph 4, available at: www.coe.int/t/dghl/standardsetting/media/MCM%282009%29011_en_final_web.pdf.

applied extensively to many other areas of human development, can make a distinctive and vital contribution to PSM as well. Rights are very useful political, economic and social tests for taking decisions and for evaluating their outcomes. Additionally, rights can empower those who are involved in PSM and create a strong initiative for public participation and focus on the most disadvantaged.

The concept of the rights-based approach applies international human rights standards to various processes of human development. In this approach to PSM policies and functions, the primary goal would be to fulfil human rights: that is, primarily the right to freedom of expression but also other rights such as the right to education, the right to public participation, the right to freedom of association and others. There has been little or no work carried out so far on how a rights-based approach can be applied to PSM. Hence, we argue that applying this concept to PSM, by satisfying its five principles (rights, accountability, empowerment, participation, non-discrimination and inclusion of vulnerable groups), will allow it to contribute significantly to the full realisation of human rights in society.

In discussing human rights obligations, this chapter refers to the human rights standards contained in, and principles derived from, international human rights instruments, particularly the International Covenant on Civil and Political Rights (ICCPR),⁶ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁷ the Convention on Human Rights and Fundamental Freedoms (ECHR)⁸ and the European Social Charter (revised),⁹ and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.¹⁰

We also refer to a number of instruments developed and adopted by the Council of Europe in relation to freedom of expression and public service broadcasting.¹¹

⁶ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force on 23 March 1976.

⁷ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force on 3 January 1976.

⁸ Adopted on 4 November 1950, CETS No. 005, entered into force on 3 September 1953.

⁹ Adopted on 3 May 1996, CETS No. 163, entered into force on 1 July 1999.

¹⁰ Adopted on 20 October 2005, entered into force on 18 March 2007.

¹¹ Particular references are made to Parliamentary Assembly of the Council of Europe (PACE) Resolution 428 (1970), containing a declaration on mass communication and human rights and setting out principles relating to the status and independence of the media; Recommendation 1407 (1999), defining the role of the media in the development of democracy; Resolution 1636 (2008), listing 27 basic principles for national media legislation and practice; Recommendation No. R (97) 21, containing means of action for promotion by the media of a culture of tolerance; Recommendation No. R (99) 1, proposing measures for promotion of media pluralism; Recommendation No. R (2003) 9, setting out principles for transition to digital broadcasting; Recommendation CM/Rec(2007)2, including measures for media pluralism and diversity of media content; the Declaration of the Committee of Ministers of 31 January 2007, recognising the role of PSM in counterbalancing the risk of misuse of power by the media in a situation of strong media concentration; and the Political Declaration and Action Plan and Resolution "Towards a new notion of media" by the Ministers responsible for Media and New Communication Services.

Specific Council of Europe documents concerning the functions and operation of PSM include Recommendation 1641 (2004), reviewing the situation of PSM across Europe; Recommendation 1878 (2009), outlining the key issues related to PSM and their funding; Committee of Ministers Recommendation No. R (96) 10, including guidelines on the guarantee of the independence of public service broadcasting; Recommendation CM/Rec (2007)3, setting out principles concerning the remit of PSM; and Declaration of the Committee of Ministers of 27 September 2006 containing an overview of the independence of PSM in Europe.

I. Challenges to PSM today and their impact on the free flow of information and human rights

PSM exist everywhere in Europe, though their level of development varies between countries. National political and cultural factors and state of the economy, as well as the size of PSM, influence their institutional organisation, roles and functions.¹² All models in Europe, however, exist today in an environment marked by several common factors. These include:

- a simultaneous offer of a multitude of free private channels;
- reduced advertising revenues due to the current economic recession and the spread of advertising revenues over a wider range of media;
- new technological developments for the creation and distribution of content (on-demand media services, the digital switchover and the Internet);
- changed audience behaviour and user demands for thematic channels and interactive or on-demand services and the utilisation of the Internet as another platform for providing PSM services.¹³

Overall, PSM faces four major challenges today and the solutions require restructuring of governance systems, processes and behaviour.¹⁴

1.1 Transformation from public service broadcasting to PSM

In the new digital age, public service broadcasting is transforming into PSM, operating in a broader and more interactive media landscape. Digital technologies provide for the possibility of extending the spectrum of public service broadcasting programmes and new services.¹⁵ In line with the objectives of the EU Digital Agenda,¹⁶ PSM should diversify their formats and expand to new platforms such as the Internet, SMS services, web pages and smartphone applications to respond to user demands. For example, young PSM audiences access services on mobile and Internet-based platforms and are keen users of on-demand services. Apart from servicing society and individual citizens in innovative ways, PSM should use new technologies to engage audiences and enable their participation in content creation and distribution. PSM are expected to play a pioneering role in both encouraging and using technological developments in order to offer their content to the public.¹⁷ The transformation from public service broadcasting to PSM demands appropriate legal frameworks and sufficient financial revenues. It is necessary for states to amend their broadcasting laws to deal with investment and social and technical issues arising from the digital switchover.¹⁸

1.2 Explosive competition at production and transmission

Today public service broadcasters are not the sole broadcasting actors and must compete with other players in the creation and distribution of media content. As noted by the European Parliament:

Media policy in 2010 cannot be restricted to maintaining the balance between commercial and public service broadcasting. In the current media context, new big players such as

¹² See: Lowe G.F. and Nissen C.S. (eds) (2011), *Small among giants: Television broadcasting in smaller countries*, Nordicom, Göteborg, for an excellent analysis on how size matters for how public service broadcasting works and why in Europe.

¹³ See: Recommendation 1878 (2009).

¹⁴ These challenges have been identified by the Council of Europe's Ad hoc Advisory Group on Public Service Media Governance (MC-S-PG) to which ARTICLE 19 has an observer status.

¹⁵ By May 2011 the digital switchover had been completely implemented in Andorra, Germany, Denmark, Belgium, Croatia, Slovenia, Finland, Luxembourg, the Netherlands, Sweden, Malta, Latvia, Estonia, Spain and Switzerland.

¹⁶ European Commission (2011), "A digital agenda for Europe", Communication from the Commission, COM(2010) 245 final/2.

¹⁷ See: Resolution on public service broadcasting in the digital era: the future of the dual system, adopted on 25 November 2010 in a plenary session of the EU Parliament, NI/2010/2028. The resolution was based on a motion and explanatory report prepared by Ivo Belet.

¹⁸ See: Nyman-Metcalf K. and Richter A. (2010), *Guide to the digital switchover*, OSCE, Vienna.

telecom and Internet service providers as well as search engines play an increasingly important role. Citizen-journalism and user-generated content also challenge the traditional media players. The dual broadcasting system has evolved into a multi-player media environment.¹⁹

In the new media environment, PSM should ensure a diverse range of freely accessible programming, which contributes to media pluralism, cultural and linguistic diversity, editorial competition and freedom of expression.²⁰ At the same time state aid for PSM should not result in unfair competition with commercial broadcasters. To prevent unfair competition the EU requires its member states to adopt some form of *ex ante* test and clearly define the public service benefit before launching new services.²¹

1.3 Securing the right level of independence from the state, private competitors and interest groups

Technological developments and the liberalisation and opening up of the airwaves to commercial and community broadcasting have not significantly lessened government control over PSM supervisory bodies.²² For example, a recent study by the Institute of European Media Law revealed political influence on the Albanian public broadcaster RTSH especially during election periods.²³ In Bosnia and Herzegovina political parties attempt, in parliament, to appoint “their people” to the steering boards of PSM.²⁴ In Kosovo, the deputy head of the government influenced the nominations for elections to the board of RTK, the Kosovo public service broadcaster, by taking part in the last round of nominations discussed by the responsible parliamentary committee.²⁵ In Romania, PSM are controlled by the parties with a majority in parliament; the latter can dismiss the PSM board by not approving an annual activity report, and can both nominate and elect the board, whose chairman is also an executive director of PSM.²⁶

According to the Council of Europe Recommendation Rec(96)10²⁷ the legal framework of PSM should contain a number of safeguards against interference, including a clear statement about institutional autonomy, determining the scope of the latter. It should also include particular safeguards against politically motivated appointments or removals of members of governing bodies. It should similarly guard against conflicts of interest on PSM boards. PSM laws should ensure that the funding of PSM is not used to prejudice their independence, and that the pay and benefit packages for the members of the governing bodies are adequate and not determined by the government.

¹⁹ Supra, note 17

²⁰ Supra, note 17

²¹ According to paragraph 88 of the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ C 257, 27.10.2009, p. 1), the *ex ante* assessment shall include two steps:

1. Assessment of whether the new services meet the democratic, social and cultural needs of society (“public value”). The assessment of the public character of a service is within the competence of Member States.
2. Assessment of the impact of the service on the market. In assessing the impact of the service on the market, Member States have to take into account a number of criteria (the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives).

²² See for examples of governmental interference with PSM, PACE Recommendation 1641 (2004); Declaration on the guarantee of the independence of public service broadcasting in member states; Declaration of 26 March 2008 of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector; Martin B., Scheuer A. and Bron C. (eds) (2011), “The media in South-East Europe”, *A Comparative Media Law and Policy Study*, Friedrich Ebert Foundation, Berlin, available at : www.fes.bg/files/custom/library/2011/The%20Media%20in%20South-East%20Europe.pdf.

²³ Martin et al. op. cit., p. 36.

²⁴ Ibid. p. 44.

²⁵ Ibid. p. 80.

²⁶ Ibid. p. 120.

²⁷ Recommendation No. R (96) 10 of the Committee of Ministers on the guarantee of the independence of public service broadcasting and the Appendix to it.

1.4 **Securing public support and public funding for PSM**

With the huge growth in the number of commercial channels the need for PSM has been questioned in some countries. In addition, some European PSM systems are in urgent need of proper financial backing.

PSM financing is dependent on public support. Some PSM are financially unstable as a result of the low collection rate of broadcasting fees. For example in Serbia, the collection rate is 44%, and thus far from sufficient to cover PSM expenses.²⁸ Another problem is dwindling public resources in many countries, which prevent PSM from maintaining the level and quality of programming required. However, if PSM are allowed to supplement their income with external funding they may become subservient to their backers. In Bulgaria, for instance, the lack of a clear and transparent funding scheme makes PSM funding dependent on the goodwill of the government and parliament.²⁹

Without stable and sufficient funding, PSM will not be able migrate to the digital media environment and fulfil their remit. Moreover, scarce and unstable funding increases the risk of interference with editorial independence.

The responses to the weaknesses of the current models of funding include the improvement of management to efficiently use all available resources, increasing skills and retaining talent, and ensuring an appropriate level of public accountability by developing more transparency and responsiveness.

We believe that the above challenges, arising from technological developments, competition and calls for PSM accountability, can improve the free flow of information through:

- digitalisation and new technologies that help PSM fulfil their duty to promote free expression, quality journalism, pluralism and democratic values in innovative ways. Various groups, including minorities whose needs are served inefficiently in purely commercial markets, can have different access to PSM information and programmes;
- competition and co-operation with other media that leads to the improvement of content and to mixing private media ownership with public service values. Private media companies with public service values have become important players in several media markets, including the United Kingdom (Channel 4), Sweden (TV4) and Norway (TV2). The European quotas in favour of independent producers have a positive impact on new players in PSM,³⁰
- the launching of new initiatives for transparency and the introduction of new forms of dialogue with the public, which stimulate accountability of both PSM as an institution and the state as a main PSM stakeholder. Democratisation of PSM will ensure more effective and closer engagement with audiences.

Nonetheless, there is a real danger that, in the process of digitalisation and the introduction of new technologies, access to PSM for some groups will be cut off from the flow of information or that not everyone will be able to interact on new platforms or participate in PSM governance. Competition with private broadcasters and the demands for funding can result in less media pluralism and can degrade the quality of audiovisual works. Insufficient funding can be a barrier to language and cultural diversity.³¹

²⁸ Martin et al., op. cit., p. 126.

²⁹ Ibid., p. 57.

³⁰ The Audiovisual Media Services Directive and the Council of Europe Convention on Transfrontier Television elaborate on quotas in favour of independent producers. See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the co-ordination 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) and the 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.

³¹ 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

II. Rights-based approach to PSM

In this section, we demonstrate how a rights-based approach can be applied to PSM and argue that it should guide policies and reforms related to PSM.

A rights-based approach is a conceptual framework for a process of development that is based on international human rights standards and directed at promoting and protecting human rights, analysing inequalities, and redressing discriminatory practices and the unjust distribution of power.³² Borrowing from this concept, the rights-based approach to PSM should be based on:

- linkage to human rights standards: human rights standards contained in, and principles derived from, international human rights instruments, should guide the policy development and implementation of PSM. As such, the rights-based approach to PSM shall identify the rights holders and the duty bearers, and ensure that duty bearers have an obligation to realise all human rights;
- accountability: the state should be accountable for its policy in support of PSM while PSM institutions should be fully accountable for their actions. As duty bearers, state and PSM institutions should be obliged to behave responsibly, seek to represent the greater public interest and be open to public scrutiny;
- participation: the rights-based approach to PSM demands a high degree of participation of all interested parties;
- non-discrimination: principles of non-discrimination, equality and inclusiveness should underlie the practice of PSM. The rights-based approach to PSM should also ensure that particular focus is given to vulnerable groups, to be determined locally, such as minorities, indigenous peoples or persons with disabilities;
- empowerment: the rights-based approach to PSM should empower rights holders to claim and exercise their rights. This means that there should be mechanisms to compel state and PSM institutions to perform their duties.

Below we examine how these principles can be applied to PSM and used to strengthen PSM policies and reforms.

2.1 *Linkage to human rights standards*

Under the rights-based approach, the main objective of governmental policies relating to PSM would be to respect, fulfil and protect human rights. The right to freedom of expression is the most relevant to PSM, but other rights are also involved.³³

2.1.1 *Right to freedom of expression*

Article 10 of the European Convention on Human Rights and Fundamental Freedoms states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

cultural expressions, including enhancing diversity of the media through public service broadcasting. Such measures can include quotas concerning broadcast productions.

³² Human rights-based approaches have been applied to development, education and reproductive health. See: the UN Practitioner's Portal on Human Rights Based Programming: <http://hrbportal.org>.

³³ The right to freedom of expression is guaranteed by Article 19 of the International Covenant of Civil and Political Rights, Article 9 of the African Charter on Human and Peoples' Rights, and Article 13 of the American Convention on Human Rights.

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In the *Handyside* case, the European Court of Human Rights underscored the importance of the right to freedom of expression stating that it is one of the “essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man.”³⁴ Furthermore, the Court explained that Article 10 is applicable not only to inoffensive “information” or “ideas” but also to those that “offend, shock or disturb the State or any sector of the population.”³⁵

Furthermore, the Parliamentary Assembly and the Committee of Ministers of the Council of Europe have promulgated numerous resolutions, declarations and recommendations which elaborate on Article 10’s protection for PSM.³⁶ The Court’s judgments and the instruments adopted by the Parliamentary Assembly and the Committee of Ministers over a period of almost 60 years illustrate how the Council of Europe has helped to create viable PSM.

There are a number of points of immediate practical relevance to PSM in Article 10.

The right to freedom of expression belongs to both individuals and the media

Although ECHR does not explicitly mention the freedom of media, the Court grants the press special status in the enjoyment of the freedoms contained in Article 10. In the case of *The Sunday Times* (No. 1)³⁷ the Court confirmed that the principles relating to freedom of expression defined in the *Handyside* case are applicable to and of particular importance for the press. Furthermore, in the *Jersild* case³⁸ the Court recognised that the press plays the “vital role of a ‘public watchdog’” and emphasised the need for the application of these principles in the area of audiovisual media.³⁹

The right to freedom of expression includes the right to impart and receive information and ideas

The right to impart information and ideas which is normally exercised by journalists and the media is complementary to the right of individuals to receive information and ideas.⁴⁰ In the *Jersild* case⁴¹ the Court clarified that the protection afforded by Article 10 includes not only the substance of the ideas and information expressed but also the form in which they are conveyed. In this case, the Court found that the Danish courts violated Article 10 when they convicted a journalist employed at the Danish Broadcasting Corporation for his film, which included an interview with a group of young people in the course of which they made racist remarks. The Judges in Strasbourg held that it was not for them or the national courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.⁴²

The right to impart and receive information “through any media” enshrines the freedom of broadcasting and the right of access to broadcasting, both private and public. Freedom of expression is expressed not only through private media but also through PSM.

³⁴ *Handyside v. the United Kingdom*, Appl. No. 5493/72, judgment of 7 December 1976, paragraph. 49.

³⁵ *Ibid.*

³⁶ See footnotes 11, 16-7, 21-2

³⁷ *The Sunday Times v. the United Kingdom*, Appl. No. 6538/74, judgment of 26 April 1979, paragraph. 65.

³⁸ *Jersild v. Denmark*, Appl. No. 15890/89, judgment of 23 September 1994.

³⁹ *Ibid.*, paragraph. 31.

⁴⁰ For the first time the Strasbourg Court recognised the complementary character of the right to impart and the right to receive information and ideas in the *Jersild* case. This position has been reiterated in subsequent cases. See for example, *Radio France and Others v. France*, Appl. No. 53984/00, judgment of 30 March 2004, paragraph. 33.

⁴¹ *Jersild v. Denmark*, *op. cit.*

⁴² *Ibid.*, paragraph. 35

Does the right to freedom of expression entail an individual right to express views and opinions via PSM?

The opinion of the Court on this question was stated in the *Haider* case.⁴³

*Article 10 (of the ECHR) cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio or television in order to forward his opinion, save under exceptional circumstances, for instance if one political party is excluded from broadcasting facilities at election time while other parties are given broadcasting time.*⁴⁴

The right to freedom of expression applies across borders

This point is highly relevant in an age when the technical capacity to broadcast across borders is widely available. In the *Autronic* case,⁴⁵ the Court recognised that the right to receive information covers also international television broadcasts.

The right to freedom of expression must be accompanied by the right to protection of journalists' sources

While this right is not explicitly provided by the ECHR and other international human rights treaties, it has been proclaimed in constitutions (for example the constitutions of Portugal and the former Yugoslav Republic of Macedonia), general and special laws, and has been recognised by the Court and national courts.⁴⁶ Recommendation No. R (2000) 7⁴⁷ sets out exceptions to the right to protection of sources where:

- 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;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court or another independent or impartial decision-making body, after a full hearing.⁴⁸

States should limit their restrictions to freedom of expression

The ECHR provides that the right to freedom of expression may be restricted only if such a restriction is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society to achieve this aim.⁴⁹ The Court has examined the legitimacy of various measures in the field of public service broadcasting.

Monopoly of public broadcasting

In the *Informationsverein Lentia* case,⁵⁰ the Court found that the state broadcasting monopoly in Austria is a far-reaching restriction on the freedom of expression which was not justified by a

⁴³ *Haider v. Austria*, Appl. No. 25060/94, decision of 18 October 1995, (European Commission of Human Rights).

⁴⁴ *Ibid.*, paragraph. 3 of the Law Section. The Commission referred to Application No. 9297/81, Dec. 1.3.82, D.R. 28, p. 204 and No. 23550/94, Dec. 24.2.95, unpublished.

⁴⁵ *Autronic AG v. Switzerland*, Appl. No. 12726/87, judgment of 22 May 1990.

⁴⁶ In 2007 in its decision in the *Cicero* case (1 BvR 538/06; 1 BvR 2045/06) Germany's constitutional Court declared the security services searches of a journalist's apartment and the offices of *Cicero* magazine in September 2005 in Potsdam unconstitutional because they aimed "exclusively" or "predominantly" at identifying the source of the media's information, and not at actually pursuing a criminal case.

⁴⁷ Recommendation No. R (2000) 7 on the right of journalists to disclose their sources of information, adopted by the Committee of Ministers on 8 March 2000, at the 701st meeting of the Ministers' Deputies.

⁴⁸ *Ibid.*, Principle 3.

⁴⁹ See Article 10 of the ECHR, paragraph. 2.

⁵⁰ *Informationsverein Lentia v. Austria*, Appl. Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, judgment of 24 November 1993.

pressing need. Therefore, the refusal to provide licences for operation of private television and radio stations was found to be in breach of the right to freedom of expression.

Prohibition of political advertisement

In the *VgT Verein gegen Tierfabriken* case,⁵¹ the Court found that the prohibition on broadcasting a political advertisement via the Swiss Radio and Television Company was not justified with relevant and sufficient arguments and did not answer a particularly pressing social need.⁵²

Defamation

In the *Radio France* case,⁵³ the Court found that the conviction of radio journalists of defamation did not violate Article 10. The judges considered that there was a “pressing social need” to take action against journalists who incorrectly reported that a former deputy prefect had admitted that he supervised the deportation of Jews during the Second World War.

Locking and packing up television after cancellation of subscription of public service television

In the *Faccio* case⁵⁴ the Court found that the right to freedom of expression of an applicant was not violated by the police locking and packing up his television after he asked for a cancellation of his subscription to public service television. The Court observed that the action was permitted by a legislative decree which aimed at dissuading individuals from failing to pay the licence fee, which was regarded as a tax for the financing of the public broadcasting service. The Court did not find problematic the obligation for owners of television sets to pay the tax in question regardless of whether or not they wished to watch programmes on public channels.

Disciplinary measure against a journalist employed by PSM

In the *Wojtas-Kaletka* case,⁵⁵ the Court found a violation of the right to freedom of expression. A journalist employed by the Polish public television company (TVP) was reprimanded by her employer after criticising the programming of TVP in an interview published in a national newspaper. Accepting that the issues raised by the journalist were of general interest and taking note of the professional obligations and responsibilities of the journalist, the Court determined that in this case the right to freedom of expression outweighed the duties of employees towards their employers.

State obligations with respect to broadcasting pluralism

The state obligation to create an environment in which diverse media exist has been proclaimed by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression.⁵⁶ The Convention establishes that states enjoy the sovereign right to adopt measures to protect intercultural dialogue and the diversity of cultural expressions, as well as a duty to adopt measures aimed at enhancing the diversity of media, including through public broadcasting.

Likewise the Committee of Ministers of the Council of Europe stated in Recommendation CM/Rec(2007)2⁵⁷ that “Member states should encourage the development of other media

⁵¹ *Vgt Verein gegen Tierfabriken v. Switzerland*, Appl. No. 24699/94, judgment of 28 June 2001, paragraph 69.

⁵² In contrast to the *Vgt Verein gegen Tierfabriken* case, in the *Murphy* case the Court held that a ban on broadcasting a radio advertisement for a religious meeting was justifiable under Article 10 of the ECHR. The judges agreed that in the latter case the member states enjoyed a wider margin of appreciation to determine how to balance religious expression with protection of rights of others due to the lack of uniform European conceptions on this topic.

⁵³ *Radio France and Others v. France*, Appl. No. 53984/00, judgment of 30 March 2004, paragraph 37.

⁵⁴ *Faccio v. Italy*, Appl. No. 33/04, decision of 31 March 2009.

⁵⁵ *Wojtas-Kaletka v. Poland*, Appl. No. 20436/02, judgment of 16 July 2009.

⁵⁶ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, adopted on 20 October 2005 by the 33rd General Conference and entered into force on 18 March 2007.

⁵⁷ Recommendation CM/Rec(2007)2 of the Committee of Ministers on media pluralism and diversity of media content, adopted by the Committee of Ministers on 31 January 2007, at the 985th meeting of the Ministers' Deputies, paragraph 4.

capable of making a contribution to pluralism and diversity and providing a space for dialogue. These media could, for example, take the form of community, local, minority or social media.”

In the *Wojtas-Kaleta* case,⁵⁸ the Court underlined the state’s role of guaranteeing pluralism, declaring that “where a State decided to create a public service broadcasting system, the domestic law and practice must guarantee that the system provides a pluralistic audiovisual service.”⁵⁹

2.1.2 Other human rights relevant to PSM

States are obliged to respect and protect other rights from the ECHR that are relevant to PSM and their staff. These include the right to life,⁶⁰ the prohibition of torture, inhuman and degrading treatment and punishments,⁶¹ the right to liberty and security,⁶² the right to privacy,⁶³ and the prohibition on discrimination.⁶⁴ Under the European Social Charter, PSM staff are entitled to a number of employment and social rights including freedom to work,⁶⁵ fair working conditions,⁶⁶ right to association and collective bargaining rights,⁶⁷ right to social security, social welfare and social services,⁶⁸ and the right to non-discrimination.⁶⁹

The Council of Europe monitors the situation of journalists’ rights. Recalling the state’s obligation, in accordance with Article 2 and 10 of the ECHR, to prevent and investigate any murders of journalists as well as acts of severe physical violence and death threats against them, Resolution 1535 (2007)⁷⁰ of the Parliamentary Assembly highlighted that “where attacks against journalists can be carried out with impunity, democracy and the rule of law suffers.”⁷¹

The 2010 report *Respect for media freedom*,⁷² by the PACE Committee on Culture, Science and Education, listed cases of death threats, harassment and physical attacks by police officers and individuals against PSM journalists. For example, in Kosovo, a television presenter was threatened in June 2009 following her investigative reports on the public television channel RTK about limits on press freedom in Kosovo and alleged atrocities committed by the Kosovo Liberation Army in the conflict of the late 1990s. In 2008 and 2009 bombs were exploded at the EITB public broadcasting headquarters in Bilbao and another against a television transmission facility in Hernani. The aforementioned PACE report on *Respect for media freedom* included cases in which journalists in Moldova were arrested during post-election demonstrations in April 2009.

The Strasbourg Court has examined complaints on searches of journalists’ homes and seizure of their equipment for identification of their sources. In the *Voskuil* case⁷³ and the *Tillack* case⁷⁴ the

⁵⁸ *Wojtas-Kaleta v. Poland*, op. cit.

⁵⁹ *ibid.* paragraph. 47.

⁶⁰ European Convention for Human Rights, Article 2.

⁶¹ *Ibid.*, Article 3.

⁶² *Ibid.*, Article 5.

⁶³ *Ibid.*, Article 8.

⁶⁴ *Ibid.*, Article 14.

⁶⁵ European Social Charter, Article 1.

⁶⁶ *Ibid.* Article 2.

⁶⁷ *Ibid.* Articles 5 and 6.

⁶⁸ *Ibid.* Article 12.

⁶⁹ *Ibid.* Article 20.

⁷⁰ Resolution 1535 (2007), adopted by the Parliamentary Assembly on 25 January 2007.

⁷¹ In Recommendation 1897 (2010) the Parliamentary Assembly of the Council of Europe recalled that at least 20 journalists have been killed in Europe since 2007 and proclaimed that states must do more to ensure respect the safety of journalists.

⁷² “Respect for media freedom”, Report by Committee on Culture, Science and Education, Doc. 12102, published on 6 January 2010, Rapporteur: Mr Andrew McIntosh, United Kingdom, Socialist Group.

⁷³ *Voskuil v. the Netherlands*, Appl. No. 64752/01, judgment of 22 November 2007.

⁷⁴ *Tillack v. Belgium*, Appl. No. 20477/05, judgment of 27 November 2007.

Court found that searches and seizures at journalists' homes and offices and seizure of their equipment interfered with their right to freedom of expression.

2.1.3 *Non-human rights standards related to PSM*

Although no international treaty deals explicitly with PSM, the Council of Europe has developed standards defining state-specific obligations with respect to PSM. In addition Council of Europe instruments list the obligations upon PSM organisations.

The first is a general obligation to maintain PSM and the responsibility "to guarantee the fundamental role of the PSM".⁷⁵ The Council of Europe instruments elaborate on this obligation by defining several responsibilities. States should:

- set the remit of PSM. Specific provisions should be included in legislation;⁷⁶
- enable PSM to use new communication technologies and services by providing them with the necessary technical resources.⁷⁷ In order to ensure universal access to PSM, states should enable public service broadcasters to transmit on the different digital platforms (cable, satellite, terrestrial);⁷⁸
- encourage PSM to play an active role in promoting social cohesion and integration among various societal groups including ethnic and religious minorities, the young, the elderly, the unemployed and persons with disabilities while respecting their different identities and needs.⁷⁹ States should ensure that all have universal access to PSM;⁸⁰
- ensure that PSM institutions, organisations and all parties concerned are accountable for their performance. Expectations should be clearly defined, and PSM and other stakeholders should provide effective reporting of performance. States should ensure that PSM regularly make information on their activities available to the public and develop procedures for allowing viewers and listeners to provide feedback;⁸¹
- support the introduction of public consultation mechanisms which may include the creation of programming policy advisory structures, suitably diverse in their composition to reflect the general public;⁸²
- guarantee the independence of PSM from any kind of political or social control, in deciding their internal organisation. States must ensure that the day-to-day management including the editorial responsibility for programme schedules and the content of programmes is a matter decided entirely by the broadcasters themselves. They should adopt appropriate structures such as pluralistic internal boards or other independent bodies,⁸³ ensuring that people with clear party political affiliations do not hold senior management positions within PSM.⁸⁴ In the *Manole* case, the Court further held that the state has a duty to ensure that the public has access through television and radio to impartial and accurate information

⁷⁵ Although most Council of Europe standard-setting instruments concerning PSM describe the PSM characteristics and principles without developing a list of specific state obligations in relation to them, Recommendation No. R (99) 1 and Recommendation CM/Rec(2007)2 are exceptions insofar as they specifically elaborate on member states' obligations towards PSM. See also Recommendation CM/Rec(2007)3 on the remit of public service media in the information society.

⁷⁶ Recommendation CM/Rec(2007)3 on the remit of public service media in the information society.

⁷⁷ See recommended measure V. related to public service broadcasting of Recommendation No. R (99) 1 and Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content.

⁷⁸ Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting, adopted by the Committee of Ministers on 28 May 2003, at the 840th meeting of the Ministers' Deputies.

⁷⁹ Recommendation No. R (99) 1, op. cit. (n.77).

⁸⁰ Recommendation CM/Rec(2007)3, op. cit. (n.76).

⁸¹ Recommendation No. R (99) 1 and Recommendation CM/Rec(2007)2, op. cit. (n.77).

⁸² Recommendation No. R (99) 1 and Recommendation CM/Rec(2007)2, op. cit. (n.77).

⁸³ See Prague Resolution No. 1, "The future of public service broadcasting", adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Recommendation No. R (99)1, op. cit. (n.77).

⁸⁴ Resolution 1636 (2008) on indicators for media in a democracy, adopted by the Parliamentary Assembly on 3 October 2008, paragraph. 8.20.

- and a range of opinions and comments, reflecting the diversity of political outlook within the country;⁸⁵
- ensure sufficient and sustained funding of PSM from various sources.⁸⁶ At the 4th European Ministerial Conference on Mass Media Policy the member states of the Council of Europe undertook to maintain and, where necessary, establish an appropriate and secure funding framework which guarantees public service broadcasters the means necessary to accomplish their duties.⁸⁷

As noted above, the human rights approach to PSM shall identify the rights holders and duty bearers. In this respect, PSM are not only rights holders. The Council of Europe standard-setting instruments define specific obligations for them. PSM should:

- fulfil their mandate and act in accordance with the law, like all public institutions;
- create and distribute content without interference by public authorities and private interest groups (institutional independence). Resolution 1636 (2008) states that public service broadcasters should establish in-house codes of conduct for journalistic work and editorial independence from political influence;⁸⁸
- ensure accountability through regular evaluation and review of activities, as emphasised by Recommendation CM/Rec(2007)3,⁸⁹ in order to ensure that all groups in the audience are adequately served;⁹⁰ and
- be open to the public, through the introduction of forms of public consultation, as stated in Recommendation CM/Rec(2007)2.⁹¹ This may include the creation of advisory structures, reflecting public diversity, to ensure programming policy meets public requirements.

2.2 Accountability

PSM accountability regimes are normally part of the PSM legal framework. The legal framework specifies the bodies to which the PSM institutions are responsible. Bodies such as parliaments may have formal relationships with PSM, while others – such as PSM staff, civil society organisations or audience councils – have informal relationships with PSM.

PSM should be held accountable for their remit in the first place. But they should also be accountable for administrative operability and financial efficiency. For example, where PSM decide to commission work from independent market players, they should be held accountable for the outcomes.

Normally, the legal framework requires PSM to report on their activities to parliaments. PSM can undergo audit processes too. PSM frameworks set out timetables for annual reports and other audits.

Parallel to parliaments, the public can hold PSM institutions accountable through public representatives sitting on a supervisory board. In addition, institutions akin to the ombudsman, audience councils, and complaints procedures for breaches of codes of practice can hold PSM accountable for their programming.

Several examples illustrate such institutional arrangements and policies. In Portugal, a listener and viewer Ombudsman is nominated by the Radio and Television Board. In Spain, an Ombudsman for listeners, viewers and media interactive service users is nominated by the

⁸⁵ *Manole and Others v. Moldova*, Appl. No. 13936/02, judgment of 17 September 2009, para. 100.

⁸⁶ Recommendation No. R (99) 1 and Recommendation CM/Rec(2007)2, op. cit. (n.77).

⁸⁷ Prague Resolution No. 1, op. cit. (n.83).

⁸⁸ Resolution 1636 (2008), op. cit. (n.84), paragraph 8.21.

⁸⁹ Recommendation CM/Rec(2007)3, op. cit. (n.76).

⁹⁰ Recommendation CM/Rec(2007)3, op. cit. (n.76), Principle No. 6.

⁹¹ Recommendation CM/Rec(2007)2, op. cit. (n.77)

president of the Radio Television Corporation (RTVE). The ombudsmen in both countries respond and mediate in the public's name and prepare reports on PSM performance.⁹²

The Audience Council of the Österreichischer Rundfunk in Austria "safeguard[s] the interests of the listeners and viewers". Its 35 members are made up of representatives from a wide-cross section of civil society organisations from church groups to academics.⁹³

In the United Kingdom, viewers can make complaints through the website of the British Broadcasting Corporation (BBC). The BBC Editorial Complaints Unit deals with serious complaints about breaches of the BBC's editorial standards. If complainants are not satisfied by its findings, 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.⁹⁴

According to the Council of Europe's declaration on the guarantee of the independence of public service broadcasting in the member states,⁹⁵ PSM is "relatively" open and transparent in most states. 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 may be the result of inexperience in holding PSM publicly accountable or due to a perception that the parliament has a weaker supervisory function if PSM's funding comes from advertisements or licence fees. Whatever the reasons, deficiencies in PSM's accountability affect the public's trust, and lead to alienation of viewers and listeners.

2.3 Participation

In the past, many public service broadcasting institutions have kept the public at a distance; governments and politicians were their preferred partners. Because of this lack of dialogue, many viewers, civil society organisations and private media players are indifferent towards or feel alienated by PSM systems. For example, a study established that in December 2007, 72% of the British population had never contacted a news organisation on any platform.⁹⁶

The present social environment, characterised by the informal, participatory and democratic culture of the Internet and the information and communication technologies, challenges the current PSM model. It demands that PSM be responsive and open to partnership with public and private media players as well as being transparent in its decision making. Both PSM legislation and culture should address this demand.

Recommendation Rec(2007)3 on the remit of PSM in the information society⁹⁷ calls for PSM to make use of user-generated content and other participatory schemes in order to involve the younger generation in active forms of communication.⁹⁸ It is pointed out that PSM should themselves enhance their dialogue with the general public, particularly by using new interactive services.⁹⁹ Recommendation Rec(2007)2 on media pluralism and the diversity of media content calls on member states to invite PSM "to envisage the introduction of forms of consultation with

⁹² Nino Conde, PSM ombudsman, "Responsiveness and Accountability", paper presented during the consultation meeting of the Ad hoc Advisory Group on Public Service Media Governance, Strasbourg, 17 and 18 September 2009.

⁹³ 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 www.ris.bka.gv.at/Dokumente/Erw/ERV_1984_379/ERV_1984_379.html.

⁹⁴ BBC Complaints/Editorial Complaints Unit rulings, available at www.bbc.co.uk/complaints/ecu.

⁹⁵ Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, adopted on 27 September 2006 at the 974th meeting of the Ministers' Deputies.

⁹⁶ Claire Wardle, User generated content and public service broadcasting, available at <http://clairewardle.com/2010/05/19/user-generated-content-and-public-service-broadcasting>.

⁹⁷ Recommendation CM/Rec(2007)3, op. cit. (n.76).

⁹⁸ Recommendation CM/Rec(2007)3, op. cit. (n.76), Principle No. 5.

⁹⁹ Recommendation CM/Rec(2007)3, op. cit. (n.76), Principle No. 18.

the public, which may include the creation of advisory structures, where appropriate reflecting the public in its diversity, so as to reflect in their programming policy the wishes and requirements of the public.”¹⁰⁰

The need for more democratic and participatory governance of PSM has already been identified in some states. For example, during the 2010 UK election campaign, senior Labour cabinet members David Miliband and Tessa Jowell proposed that the BBC be transformed into a co-operative to give licence fee payers a “democratic voice” and make it more accountable. Their argument was that the BBC is owned by the British public and therefore ordinary members of the public should have a real say in how it is run. Miliband and Jowell proposed that the majority of BBC Trust be elected by members’ councils representing BBC viewers.

Greater levels of democracy and participation in PSM can be achieved by enabling individuals to:

- give feedback through correspondence with programme creators: it has become normal practice in many countries for programme presenters to invite the audience to write to them by SMS or Twitter, for example;
- participate in online discussions related to programme topics: this option is similar to the first one and is appropriate in cases where the programme has a website or a blog on which viewers can publish their views about the programme;
- access airtime with user-generated content: for example, Channel 4 allows users to upload and view their own documentaries;
- participate in PSM management and formulation of policy: opportunities for this are created through PSM or broadcasting regulators’ websites or blogs.

For private media players, PSM democratisation means developing fruitful and co-operative relationships with PSM. Outsourcing some of the content production to independent, private media companies is one way of opening up formerly closed PSM companies and at the same time giving the private sector access to public support as part of a business policy.

2.4 Non-discrimination

The rights-based approach to PSM demands that PSM institutions be governed by the principle of equality and freedom from discrimination. At the same time particular focus should be given to the status of vulnerable groups, such as minorities, indigenous peoples and persons with disabilities.

Council of Europe Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance¹⁰¹ recognised that “the media can make a positive contribution to the fight against intolerance, especially where they foster a culture of understanding between different ethnic, cultural and religious groups in society.” Referring to states’ commitment to equality and the prohibition of discrimination on any grounds, the Recommendation emphasises the need for training, standard-setting (especially through codes of conduct) and access for minority groups to media. Public service broadcasters are advised to consider:

- making adequate provision for programme services, including those at popular viewing times, which help to promote the integration of all individuals, groups and communities as well as proportionate amounts of airtime for the various ethnic, religious and other communities;
- developing a multicultural approach to programme content so as to avoid programmes which present society in mono-cultural and mono-linguistic terms;
- promoting a multicultural approach in programmes which are specifically geared to children and young people so as to enable them to grow up with the understanding that cultural, religious and ethnic differences are a natural and positive element of society;

¹⁰⁰ Recommendation CM/Rec(2007)2, op. cit. (n.77).

¹⁰¹ Recommendation No. R (97) 21 of the Committee of Ministers on the media and the promotion of a culture of tolerance, adopted on 30 October 1997 at the 607th meeting of the Ministers’ Deputies.

- developing arrangements for sharing, at the regional, national or European level, programme material which has proven its value in mobilising public opinion against intolerance and improving community relations in multi-ethnic and multicultural societies.

Furthermore, Recommendation CM/Rec(2007)3 on the remit of the PSM in the information society¹⁰² calls on Council of Europe member states to, *inter alia*, offer universal access to PSM for all individuals and social groups, including minority and disadvantaged groups, through a range of technologies. It stipulates that:

Public service media should integrate all communities, social groups and generations, including minority groups, young people, old persons, the most disadvantaged social categories, persons with disabilities, while respecting their different identities and needs. In this context, attention should be paid to the content created by and for such groups, and to their access to, and presence and portrayal in, public service media. Due attention should also be paid to gender equality issues.¹⁰³

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,¹⁰⁴ further underpins nation states' rights to take measures aimed at enhancing the diversity of the media, including through public service broadcasting. The convention emphasises that cultural diversity – flourishing within a framework of democracy, tolerance, social justice and mutual respect among peoples and cultures – is indispensable for peace and security at local, national and international levels.

A number of broadcasting laws in Europe include the obligation to promote equality and fight discrimination. In addition, several codes of conducts or ethical codes also impose respect for equality and protection of minorities, including:

- the French Law of 30 September 1986, defining the mission of public services. It states that public service broadcasters must implement actions in favour of social cohesion and cultural diversity, combat discrimination, and propose programmes reflecting the diversity of French society;¹⁰⁵
- the Spanish Law No. 17/2006, regulating national public service broadcasting. This requires the Corporation RTVE, which manages national public service broadcasting, to encourage the integration of minorities and social groups with special needs, preserve gender equality, protect the rights of children and promote the protection of the environment. The *Mandato-Marco* of December 2007, a framework agreement that specifies the public service remit of RTVE, refers to “the plurality of the society which must be reflected without any discrimination”¹⁰⁶ and states that RTVE shall “offer contents related to minorities, integration of immigrants and religious beliefs; it will also broadcast the different cultural expressions, Spanish or foreign, in national and international scope”;
- the legal obligation of the public broadcaster in Cyprus to provide an output for all citizens with respect to their age, gender, colour, belief, religion, political or other opinions, national, ethnic or social origin, and membership of any minority;
- the Television Act of Portugal, which requires public service broadcasters to promote a culture of tolerance. Public service broadcast operators are obliged to provide pluralistic programming that takes into account minority interests and promotes cultural diversity. They must broadcast culture, education and information programmes aiming at specific audiences, including the immigrant communities established in Portugal.

Focus on promotion of non-discrimination and equality should therefore be strengthened in the development of PSM policies. Specifically, PSM should prioritise their initiatives to those groups

¹⁰² Recommendation CM/Rec(2007)3, op. cit. (n.76).

¹⁰³ Recommendation CM/Rec(2007)3, op. cit. (n.76), section 8.

¹⁰⁴ Adopted on 20 October 2005, entered into force on 18 March 2007.

¹⁰⁵ The Law of 30 September 1986, Article 43-11.

¹⁰⁶ Article 11 of *Mandato-Marco*, cited in Institut für Europäisches Medienrecht (2009), “*Public service media according to constitutional jurisprudence*”, EMR, Saarbrücken/Brüssel, see: www.ebu.ch/CMSimages/en/leg_EMR_PSM_study_tcm6-67510.pdf.

suffering the greatest discrimination and disadvantage. PSM institutions should also make their content available in accessible formats and minority languages.

2.5 Empowerment

Individuals, groups and legal entities are not empowered by human and legal rights unless there are mechanisms they can use to enforce their rights. In order to be empowered by their rights, PSM and other rights holders should be able to hold the state accountable for the fulfilment of its obligations and commitment with respect to PSM. At the same time PSM should be accountable to the viewers and listeners for the fulfilment of their obligations. Below we examine how state and PSM institutional obligations and commitments relating to PSM can be enforced.

2.5.1 Enforcement of state human rights obligations

The ECHR requires that victims or potential victims of human rights violations, whether persons or legal entities, have legal remedies at the national level. The rights proclaimed in the ECHR are either incorporated into domestic law or victims can have direct recourse to them. Proceedings against state or judicial acts infringing upon the right to freedom of expression of journalists, PSM or the general public can be brought to courts or other bodies competent to enforce human rights. If courts find that an act of a public authority is unlawful because of a conflict with a Convention right, they can grant such relief or remedy or make such order within their powers as they consider just and appropriate.

At the European level the Court safeguards the implementation of the rights guaranteed by the ECHR, acting on individual or state complaints. Likewise, the European Committee of Social Rights monitors compliance in the member states to the European Social Charter and can examine collective complaints. The Committee of Ministers of the Council of Europe is responsible for ensuring that the Court's judgments are enforced. It also monitors the state of human rights and exerts pressure upon governments which violate them. PACE debates human rights issues and adopts resolutions and recommendations for member states concerning specific and broader issues relating to the situation of human rights in Europe. For example, in 1999 PACE recommended that the Committee of Ministers "monitor closely the state of freedom of the press in European member and non-member countries so as to exert moral and political pressure upon governments which violate freedom of expression and defend and protect journalists who are victims of such violations."¹⁰⁷

The Commissioner for Human Rights promotes education in, awareness of and respect for human rights in the member states of the Council of Europe. He issues reports, recommendations and opinions¹⁰⁸ based on information gathered during country visits and dialogue with national institutions. He publishes issue papers¹⁰⁹ and opinions¹¹⁰ that identify thematic concerns and propose solutions. In this regard, the Commissioner has undertaken work on media freedom and adopted positions that contain many important recommendations.¹¹¹

The Organization for Security and Co-operation (OSCE) in Europe has mandated its Representative on Freedom of the Media to observe relevant media development in participating states. The Representative should also advocate and promote full compliance with OSCE principles and commitments regarding freedom of expression and free media. The

¹⁰⁷ Recommendation 1407 (1999) on media and democratic culture, adopted by the Parliamentary Assembly of the Council of Europe on 29 April 1999.

¹⁰⁸ See: "Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media", CommDH(2011)10, Strasbourg, 25 February 2011.

¹⁰⁹ See: "Ethical journalism and human rights", Issue Discussion Paper commissioned and published by Thomas Hammarberg, CommDH(2011)40.

¹¹⁰ See: "Media diversity: a core element of true democracy", Viewpoint, 1 October 2007; "Investigative journalists and whistle-blowers must be protected", Viewpoint, 17 September 2007; "Do not criminalize critical remarks against religion", Viewpoint, 11 June 2007.

¹¹¹ See: Positions on Freedom of the Media. Position Paper from the Council of Europe Commissioner for Human Rights, CommDH/PositionPaper(2010)2, Strasbourg, 3 May 2010.

Representative concentrates on rapid response to serious non-compliance with these principles, contacting the participating state and the parties concerned, assessing the facts, assisting the participating state and contributing to the resolution of the problem. To achieve her mandate, the OSCE Representative on Freedom of the Media collects information on the situation of the media, to be forwarded to the Permanent Council of the OSCE and recommending further action where appropriate.

2.5.2 Enforcement of state obligations and commitments concerning PSM

The non-binding nature of international agreements and standard-setting instruments relating to PSM means that even if a government has made a commitment with respect to PSM, there is no enforcement mechanism to hold it responsible for failures to embed its commitments in law and media policies. This is why the roles of PSM and international monitoring organisations such as the Council of Europe are crucial to exposing violations and contraventions of international guidelines and commitments.

The Committee of Ministers adopts standard-setting instruments on PSM and monitors their implementation. Under the authority of the Committee of Ministers, the Steering Committee on Media and Information Society, CDMSI, has the mandate to review, consolidate and update existing instruments. It also has the mandate to conduct additional standard-setting work in respect of freedom of the media, paying due attention to, among other things, pluralism and diversity in the media, including public service media. (The CDMSI replaced the Steering Committee on the Media and New Communication Services, CDMC, on 1 January 2012).

PACE has considered issues related to PSM. In 2004, it adopted a recommendation concerning public service broadcasting.¹¹² The PACE Committee on Culture, Science and Education and its Sub-Committee on the Media hears reports about the situation of media freedom in Europe, including PSM, and drafts recommendations.¹¹³

The Commissioner for Human Rights also looks into the situation of the PSM. In 2011, the Commissioner criticised the new media legislation in Hungary, including the placement of the PSM under government control.¹¹⁴ Since 2001 the Rapporteur on Media Freedom has monitored situation in Europe, and brought serious threats to the attention of the Committee on Culture, Science and Education, including information about the PSM situation.¹¹⁵

2.6 How a rights-based approach can improve PSM

The rights-based approach to PSM would provide a transformative solution to the current challenges faced by PSM institutions. Holding governments accountable for their duties with respect to PSM will benefit the transformation process from public service broadcasting to PSM inasmuch as the latter requires legislative changes and financial support. At the same time the focus on PSM transparency and accountability will secure PSM independence from the government and private actors.

Increased public participation in PSM content production and governance will result in new ideas and better leadership and as a result will improve PSM performance. PSM policies which take account of public participation, inclusiveness and non-discrimination will strengthen the role of PSM in fostering democracy and will increase public support for PSM.

¹¹² See Recommendation 1641 (2004) on public service broadcasting, adopted by the Assembly on 27 January 2004.

¹¹³ For example: Public service broadcasting. Report, Committee on Culture, Science and Education, Rapporteur: Mr Paschal Mooney, Ireland, Liberal, Democratic and Reformer's Group, Doc. 10029, 12 January 2004.

¹¹⁴ CommDH(2011)10 op. cit. (n.108).

¹¹⁵ Respect for media freedom. Report by Committee on Culture, Science and Education, Rapporteur: Mr Andrew McIntosh, United Kingdom, Socialist Group, Doc. 12102, 6 January 2010.

Figure 1 summarises the stakeholders within PSM and their current approaches. The rights-based approach to PSM in Figure 2 illustrates how this configuration could change.

Figure 1: PSM stakeholder concerns

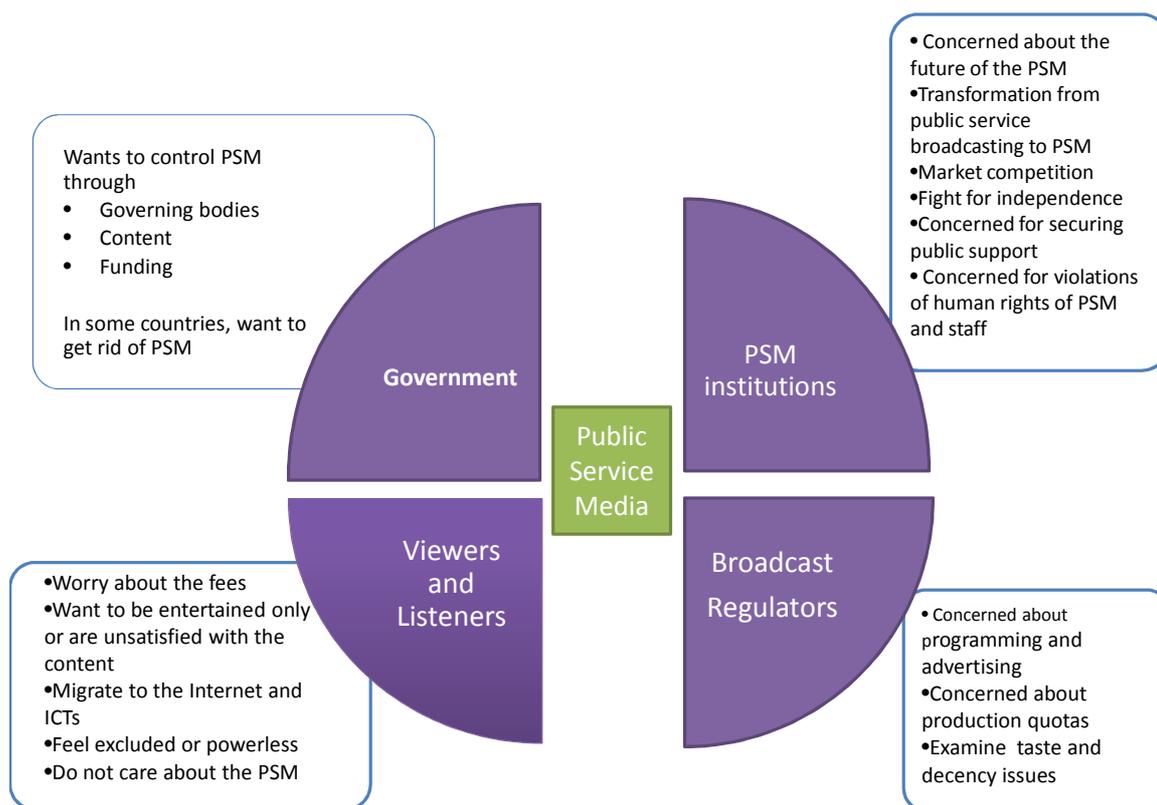
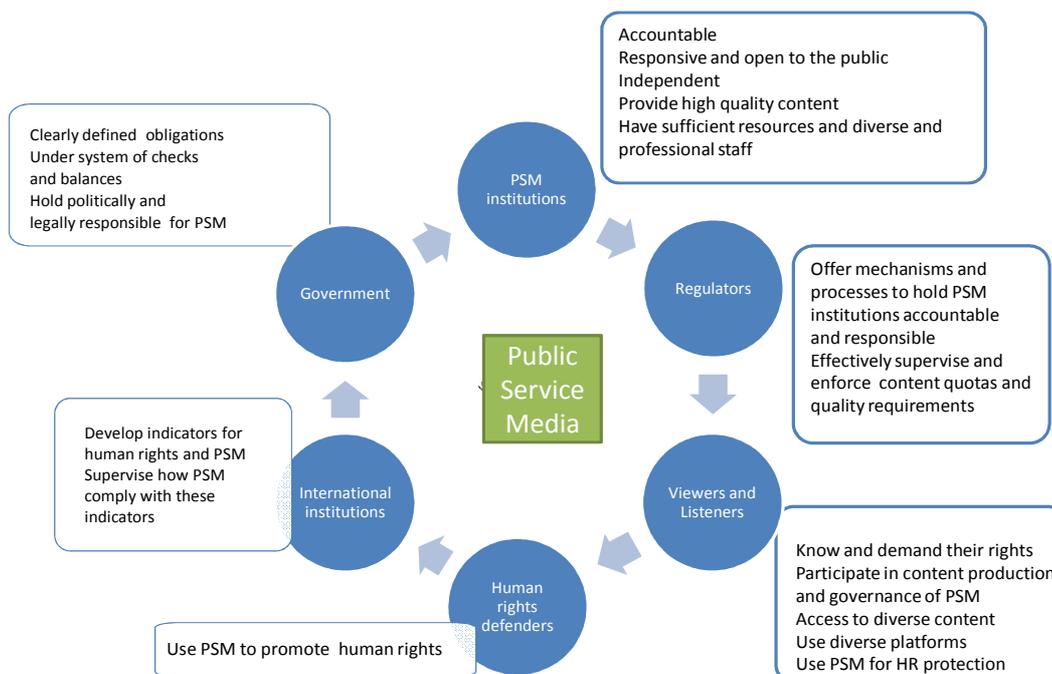


Figure 2: PSM stakeholders in rights-based approach



III. Initiatives to improve PSM in Europe

At present, there are a number of initiatives, at both the regional and national levels, which aim to improve various aspects of PSM. These initiatives basically focus on the functions of PSM in the digital era, PSM governance and the independence of PSM.

At the European level, the Council of Europe has formed an Ad hoc Advisory Group on Public Service Media Governance (MC-S-PG). In April 2011, the MC-S-PG published the draft declaration of the Committee of Ministers on public service media governance,¹¹⁶ which discusses opportunities and challenges for PSM in the “new digital media” environment. The draft emphasises the need for appropriate systems of governance in order to meet these challenges and to take full advantage of new opportunities. The MC-S-PG also adopted a draft recommendation of the Committee of Ministers on public service media governance,¹¹⁷ which includes a number of recommendations that member states:

- recognise the need for PSM to develop within a sustainable governance framework which secures both the necessary editorial independence and public accountability;
- further strengthen and, where necessary, enhance the appropriate legal and financial environment, thereby guaranteeing the independence and sustainable development of PSM, empowering them to take up the challenges of technological progress and editorial competition;
- encourage PSM and provide them with the necessary resources and tools to review and develop their internal and external governance arrangements, at whatever stage of maturity they are at, drawing inspiration from the appended guiding principles;
- encourage PSM to co-operate actively on a pan-European scale and to exchange best practices and best content in order to create a vibrant European public sphere and foster democratic citizenship within wider Europe;
- ensure the largest possible distribution of the appended guiding principles, which are designed to allow PSM to reinforce their essential position in the media system and improve their functioning in the digital environment in order to fulfil their democratic mission.

At EU level, in November 2010, the European Parliament passed a new resolution on public service broadcasting in the digital era.¹¹⁸ The resolution acknowledges the importance of the Council of Europe’s recommendations and declarations, which have been agreed upon by all the EU member states, and lay down European standards relating to freedom of expression, press freedom, media pluralism and the independence, organisation, remit and funding of PSM, particularly in the information society, thereby safeguarding the credibility of public service broadcasting. *Inter alia*, the resolution calls on member states to ensure that there are sufficient resources to enable public service broadcasters to take advantage of the new digital technologies and to secure the benefits of modern audiovisual services for the general public. It also calls for PSM to be structured in such a way as to offer attractive, quality online content in order to reach young people who access the media almost exclusively via the Internet. The member states are also asked to adequately address the issue of underfunding of public service broadcasters, bearing in mind particularly the specific remit of the public media to be accessible to the greatest possible number of viewers and listeners on all new media platforms.

¹¹⁶ Draft declaration of the Committee of Ministers on public service media governance, Strasbourg, 29 April 2011; available at www.coe.int/t/dghl/standardsetting/media/MC-S-PG/MC-S-PG_2011_002rev4%20Draft%20declaration%20of%20the%20Committee%20of%20Ministers%20on%20public%20service%20media%20governance.pdf.

¹¹⁷ Draft recommendation of the Committee of Ministers on public service media governance, Strasbourg, 29 April 2011; available at www.coe.int/t/dghl/standardsetting/media/MC-S-PG/MC-S-PG_2011_003rev4%20Draft%20recommendation%20of%20the%20Committee%20of%20Ministers%20on%20public%20service%20media%20governance.pdf.

¹¹⁸ The European Parliament resolution of 25 November 2010 on "Public service broadcasting in the digital era: The future of the dual system", 2010/2028(INI); available at [www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2010/11-25/0438/P7_TA-PROV\(2010\)0438_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2010/11-25/0438/P7_TA-PROV(2010)0438_EN.pdf).

At national level, states and PSM institutions undertake a number of initiatives both to improve PSM governance and to expand their services to make them more participatory and inclusive. For example in France, in a web on-demand radio station, ARTE Radio, the Franco-German PSM operator ARTE uses the Creative Commons licensing approach to all content. The enterprise is an open platform where listeners submit material which is posted on the site. ARTE offers the space and then content is posted, building a community partnership between user-generated content and ARTE Radio's own work and production. In Germany, ARD.de offers a specific online service based on the Internet presence of the nine public service broadcasters, and ZDF offers a programme allowing children to put questions to politicians. The "Today" programme of BBC Radio 4 links radio and the Internet and gives listeners the opportunity to influence the programme's content and approach by asking questions and providing input. The BBC's Action Network provides advice and tools to those who want to run campaigns on largely local concerns. In Denmark, the DR daily radio programme "Poul Friis" on P1 involves citizens' participation via public debates combining radio or TV shows with Internet debate and "Dogworld", where young people between 11 and 17 years of age learn democracy through games. On Radio Sweden, online services to promote diversity include web news offered in 11 different languages through the international section of the site, web-radio channels in Finnish and Sami for these minority groups (although some of these services were cut in the last year), and Ring P1 – a forum where people can call in to the radio programme.¹¹⁹

IV. Recommendations and conclusions

To summarise, PSM can be improved by:

- developing indicators for a rights-based approach to PSM;
- conducting studies on how PSM systems in Europe meet these criteria, and proposing recommendations for improvement and full incorporation of a rights-based approach to the existing systems;
- advocacy to ensure that human rights are taken into account in PSM policies;
- encouraging regulators to supervise and enforce the human rights aspects of the PSM remit;
- encouraging civil society and human rights defenders to promote awareness on public values for which PSM stand and to use PSM to strengthen human rights protection.

Council of Europe member states are in particular encouraged to:

- maintain and support PSM as a public good needed for human rights, equality, empowerment and citizens' participation in public life;
- ensure that human rights are taken into account in PSM legislation and policies;
- fulfil their obligations to PSM as defined by Council of Europe recommendations and resolutions and the case law of the Court;
- create mechanisms that allow viewers and listeners to hold PSM accountable and responsible;
- use human rights protection to set the PSM remit.

¹¹⁹ For details on these initiatives, see "Public service media governance: Looking to the future", Media and Information Society Division, Directorate General of Human Rights and Legal Affairs, Council of Europe, April 2009; available at www.coe.int/t/dghl/standardsetting/media/doc/PSMgovernance_en.pdf.

V. Conclusions

Given the developments and challenges discussed in this chapter, we believe there is a pressing need to urge states and civil society actors to intensify their efforts to support PSM and to provide them with guidance in their approach.

The future of PSM has been questioned, but PSM institutions will continue to operate in Europe because people care about good quality media, and value PSM commitment to accurate, unbiased reporting. Moreover, the significant investments and infrastructure for operation of PSM demand transformative as opposed to revolutionary solutions. We believe that the rights-based approach to PSM policy can offer such transformative solutions.

Drawing on human rights principles, this approach can ensure accountability, participation, non-discrimination and empowerment in the field of PSM. The rights-based approach demands the establishment of mechanisms to ensure transparency and accountability within government and PSM institutions. It can improve PSM image and performance by advocating for interactive and inclusive systems of governance and programme policies. The rights-based approach to PSM can ensure that viewers and listeners have access to diverse content addressing their individual and group interests, and demands that PSM promote human rights.